CONWAY

David P. Taylor
Direct Line: 613.691.0368
Email: dtaylor@conwaylitigation.ca

Assistant: Doreen Navarro
Direct Line: 613.691.0375
Email: dnavarro@conwaylitigation.ca

August 6, 2021

VIA EMAIL

Robert Frater, Q.C.
Chief General Counsel
Justice Canada
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

Dear Mr. Frater:

RE: FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA ET AL V ATTORNEY GENERAL OF CANADA, T1340/7008
CONSULTATION COMMITTEE ON CHILD WELFARE
OUR MATTER ID: 5204-006

I write regarding ongoing Caring Society concerns regarding Canada's non-compliance with the Canadian Human Rights Tribunal orders respecting Jordan's Principle. The Caring Society has repeatedly raised these matters with Canada in writing, as well as at the Jordan's Principle Operating Committee ("JPOC") and in numerous other forums. Canada has often repeatedly pledged it will "look into the problem" but has failed to take the corrective action needed to ensure First Nations children and families accessing Jordan's Principle can do so free of any discrimination. Action is needed in these areas, both as a matter of compliance with the Tribunal's immediate relief orders, but also as part of putting in place comprehensive and durable reform.

The Caring Society's concerns fall into the following categories:

1. Failure to properly identify urgent cases
2. Inappropriately high documentation thresholds
3. Impact of unnecessary requests for information on requestors' privacy interests
4. Overriding professional recommendations
5. Re-Application for supports, products or services despite unchanged needs

6. Opaque reasoning regarding application of the normative standard and substantive equality principles
7. Poor compliance with timelines for determining requests, particularly for urgent requests or requests forwarded for determination/appeal to headquarters
8. Delays in payments to suppliers or reimbursements to families
9. Inconsistent regional decision-making regarding group requests
10. Boilerplate denial letters
11. Disproportionately high denial rates in certain provinces

All of these areas have been raised with your clients on numerous occasions at JPOC, by the Caring Society and by many of the First Nations National and Provincial Territorial Organizations who are represented on JPOC, as well as by the Caring Society through numerous bilateral meetings and written exchanges.

This letter proceeds thematically to detail the concerns raised by the Caring Society at JPOC and through bilateral exchanges, as well as the solutions that have been proposed by the Caring Society. Please note that as the Caring Society continues to receive information from requestors and ISC, the areas of concern and proposed solutions set out below may be further refined.

In order to move forward with the process of achieving comprehensive and durable reform related to Jordan's Principle, the Caring Society requests specific responses to each of the proposed solutions by Friday, August 27, 2021. The Caring Society would appreciate the specific responses clearly stating: (a) whether ISC will adopt the proposed solution (and, if so, by when); or (b) if ISC rejects the proposed solution, what alternative it proposes (and by when the alternative will be in place, as well as the evidence on which it is based).

A response by August 27, 2021 will provide the Caring Society with sufficient time for consideration in advance of the September 17, 2021 deadline to provide a status update to the Tribunal.

As you will note, some of the changes proposed by the Caring Society involve clarifying amendments to the Tribunal's orders. Others involve internal changes at ISC. As experience has shown over the last four years, accountability measures will be integral to the success of any such internal changes. As such, we trust that your client will give a significantly high priority to implementing the results of the options paper process currently being led by Professor Metallic and Professor Friedland.

1. Failure to properly identify urgent cases

The Tribunal's orders specify that urgent request for supports, products or services are to be determined within 12 hours (or immediately where irremediable harm is reasonably

foreseeable). ISC is also required to proceed with determination of an urgent request from a child without *Indian Act* status living off-reserve where confirmation of recognition is not received from the child's Nation in a timely way.

The Caring Society has long expressed concerns regarding ISC's identification of, and response to, urgent cases. The Tribunal also expressed concerns with the appropriateness of Canada's assessment of urgency in S.J.'s case in its February 21, 2019 ruling (2019 CHRT 7 at para 73).

