October 10, 2023

By Email

Judy Dubois
Registry Operations
Canadian Human Rights Tribunal
240 Sparks Street, 6th 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)

It has been nearly 8 years since the Merits Decision (2016 CHRT 2). The Caring Society welcomes the Tribunal's correspondence of August 21, 2023 ("**Letter Request**"). The Tribunal has made clear that Canada is ultimately responsible for remedying the discrimination found in this case and ensuring that it does not recur.

Canada's September 21, 2023 report does not adequately respond to the Letter Request. Instead, Canada's vague assertions include the disclosure of settlement privileged material, while invoking settlement privilege on details that may adversely impact its positions. The Caring Society has significant concerns about Canada's implementation of the Tribunal's orders. Regarding implementation, the Caring Society addresses three areas of concern: (1) shortcomings in Canada's implementation of reforms to the First Nations Child and Family Services ("**FNCFS"**); (2) shortcomings in Canada's approach to Jordan's Principle; and (3) barriers faced in accessing capital under 2021 CHRT 41.

This Caring Society's submission concludes with a response to the Tribunal's October 4, 2023 letter, requesting a clear indication regarding the progress of negotiations.

A. Canada's inadequate response to the Tribunal's Letter Request

In its Letter Request, the Panel sought a supplementary report about the implementation of its past orders. In particular, the Panel requested "more details" from Canada about its implementation of the cease-and-desist orders in the 2016 Merits Decision. The Tribunal made it clear that it was "looking for more than budget allocations and generalities on how the systemic racial discrimination and the lack of coordination in Federal Programs affecting children and families and Jordan's Principle is effectively being remedied".[1] To that end, the Panel posed a series of "preliminary questions" as a baseline for Canada's response.

Canada's anemic response to the Tribunal's direction and questions complicates the Caring Society's ability to reply. This response therefore provides what the Caring Society sees as the

[1] See the Tribunal's Letter Request dated August 21, 2023, at p 2.

most urgent issues that ought to be brought to the Tribunal's attention and clearly signals other areas to be addressed as the long-term reform process unfolds.

As important context, the Caring Society provides an update on Canada's September 21, 2023 submissions, which notified the Tribunal that Jordan's Principle concerns raised by the Caring Society were the subject of a mediation process being facilitated by the Honourable Murray Sinclair. This information was shared without notice to, or the consent of, the Caring Society. In any event, as detailed below, Mr. Sinclair withdrew from this role on September 29, 2023.

B. Shortcomings in Canada's approach to FNCFS

The Caring Society highlights the following concerns with Canada's approach to the FNCFS Program, some of which were also addressed in its May 10, 2023 letter submissions. As detailed below, Canada's approach to dividing the $2,500 per capita prevention funding introduced following 2022 CHRT 8 between First Nations and FNCFS Agencies and its adverse population and inflation calculations are creating a non-evidence informed funding model that was never intended pursuant to the consent order. This raises serious concerns about its lack of accountability in actively addressing the discrimination that the Tribunal found.

i. Splitting prevention funding between First Nations and Agencies

Starting in the 2023/24 fiscal year, ISC acceded to requests from individual First Nations served by FNCFS Agencies to re-direct some or all the $2,500 per person prevention allotment away from the FNCFS Agency to the First Nation's own prevention initiatives, contrary to the sharing of the prevention funding contemplated in the consent motion leading to 2022 CHRT 8. As set out below, this non-evidence-based split in prevention funding creates a strong potential for discrimination for children served by FNCFS Agencies and First Nations. To be clear, the Caring Society strongly supports First Nations and FNCFS Agencies receiving adequate prevention funding to meet the needs of their children. However, for the reasons set out below, the Caring Society's position is that Canada should be adding more prevention funding for First Nations instead of splitting the $2,500 per capita that was developed as an adequate prevention budget for agencies with existing service capacity.

From the Caring Society's perspective, the consent motion brought in March 2022 in relation to certain immediate measures did not contemplate the splitting of the $2,500 per capita prevention funding in the manner currently undertaken by ISC. In fact, Dr. Valerie Gideon's affidavit of March 4, 2022 makes clear that the funding would be directed to FNCFS Agencies already providing prevention services, with any remainder to be determined through discussions:

> [41] ISC has calculated each First Nation, FNCFS agency or service provider's prevention allocation for 2022-23. During the 2022-23 transition year, for each First Nation served by a delegated FNCFS agency, ISC will calculate the prevention funding at $2,500 per capita. It will allocate to the agency an amount equal to what that agency received in 2021-22. The remainder can be determined in discussion with First Nations. First Nations not served by a delegated FNCFS agency will receive the entire $2,500 per capita, consistent with the funding approach under the CWJI Program and 2021 CHRT 12.

As the Panel will recall, IFSD calculated the $2,500 per capita funding amount based on the ability of single service providers, with existing capacity to deliver prevention services.[2] Moreover, 2022 CHRT 8 makes clear that the prevention funding is to be directed to those providers "responsible for the delivery of prevention services".[3] It is important to note that the $2,500 per capita amount, on its own, cannot be properly characterized as the IFSD methodology as it was proposed as one element of a holistic funding model for agencies. This model is subject to further research in Phase 3, as ordered by the Tribunal in 2022 CHRT 8. There is also a separate research project underway to explore the prevention funding needs of First Nations without agencies.

While most communities received increases in prevention funding with the introduction of 2022 CHRT 8 (and those that did not saw their prior funding levels maintained), reducing or removing prevention funding from FNCFS Agencies will impair their capacity to deliver prevention services to children, families, and communities in line with provincial and federal child welfare legislative requirements. Indeed, all FNCFS Agencies are required by provincial/Yukon child welfare laws and *An Act respecting First Nations, Inuit and Métis children, youth, and families* (the "**Federal Act**") to prioritize prevention in the delivery of their services. The Federal Act goes further and requires FNCFS Agencies to target the structural drivers that predispose First Nations children and families to child welfare intervention.

> **Priority to preventative care**
>
> **14(1)** In the context of providing child and family services in relation to an Indigenous child, to the extent that providing a service that promotes preventative care to support the child's family is consistent with the best interests of the child, the provision of that service is to be given priority over other services.
>
> **Socio-economic conditions**
>
> **15** In the context of providing child and family services in relation to an Indigenous child, to the extent that it is consistent with the best interests of the child, the child must not be apprehended solely on the basis of his or her socio-economic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of his or her parent or the care provider.[4]

While ISC is encouraging FNCFS Agencies to access funding at actuals for "least disruptive measures" through the protection funding stream, it is not clear if Canada will continue this funding at actuals method as part of long-term reform, or that this will be sufficient to maintain existing services where a First Nation claims all, or most of, the $2,500 per capita funding. This approach forces FNCFS Agencies back to using protection labeled funds to fund prevention services and reintroduces the problematic elements of the "funding at actuals" process that the March 2022 consent order sought to avoid (i.e.: imposing on FNCFS Agency capacity by introducing a request-based funding stream and leaving federal employees who are not trained social workers to

---

[2] See e.g., IFSD, *Enabling First Nations Children to Thrive* (December 15, 2018), at pp 89–94 (Phase 1); IFSD, *Funding First Nations child and family services (FNCFS): A performance budget approach to well-being* (July 31, 2020), at pp 182, 186 (Phase 2).
[3] See 2022 CHRT 8 at para 172(7).
[4] See *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, ss 14(1) & 15.

determine eligible prevention costs).

