

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

**FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and
ASSEMBLY OF FIRST NATIONS**

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

**ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous Services Canada)**

Respondent

- and -

**CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION**

Interested Parties

**NOTICE OF MOTION FOR RELIEF OF THE COMPLAINANT
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA**

David P. Taylor
Kevin Droz

Sarah Clarke

CONWAY BAXTER WILSON LLP/s.r.l.
Suite 400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3X9
Tel: 613-691-0368
Email: dtaylor@conway.pro

CLARKE CHILD & FAMILY LAW
Suite 950 – 36 Toronto Street
Toronto, ON M5C 2C5
Tel: 416-260-3030
Email: sarah@childandfamilylaw.ca

**Counsel for the First Nations Child and
Family Caring Society of Canada**

NOTICE OF MOTION

TAKE NOTICE THAT THE COMPLAINANT, THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA (the “Caring Society”) will make a motion to the Canadian Human Rights Tribunal located at 240 Sparks Street, 6th Floor West, Ottawa, Ontario, on December 19, 2023 at 1:00 PM or as soon thereafter as it may be heard.

This motion is for further relief to ensure that this Tribunal’s Orders of January 26, 2016 (2016 CHRT 2), April 26, 2016 (2016 CHRT 10), September 14, 2016 (2016 CHRT 16), May 26, 2017 (2017 CHRT 14, as amended by 2017 CHRT 35), February 21, 2019 (2019 CHRT 7), July 17, 2020 (2020 CHRT 20) and November 25, 2020 (2020 CHRT 36) are effective, specifically regarding Canada’s wilful: (i) narrowing of the Tribunal’s orders by imposing additional eligibility and request processing criteria ii) ineffective methods for receiving, and processing, Jordan’s Principle requests by telephone or other formats; (iii) chronic failure to adhere to the Tribunal’s timelines for determining requests including in urgent cases; (iv) failure to adhere to reasonable timeframes to fund approved requests; and (v) failure to adopt sufficient accountability measures to ensure that the Tribunal’s orders are upheld and (vi) attempting to shield itself from non-compliance by relying on the *Financial Administration Act* and administrative rationales. This motion is made under Rule 3 of the *Canadian Human Rights Tribunal Rules of Procedure (Proceedings Prior to July 11, 2021)*, pursuant to Rules 1(6), 3(1), 3(2), and 5(2), and pursuant to the Canadian Human Rights Tribunal’s continuing jurisdiction in this matter. The proposed motion will be heard orally.

AND TAKE NOTICE THAT THIS MOTION IS FOR:

1. An order that Canada immediately include in its definition of “urgent requests” requests from First Nations children who:
 - a. Have recently experienced the death of a caregiving family member, biological parent(s), and/or siblings, or are reasonably anticipated to experience such a death;
 - or

- b. are impacted by a state of emergency proclaimed by a First Nations government, a provincial/territorial government, or the federal government;
2. An order that Canada immediately revise its National Call Centre calling tree and other contact mechanisms that may exist to ensure that requestors can immediately and easily indicate that their request is urgent or, in the case of an existing request, has become urgent and ensure that ISC staff with authority to review and determine urgent requests are available in sufficient numbers during, and outside of business hours;
3. An order that Canada will, within 45 days of this Tribunal's order, appoint sufficient persons in each ISC region and nationally who are responsible for managing urgent Jordan's Principle cases to ensure that the determinations are made in a manner consistent with the Tribunal's orders;
4. An order that Canada will, within 7 days of this Tribunal's order, adopt the following measures related to its backlog of unaddressed Jordan's Principle requests:
 - a. Report back to this Tribunal and the parties to identify the total number of currently backlogged cases, including with information regarding the cumulative number of backlogged cases at month's end, dating back 12 months;
 - b. Contact all requestors in the backlog by email or phone setting out the Tribunal's timeline orders, noting Canada's non-compliant backlogs and urging requestors with urgent or time sensitive requests, or non-urgent requests that have become urgent, to contact specific personnel who will, including over the holiday season, determine such requests within 12 hours. The notice should also include timeframes for resolving the backlogs, information on requesting retroactive payments for requestors who had to pay for services, products or supports due to Canada's non-compliance, and information on measures being taken to prevent backlogs from recurring.
 - c. triage all backlogged requests for urgency and communicate with all requestors with undetermined urgent cases to take interim measures to address any reasonably foreseeable irremediable harms; and