It appears to the Caring Society that ISC relies on families (or other requestors) to specifically identify their case as urgent, rather than ISC staff screening cases on intake for urgency. This situation is particularly problematic as, until November 2020, there was no section of the request form provided to requestors to indicate urgency. The latest request form seen by the Caring Society asks for information regarding the urgency of the request; however, even this does not come until the third page of the form. It is unclear how consistently Focal Points are proactively seeking information from requestors about the urgent nature of their needs, or if there is a presumption of non-urgency unless the requestor expressly states otherwise.

As is addressed below, ISC is not complying with the timelines for determination of requests in a significant number of cases. In 2019/20, 40% of urgent individual requests and 44% of urgent group requests were decided beyond the Tribunal-mandated timeframes. These concerns continued through the first two quarters of 2020/21, when 41% of urgent individual requests and 75% of urgent group requests were determined late.

To the Caring Society's knowledge, ISC has no clear procedures to mitigate risks of harm/death to children where the Tribunal-mandated timelines are exceeded. This is particularly concerning in light of past examples, such as regarding the request made by Wapkeka First Nation for mental health supports related to youth suicide pacts in their community. Tragically, Canada failed to identify the case as urgent and did not take any steps to ensure the mental health needs of the youth in question were met, resulting in the deaths of children. The Tribunal's definition of "urgent" makes clear that when children are facing immediate risks, Canada cannot leave the child in that situation without taking appropriate action to mitigate such risk.

Proposed solutions: When doing file intake, Focal Points should conduct a preliminary screen for urgency and, if the need for determination is urgent, should mark the file as such

The following procedure should apply to cases identified as urgent:

(a) The urgent case should be tracked by an employee and a supervisor, with a progress report each hour on the determination;

(b) If the case comes within 2 hours of the 12 hour period and is still not determined, and is unlikely to be determined within 12 hours, the Focal Point must contact the family and implement a risk mitigation plan and the case must be flagged to the Assistant Deputy Minister so mitigation measures can be put in place.

Active and regular auditing of random, representative samples of non-urgent cases to determine whether non-urgent cases have properly been categorized

In all urgent cases in which the timeframe for determining the request is exceeded, proactive measures must be taken to ensure delays do not result in irremediable harm to the child

2. Inappropriately high documentation thresholds

The Tribunal orders specify that ISC is only permitted to seek further information from requestors where that information is reasonably necessary to determine the child's clinical needs, and that professionals outside of the child's circle of care may only become involved if the professionals already involved are unable to provide the reasonably necessary clinical information.

The Caring Society continues to be concerned by repeated requests for further information from requestors delaying the determination of requests. These concerns are particularly acute given ISC's position that the Tribunal-ordered timelines for determining requests do not begin until ISC is satisfied it has received all of the information it seeks.

In particular, the Caring Society is aware of a number of cases in which ISC refuses to accept letters of support from professionals already involved in the child's care, on the basis of alleged conflicts of interest or because ISC takes the position that the professional already involved lacks the expertise to make the recommendation. This is particularly concerning for regulated professionals, whose professional associations already have detailed conflict of interest policies in which ISC ought not be interfering.

ISC has also required an unreasonable level of professional documentation for needs, requiring multiple letters to be submitted from different professionals where a child has multiple needs, rather than accepting one letter to cover the various needs arising. Furthermore, ISC has repeatedly refused to accept letters of support from a professional submitted for a different purpose (such as for supports received through a school or community program), requiring families and professionals to repeat the same analysis for Jordan's Principle. The Caring Society is also aware of numerous cases in which ISC requires unreasonable specificity in letters of support regarding the way in which the support, product or service requested will meet the child's needs, rather than adopting a common sense reading of the letter of support.

ISC is also delaying processing of requests until financial quotes for the requested support, product or service are provided by the family or navigator. Families or navigators are required to gather and submit quotes as part of the request package, before ISC will consider the request. This is a time-consuming and burdensome process, which results in serious administrative delay. This is inconsistent with the Tribunal's orders.

