MAIN CONCLUSIONS

- The federal government recently announced a $40 billion settlement of First Nations child-welfare claims though previous maximum amounts were in the range of $6–$8 billion.

- The original complaint, launched in 2007, took issue with the First Nations Child and Family Welfare program, which came into effect in 1991 and is now being phased out under new legislation.

- The essence of the claims, which were adjudicated by a Canadian Human Rights Tribunal, is that the federal program was underfunded in comparison to provincial child welfare programs, and thus discriminatory under the Canadian Human Rights Act.

- The settlement will provide $20 billion for improvement of services for the next five years, and $20 billion for compensation to First Nations children living on Indian reserves who were taken into care from 1991 onwards. Compensation will also be paid to these children’s caregivers—parents or grandparents.

- No concrete harm to individual children was ever demonstrated in the litigation; the harm was said to be the discriminatory underfunding of the program.

- The two unelected lawyers who constituted the Canadian Human Rights Tribunal nullified longstanding government policy without any consideration of how to replace it and what that might cost.

- This $40 billion settlement sets a new benchmark for Indigenous claims far higher than the previous maximum amounts in the range of $6–$8 billion.

- Settlements of this magnitude increase the incentives for law firms to bring ever more numerous and larger class actions seeking compensation from government for alleged historical wrongs.
A $40 billion settlement
In her fall 2021 economic update, Canada’s Minister of Finance said that she was setting aside $40 billion for a settlement of First Nations’ child welfare claims (Gov’t of Canada, 2021). This was with reference to a case that had been before the Canadian Human Rights Tribunal since 2007, reinforced by a class action in 2017 (Sortor, 2019). Earlier in the fall, Canada had lost in Federal Court (Federal Court, 2021), but had filed a notice of appeal to the Federal Court of Appeal, while simultaneously agreeing to out-of-court negotiations (Tumilty, 2022). The Minister’s announcement was a signal that Canada expected to reach a settlement in these negotiations, and that expectation was confirmed by an announcement on January 4, 2022, about an agreement-in-principle for a $40 billion settlement (Indigenous Services Canada, 2022).

Even in a time of multi-billion class-action settlements of Indigenous claims, the figure of $40 billion was astonishingly high—five or six times higher than any such previous settlement. There was little negative commentary about the huge size of the settlement; Canadians have apparently become used to big government expenditures in the age of COVID. Indeed, those following the case closely must have been more surprised than anyone because previous predictions of a settlement had been in the range of $3–$6 billion (Sortor, 2019).

The original complaint to CHRC 2007
The original complaint to the Canadian Human Rights Commission (CHRC) was launched in 2007 by the First Nations Child and Family Caring Society, whose Executive Director is Cindy Blackstock, a professor of social work at McGill University, and joined by the Assembly of First Nations and some other supporters. The theory of their case was that the federal government’s First Nations Child and Family Welfare (FNCFW) program, in effect since 1991, was discriminatory against First Nations people because it was underfunded. Underfunding was the crux of the argument, though the litigants also made many criticisms of the details of the various funding formulas used in the FNCFW program. The underfunding was said to be a violation of section 5 of the Canadian Human Rights Act, which prohibits differentiating adversely on the basis of race in providing services customarily available to the public (Gov’t of Canada, 1985).

The litigants also made a collateral attack upon the implementation of Jordan’s Principle, a resolution passed unanimously by the House of Commons in 2007. Jordan’s Principle states that services ordinarily available to other children must be made available to First Nations children even if there is a question of which level of government should bear the expense. The government immediately involved in the case should pay for the service and then try to collect later from the other level. Litigants argued that Jordan’s Principle was underfunded in practice, and that too was a violation of the Canadian Human Rights Act.