- d. report back to this Tribunal and the parties regarding the number of urgent cases identified in the backlog and the timeframe by which all urgent and non-urgent backlogged requests will be determined;
5. An order requiring Canada to adopt the following measures with respect to its National and Regional and other Jordan's Principle contact centres including its call-in lines:
 - a. Restrict the National Jordan's Principle Contact Centre's practice of referring urgent cases to ISC regional offices (or vice versa) to only situations wherein ISC staff conduct a live transfer of the requestor and can confirm that the Regional Office (or National Jordan's Principle Contact Centre) has sufficient capacity to determine the case within the timeframe required under the Tribunal's orders;
 - b. Provide the National and Regional contact centres with the capacity to determine the case within the timeframe required under the Tribunal's orders;
 - c. Provide the National and Regional contact centres with the capacity to put in place immediate compassionate interventions when a request is placed for urgent services;
 - d. Within 7 days, Canada must establish, and publicly post on its website and on social media, contact phone numbers, email addresses, and hours of operation for the ISC office in each province/territory and for headquarters, for both requests and payment inquiries;
6. An order clarifying that, consistent with 2017 CHRT 14 and 2017 CHRT 35, Canada shall immediately "begin the determination clock" when they are in receipt of a letter of recommendation from a professional with relevant expertise or, in the case of requests relating to culture or language, a letter from a community-authorized Elder or knowledge keeper and stop the clock when the requestor is advised of the determination of the case;
7. An order clarifying that, consistent with 2017 CHRT 14 and 2017 CHRT 35, Canada cannot delay funding for approved services in a manner that creates discrimination for First Nations children, youth and families including by placing undue hardship on families and

service, support, or product providers in a manner that risks a disruption, delay, or inability to meet the child's needs.

8. An order clarifying that, consistent with the reasoning in 2021 CHRT 41, this Tribunal's orders have primacy over any interpretation of the *Financial Administration Act* and related instruments such as "terms and conditions," agreements, policies and conduct that limits the Tribunal's remedial authority, and that Canada shall not rely on the *Financial Administration Act* to justify departures from this Tribunal's orders;
9. An order that Canada report to the Tribunal, within 7 days of this Tribunal's order, regarding which of the proposed solutions (and timelines for implementation of those solutions) contained in the Caring Society's "Jordan's Principle Work Plan" (attached to this Notice of Motion as Schedule "A") it is prepared to adopt (including timeframes for implementation) and, in the case of any proposed solution Canada is not prepared to adopt, the reason why not and what effective alternative measure Canada proposes to take (and the timeline on which such effective alternative measure will be implemented);
10. An order convening a case conference within 7 days of Canada's having submitted its response to the Caring Society's "Jordan's Principle Work Plan", at which the Tribunal may make orders, including consent orders, and provide direction and establish a schedule with respect to any matters contained within this Notice of Motion, the Caring Society's "Jordan's Principle Work Plan" and/or Canada's responding report that remain in dispute;
11. An order that within 45 days, Canada provide a report confirming to the Tribunal that First Nations and First Nations organization receiving, and/or determining and/or funding Jordan's Principle requests have sufficient and sustainable resources, including funding, to do so;
12. Additional relief as the Tribunal may award to give full effect to its orders; and
13. An order that the Tribunal retain jurisdiction until such time as measures are in place to end the discrimination and prevent its recurrence.

