

May 10, 2023

***By Email***

Judy Dubois  
Registry Operations  
Canadian Human Rights Tribunal  
240 Sparks Street, 6<sup>th</sup> Floor West  
Ottawa, ON K1A 1J4

Dear Ms. Dubois:

**Re: First Nations Child and Family Caring Society of Canada et al v. Attorney General of Canada (Tribunal File: T1340/7008)**

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We write in response to the Tribunal's correspondence addressed to the Parties dated March 16, 2023, and March 28, 2023. Long-term reform must achieve two key goals: 1) ensure the discrimination toward First Nations children, youth, and families ends and 2) prevent the recurrence of discrimination within the context of Canada's systemic and longstanding patterns of harming First Nations children, youth, and families through residential schools, the 60's Scoop, and the systemic discrimination before the Tribunal. We are mindful of the direction from Residential School Survivors and First Nations Leadership to get this right and we are therefore committed to basing long-term reform on First Nations-informed evidence that accounts for distinct community circumstances.

The Caring Society acknowledges that the Tribunal's orders and the collective work of First Nations and their allies (especially children) have resulted in positive change for First Nations children, youth, and families. However, the Caring Society's position is that substantive matters must still be addressed by Canada to end the discrimination and prevent its recurrence.

This correspondence provides the First Nations Child and Family Caring Society of Canada's ("**Caring Society**") answers to the four questions posed by the Panel regarding the implementation of the Panel's Orders.

On May 8, 2023, the Caring Society wrote to the Tribunal requesting the opportunity to respond to the May 10, 2023 update to be provided by Canada. Given that no response was received, the Caring Society is providing these brief responses to the Panel's questions and renews its request to file reply to submissions on or before May 24, 2023, or on a date convenient to the Panel.

## THE CARING SOCIETY'S LETTER SUBMISSIONS

1. **A further detailed update of the implementation of orders 1-8 issued March 24, 2022 in ruling 2022 CHRT 8 at paragraph [172]. Please provide as many details as possible. The Tribunal may schedule a case management conference upon reception and review of this update.**
  - (a) **The Tribunal views the [2022 CHRT 8 at para. 172, orders 3, 4(c), and 4(d)] consent orders as important precursors to the Jordan's Principle Reform. The Tribunal would appreciate a detailed update of the implementation progress of the above orders.**

*Order #1: Reform to the First Nations Child and Family Services Program ("FNCFS Program") shall reflect a performance-informed budgeting approach, with consideration of the well-being indicators defined in the Institute for Fiscal Studies and Democracy ("IFSD") Measuring to Thrive framework.*

The Caring Society acknowledges that Canada, the AFN, the Caring Society, COO, and NAN ("the Parties") continue to discuss a performance-informed budgeting approach with consideration of the well-being indicators defined in the Institute for Fiscal Studies and Democracy's ("IFSD") Measuring to Thrive framework. The Caring Society also acknowledges that Indigenous Services Canada ("ISC") has submitted a list of proposed indicators to the Parties. Some of those proposed indicators are rooted in IFSD's Measuring to Thrive framework, while others are not.

While discussion is ongoing, the Caring Society is of the view that ISC's proposed indicators are not adequate, as they do not include the structural factors driving maltreatment identified in Dr. Trocmé's expert evidence before the Tribunal (e.g., poverty, poor housing, mental health, addictions, and domestic violence). Canada's choice to collect child/family level indicators even though the structural indicators are within its control will likely have the unjust effect of codifying structural discrimination as a family deficit. Collection of data in an evidence-informed manner would detect discrimination and guide the implementation of mitigating policy measures.

The Caring Society's position is that 2022 CHRT 8 requires the reliable and valid collection of data on the factors that directly impact the over-representation of children in care (e.g., housing, poverty, mental health/addictions, and domestic violence) and that are grounded in performance-based budgeting. As set out at paragraph 16 of the Affidavit of Dr. Cindy Blackstock, dated March 4, 2022 (cited by the Panel at para 32 of 2022 CHRT 8), the Reformed Funding Approach must be based on evidence informed principles including the following:

- a. Funding will be provided by Canada based on evidence informed well-being indicators for First Nations children, youth, and families, as opposed to being driven by bureaucratic markers for funding;

- b. The well-being indicators will facilitate reliable data collection at a community, regional and national level to inform best practices and improve federal child welfare policies and legislation over time;
- c. Funding will be based on a bottom-up budgeting approach driven by the *actual needs* of children, families, and communities, reflecting the guidance and direction provided by the Tribunal to date; and
- d. Funding will address the structural drivers of the over-representation as well as culturally based child welfare services.