Moreover, least disruptive measures must include primary prevention to support sound holistic social work practice and respond to the changing needs of children, youth, and families in contact with the child welfare system. As the Tribunal has found, delivering prevention services is critical to keeping children safely out of care and must be delivered on a continuum.[5] If FNCFS Agencies cannot deliver prevention services in line with their statutory obligations, First Nations children, youth, and families will suffer and the inability of the agency to delivered mandated prevention services may attract individual and systemic liability.

As the evidence made clear during the hearing of the Complaint, many First Nations Agencies serve multiple First Nations and pool resources to offer services to all children. When ISC redirects prevention money for children in one or more of the First Nations, it can disrupt prevention programs for all children being served by the agency. In addition, unilaterally diverting prevention funding away from FNCFS Agencies without consultation is creating conflict among some First Nations and Agencies as both grapple with how to get sufficient resources to deliver the services their children need and deserve.

Capacity to provide prevention services is essential to providing quality and effective interventions to meet the needs of First Nations children, youth, and families. The Tribunal will recall the developmental provisions in Directive 20-1 for the creation of new FNCFS Agencies, which presumed a five-year developmental period to accomplish, among other things, community needs assessments, program design, office set up and hiring/training staff.[6] According to INAC's First Nations Child and Family Services National Manual (2005), the discriminatory Directive 20-1 provided $285,297.24 for Agency development (assuming it served over 801 children and one First Nation).[7] Today, ISC expects First Nations to deliver prevention with no capacity funding. It is unfair to expect First Nations to deliver prevention services without similar capacity funding and sufficient time to build such services. Moreover, the Caring Society is concerned about the significant liability that may flow from arrangements where ISC funds statutory prevention to a non-delegated service provider – particularly without capacity or without adequate capacity.

The Caring Society strongly believes that Canada should take a "yes, and" approach, providing First Nations with the prevention funding they need to deliver critically important services in their communities and ensuring FNCFCS Agencies can meet their legal obligations. Importantly, prevention services for children, youth, and families must be coordinated where there are multiple service providers to avoid service gaps and disruptions. Failing to take this "yes, and" approach may set up both First Nations and Agencies to fail, as First Nations may struggle with the sufficiency of the $2,500 per capita amount if they do not have the existing capacity, while stretching FNCFS Agencies' delivery of mandated prevention services without adequate funding.

Finally, and consistent with Canada's obligations for "free, prior and informed" consent pursuant to the United Nations Declaration on the Rights of Indigenous Peoples, the Caring Society expects

---

[5] See e.g., 2016 CHRT 2 at para 116, 384, 386, and 458.
[6] CHRC Book of Documents, Vol 1, Tab 2, *Directive 20-1* at pp 3-4.
[7] CHRC Book of Documents, Vol 3, Tab 29, *First Nations Child and Family Services National Program Manual* at p 21.

Canada to disclose any adverse effects or possible liability burdens prior to entering funding arrangements with First Nations or Agencies and to take positive and adequate measures to address such matters where they arise.

ii. Inflation

Canada's unilateral decision to discontinue Directive 20-1's inflation adjustment in 1995 was cited as problematic in both the Joint National Policy Review (2000)[8] and the Wen:de reports (2005),[9] as lost purchasing power made Canada's serious child and family service funding inequities even worse. In the *Merits Decision*, the Tribunal detailed Canada's failure to adjust FNCFS funding for inflation[10], citing it as one of the main adverse impacts.[11] Then, in 2016 CHRT 16, the Tribunal identified "[i]nflation/cost of living and for changing service standards" as an item that required immediate relief,[12] and ordered Canada to show how its plan for future funding accounted for future cost drivers and yearly growth.[13] Crucially, the Tribunal observed that "[t]here is no doubt that inflation is a key factor which impacts overall service delivery and agency capacity to deliver those services".[14]

More recently, the Caring Society noted its significant concerns with Canada's approach to calculating and applying an inflation adjustment to the $2500 per capita prevention funding.[15] IFSD recommended Canada apply the widely used Consumer Price Index to adjust for inflation. However, Canada chose to ignore this evidence and unilaterally applied an untested and questionable 2% inflation adjustment, suggesting it is using 2% to ensure consistency year over year in prevention budgets.[16] However, this approach has not kept pace with market conditions and has resulted in an erosion of prevention purchasing power given the higher rates of inflation. Indeed, consistency and reliability in funding can be achieved without reducing purchasing power by adopting a 2% base inflation with upward increases to the value of the Consumer Price Index when inflation exceeds. This would ensure service providers can meet market pressures, while also providing a consistent baseline approach to funding.

The Caring Society is also concerned that Canada is redeploying the Final Domestic Demand Implicit Price Index in funding agreements with First Nations exercising authority under the Federal Act. As the Tribunal will recall, this approach was discredited for use for child and family services in the Wen:de: the Journey Continues (2005) report.[17] Nevertheless, Canada continues to apply it for this purpose, raising questions about whether it is contracting out of its human rights obligations by including adverse funding structures and approaches in fiscal agreements with First Nations under the Federal Act.

---

[8] CHRC Book of Documents, Vol 1, Tab 3, *First Nations Child and Family Services Joint National Policy Review* at p 14.
[9] 2016 CHRT 2 at paras 163-164 & 171-173.
[10] See e.g., 2016 CHRT 2 at paras 163-164, 171-173, 251-253, 275, 333, and 387.
[11] See e.g., 2016 CHRT 2 at para 458.
[12] See 2016 CHRT 16 at para 36.
[13] See 2016 CHRT 16 at paras 55 and 88. See generally 2016 CHRT 16 at paras 51-55.
[14] See 2016 CHRT 16 at para 88.
[15] See the Caring Society's letter submissions dated May 10, 2023, at p 6.
[16] See Canada's letter submissions dated June 12, 2023 (responding to the Parties), at p 9.
[17] CHRC Book of Documents, Vol 1, Tab 6, *Wen:De: The Journey Continues* at p 19.

iii. Population

2022 CHRT 8 requires Canada to fund prevention at a rate of $2,500 per resident on reserve. Canada, however, has adopted a narrower approach by adding *Indian Act* registration (or eligibility thereunder) as an additional criterion. Further entrenching the *Indian Act* into reform of the FNCFS Program is deeply concerning to the Caring Society, given that it is the legal instrument used to remove generations of First Nations children from their families by placing them in residential schools. Indeed, as Prime Minister Trudeau has properly recognized, the *Indian Act* is "discriminatory and paternalistic."[18] Moreover, Canada has not sought clarification from the Tribunal on this matter and has unilaterally chosen to adopt this definition despite the Caring Society repeatedly expressing its concerns. Canada continues to unilaterally narrow definitions resulting in discrimination despite, as this Panel has noted, the Supreme Court of Canada proclaiming that the *Canadian Human Rights Act* must be interpreted in a "broad, liberal and purposive manner."[19]