Proceeding as a human rights complaint meant that the complainants did not have to call children who had been taken into care to prove harm. They argued, and the Tribunal accepted, that the harm was the discrimination caused by underfunding. The dignity of all children who had been taken into care, as well as that of their caregivers, had been equally harmed by the discriminatory underfunding. It might have been a harder task to argue about more tangible forms of harm, because some of these children must have been rescued from abusive or negligent parents. Even if some social workers were overzealous and did not understand the child-rearing practices of First Nations, there would have been cases of children whose lives were literally saved by being taken into care. The human rights approach avoided all these messy real-world considerations.

The tribunal held that everyone who came into contact with FNCFW suffered an affront to their human dignity and should therefore be compensated at the
maximum amount allowable under section 53 of the Canadian Human Rights Act (Gov’t of Canada, 1985): $20,000 for “pain and suffering,” plus an additional $20,000 because the Canadian government had acted “willfully” and “recklessly” in persisting so long with the FNCFW without changing it, in spite of numerous critical reports. The Tribunal held that each child taken into care, plus each parent (or grandparents if they were the caregivers), should receive $40,000 for each child taken into care.

The Caring Society’s victory took a long time to achieve. Although the complaint was laid in 2007, the key Human Rights Tribunal (HRT) decision was not rendered until 2016. There were also half a dozen other subsequent HRT decisions dealing mainly with details of compensation. Then the federal government appealed in Federal Court, where they lost in fall 2021 (Federal Court, 2021).

**The details of the case**

Some details of this procedural odyssey deserve further comment. The original Tribunal consisted of three members, as allowed by section 49(2) of the Canadian Human Rights Act if justified by the “complexity of the complaint” (Gov’t of Canada, 1985). In this case, a tribunal of three was appointed but one member died in 2015 and was not replaced, leaving only Sophie Marchildon and Edward P. Lustig to hear the evidence and make a decision. As is often true of HRTs, these members were hardly neutral adjudicators; the opening paragraph of their main decision—the so-called Merit decision of 2016—reads as if it could have been written by the complainants. The government again ran into a perception of bias when it sought judicial review in the Federal Court, where the case was tried by Mr. Justice Paul Favel, a member of the Poundmaker Cree Nation, former Deputy Chief Commissioner of the Saskatchewan Human Rights Commission, and member of the Oversight Committee on the Indian Residential Schools Settlement Agreement (Dep’t of Justice Canada, 2017).

Regardless of Mr. Favel’s personal impartiality, his past immersion in the issues could give rise to the “reasonable apprehension of bias” that is the Canadian standard for recusal of a judge (Judicial Disqualification Resource Center, 2022). Yet the Crown did not ask for recusal, perhaps because Jody Wilson-Raybould’s practice directive put limits on the ability of the Department of Justice to litigate Indigenous rights cases and emphasized the desirability of negotiated settlements (Wilson-Raybould, 2021).

It was never clear how much a loss would cost the Crown. For one thing, the HRT decision included orders to restructure the FNCFW and to implement Jordan’s Principle more generously, but these were not specific remedies. Rather, the government would have to devise new plans and bring them back for HRT approval. Nor was the amount of individual compensation clear. The HRT announced a precise amount of $40,000 for every on-reserve Indian child taken into care from 2006 onward and for those children’s caregivers, but no enumeration of these categories existed. To give an idea of the order of magnitude, one credible source says there were over 65,000 children in care in Canada in 2007, and that almost half of these children were Indigenous (McMurtry, 2015). Indigenous, of course, is a much broader category than First Nations people living on reserve. Assume that the settlement might reach 50,000 children and 100,000 caregivers; that would be $6 billion in compensation—a large figure, to be sure, but comparable to what was paid to claimants in the Residential Schools Settlement (Crown-Indigenous Relations and Northern Affairs Canada, 2021). Then there would the cost of improving service levels to the satisfaction of the HRT, whatever that might be (the cost was never discussed in the HRT decisions).

