



Preliminary, high-level review of *Final Agreement on Long-Term Reform of the First Nations Child and Family Services Program*

For: BC First Nation Chiefs
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Legal disclaimer and disclosure

- We have previously acted for the Caring Society in connection with the FSA
- We are not currently retained in connection with the FSA. We are providing information today on a *pro bono* basis
- The information contained in this presentation reflects observations arising from our preliminary, high-level review of the FSA. It does not constitute legal advice
- FNs should consult with legal counsel and child and family services experts about their specific circumstances before making a decision on the FSA

1. Background and context for the FSA

- In 2007, Caring Society and AFN filed a human rights complaint against Canada, alleging Canada was discrimination against FN children and families by (i) inadequately funding the FNCFS program and (ii) failing to implement Jordan's principle
- The Chiefs of Ontario ("COO") and the Nishnawbe Aski Nation ("NAN") joined later as interested parties
- In 2016, the CHRT validated the complaint and ordered Canada to "cease its discriminatory practices, reform the FNCFS program, and take measures to immediately implement the full meaning and scope of Jordan's principle."
- The CHRT subsequently issued many orders requiring Canada to comply with the 2016 decision

1. Background and context for the FSA

- On July 10, 2024, AFN, COO, NAN, and Canada announced they had reached agreement on a Final Settlement Agreement (“FSA”) to resolve the CHRT complaints in relation to the FNCFS Program (Jordan’s principle will be dealt with separately)
- FN leadership is now being asked to decide whether to endorse the FSA at a Special Chiefs Assembly in late October or early November

2. BE AWARE: AFN is required to “promote” the FSA and make best efforts to “procure” your approval

- AFN is holding engagement sessions to promote the FSA and procure your approval, rather than to consult with FN leadership to obtain your free, prior and informed consent:

PART XXIV – COOPERATION AND APPROVAL

Cooperation of First Nations Leadership and Tribunal Approval

379. The Parties shall speak publicly in favour of this Final Settlement Agreement and shall make best efforts to procure the endorsement of this Final Settlement Agreement by First Nations leadership and, subject to such endorsement by way of resolution, to procure the approval of this Final Settlement Agreement by the Tribunal or, as necessary, the Federal Court or further Appellate Court.

- Key information may not be reaching you in this process: AFN is under an obligation to keep all discussions and communications in connection with the AIP and FSA negotiations confidential

3. Legal standards and human rights are being ignored in the negotiation of the FSA and the process to promote it

- At international law, victims of human rights violations have the right to reparation, which includes the right to be consulted about, and to participate in, the development of measures to eliminate systemic discrimination:

“institutional reforms aimed at preventing a recurrence of violations should be developed through a process of broad public consultations, including the participation of victims and other sectors of civil society”

3. Legal standards and human rights are being ignored in the negotiation of the FSA and the process to promote it

- The Declaration enshrines the right of Indigenous peoples to be informed and consulted about matters through their own representative institutions, chosen in accordance with their own procedures:
 - Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representative chosen by themselves in accordance with their own procedures...
 - Article 19: States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them

3. Legal standards and human rights are being ignored in the negotiation of the FSA and the process to promote it

- The honour of the Crown and Canada's fiduciary duty to FNs are also at stake
- It appears Canada has offloaded its duties under international law as well as pursuant to the Declaration, the honour of the Crown, and its fiduciary obligations to AFN
- Even if AFN is a "representative institution" chosen by FNs "in accordance with their own procedures", AFN has not followed the requirements the Chiefs established in accordance with those procedures (i.e. as set out in applicable resolutions)
- The AFN Chiefs-in-Assembly approved the submission of the joint complaint by AFN and the Caring Society to the CHRT in AFN Resolution 53/2006. Despite this, the Caring Society was inexplicably excluded from FSA negotiations

3. AFN resolution 40/2022 has not been complied with

Resolution directive	Status	Comments
2. No reduction in funding	FSA funding may be inadequate. Funding limited to 10-year term	
4. “First Nations-in-Assembly” must approve the FSA on long-term reform	Unclear	FSA provides its coming into force is “contingent on the endorsement of FN leadership”
6. Canada to fund FN National Advisory Committee to inform FSA	Not completed	AFN stopped calling NAC meetings in Feb 2024. No input from NAC into FSA
7. Canada to provide Chiefs with “ <u>all available options and related supporting financial resources</u> ” to ensure FPIC on long-term reform	Not completed	Parties providing execution version of FSA rather than options. No ability to provide input or change FSA
8. Ensure FSA does not inhibit right to seek CHRT orders	Not completed	FSA seeks to end CHRT jurisdiction

3. BC AFN resolution 07/2024 has not been complied with

Resolution directive	Status	Comments
1. AFN to ensure that FN title, rights, and sovereignty are acknowledged and upheld in any negotiations related to children and families	Not completed	See below re: no decision-making role for BC First Nations, FNLC, BC AFN, or UBCIC in FSA once signed
3. AFN to share drafts of FSA with Caring Society, NAC, and regional experts and “meaningfully incorporate their recommendations for change”	Not completed	AFN did not share drafts of the FSA AFN did not incorporate any recommendations from experts AFN agreed to exclude Caring Society from negotiations
4. Canada to provide funding for regional engagement on the draft compensation distribution protocol	Not completed	How this will occur still uncertain