A requirement for quotes is an administrative procedure and "receiving quotes" must not delay the receipt of services, nor is it the responsibility of a requestor to get such quotes before the request is determined. The November 2, 2017 order specifically states that after a request is approved, where the service is available, Canada is to fund services within the Tribunal-mandated timeframes. Where a service is not available, Canada is to make every reasonable effort to ensure funding is provided as close as possible to the Tribunal-mandated timeframes. Issues with respect to the cost of the service approved are to be determined within the Tribunal-mandated timeframe, and do not permit ISC to delay determination of requests due to funding-related administrative questions. Indeed, the November 2017 consent order was reached expressly on the basis that administrative considerations must not delay receipt of services by a First Nations child (2017 CHRT 35 at para 3(b)(iv)).

Proposed solutions: Seek an Order, on consent, from the Tribunal clarifying that "reasonable documentation" for a request for a support, product or service means:

(a) Recommendation from: (i) a licensed professional with relevant expertise already involved in the child's care; or (ii) a community-authorized Elder and/or knowledge holder; and

(b) Consent from the child's guardian

Multiple letters of support do not need to be submitted where a child has multiple needs, and a professional's scope of expertise should not be limited to the exact type of services that professional provides

In a way that minimizes administrative burden to requestors, address cost estimates after the service request has been determined, within the applicable Tribunal-mandated timeline, keeping in mind that the receipt of services should not be delayed by requests for multiple financial quotes.

3. Impact of unnecessary requests for information on requestors' privacy interests

The Caring Society is also concerned that ISC is collecting more personal information than is required to determine requests for supports, products or services. Given that clinical case conferencing is only permitted where more information is reasonably necessary to determine a First Nation's child's clinical needs, it is unclear why detailed assessments are required where no questions arise regarding those clinical needs. The Caring Society's position is that a letter

from a professional with relevant expertise that generally outlines the child's needs and the recommended support(s), product(s), or service(s) to meet those needs should be sufficient in almost all cases. The cases in which more is required should be limited to those in which more information is reasonably necessary, pursuant to the Tribunal's November 2, 2017 order regarding clinical case conferencing. ISC should presume that professionals are performing their duties to the standard of their profession unless there is a clear indication to the contrary, and should not be questioning professional expertise.

Additionally, it is unclear which information is collected by ISC for the purpose of determining requests for supports, products or services, and which information is collected for ISC's own data-tracking purposes. The Caring Society has repeatedly raised the need to consult the Privacy Commissioner to ensure that children's and family's privacy rights are respected.

Proposed solution: Consistent with the November 2017 Order, only require detailed assessments where more information is reasonably necessary to determine the request for the support(s), product(s) or service(s) in question

Cases where information beyond a letter of support is requested should be tracked to ensure that assessments and other detailed plans or documents are being collected only in situations consistent with the November 2017 order

Engage with the Office of the Privacy Commissioner's Government Advisory Directorate, including with participation of JPOC, to obtain proactive advice and guidance on protecting the privacy of individuals who are the subject of requests under Jordan's Principle, up to and including the completion of a Privacy Impact Assessment

4. Overriding professional recommendations

The Caring Society has seen a pattern of ISC overriding recommendations from professionals within the child's circle of care. As noted above, this often arises on the basis of alleged conflicts of interest on the part of these professionals, or because ISC deems the professional to lack the relevant expertise. The result is an outright denial of the request, or a requirement to submit another recommendation from a "third-party professional", often with expertise dictated by ISC.

ISC does not have clinical expertise. As such, recommendations from professionals should only be questioned where clinical case conferencing is permitted by the Tribunal's November 2017 order (i.e., where it is reasonably necessary to understand a First Nation's child's clinical needs). Where there is a concern regarding conflict of interest, this should be pursued by ISC through other channels, such as via the applicable regulatory or supervisory body.

Proposed solution: Adhere to the existing Tribunal orders and cease the practice of requiring third-party assessments when recommendations come from within the child's circle of care.