The Caring Society further acknowledges that discussions about the mandate for a National First Nations-led Secretariat are ongoing. In addition, the National Advisory Committee on First Nations Child and Family Services (the “NAC”) has been clear that Regional Secretariats must be adequately resourced and funded. Ongoing discussions about a National Secretariat should not displace discussions about the key roles that Regional Secretariats must play in supporting the implementation of long-term reforms to the FNCFS Program.

*Order #2: Canada shall fund at actual cost post-majority care to youth ageing out of care and young adults who were formerly in care up to and including the age of 25 across all provinces and territories (“post-majority care”). This funding shall be accessible through the actuals process for maintenance and protection reimbursed at the actual cost to the First Nations authorized post-majority service provider and shall be available until March 31, 2023. After this time, funding for post-majority care will be made available through the reformed FNCFS Program’s funding formulas, policies, procedures and agreements in an evidence-informed way agreed to by the Parties.*

The Tribunal ordered Canada to fund post-majority care at actuals until March 31, 2023, by which date it was presumed that post-majority care would then be made available under the Reformed Funding Approach. This is clearly set out in the language of the post-majority care order and there is nothing in 2022 CHRT 8 to suggest that access to post-majority care would be time-limited or be available only as an interim order. Therefore, the Caring Society does not agree that there is consensus regarding the end date of March 31, 2024, for post majority services: those services ought to continue to be available at actuals until the Reformed Funding Approach is in place or until further order of the Tribunal.

Moreover, First Nations leadership and First Nations agency experts have advised Canada and the Caring Society that Canada ought to fund a comprehensive public awareness campaign to inform young people of their eligibility to receive post-majority care. At this point, many young adults are not aware that they can receive help via this important avenue. The Caring Society notes that delayed take-up in this regard is consistent with the experience under Jordan’s Principle.

*Order #3: Given Canada’s commitment to non-discrimination and substantive equality, Canada shall assess the resources required to provide assistance to families and/or young adults in identifying supports for needed services of high needs Jordan’s Principle recipients past the age of majority (as defined in the applicable First Nations or provincial/territorial statute). Canada*

*shall consult with the Parties within sixty (60) days of the order to discuss the scope and scale of these transition supports and how such funding capacity can be incorporated into the Jordan's Principle long-term reform.*

Unfortunately, the Parties have not made substantive progress with respect to this order. While there were some discussions in early 2022, the matter remains largely unaddressed. The Caring Society has repeatedly urged ISC to provide funding on an actuals basis for young people requiring Jordan's Principle after the age of majority to ensure they are not discriminated against on the basis of race, national or ethnic origin, disability, or other prohibited grounds. Canada has refused to do so and has not tabled an alternative that would achieve the goal of non-discrimination.

At present, it appears that the only long-term solution being contemplated by Canada to meet ongoing needs is to fund Service Coordinators to provide post-majority navigation support. While costing of service coordination is expected to form part of IFSD's second phase of work regarding Jordan's Principle, it is currently unknown whether current service coordination organizations have capacity or interest in taking on this role. Furthermore, the Caring Society remains concerned that a strictly navigational approach will be ineffective, as services for First Nations individuals with high needs are often not available, such that navigation does little to resolve gaps in services.

*Order #4: Canada shall fund the following research through the Institute for Fiscal Studies and Democracy ("IFSD"):*

- a. the IFSD Phase 3 Proposal (including stage 5): Implementing a well-being focused approach to First Nations child and family services through performance budgeting, dated July 22, 2021;*

IFSD's Phase 3 research is ongoing and is being funded by Canada. The work continues to follow its trajectory as set out in Exhibit "G" to the Affidavit of Dr. Blackstock, dated March 4, 2022. However, there are crucial outstanding data requests from Canada that exceed the timeframes set out in 2022 CHRT 8. Should such data not be forthcoming in a prompt manner, Canada will imperil the timelines for completion of the Phase 3 work.

- b. the IFSD needs assessment regarding the real needs of First Nations not served by an agency to identify their needs as they relate to prevention, operations and to further identify remedies to gaps that need to be closed as part of long-term reform (the "Non-Agency First Nations Needs Assessment");*

IFSD is anticipating that it will provide Parties with an update regarding the Non-Agency Needs Assessment in September 2023.

- c. the IFSD assessment regarding available data on the use of Jordan's Principle to inform a future cost assessment of Canada's implementation of Jordan's Principle and program reform (the "Jordan's Principle Data Needs Assessment"); and*
- d. upon completion of the Jordan's Principle Data Assessment, the IFSD needs assessment regarding a long-term funding approach for Jordan's Principle,*

*including but not limited to identifying and addressing formal\* equality gaps, in keeping with the Tribunal's rulings, including but not limited to 2016 CHRT 2, 2017 CHRT 35, 2020 CHRT 20 and 2020 CHRT 36 (the "Jordan's Principle Long Term Funding Approach Research").*

*\* This order does not modify any substantive equality orders made by this Tribunal in this case.*