4. Potential for ongoing discrimination

- CHRT orders require Canada to pay approximately \$45 billion over 10 years:
 - 2018 CHRT 4: actual costs of intake and assessment, building repairs, legal, and prevention/least disruptive measures (replaced by 2022 CHRT 4)
 - 2021 CHRT 41: actual costs of capital
 - 2022 CHRT 8: fund prevention at \$2,500 per resident on reserve, post-majority services, and band representative services
- **This funding is not at risk if the FSA is rejected and sent back for revisions. The CHRT orders will remain in place. The CHRT will retain jurisdiction and the ability to continue to force Canada to comply with its orders**
- **Decision-making criteria on funding:** the FSA should provide guaranteed funding that meets or exceeds what Canada is currently required to pay under the CHRT orders

4. Potential for ongoing discrimination: criteria not met

- **Funding amounts:** Experts have concluded that funding may be inadequate, particularly in BC where we have not yet established prevention costs
- Canada is not required to increase funding if outcome of FSA is more discrimination:
 - Canada's funding during the first 5 years is capped at \$24.477 billion, subject to limited exceptions, and must be no less than funding provided in 28/29 during second 5 years
 - Dispute Resolution Tribunal does not have jurisdiction to order Canada to fund new components, increase funding for existing ones, amend the FSA, or make systemic changes
- **No guarantees:** funding remains subject to annual appropriations by Parliament or other approval processes required by Canada, and the FSA fails to provide a remedy to address this uncertainty

4. Potential for ongoing discrimination: criteria not met

- **No guarantees (cont'd):** Canada is not required to provide any funding after the 10-year term of the FSA expires to ensure that discrimination does not happen again
- Canada is not required to provide any additional funding to FNs, or regional or sub-regional organizations beyond what is set out in the FSA:
 - there is no funding for BC regional or sub-regional orgs (i.e. FNLC, BC AFN, FNS or UBCIC)
 - in contrast, the FSA provides AFN, COO, and NAN with significant funding:
 - \$22 million to participate in Reform Implementation Committee
 - \$84.1 million to support the National and Regional Secretariat(s)

5. No decision-making role for BC

- FNLC, BC AFN, FNS, UBCIC, and BC FNs are not parties to the FSA and there is no formal decision-making roles set out for them once the FSA has been signed:
 - membership of National Secretariat limited to AFN, COO, and NAAN
 - Reform Implementation Committee members appointed by Canada, AFN, COO, and NAAN, and required to carry out work in confidential processes. The Committee is not required to consult with First Nations (it is only required to issue a Party approved Annual Report)
 - AFN selects, retains, and oversees the Program Assessment Organization(s)

5. No decision-making role for BC

- FNLC, BC AFN, FNS, UBCIC and BC FNs cannot:
 - initiate “Parties’ Dispute”, which is a dispute in connection with the FSA or a decision by Canada as to whether or how any recommendations of the Reform Implementation Committee will be implemented, or
 - seek leave to participate in a Parties’ Dispute or a Claimant Dispute, whereas Parties have a right to participate in Parties’ Disputes and can bring a motion to intervene in a Claimant Dispute
- The President of the Dispute Resolution Tribunal is appointed by the GIC, on the recommendation of the ISC Minister following consultation with Canada, AFN, COO, and NAN

5. No decision-making role for BC

- **Any information “provided, created, or obtained in the course of implementing” the FSA, which must be kept confidential, will not be shared with FNLC, BC AFN, FNS, UBCIC, or BC FNs**
- FNLC, BC AFN, FNS, UBCIC, and BC FNs may seek to discuss changes to the FNCFS program with Canada, which is not required to provide them with additional funding
- BC FNs treated as “service providers” that can request additional funding, and initiate a Claimant Dispute so long as they waive their right to file a CHRT complaint

5. No decision-making role for BC

- **THERE IS NO MAKING ISC GREAT AGAIN!** Reform continues to rely on colonial approach to delivery of CFS: ISC to administer program and deliver funds, rather than creating an independent First Nation Treasury Board and First Nation organizations to administer delivery of FNCFS funding

6. The dispute resolution process is inadequate to end discrimination

- **Weaker approach to disputes:** the process to resolve the dispute appears weak. The Dispute Resolution Tribunal has less authority to resolve issues than, for example, the CHRT:
 - unclear whether dispute outcomes will ever have binding force of law, before or after the FSA's ten year term expires
 - concerning given the existing gains made at the CHRT and difficulty getting Canada to comply with orders that do have the force of law
 - in contrast, CHRT orders do not expire, can be varied, and have the force of law

7. C-92, self-government, and treaty funding commitments are too vague

- Only commitment in FSA is that a FN that is funded to exercise jurisdiction in the delivery of some or all aspects of CFS pursuant to (i) a self-government agreement, (ii) treaty arrangement, or (iii) a coordination agreement under C-92 will “not be offered less funding than what its entitled would be for services funded under the” FSA and covered by such jurisdictional agreement

8. Looking ahead: what's next?

- If FN leadership approves the FSA, Canada, AFN, COO, and NAN will bring a motion to end the Tribunal's jurisdiction and replace the CHRT orders with the FSA
 - BC FNs, regional organizations and FN agencies can apply to the Tribunal for "interested party" status to participate in that hearing
- If FN leadership does not approve the FSA, it can be sent back for re-negotiation. This happened with the FSA for compensation



Questions

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