Engage professional associations to complete the process of revising the draft policy on Clinical Case Conferencing through the CCCW.

5. Re-Application for supports, products or services despite unchanged needs

ISC requires families to re-apply for services on a periodic basis, either annually or prior to the end of a fiscal year, even where the child's needs have not changed. The Caring Society's understanding is that this is linked to the federal government's cycle for funding commitments. However, children's needs do not operate on the basis of the calendar or fiscal year.

More troubling, ISC has paired its funding cycle with a requirement for re-assessments even where there is no clinical indication of a change to the child's circumstances. The Caring Society has heard that ISC has insisted on new "reassessments" associated with these re-applications in the midst of the COVID-19 pandemic in regions subject to Stay-at-Home Orders and where many professional offices were closed, meaning that a child's participation in an unnecessary assessment could imperil their health and wellbeing. In any event, being subject to unnecessary testing at any time can be harmful to children's wellbeing and place significant stress on children, families and recipients. It also increases chances for bureaucratic delay to interfere with children's needs.

Where a child's needs are ongoing, ISC should arrange its administrative processes to ensure that funding continues without disruption to the child. Re-assessments should not be required unless the professional recommendation is time-limited (for instance, suggesting or requiring that the child's needs be re-evaluated at a given point), or where a professional has reviewed the child's needs in the ordinary course and provides a revised recommendation regarding the support(s), product(s) or service(s) in question.

Proposed solutions: Seek an Order, on consent, stipulating that re-assessments for approved supports, products or services need only be made when either: (i) a professional recommendation is time-limited; or (ii) the professional re-assesses the child's needs in the ordinary course and furnishes ISC with a new or modified recommendation in respect of the child.

Develop a case management procedure for children with multiple support/product/service needs that avoids repeat-applications for the same child based on the same diagnosis

6. Opaque reasoning regarding the application of the normative standard and substantive equality principles

The Caring Society has seen a number of cases in which a support, product or service is denied on the basis that it goes beyond the normative standard. However, ISC does not provide accompanying information regarding the normative standard being applied, nor does it disclose the source of its information.

ISC also denies requests on the basis that insufficient information regarding substantive equality was provided. In many cases, such denials are overturned on appeal when more information is provided or the family re-communicates information that was already submitted in support of the request, but was not properly considered.

The Caring Society also continues to be concerned that a significant number of requests approved under Jordan's Principle relate to supports, products and services that are within the normative standard (2019/20: 67% of individual requests and 87% of group requests; 2020/21: 51% of individual requests and 40% of group requests). Building on concerns raised above, the Caring Society notes that the request-based system for normative standard services means that families are required to provide professional recommendations and gather quotes for public services and supports that should be provided as a matter of course.

Further, this suggests that Jordan's Principle is being relied systemically on to plug gaps caused by underfunding of public services for First Nations. ISC should be in an improved position to begin closing these service gaps (or to pressure provinces to close these gaps) given the significant data it has collected via requests over the last four years.

Proposed solution: Disclose the normative standards (and the source of these standards) applied by ISC to determine requests for supports, products and services under Jordan's Principle

Proactive evaluation of substantive equality considerations by Focal Points

Develop an option for re-review (rather than a formal appeal) by the Focal Point or senior official with delegated denial authority when it become obvious that ISC has overlooked information already provided when determining a request

Work with other sectors of ISC, other federal departments, and provincial/territorial governments to close normative service gaps by the end of fiscal year 2022/23

7. Compliance with timelines for determining requests, particularly for urgent requests or requests forwarded for determination/appeal to headquarters

ISC's compliance with the Tribunal-mandated timelines for determining requests has given rise to significant concerns. The average compliance rate across the various types of requests in 2019/20 ranged between 56% and 66%, with performance as poor as 30-40% in some months. Performance in the first two quarters of 2020/21 did not show signs of improvement, and in fact raised even greater concerns with compliance for urgent group requests falling to an average of 25% (and being 0% in August and September 2020).