On November 7, 2022, the Caring Society filed the Jordan's Principle Data Needs Assessment, dated September 1, 2022, with the Tribunal. While there was delay in commencing the Jordan's Principle Long Term Funding Approach Research, it is now underway and is anticipated to be completed by December 2024. However, that timeline is conditional on Canada providing data in a timely manner. As set out by the Tribunal in 2022 CHRT 8, this research will be critical to ensuring an evidence-based approach to the long-term reform of Jordan's Principle:

**[76] [...] The Panel finds this order is necessary to achieve evidence-based meaningful and sustainable long-term reform informed by the real needs of children, youth and families. This is consistent with the Panel's orders to provide services according to the First Nations children's real needs.** [Emphasis added]

*Order #5: Canada shall fulfil all IFSD data requests within ten (10) business days or propose reasonable alternative timelines required to protect privacy.*

The Caring Society remains concerned about ISC's systemic non-compliance with the Tribunal's order and its inability to fulfill IFSD's data requests within 10 business days. Both the Caring Society and the AFN have raised this issue with ISC over a period of several months with little effect. Canada's responses on why data could not be furnished within the time periods are often related to administrative as opposed to substantive matters.

*Order #6: Canada shall consult with the Parties and implement the mandatory cultural competency training and performance commitments for employees within Indigenous Services Canada. Canada shall also work with the Parties to establish an expert advisory committee within sixty (60) days of this order to develop and oversee the implementation of an evidence-informed work plan to prevent the recurrence of discrimination. Canada shall take reasonable measures to begin implementing the work plan.*

The Parties have established an Expert Advisory Committee ("EAC") to guide an Independent Third-Party Evaluation for ISC reform, as set out in this order. The EAC is co-chaired by the Caring Society, the AFN, and ISC. There remains much work to be done.

With respect to the mandatory cultural competency training, the Caring Society is concerned that two days (or 15 hours) of training for ISC staff is insufficient and falls far short of meeting the Tribunal's order for ISC to implement the cultural competency training and performance commitments for employees. Indeed, the scale of Canada's discrimination and the devastation it has had on First Nations children and families suggests that more than 2 days of training is needed. The current level of training does not provide for child development, trauma, and other important

subject areas. Nor does this time account for the systemic cultural changes needed to translate the training into practice.

*Order #7: Pursuant to paragraph 413(3) of 2018 CHRT 4, adding the following paragraph to the Tribunal's order in 2018 CHRT 4*

*[421.1]: In amendment to paragraphs 410, 411, 420 and 421 Canada shall, as of April 1, 2022, fund prevention/least disruptive measures at \$2500 per person resident on reserve and in the Yukon in total prevention funding in advance of the complete reform of the FNCFS Program funding formulas, policies, procedures, and agreements. Canada shall fund the \$2500 on an ongoing basis adjusted annually based on inflation and population until the reformed FNCFS Program is fully implemented. This amount will provide a baseline for the prevention element in the reformed FNCFS Program pursuant to paragraph 1 of the Consent Order. Flexibility will be provided on the implementation for First Nations governments and FNCFS agencies not ready on the start date, which will require more time due to exceptional circumstances that will be further defined with the parties. Funds will be directed to the First Nations and/or First Nations child and family service providers(s) responsible for the delivery of prevention services.*

*These funds shall be eligible to be carried forward by the First Nation and/or First Nations child and family service providers(s).*

The Caring Society is concerned about ISC's imposition of certain eligibility limitations in relation to the per capita amount for prevention funding. For example, in ISC's latest public communication to recipients in April 2023, ISC is limiting prevention funding "based on a First Nation's total registered population on reserve and on Crown land, and in the Yukon based on the total registered population of a First Nation [emphasis added]". The addition of "registered" is a limiting factor introduced by ISC and is not in keeping with 2022 CHRT 8.

The Caring Society is also concerned as the inflation factor being applied has not kept pace with market conditions since the time 2022 CHRT 8 was made. Moreover, the inflation and population adjustments were not applied to the allocation of funds that were provided on April 1, 2023, and there is no clear public confirmation that Canada will use the Consumer Price Index rate of inflation to adjust the \$2500 per capita as opposed to using discriminatory approaches such as a flat 2% figure or its Final Domestic Demand Implicit Price Index ("FDIPI") approach. This remains a significant point of concern for the Caring Society.

*Order #8: Pursuant to 2021 CHRT 12 at paragraph 42(5), adding the following paragraph to the Tribunal's order in 2021 CHRT 12:*

*[42.1] In amendment to paragraph 42(1), Canada shall, as of April 1, 2022, fund prevention/least disruptive measures for non-Agency First Nations (as defined in 2021 CHRT 12) at \$2500 per person resident on reserve and in the Yukon, on the same terms as outlined in 2018 CHRT 4 at paragraph 421.1 with respect to FNCFS Agencies.*

As set out above, the Caring Society has concerns regarding the limitations placed by ISC on access to this prevention funding.