Moreover, this method for determining populations for the purposes of calculating the $2,500 per capita prevention amount is likely underinclusive. In general, Canada uses one of two mechanisms to count First Nations populations: (1) the Indian Registration System ("**IRS**"),[20] which tracks First Nations persons who are registered under the *Indian Act*; and (2) the Census.[21] Canada also develops population projections.[22] Both the IRS approach and the Census approach are underinclusive. To combat this risk of under-inclusiveness in funding estimates, it would be prudent to ask funding recipients to define their total population served irrespective of Indian Act status or place of residence. IFSD's Phase 1 report highlighted the inconsistencies in population data between service provider-reported data on population served and publicly available data.[23] IFSD also noted a lack of data in Phase 2.[24] Much like the need to adopt a child first approach to Jordan's Principle to resolve disputes between ISC and FNCFS Agencies regarding prevention services to children living off-reserve (addressed below), the approach to establishing population for prevention funding must reflect the fluidity with which many First Nations persons access services both on and off reserve and therefore arrive at a more accurate portrait of a particular community's population. In the Caring Society's view, transitioning to an approach that promotes First Nations capacity to count and report on their own population, as opposed to those who have been registered in the IRS system or engaged with the Census would better ensure that the necessary funding is reaching those in need.

iv. Jurisdictional disputes between the FNCFS and Jordan's Principle

The *Merits Decision* found that Canada's discriminatory approach to Jordan's Principle included its failure to apply a government of first contact approach to resolving jurisdictional disputes

---

[18] Canada, Parliament, *House of Commons Debates*, 42nd Parl, 1st Sess, Vol 148, No 264 (14 February 2018) at 17193 (Rt Hon Justin Trudeau).
[19] 2016 CHRT 10 at para 11, citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 33 and 62.
[20] See e.g., Indigenous Services Canada, "Registered Indian Population by Sex and Residence, 2021".
[21] See e.g., Statistics Canada, "Statistics on Indigenous Peoples".
[22] See e.g., Statistics Canada, "Indigenous population in Canada – Projections to 2041".
[23] See IFSD, *Enabling First Nations Children to Thrive* (December 15, 2018), at pp 46-47 (Figures 16-17) (Phase 1).
[24] See IFSD, *Funding First Nations child and family services (FNCFS): A performance budget approach to well-being* (July 31, 2020), at pp 106-112 (Phase 2).

within the federal government and between the federal government and provincial governments. The Tribunal will recall that *Wen:de: We are Coming to the Light of Day* found that disputes between federal departments were the most frequent type of jurisdictional dispute accounting for 36% of cases.[25] This was particularly problematic between Health Canada (and its First Nations and Inuit Health Branch) and Indian and Northern Affairs as they then were. These challenges continued after the *Merits Decision*, as detailed in the affidavits of Raymond Shingoose (dated December 20, 2016 and January 30, 2017), which described 32 cases in which children were not able to remain in their homes due to gaps in services between Health Canada and INAC.[26]

In 2017, Canada amalgamated its First Nations service providers under a new ministry called Indigenous Services Canada ("ISC"). ISC's constating statute, the *Department of Indigenous Services Act*, S.C. 2019, c. 29, s. 336 requires the Minister of Indigenous Services to ensure that services are provided to eligible Indigenous individuals on a broad range of matters, including child and family services, education, health, social development and housing.[27] The preamble of ISC's statute makes it clear that, in carrying out these activities, access to these services must be needs-based, and must account for socio-economic gaps between Indigenous individuals and other Canadians and social factors impacting on health and well-being (i.e., substantive equality). As noted above, in the context of child and family services, this is reinforced by the Federal Act, which now requires that Indigenous children "must not be apprehended solely on the basis of [their] socio-economic conditions, including poverty, lack of adequate housing or infrastructure".[28]

The most recent Ministerial ISC mandate letter (dated December 16, 2021), notes closing socio-economic gaps and improving access to services as part of what is required to "achieve equity".[29] The mandate letter specifically cites continued full funding of Jordan's Principle as being required to make sure that First Nations children get the care they need. Indeed, in addition to being required pursuant to this Tribunal's orders, Jordan's Principle is a vital plank in ensuring that ISC carries out its statutory mandate.

In its May 24, 2023, letter submission, the Caring Society noted concerns regarding ISC's approach to questioning FNCFS Agencies that are providing prevention services to First Nations children residing off-reserve.[30] The Caring Society remains concerned that ISC is creating bureaucratic and administrative barriers and perpetuating jurisdictional conflicts with potentially detrimental impacts on First Nations children and youth in need of services.

Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve.[31] Jordan's Principle includes prevention services as part of the range of

---

[25] CHRC Book of Documents, Vol 1, Tab 5, *Wen:De: We are Coming to the Light of Day* at p 17.
[26] Affidavit of Raymond Shingoose affirmed December 20, 2016 at para 28; Affidavit of Raymond Shingoose, affirmed January 30, 2017 at para 12.
[27] *Department of Indigenous Services Act*, S.C. 2019, c. 29, s. 336, s. 6(2).
[28] *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24, s. 15.
[29] See Canada, Prime Minister of Canada, "Minister of Indigenous Services and Minister responsible for the Federal Economic Development Agency for Northern Ontario Mandate Letter", dated December 16, 2021.
[30] See the Caring Society's letter submissions dated May 24, 2023 (responding to Canada's May 10, 2023, submissions), at pp 7-8.
[31] See 2017 CHRT 35.

"health, education and social supports" that must be available to First Nations children, on- or off-reserve. By questioning FNCFS Agencies' efforts to assist First Nations children living off-reserve, Canada is not taking a government of first contact approach. It is instead requiring Agencies to file Jordan's Principle applications "up front" in order to receive funding, as opposed to making the appropriate budgetary adjustments administratively in a way that does not delay, disrupt or deny essential statutory services to these children. Where FNCFS Agencies are the first point of contact for First Nations children and families living off-reserve, they should be supported in providing such services, rather than artificially redirected to make Jordan's Principle requests. Any other approach reflects a mindset that is not based in the lived realities of First Nations who travel on- and off-reserve to access services.

C. Shortcomings in Canada's approach to Jordan's Principle

In presenting her 2022 report to Parliament regarding Emergency Management in First Nations Communities to the Standing Senate Committee on Indigenous Peoples, Auditor General Hogan noted as follows:

> In 2011, at the end of her mandate as Auditor General of Canada, Sheila Fraser summed up her impression of the government's actions after 10 years of audits and related recommendations on First Nations issues with the word "unacceptable." Five years later, my predecessor, Michael Ferguson, used the words "beyond unacceptable." We are now into decades of audits of programs and government commitments that have repeatedly failed to effectively serve Canada's Indigenous peoples. It is clear to me that strong words are not driving change—concrete actions are needed to address these long-standing issues, and government needs to be held accountable.[32]

Serious and detrimental failures continue to colour Canada's approach to the Tribunal's existing orders on Jordan's Principle and to ensure that First Nations children and youth can access Jordan's Principle with dignity, respect, and compassion. By not addressing clear and obvious problems (i.e., increased volume of requests, backlogs in processing requests, dysfunctional 24-hour and regional phone lines, and a failure to meet timelines for determining requests and issuing payment), Canada's implementation of Jordan's Principle once again places the burden of discrimination on First Nations children, youth and families.