It is entirely unclear to the Caring Society what action is being taken to address these significant compliance concerns, or how children are provided with any redress for their rights under the Tribunal's orders having been violated.

Proposed solution: Seek an Order, on consent, to clarify that:

(i) Compliance time periods begin as soon as a professional/Elder/Knowledge keeper recommendation and parental consent have been provided (including via the 24-hour line); and

(ii) ISC will furnish the Tribunal (or other accountability mechanism established) with quarterly reports on compliance with the mandated timelines and with specific plans to improve compliance.

8. Delays in payments to suppliers or reimbursements to families

The Caring Society has long raised concerns regarding delays in payments to suppliers, or in reimbursements to families, following the approval of requests for years. As noted above, the November 2017 order requires funding to be arranged within the Tribunal-mandated timelines where the service is available, and as close to those timelines as possible where the service is not available. The Caring Society is particularly concerned that this issue remains unaddressed when evidence before the Tribunal in 2019 stated that a solution (the implementation of acquisition cards) was on the cusp of being implemented.

Delays in providing reimbursement to families risks causing serious hardship, while delays in payments to suppliers sours relationships and risks these suppliers or professionals no longer being willing to provide services.

The Caring Society is also aware that it commonly falls to families to act as a bridge between ISC and the supplier(s) to establish payment arrangements. This is another administrative burden that the Caring Society regards as properly belonging to ISC and may well increase efficiency, as

ISC is in a better position to communicate to suppliers exactly what is required to expedite payment.

Proposed solutions: Implement acquisition cards to permit Focal Points to make more immediate payment to suppliers

Take proactive measures to ensure that ISC's administrative procedures, including payment for a service/product and support, do not deny, delay, disrupt or imperil the child's needs being met

Families be given the option of having ISC's Jordan's Principle financial officials reach out directly to suppliers on their behalf; this option should be communicated clearly from the outset

9. Inconsistent regional decision-making and funding caps regarding group requests

There are no clear national standards for group requests, such that the process for assessing group requests is uneven across regions. This leads to inconsistent outcomes, as well as varied application requirements depending on the region in which a requestor happens to find itself.

Secondly, funding for approved group requests is provided on a "per capita basis", which effectively requires requestors to cap participation in the services provided in order to ensure that the funds are sufficient to provide services that meet children's needs. This is a particular problem where demand for the service in question surges following implementation of the supports, products or services approved under the group request.

Finally, the Caring Society has been made aware that, in some cases, group requests require the submission of individualized data, such as diagnoses, with regard to the children expected to avail themselves of the support, product or service in question. This requirement raises privacy concerns similar to those outlined above. It is unclear why highly specific information about individual children should be required for ISC to determine group requests. Indeed, such detailed requests run contrary to expediting services to meet the needs of First Nations children, which is one of Jordan's Principle's purposes.

Proposed solutions: Adopt national standards based on existing best practices in regions to develop a more standard group request assessment process, taking into account the particular circumstances applicable in each region

Provide an efficient means to amend funding for group requests where actual demand exceeds the demand forecast at the time the request was made

10. Boilerplate denial letters

The Caring Society has seen a number of denial letters, provided by families who seek assistance following the refusal of their request for supports, products or services. These denial letters often contain only one-line descriptions of the reason for denial, which entirely fail to engage with the child's (or children's) needs and circumstances.

Decision-makers are obliged to provide specific reasons for their decisions. The Supreme Court of Canada has made clear that, while decision-makers do not have to provide elaborate decisions dealing with every element before them, they must meaningfully grapple with key issues or central arguments raised. This is important not only to ensure that requestors are assured their concerns have been heard, but also to allow requestors a meaningful opportunity to appeal.