AND TAKE NOTICE THAT THE GROUNDS FOR THE MOTION ARE:

1. In its decision dated January 26, 2016 (2016 CHRT 2), this Tribunal found that Canada's failure to properly implement Jordan's Principle was discriminatory on the basis of race and national or ethnic origin contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6;
2. In its decision dated April 26, 2016 (2016 CHRT 10), this Tribunal found that Canada had not taken sufficient measures to implement the full meaning and scope of Jordan's Principle and ordered Canada to immediately consider Jordan's Principle as including all jurisdictional disputes and involving all First Nations children. The Tribunal further ordered that pursuant to the purpose and intent of Jordan's Principle, the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided;
3. On July 6, 2016, Canada announced the Child First Initiative, which it described as a child-first approach that addresses in a timely manner the needs of First Nations children living on reserve with a disability or a short-term condition;
4. In its decision dated September 14, 2016 (2016 CHRT 16), the Tribunal ordered Canada to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve. The Tribunal also requested an explanation from Canada regarding its limitation of Jordan's Principle's application to those First Nations children with a disability or a short-term condition;
5. On November 22, 2016, the Caring Society brought a non-compliance motion regarding Canada's implementation of Jordan's Principle;
6. In its decision on the Caring Society's motion, rendered on May 26, 2017 (2017 CHRT 14), the Tribunal found, among other things, that Canada's definition of Jordan's Principle did not fully address the findings in its January 26, 2016 decision (2016 CHRT 2) and was not sufficiently responsive to the Tribunal's previous orders.
7. The Tribunal's May 26, 2017 order (2017 CHRT 14) required Canada to base its definition and application of Jordan's Principle on five key principles, one of which was that Jordan's

Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve;

8. On June 23, 2017, Canada filed an application for judicial review of the Tribunal's May 26, 2017 order. On November 2, 2017, the Tribunal amended its May 26, 2017 order in light of a consent agreement between the Caring Society, the Assembly of First Nations and Canada regarding changes to address Canada's concerns with the orders in a way that would ensure substantive equality for First Nations children, bearing in mind the need to provide culturally appropriate services to First Nations children and to safeguard the best interests of First Nations children. The application for judicial review was discontinued on November 30, 2017);

9. Beginning in early 2018, the Caring Society began publishing a concerns document, itemizing the implementation-related concerns it was hearing from families, Jordan's Principle Service Coordinators/Navigators and service providers experiencing difficulty in accessing Jordan's Principle;

10. The Caring Society raised these concerns during the May 9, 2018 cross-examination of Sony Perron, the October 30 and 31, 2018 cross-examination of Valerie Gideon, and the May 7, 2019 cross-examination of Valerie Gideon;

11. The Caring Society repeatedly raised these concerns from 2018-2020 at the Consultation Committee on Child Welfare, and has, since 2018, repeatedly raised these concerns at meetings of the Jordan's Principle Operations Committee and in bilateral discussions with ISC staff;

12. The Caring Society raised further concerns related to Canada's implementation of Jordan's Principle in correspondence dated September 17, 2021;

13. Following discussions between Canada, the AFN, and the Caring Society at the end of 2021, ISC implemented a "Back to Basics" approach, agreed to as part of an Agreement in Principle regarding long-term reform of First Nations child and family services and Jordan's Principle;

14. The Agreement in Principle also contained a detailed work plan to improve outcomes under Jordan’s Principle, to ensure ISC’s compliance with the Tribunal’s orders (“2021 Work Plan”), including commitments to:

- a. Identify, respond to and report on urgent requests (which were agreed to include, keeping in mind the age and vulnerability of the child involved, all cases involving end-of-life/palliative care, mention of suicide, physical safety concerns, lack of access to basic necessities, risk of the child entering child welfare system, etc.);
- b. Develop and implement ISC internal quality assurance measures, including training, a complaint mechanism, and an independent office to ensure compliance;
- c. Privacy protections, including engagement with the Privacy Commissioner;
- d. Ensure professional recommendations are respected, and that clinical case conferencing only takes place where reasonably required to ascertain needs;
- e. Ensure that reapplications and/or cessation or disruption in funding, and/or payment procedures do not negatively impact First Nations children;
- f. Increase national consistency and standards, especially with respect to group requests, to develop and implement tracking to achieve this, and to provide for re-review of cases prior to appeal;
- g. Increase specificity and personalization in denial rationales, with prompt communication to the requestor; and
- h. Implement the “Back to Basics” approach and cultural change regarding determination of Jordan’s Principle requests;