Each of the concerns raised herein regarding Jordan's Principle have previously been shared with Canada either through ongoing direct Caring Society-ISC communication or at the Jordan's Principle Operations Committee ("**JPOC**"). Indeed, the Caring Society projected an increase in the volume of requests made to Canada if it chose not to fill gaps in other federally-funded programs like education and health by taking measures like implementing the Spirit Bear Plan, as called for by the First Nations in Assembly in 2017. In this respect, the Caring Society's projection is consistent with IFSD's conclusion in its Jordan's Principle data assessment: "Jordan's Principle may appear to be working for children as requests, approvals, and expenditures increase. These trends, however, are symptoms of underlying gaps in programs and services. Only when equitable points of departure are established for First Nations children can substantive equality be

[32] Canada, Parliament, Senate, Standing Committee on Indigenous Peoples, *Proceedings*, 44th Parl, 1st Sess, No 26 at 26:18 (23 November 2022).

achievable".[33]

Since September 2022, the Caring Society has intervened in 118Jordan's Principle cases, 21% of which were urgent. Only 38 have resolved at the level of the child. Overall, the Caring Society has struggled to help children and families most in need and, when attempting to work with ISC to resolve these cases, is often met with resistance, delay, and indifference. The Caring Society is very concerned for the children and families who have contacted the Caring Society, but is most concerned with those who have not or cannot. There are children falling through the cracks.

i. Jordan's Principle Phone Lines

Canada makes public representations on how to make a Jordan's Principle request on its website, via social media, and in other fora. This is vital to ensure that First Nations children and families are aware of how to access Jordan's Principle, pursuant to the Tribunal's orders, particularly in urgent circumstances.

As of October 8, 2023, Canada's Jordan's Principle website includes a link titled "Submit a request under Jordan's Principle", under the heading "Services". This leads to a website that advises that ISC is available to take requests 24 hours a day, 7 days a week, that provides contact information for the national Jordan's Principle call centre (1-855-JP-Child (1-855-572-4453)) and provides a list of "regional focal points" (without defining the term) across Canada (including phone numbers for most regions, but not for Quebec).

Despite Canada's representations that agents are available 24 hours a day, 7 days a week to receive Jordan's Principle requests, calls to these lines often go unanswered and call backs can take many hours, if the caller is called back at all. In particular, the Caring Society is extremely concerned over Canada's failure to set up an effective mechanism to receive and determine urgent requests, as the National Call Centre is the only mechanism offered by ISC for families to make an urgent request outside of business hours. The Caring Society has identified this concern for many years.

Staff members at the Caring Society have called the 24-hour line approximately 20 times since January 2023. They were connected to a live agent only once, at approximately 8:45 AM ET on September 14. A call back was received 52 hours after placing an urgent call on June 17, 2023, and approximately 6 hours after placing an urgent call on September 29, 2023.

The pre-recorded message tree facing callers is confusing.[34] The Caring Society's concerns include: (1) there is no easily-identified urgent option; (2) callers are not able to reach a live agent after pressing "urgent" and waiting on hold; (3) the system has malfunctioned when an attempt was made to leave a callback number so as not to lose one's place in line (there was no ability to leave a callback number); (4) messages are rarely returned; (5) in the rare instances where messages have been returned for urgent cases, it is past the 12-hour timeframe for determining an urgent request; and (6) inability to leave a callback number on a regional line (as an alternative to the National Call Centre) where a phone number has already been left for a call back from the

[33] See IFSD, *Data assessment and framing of an analysis of substantive equality through the application of Jordan's Principle* (September 1, 2022), at pp 78 (see also pp 77-78).
[34] See "**Annex A**" for an unofficial transcript of calls to the National Call Centre on January 11, 2023 and September 29, 2023.

National Call Centre.

As callers routinely do not receive a call back from the National Call Centre, callers sometimes call the regional phone numbers listed by the ISC as an alternative resource. The Caring Society undertook a separate phone audit of the regional lines on September 15, 2023, given that callers may try the regional phone numbers listed by ISC as an alternative resource in the face of a lack of response from the National Call Centre. Only two live agents were reached. The other regional lines either: (1) triaged calls through a phone tree before eventually advising to leave a callback number; or (2) sent the caller directly to voicemail.

There is also no mechanism by which callers can indicate a change in urgency over time.

The inability to reach a live agent obviously raises concerns regarding urgent requests, as it is unclear what avenue families should follow when they are faced with an urgent situation (or when a pre-existing request becomes urgent due to the passage of time).

Despite these clear concerns, Canada's initial response in January of 2023 and repeated in May of 2023 were simply that these were anomalies that would be easily remedied. Despite this initial assurance, the problems with the 24-hour line and regional lines have persisted for months.

These barriers are exacerbated by ISC's failure to adequately staff the National Call Centre line which, as of May 24, 2023, had just 16 call agents.[35] While this phone line remains inadequately staffed, families in need continue to experience unreasonable delays and confusion in obtaining urgent and non-urgent care, akin to the discrimination and hardship First Nations children and families faced prior to 2017.[36] The Caring Society's view is that the 24-hour Jordan's Principle National Call Centre line and regional lines need to be urgently remedied to ensure prompt access to services.

ii. Timelines

1. Failure to meet the Tribunal-ordered timelines for determining urgent and non-urgent Jordan's Principle requests.

Nearly six years ago, the Tribunal issued a consent order requiring Canada to determine Jordan's Principle requests on the following timelines:

- 12 hours for urgent individual requests;
- 48 hours for non-urgent individual requests;
- 48 hours for urgent group requests; and
- 7 days for non-urgent group requests.[37]

---

[35] See the Caring Society's letter submissions dated May 24, 2023 (responding to Canada's May 10, 2023, submissions), at p 3.

[36] See the Caring Society's letter submissions dated May 24, 2023 (responding to Canada's May 10, 2023, submissions), at pp 3-4, for a discussion of Dr. Blackstock's experiences contacting the National line and facing unreasonable delay.

[37] See 2017 CHRT 35 (released on November 2, 2017).