**The road to $40 billion**

How, then, did we get to the recently announced total of $40 billion—$20 billion for compensation and $20 billion for improving the level of service?
There has apparently been a shift in thinking at the highest level of government. On October 29, 2021, Ottawa said it would appeal Justice Favel’s ruling in the Federal Court of Appeal; but at the same time it announced that negotiations for an out-of-court settlement would begin on November 1 (Stefanovich and Boisvert, 2021). On November 11, the government announced that former Senator and Chair of the Truth and Reconciliation Commission Murray Sinclair would be appointed to chair the negotiations. Marc Miller, Minister of Crown-Indigenous Relations, was reported as saying that some children would be entitled to more than $40,000 apiece (Canadian Press, 2021). On December 14, 2021, the Minister of Finance made the first announcement of the $40 billion figure, even though negotiations were still in process. Then, on January 4, 2022, the Department of Indigenous Services Canada announced that an agreement-in-principle had been reached that would indeed cost $40 billion. Although the Department will not yet release the text of the agreement, the announcement contained another clue to the expansion of cost: compensation would be paid for child removals and Jordan’s Principle violations back to April 1, 1991 (Indigenous Services Canada, 2022). Such an early date had never been mentioned in the HRT decisions; it will obviously lead to a major increase in the potential number of claimants. That, plus Minister Miller’s hint that compensation may go above the HRT figure of $40,000 apiece, may account at least in part for the sudden ballooning of the compensation total to $20 billion.

The role of the Canadian Human Rights Act and Human Rights Tribunals
The role of the Canadian Human Rights Act and HRTs in this story deserves comment. Human rights legislation was originally passed to deal with individual cases of discrimination, such as when someone is denied a job or an apartment lease because of race or creed. But theories of systemic discrimination have transformed HRTs into mechanisms for changing public policy. In this instance, Marchildon and Lustig, two lawyers who were never elected by voters to public office, were empowered to tell elected governments that they had to change a set of policies, the FNCFW, that had endured for 30 years from 1991 to 2021 under three Conservative prime ministers (Mulroney, Campbell, and Harper) and three Liberal prime ministers (Chrétien, Martin, and Trudeau). These two lawyers did not have to compile any evidence of actual harm to real-world people; they only had to find the policies to be discriminatory. Nor did they have to take responsibility for designing a replacement program or figuring out how to pay for it and get support for it from voters; they merely had to tell the cabinet to bring something back for their approval. It may seem like an end run around the political process of parliamentary democracy.

An obvious reply is that this end run exists only because Parliament created the quasi-adjudicative process by passing the Canadian Human Rights Act; if elected politicians don’t like the outcome, they can amend or repeal the Act. In this instance, moreover, the elected government headed by Justin Trudeau has accepted the result with enthusiasm, setting in motion negotiations that are multiplying the cost of the outcome by a factor of four or five. So the result is in a sense democratic; if the voters don’t like what the government has done, they can vote for another party at the next election. Indeed, since Mr. Trudeau leads only a minority government, the other parties in the House of Commons can cause his government to fall if they object to the child welfare settlement.

1 Private communication via e-mail (January 11, 2022) from Megan MacLean, Media Services, Department of Indigenous Services, to the author.
The new benchmark
Regardless of one’s views about the political process, the benchmark for Indigenous class actions and human rights settlements has now been significantly raised. Potential litigants respond to signals about the odds of victory and the expected value of settlements, so one may expect more of these cases in the future. As the number and scope of claims for compensation are multiplied, the federal Indigenous spending envelope will further come to resemble a program of reparations for past injustice (Rhodes, no date), as has been demanded by RoseAnne Archibald, National Chief of the Assembly of First Nations (Flanagan, 2021). We are, however, travelling that road a step at a time without an overall debate on the merits of the case. Ironically, this path of incremental reparations may prove to be more costly in the long run than an overall, negotiated, one-time settlement.
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Acknowledgments

The author would like to acknowledge the valuable suggestions received from the readers of the manuscript. The author, however, is alone responsible for the report itself, its conclusions, and recommendations. Any remaining errors or oversights are the sole responsibility of the authors.

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ISSN 2291-8620

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