- 2. A detailed update on the progress of the implementation of the 2016 CHRT 2 order at paragraph [481] to cease its discriminatory practices and reform the FNCFS Program and 1965 Agreement to reflect the findings in this decision. This also includes long-term reform.**

*[481] The Panel is generally supportive of the requests for immediate relief and the methodologies for reforming the provision of child and family services to First Nations living on reserve, but also recognizes the need for balance espoused by AANDC. AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and 1965 Agreement to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle.*

The Caring Society is concerned that the measures set out in Annex “A” of the update filed by Canada are simply a listing of the general measures taken by Canada in response to the orders versus a serious, evidence-informed demonstration of how specific measures have redressed the discrimination and will prevent the recurrence of this discrimination against First Nations children, youth, and families. The Caring Society also takes a different position on some matters identified in Canada’s Annex “A”.

With respect to Jordan’s Principle, the Caring Society recognizes the profound increase in the services, products, and supports requested by First Nations children, youth, and families and the importance of the Tribunal’s orders in meeting those needs. It also demonstrates a need to ensure that the long-term reform of Jordan’s Principle is completed and embedded in a final Tribunal order in order to ensure that children continue to benefit from the vital life-wellness and lifesaving Jordan’s Principle services, supports, and products.

- 3. A detailed update on the implementation of the Tribunal’s compensation orders which include the compensation process and the outstanding work required to effectively distribute the compensation ordered by this Tribunal.**

The parties to the Consolidated Class Actions signed a Revised Final Settlement Agreement in April 2023. As indicated in an update to the Panel on May 2, 2023, the Parties and Interested Parties to this proceeding are of the view that the forthcoming motion regarding Tribunal approval of the Revised Final Settlement Agreement can proceed in writing, subject to the Panel’s preference for an oral hearing. For its part, the Caring Society can advise that motion materials are forthcoming on this matter.

- 4. The Tribunal received a 2022 update report on Jordan's Principle from the Caring Society, the Tribunal requests the parties' detailed views on the information contained in this report and the purpose that it may serve, in the implementation of Jordan's Principle and the reform ordered by this Tribunal. The Tribunal requests the parties' submissions on how they wish for the Tribunal to address this new information.**

The principle findings of the Jordan's Principle Data Assessment (September 1, 2022) make clear that Jordan's Principle is delivering funding where there is immediate need but is also funding what appear to be gaps in other programs and services. These gaps are not being tracked and the data being collected by ISC does not allow for any determination as to whether Jordan's Principle is helping to achieve substantive equality for First Nations children. The Jordan's Principle Data Assessment made six (6) recommendations:

- (i) Substantive equality and a related performance framework must be defined;
- (ii) A cost analysis of substantive equality ought to be undertaken through the Spirit Bear Plan or another equivalent mechanism;
- (iii) First Nations' community well-being should be defined through the Measuring to Thrive framework or other similar indicators;
- (iv) Actors engaged in Jordan's Principle ought to be interviewed;
- (v) Cost estimates should be undertaken to close the gaps defined in #2 and implementation of the accountability mechanism defined in #3;
- (vi) A reformed approach to Jordan's Principle ought to be defined, premised on recourse in exceptional circumstances.

The Jordan's Principle Data Assessment also provides details on how children and families are accessing and experiencing Jordan's Principle. To that end, the Parties agreed to a "Back to Basics Approach" to Jordan's Principle to bring ISC closer to compliance with the Tribunal's orders and to ensure that things were changing at the level of children and families. The Caring Society acknowledges that the Back-to-Basics Approach has been introduced and it has resulted in some important changes, like the presumption that substantive equality factors underlie requests for products, services, and supports. However, the Caring Society continues to hear from families and Jordan's Principle Service Coordinators that the process of submitting a request to Jordan's Principle is burdensome and is "a lot of work."

The Caring Society continues to have concerns about how the Back-to-Basics Approach is being operationalized, including with regard to the frequency/quantity of services recommended by professionals being provided, regular and longstanding delays in reimbursement of expenses to families and vendors, and time-limited approvals on the basis that "Jordan's Principle is not an income support program". Some of these concerns have been reported as recently as May 9, 2023. Addressing these concerns is of great importance to long-term reform.

The Caring Society hopes that these submissions are of assistance and are responsive to the Panel's recent requests for updates about the implementation of its orders. The Caring Society notes the Tribunal's statement that it may schedule a case conference following this update. Should this be



the case, the Caring Society will of course make itself available at a time and in a manner convenient to the Tribunal.

The Caring Society would be pleased to provide further clarification to the Panel as requested.

Yours very truly,



David P. Taylor

DPT/jk

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