Although Canada agreed to the timelines in this consent order, it continues to breach them, including in urgent cases where children are reasonably facing irremediable harm or are in palliative care. In this respect, the Caring Society's concerns, raised most recently to the Tribunal in its May 24, 2023 letter submissions, remain unaddressed.[38]

ISC adopted the "Back-to-Basics Approach" to remedy issues surrounding the implementation of Jordan's Principle. This requires that Canada implement Jordan's Principle in a manner that: respects and fully implements the CHRT orders; is non-discriminatory; is centred on the needs and best interests of the child; considers distinct community circumstances; ensures substantive equality and culturally relevant service provision; is simple to access; is timely; and minimizes the administrative burden on families.[39] Implementation of the "Back-to-Basics Approach" was a key plank in a work plan committed to in the December 2021 Agreement-in-Principle on long-term reform.[40]

Through its work at JPOC, the Caring Society has learned that:

- From April 1 to July 31, 2023, Canada's compliance rate for urgent individual requests was 28% and for urgent group requests was 15%.[41] In fiscal year 2021-22, its compliance rate for urgent individual requests was 53%[42] and for urgent group requests was 31%.[43]

- From April 1 to July 31, 2023, the compliance rate for non-urgent individual requests was 30% versus 49% for non-urgent group requests.[44] In fiscal year 2021-22, its non-urgent individual request compliance rate was 44% versus 53% for non-urgent group requests.[45]

These statistics represent real children and real families. The Caring Society has worked directly with a number of these families, who reach out when they cannot get a response from ISC. These include ISC's failure to adequately respond to an urgent travel request for children to attend a memorial Potlatch for their mother and brother, and ISC's failure to adequately respond to a mother's request for urgent medical transportation. ISC's failures to abide by the Tribunal-ordered timelines and is putting children, families, and communities at risk of harm.[46] Although the Caring

---

[38] See the Caring Society's letter submissions dated May 24, 2023 (responding to Canada's May 10, 2023, submissions), at p 4.
[39] See Indigenous Services Canada, "Back-to-Basics Approach" at p 2. See also the Caring Society, "Back-to-Basics Approach for Improving Outcomes Under Jordan's Principle", dated March 2023 (information sheet).
[40] Canada, Indigenous Services Canada, *Executive Summary of Agreement-in-Principle on Long-Term Reform*, under the heading "Jordan's Principle".
[41] See "**Annex C**", Indigenous Services Canada, "Jordan's Principle July 2023 Compliance Report" (August 14, 2023), at p. 2.
[42] See "**Annex D**", Deep Dive at p. 77 ("Table 71: Compliance rate by request type, urgency, and month of sufficient information, fiscal year (FY) 2021-22").
[43] See Deep Dive, at p. 77 (Table 71).
[44] See Indigenous Services Canada, "Jordan's Principle July 2023 Compliance Report" (August 14, 2023), at p. 2.
[45] See Deep Dive at p. 77 (Table 71).
[46] 28% of respondents in a study of over 200 Canadian pediatricians (currently undergoing peer review) reported a negative outcome for a child or family due to delay, such as medical complication, worsened mental health, unnecessary separation from the family, delay of therapy, and prolonged hospitalization. See "**Annex B**", Jennifer King and Dr. Ryan Giroux, "Implementing Jordan's Principle in pediatric practice and advocacy: Barriers and solutions", presentation to the Canadian Paediatric Society Annual Conference 2023 (May 25, 2023), at pp. 4 and 9.

Society acknowledges that Canada has approved more than 3.39 million products, services, and supports under Jordan's Principle,[47] systemic non-compliance with the Tribunal-ordered determination timelines cannot remain the status quo.

2. Unopened requests and backlogs in the regions

At JPOC, a member from British Columbia advised that the ISC BC Regional Director General had reported a of Jordan's Principle requests in the region of over 2,000 requests that had not been reviewed or assigned. ISC did not refute the claim. The Caring Society has heard similar concerns in Manitoba Region, in which one community alone has reported a backlog of 100 requests (see October 5, 2023 letter from Interlake Reserves Tribal Council's Health Director, attached to this letter as "**Annex E**").

These backlogs mean that the needs of First Nations children requiring critical assistance under Jordan's Principle, many of which will be urgent according to Canada's own data trends, are not being met. Quality control measures are clearly insufficient as Canada did not proactively disclose the backlogs to, or seek solutions from, JPOC or the Parties. Moreover, ISC did not take adequate measures while the backlogs were building to stem the problem at the earliest stage.

3. Lack of timely payment for services

The Caring Society remains concerned about Canada's delays in issuing reimbursements for services to First Nations children that have been approved and provided.[48] Since its letter submissions in May 2023, the Caring Society has observed little improvement in Canada meeting the 15-business day reimbursement service standard, and regional capacity to meet this timeline continues to vary across the country. Despite acquisition cards being available to ensure payment is not a barrier to accessing services or meeting families' needs, the Caring Society's understanding is that they are rarely used. The Caring Society remains unaware of a tangible plan to address payment issues, or an explanation for the variance in capacity amongst the regions.

While payment delays may appear banal and administrative – the impacts to children, youth, and families and those who serve them are severe. Indeed, a CBC News story posted on June 28, 2023, features First Nations families and service providers who have experienced significant hardships due to Canada's payment delays. In the story, speech therapist Alanna McIntyre is owed $500,000 in back payments from Canada, dating to 2021, placing her business, and further services to First Nations children, at risk. Kevin Tegosh put his daycare building up as collateral for a $200,000 revolving loan to pay service providers waiting for payments from Canada for approved services, so the children can continue to get the help they need.[49]

The Caring Society has used its own revenue to ensure a child in palliative care could remain with their family while they awaited Jordan's Principle payments due from Canada. The Caring Society has had to provide financial support to this family repeatedly, as Canada pays the back payments

---

[47] See Indigenous Services Canada, "Jordan's Principle" ("Helping First Nations children").
[48] See the Caring Society's letter submissions dated May 24, 2023 (responding to Canada's May 10, 2023, submissions), at p 2, for a discussion of the Caring Society's detailed perspective on Canada's reimbursement delays.
[49] Olivia Stefanovich, "Backlog at federal Indigenous children's program leaves families to shoulder heavy bills", *CBC News* (28 June 2023), online: https://www.cbc.ca/news/politics/jordans-principle-ongoing-payment-approval-delays-1.6851978.

and then falls behind again. Canada's conduct has created great unnecessary stress during a heartbreaking time.

When Canada does not pay its bills on time, it is First Nations children, youth and families who pay the price and this must stop.

iii. Shortfalls in approving Jordan's Principle requests

1. Failure to apply substantive equality principles resulting in denials of requests for basic needs.

The Back-to-Basics Approach emphasized the presumption of substantive equality when determining Jordan's Principle requests. However, the Caring Society is concerned that Canada is overlooking these principles in its decision-making and employing a bureaucratic approach to determining requests, instead of understanding the needs of First Nations children. Specifically, the Caring Society has learned that Canada is denying requests for basic needs based on the ground that Jordan's Principle is not intended to provide long-term income support, nor to act as an income supplement. In other instances, requests are approved as "exceptional measures" or "one-time approvals" for arbitrary periods of three to six months. Denying or limiting Jordan's Principle requests on these grounds does not meaningfully consider the needs of children and increases their risk of harm.