The Caring Society is aware of cases in which the true reason for denial only becomes apparent when families pursue judicial review before the Federal Court and receive the Certified Tribunal Record. While the Caring Society's understanding is that ISC's resistance to providing more detailed reasons for denial relates to the level of effort involved for ISC staff, it is unclear to the Caring Society how there can be greater effort involved if more detailed reasoning already exists in documents that would ultimately be included in a Certified Tribunal Record if judicial review were pursued.

The Caring Society has been informed that ISC is working to address the need for further detail in denial letters by increasing the number of standardized responses that can be used in an autogenerated denial letter. However, the Caring Society's position is that such an approach will not address the problem, as increasing the number of standardized reasons will not address the need for specificity in the reason for denial, or the right of requestors to adequate reasons in order to be able to submit a meaningful appeal from a denial.

Proposed solution: ISC must furnish denial letters that specifically address the criteria applied by the decision-maker and how the request failed to meet each of the criteria for approval

11. Disproportionately high denial rates in certain provinces

The statistics provided with respect to 2019/20 and the first two quarters of 2020/21 indicate a dramatic uptick in denials.

In 2019/20, there were 3,231 individual denials (10.4% of requests) and 299 group denials, representing 847,114 services (18.3% of requests denied, representing 70% of all services requested).

In the first two quarters of 2020/21, there were 3,774 individual denials (19.0% of all requests) and 329 group denials (26.3% of requests denied, representing 30.3% of all services requested).

The Caring Society understands that denial authority was delegated to senior officials within regions in order to increase the efficiency of service request determination. However, the Caring Society is concerned that this delegation has led to significant disparity in treatment of requests throughout the country.

In 2019/20, while 18.3% of group requests were denied nationwide, 51.5% of group requests were denied in British Columbia, while 47.2% of group requests were denied in Alberta. Individual request denials in British Columbia were also concerning, as 10.4% of requests were denied nationwide, while 26.3% of requests in British Columbia were denied.

In 2020/21, 26.3% of group requests were denied nationwide, while a staggering 92.9% of group requests in British Columbia were denied, with 59.1% of group requests in Alberta being denied. Individual denial rates in Alberta (49.4%), the Northern region (40.5%) and British Columbia (38.8%) were also concerning as they far outpaced the national rate (19.0%).

To the extent that some of these high denial rates result from reliance on the community navigator process, it is important to note that the Caring Society supports the community navigator process. However, these navigators need sufficient information and resources from ISC to succeed. ISC has under-funded many navigator services resulting in high caseloads and delays for children and families. Moreover, the Caring Society has had to correct information contained in some navigator organization materials. Canada must proactively review and support the groups it contracts with to ensure the information they provide is accurate, and that they have adequate resources to support families in accessing services for their child(ren) per the Tribunal's orders.

Proposed solution: Active and regular auditing of random, representative samples of decisions by senior officials to whom denial authority has been delegated, to ensure that the denials are properly made

ISC must take proactive and timely efforts to assess the reasons for the high rates of denials in specific regions and take measures to remedy the problem.

Where ISC funds a navigator service, ISC is responsible for ensuring the service has the resources and information required to educate the public and provide services in accordance with Tribunal's orders on Jordan's Principle.

We look forward to hearing from you by August 27, 2021 with your client's response to these problems and the specific solutions identified in this letter.

Yours truly,

David P. Taylor

DPT/dn

Copy to: **Jonathan Tarlton, Patricia MacPhee, Kelly Peck, Max Binnie and Meg Jones**
Co-counsel for the respondent Attorney General of Canada

David Nahwegahbow, Stuart Wuttke and Adam Williamson
Co-counsel for the complainant Assembly of First Nations

Brian Smith and Jessica Walsh
Co-counsel for the Canadian Human Rights Commission

Maggie Wente and Joel Morales
Co-counsel for the Interested Party, Chiefs of Ontario

Julian Falconer, Akosua Matthews and Molly Churchill
Co-counsel for the Interested Party, Nishnawbe Aski Nation

Sarah Clarke, Anne Levesque and David Wilson
Co-counsel for the complainant, First Nations Child and Family Caring Society of Canada