These denials are especially concerning for families in need of Jordan's Principle services to mitigate child protection risk and prevent children from being removed because of a child welfare intervention. Such families resort to Jordan's Principle, as opposed to other federal services, because the latter either do not fund, or do not adequately fund, the range of services and supports a child may need (or, when needed services or supports are funded, severe delays render these services inaccessible). Requesting necessities such as food and shelter via Jordan's Principle mitigates the risk of children entering the child welfare system. Denials of these necessities increase this risk. The Caring Society's view is that Canada must apply best interest of the child and substantive equality principles to its decision-making in a more robust way.

Indeed, the Caring Society has had to use its own funds to assist some families in urgent circumstances. The Caring Society is concerned that without its intervention, these children, youth, and families would have experienced serious irremediable hardship and harm that is meant to be mitigated under Jordan's Principle.

More importantly, the Caring Society is extremely concerned for those children and families who have not reached out to the Caring Society. The Caring Society is not funded to support families having trouble in accessing supports, products, or services via Jordan's Principle. The number of families in need outstrips the Caring Society's capacity to provide relief. Indeed, assisting families and community navigators in dealing with Canada's non-compliance consumes a considerable amount of Caring Society staff time.

2. Unreasonable attestation/documentation requirements, contrary to the Back-to-Basics approach

As detailed in its letter submissions dated May 24, 2023, the Caring Society has longstanding

concerns about the documentation and attestation requirements placed on families and service providers.[50] The Back-to-Basics Approach contains a robust account of what "reasonable documentation" to support a Jordan's Principle request means.[51] Some of the issues of which the Caring Society is aware surrounding documentation and attestation requirements include:

- Canada has set unreasonable attestation requirements, such as having parents sign an attestation for each service provided to their child during the school day even though the parents have already signed a consent for the requested services. ISC expects service providers to have non-clinical visits with parents to obtain these attestations at their own expense. Such requirements are often duplicative, as ISC requires this type of documentation even where a relevant professional order requires that billings accurately reflect services rendered. Such requirements delay payment processing and further risk service providers opting out of providing services under Jordan's Principle.
- Canada should not require families to resubmit documents to extend approved services when needs have not changed. This ISC practice risks exposing the child to repeat assessments that are not clinically required and places a further burden on service professionals. The Back-to-Basics Approach stipulates that "[f]ocal Points (or other adjudicating staff) will review previous requests for the child and any relevant letters already on file and used to support past requests, can be used to support new requests that are clearly linked. This is particularly the case with children and youth with chronic and complex needs".[52] Adhering to this approach will avoid unnecessary and duplicative requests for information and reduce administrative burdens in the process.

Canada should be applying the Back-to-Basics Approach and must abide by its commitments respecting reasonable documentation for Jordan's Principle requests.

3. Continued reliance on the *Financial Administration Act* by ISC staff to deny requests, contrary to the guidance in 2021 CHRT 41

The Tribunal found that orders made under the *CHRA* govern in the event of conflict with an interpretation of the *Financial Administration Act* ("*FAA*") that limits the Tribunal's remedial authority.[53] In making this finding, this Tribunal observed that Canada's interpretation of the *FAA* funding regime favoured "process over substance" and reflected "the old mindset".[54] The "old mindset" emphasized FNCFS authorities and Terms and Conditions over the Tribunal's orders.[55] Contrary to the guidance in 2021 CHRT 41, Canada still relies on the *FAA* when denying some Jordan's Principle requests or relaying reimbursement and payment for products and services. For example, the Caring Society has heard concerns from families who have been required to submit itemized receipts when they purchase grocery cards for approved grocery requests, and who have

---

[50] See the Caring Society's letter submissions dated May 24, 2023 (responding to Canada's May 10, 2023, submissions), at pp 4-5.
[51] See Indigenous Services Canada, "Back-to-Basics Approach", at pp 3-5 ("Documentation required to support a request is reasonable and not a barrier to accessing Jordan's Principle").
[52] See Indigenous Services Canada, "Back-to-Basics Approach", at p 4 ("Documentation required to support a request is reasonable and not a barrier to accessing Jordan's Principle").
[53] See 2021 CHRT 41, at para 377.
[54] See 2021 CHRT 41, at para. 341.
[55] See 2021 CHRT 41, at para. 341.

been questioned for including items like chocolate bars or batteries. Such an approach infringes on the dignity of children and families and is not in keeping with an approach to substantive equality.

The Caring Society's view is that ISC must shift its "old mindset" and cease emphasizing the *FAA* and other bureaucratic policies over the Tribunal's orders. Canada's position is even more puzzling in the wake of the compensation order, where the price of non-compliance and discrimination far exceeded the costs of remedying the inequalities that caused the harm to tens of thousands of victims. The CHRT orders must prevail over limiting interpretations of the *FAA*.

iv. Internal quality control, auditing, and lack of compassion in ISC

At this point Canada lacks reliable and effective mechanisms to detect and improve upon systemic failures in upholding the rights of First Nations children under Jordan's Principle. Since as early as 2018, the Caring Society has repeatedly raised the same concerns and provided suggested remedies only to have Canada not implement the changes. In proposing these solutions, the Caring Society has been clear that it is open to Canada implementing other effective remedies. What is not open to Canada is to continue its discriminatory conduct which, in the Caring Society's view, is unfortunately happening.

The Caring Society cannot understand how a backlog of cases was allowed to accumulate in the thousands, without quality control measures detecting the problem at a far earlier stage and applying effective interventions. This is particularly concerning to the Caring Society given the Jordan's Principle work plan having identified "Develop[ing] and implement[ing] Indigenous Services Canada internal quality assurance measures, including training on various topics, a complaint mechanism, and an independent office to ensure compliance" as a required item.[56] To the Caring Society's knowledge, Canada still has no plans to reduce the backlog of unopened emails or unanswered voicemails containing Jordan's Principle requests (including triaging the backlog for urgency) and lacks a plan to ensure that such backlogs do not continue or worsen.

Canada also lacks adequate auditing measures to meaningfully evaluate existing mechanisms before issues reach a crisis point. Insufficient data collection underscores this concern. Further, Canada lacks a data-driven explanation as to why regional offices vary in compliance rates to certain timelines like ISC's 15-business day reimbursement service standard. Better data can help the Parties: (1) to understand why efficiency and compliance rates vary per region, (2) to learn "best practices" from more efficient regions or offices, and (3) to allow for course correction.

Canada's dysfunctional 24-hour line and regional phone line issues also could have been easily identified if the government itself tried calling these numbers. Testing the systems should be a regular practice. It is also baffling why Canada has not changed its message on the 24-hour line to allow callers to more clearly indicate that a case is urgent, an item the Caring Society first raised in January 2023. Technology exists to change the message content to add an urgent option.

Canada's deficient quality control and auditing mechanisms may stem from a general waning of

---

[56] Canada, Indigenous Services Canada, *Executive Summary of Agreement-in-Principle on Long-Term Reform*, under the heading "Jordan's Principle".

the Back-to-Basics requirement of a compassionate, common-sense, and reconciliation-first approach to Jordan's Principle.[57] This waning is felt by First Nations families whose urgent requests are sent to voicemail, when service providers refuse to provide services to families due to Canada's non-payment, or when unjustified attestation or unreasonable questioning of expert professionals creates unnecessary barriers to children accessing the support they need.

Canada agreed to adopt a common sense and compassionate approach to Jordan's Principle. As detailed in the cases previously described and in too many more, Canada has failed to achieve these basic requirements. The lack of compassion is particularly troubling in cases involving children who are in palliative care or have experienced the death of a close family member. On numerous occasions, Canada has failed to determine such urgent cases within the required timelines, leading the Caring Society to intervene (and sometimes pay for the service). When ISC does respond, the requestor receives a banal email setting out the ISC decision with no reference to the sacred moment this family is experiencing. Indeed, in one such case, an Elder felt the need to share a PowerPoint with ISC on the importance of memorial potlatches after she interacted with ISC only to have ISC repeat the non-compassionate response two more times over the coming months when children in the Elder's care experienced the deaths of close family members.

The Caring Society's impression is that ISC staff tend to take a defensive stance when faced with critique, by denying, ignoring, or minimizing the issues. Even when ISC makes clear and obvious errors, the Caring Society has not seen a willingness to accept accountability, express remorse and remediate the arising harms. First Nations families with children in palliative care or caring for children who have experienced the death of immediate family members have shared that interacting with ISC has deepened their trauma. This is unacceptable and can be improved by better recruitment, training and ensuring appropriate and skilled supervision. Moreover, in the past ISC agreed to have one ISC employee work with families to avoid the family having to repeatedly share their story, but the Caring Society has have not seen any evidence that ISC has implemented this approach.

The Caring Society adopts the recommendations in the 2022 "Doing Better for Indigenous Children and Families; Jordan's Principle Accountability Mechanisms Report" authored by Naiomi Metallic (Dalhousie University Schulich School of Law), Hadley Friedland (University of Alberta), and Shelby Thomas (National Centre for Truth and Reconciliation).[58] This report, which was commissioned to assist the parties in long-term reform discussions, suggests various accountability mechanisms with the ultimate goal of ensuring First Nations children, youth and families enjoy the full benefit of the Tribunal's orders. These recommendations remain unanswered by Canada and, if properly implemented, hold significant promise to remedy many of the compliance problems the Caring Society has identified.

The Caring Society's view is that Canada must address its own culture and shift its approach to a rights-based model that places First Nations children at the centre of its decision making, in line with the Tribunal's orders. There must also be adequate training for its staff to ensure the implementation of Back-to-Basics includes a compassionate response and an effective quality assurance function.

---

[57] See Indigenous Services Canada, "Back-to-Basics Approach" at p 2 ("Objective").
[58] https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1014&context=reports

D. Barriers faced in accessing capital under 2021 CHRT 41

Capital and services go together. To provide services to children, youth, and families there needs to be a fit for purpose facility to house them and suitable offices for the staff who provide them.

To that end, Canada has been ordered to fund First Nations or First Nations-authorized service providers for the full cost of the purchase or construction of capital assets to support the delivery of services to First Nations children pursuant to 2021 CHRT 41.[59] Nevertheless, the Caring Society has been made aware that some First Nations and FNCFS Agencies continue to face barriers, inconsistent communication, and shifting goalposts when trying to place a capital request.

In general, the Caring Society has heard concerns from First Nations and families about the capital request process in three main areas: (1) capital projects that contemplate new Jordan's Principle services being provided; (2) the level of detail required at the feasibility stage when considering options, as opposed to the design stage when fleshing out the project scope based on the option selected; and (3) repeated and continuing *ad hoc* requests for supporting documents or further information. For example, the Caring Society has been notified of a situation in which Canada has required a community to provide invoices demonstrating "existing" services before proceeding with a capital request, potentially creating a situation where services are being provided in non-existent or inadequate facilities. This creates an impossible situation for the First Nation. In the Caring Society's view, the Tribunal did not contemplate that capital would only be made available for the delivery of "existing" services when there are additional needs that can only be met when capital is in place to offer services, whether for FNCFS under Jordan's Principle.[60]

The Ojibways of Onigaming First Nation has made the Caring Society aware of the difficulties it has faced in trying to access capital funding under 2021 CHRT 41 to support an urgently-needed Youth Crisis Centre in the community (see recent correspondence from Chief Copenace, ("**Annex F**")).[61] In his letter, Chief Copenance clearly indicates the tragic and urgent situation faced by children, youth, and families in his small First Nation that, according to 2021 Census data,[62] has only 380 citizens:

> In October 2014 Ojibways of Onigaming First Nation declared a State of Emergency on Suicide and Mental Wellness following the fourth suicide of the year and an increase in suicidal behaviors, domestic violence, drug and alcohol abuse, and unresolved grief. Tragically, nearly a decade later, our community remains in state of emergency and our youth and families continue to experience violence, overdoses, and death, at unprecedented levels. We have suffered 31 deaths in our families the past two years along and feel strongly

---

[59] See e.g., 2021 CHRT 41 at para 544.
[60] See e.g., 2021 CHRT 41 at para 544.
[61] See letter from Chief Jeff Copenace, Onigaming First Nation, to First Nations Child and Family Services Society of Canada dated September 25, 2023, at p 1. The community has been under a state of emergency for approximately 9 years during which many young persons have unfortunately passed away.
[62] See Canada, Statistics Canada, "Profile table: Ojibways of Onigaming First Nation [First Nation or Indian band or Tribal Council area], Ontario" (Indigenous Population Profile, 2021 Census of Population).

that many could have been preventable if we had the proper infrastructure.[63]

Despite the clearly urgent and dire circumstances, Onigaming First Nation has identified several obstacles to accessing funding under 2021 CHRT 41 to deliver Jordan's Principle services, including: (a) the non-collaborative approach taken by many government officials in the capital request process; (b) an overly complex and more cumbersome approvals process than what they typically encounter from other provincial or federal agencies in seeking support for infrastructure projects; and (c) "moving goalposts" with respect to the information Canada requires of them in support of their request.[64]

It is important to note that the Onigaming First Nation has retained famed Metis Architect Douglas Cardinal's firm to do this work. The caliber of expertise on the First Nations side of the project is exceptional.

The Caring Society acknowledges that efforts to revise the capital guide are ongoing and that the Parties continue to have discussions about the capital process, but revisions to the guide are unlikely to resolve Canada's non-compliance and the resulting adverse consequences for children, youth, and families.

Greater efforts are required by ISC to streamline what is becoming an unnecessarily bureaucratic and laborious process that is resulting in even urgent needs like those facing the children and youth of the Ojibways of Onigamaing First Nation not being met. For its part, the Caring Society seeks to have issues surrounding the implementation of 2021 CHRT 41 resolved as quickly as possible so that First Nations children, families, and communities have access to much-needed capital assets in which to deliver much-needed services. The alternative is unacceptable and, as the example from the Ojibways of Onigaming First Nation makes clear, may result in tragic consequences and irreversible harms.

E. The Path Forward

The Caring Society is committed to a First Nations-informed research and evidence-based approach to ensure sustainable and culturally appropriate long-term reform of FNCFS and Jordan's Principle. No other approach will redress the discrimination and prevent its recurrence, as required by the Tribunal.

Canada asserted in its September 21, 2023, letter submissions that negotiations "have slowed in the past several months as a result of the deadline extensions and other departures from the AIP proposed by the Path Forward" document from the Caring Society and the AFN. Canada stated that it is seeking a revised mandate and is awaiting instructions.[65] The Caring Society disagrees with such an interpretation and has two submissions in response.

First, Canada has been unable to secure a revised mandate to engage in discussions about the Path

---

[63] See letter from Chief Jeff Copenace, Onigaming First Nation, to First Nations Child and Family Services Society of Canada dated September 25, 2023, at p 1.
[64] See letter from Chief Jeff Copenace, Onigaming First Nation, to First Nations Child and Family Services Society of Canada dated September 25, 2023, at pp 2-3.
[65] See Canada's letter submissions dated September 21, 2023, at p 3.

Forward document since March 15, 2023. Meaningfully advancing negotiations about the long-term reform of FNCFS is difficult, if not impossible, where Canada lacks the authority to engage in substantive discussions about the Caring Society and the AFN's proposed Path Forward. Unfortunately, the reality is that the people most impacted by this lengthy passage of time will be First Nations children, youth, families, and communities. Due to Canada's inability to secure a mandate for almost seven months, the parties have been treading water during the long-term reform discussions that cannot properly be characterized as "negotiations". Now, given Canada's long delays, the timelines presented within the AFN-Caring Society Path Forward document are no longer feasible. Additionally, the Caring Society has serious concerns that meaningful negotiations on solutions for long-term reform will be impossible if Canada requires months, or even more than half a year, to receive a mandate to engage with suggestions that exceed its initial mandate. This concern extends to ISC's ability or willingness to implement recommendations from the Expert Advisory Committee established pursuant to 2022 CHRT 8 to develop and oversee implementation of an evidence-informed work plan to prevent the recurrence of discrimination where those recommendations differ from Canada's mandate. The Expert Advisory Committee will play an important role as an independent group of experts regarding measures to prevent the recurrence of discrimination.

Second, the Caring Society rejects the notion that it has departed from the AIP in proposing the Joint Path Forward document with the AFN. The AIP was not limited to considerations from IFSD Phase 2 and, while it included target timelines, the hallmarks of success for a negotiated settlement was always going to be determined by the evidence and an approach that involved consultation with leadership and community. The Tribunal has set this as a clear standard in its decisions on compensation.[66]

Moreover, the Parties requested, on consent, that the Tribunal order Canada to fund (among other things) "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".[67] The Tribunal issued that order.[68] As the Tribunal noted in 2022 CHRT 8, the Parties were of the view that "some questions remain[ed] unanswered regarding the best path forward for long-term reform" and accordingly Canada "agreed to provide funding and data to enable IFSD to conduct the following research to assist the Parties in developing long-term solutions to address the findings of the Tribunal: a. IFSD Phase Three".[69] IFSD's Phase 3 research is ongoing, and IFSD has issued updates in this respect.[70]

F. Next steps

In response to the Tribunal's October 4, 2023, letter, it is the Caring Society's position that the Parties are not currently actively negotiating. On September 26, 2023, counsel for the Caring Society wrote to counsel for Canada to advise that it required an answer from Canada regarding its mandate no later than 9:00 AM on October 25, 2023. If a response is not received by that time,

---

[66] See, for e.g., 2022 CHRT 41 at paras 179-184, 227 and 503.
[67] See 2022 CHRT 8 at paras 19 and 172.
[68] See 2022 CHRT 8 at para 172.
[69] See 2022 CHRT 8 at para 24 (citing, *inter alia*, para 30 of the grounds on the joint motion).
[70] See IFSD, "A First Nations Child and Family Services Agency (FNCFS): Monthly Updates"; IFSD, "Monthly Updates" (First Nations not affiliated to an FNCFS agency).

the Caring Society will pause its involvement in the current discussions (which largely address implementation issues) and will advise of next steps after the case management conference scheduled for November 1, 2023. The Caring Society is concerned that the current discussions provide the illusion of progress without providing any meaningful mechanism to make substantive progress to alleviate the ongoing discrimination and prevent its recurrence.

The Caring Society is mindful that the Tribunal recently noted, in 2023 CHRT 44, that the parties have been "strongly encouraged […] to negotiate remedies".[71] However, the current negotiating structure has yet to yield effective remedies. It is the Caring Society's view that the current structure has become weaker still with the recent withdrawal of the Honourable Murray Sinclair from his role as Eminent First Nations Person (i.e., the interim dispute resolution mechanism agreed to by the parties under the AIP on long-term reform).[72]

While the Caring Society is prepared to hear Canada's revised mandate prior to October 25, 2023, any such revised mandate must be accompanied by sustained and rapid progress in negotiations. If this does not occur, or if no mandate is forthcoming, the Caring Society will call on the Tribunal to assist the parties in bringing this complaint to an end. The Caring Society strongly supports the Panel's involvement in "mediation-adjudication" with the parties, as previously suggested, if Canada will consent. Indeed, as the Tribunal observed in 2023 CHRT 44, only Canada has declined the Tribunal's offer to work with the Parties to help craft remedies that would best satisfy the Parties' needs and most effectively provide redress to victims.[73]

If Canada will come to the table, the Caring Society believes there is a possibility for engaging in productive discussions on long-term reform, guided by the following principles:

- FNCFS and Jordan's Principle shall be reformed and implemented in a manner that is substantively equal, culturally appropriate, holistic, in the best interests of the child and meets the distinct needs and circumstances of First Nations children, youth and families;
- Reform will be based on First Nation-led and evidence-informed solutions; and
- Reform will be informed by the voices of First Nation youth and young adults with lived experiences in the child welfare system and those who have been negatively impacted by Canada's failure to fully implement Jordans' Principle.

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

Yours very truly,

David P. Taylor

---

[71] See 2023 CHRT 44 at para 22.
[72] Canada, Indigenous Services Canada, *Executive Summary of Agreement-in-Principle on Long-Term Reform*, under the heading "Dispute Resolution".
[73] See 2023 CHRT 44 at para 22.

DPT/jk

Encl.

Copies to: **Christopher Rupar, Paul Vickery and Sarah-Dawn Norris**
Counsel for the respondent Attorney General of Canada

Stuart Wuttke, Adam Williamson and Lacey Kassis
Counsel for the co-complainant Assembly of First Nations

Brian Smith
Counsel for the Canadian Human Rights Commission

Maggie Wente, Sinéad Dearman, Jessie Stirling and Ashley Ash
Counsel for the Interested Party Chiefs of Ontario

Justin Safayeni and Stephen Aylward
Counsel for the Interested Party Amnesty International

Julian Falconer, Christopher Rapson and Nathalie Posala
Counsel for the Interested Party Nishnawbe Aski Nation

Sarah Clarke and Kevin Droz
Counsel for the co-complainant First Nations Child and Family Caring Society of Canada