15. On November 7, 2022, the Caring Society filed the Institute of Fiscal Studies and Democracy’s report titled “Data assessment and framing of an analysis of substantive equality through the application of Jordan’s Principle”;

16. While the 2021 Work Plan remains largely unimplemented, ISC's implementation of some parts of the Back-to-Basics approach had a clear and immediate effect. The total number of approved products and services increased from 513,242 in FY 2021/22 to 1,274,140 in FY 2022/23. The total number of approved products and services for the first half of FY 2023/24 (1,274,148) has already matched the total approvals for all of FY 2022/23.

17. However, as the Caring Society outlined in its May 24, 2023, and October 10, 2023, submissions to the Tribunal, this increase in the number of approved services, which the Caring Society foresaw and advised ISC of, has also led to a stark increase in the number and severity of compliance concerns the Caring Society has been receiving from families and service providers in the community. For instance, in October and November 2022, the Caring Society received requests for assistance from a total of 13 families and service providers. In October and November 2023, this number almost tripled to a total of 38 requests for assistance. Not only have the requests increased, but the back and forth required to engage ISC in attempts to resolve cases at the level of the family has also increased significantly, raising concerns regarding the capacity of ISC to engage in a manner supportive of the best interests of the child.

18. The Caring Society has noted the following concerns related to ISC's mechanism for receiving Jordan's Principle requests by telephone that are resulting in delays and denials of services to First Nations children and families:

- a. Calls to Canada's national and regional phone lines go unanswered and callbacks take many hours, if the caller is called back at all;
- b. The National Call Centre does not provide an effective mechanism for receiving and determining urgent requests, or for identifying when unanswered requests have become urgent due to the passage of time;
- c. ISC provides contact information for some regions on its website but does not indicate operating hours nor does it clarify what provinces/territories are covered in the "Atlantic" region or "Northern" region.
- d. Some regions do not have access to regional call-in lines or contact information for payment follow-up; and

- e. The existing call-in lines are confusing and do not effectively connect families to required services;

19. The Caring Society has noted the following concerns related to ISC's non-compliance with the timelines for determining requests for products, services and supports pursuant to Jordan's Principle, which are resulting in delays, disruptions, and denials of services to First Nations children, youth, and families:

- a. Canada's compliance with the Tribunal-mandated timelines for determining requests for products, services and supports has not kept pace with the increase in demand, with some ISC regions reporting far worse compliance rates than others, such that it had the following national compliance rates in the first half of FY 2023/24:
 - i. Urgent individual requests (12 hours): 29%
 - ii. Non-Urgent individual requests (48 hours): 31%
 - iii. Urgent group requests (48 hours): 24%
 - iv. Non-urgent group requests (7 days): 43%
- b. There is a significant number of unopened requests and backlogs, at least in the BC Region, as a BC Service Coordinator raised at the Jordan's Principle Operations Committee and, as the Caring Society discussed in its October 10, 2023 submissions, there are serious concerns about how widespread the backlogs issue may be nationally, in regions, at Headquarters, and at the Appeals Committee;
- c. Canada is not meeting its internal 15-business day reimbursement service standard for approved requests, such that First Nations families are experiencing barriers to meeting the needs of their children and service providers are either experiencing disruptions of their operations or are opting to withdraw from providing Jordan's Principle services;

- d. Canada's failure to reimburse for approved Jordan's Principle requests have also placed undue burdens on First Nations and First Nations organizations who have to resort to using other sources of revenue to ensure children's needs are met pending reimbursement from Canada, including in one case, reported in the media, involving taking out a revolving loan on a daycare centre.

20. The Caring Society has noted the following concerns related to ISC's decision-making regarding requests for products, services and supports pursuant to Jordan's Principle, which are resulting in delays and denials of services to First Nations children and families:

- a. ISC has failed to apply substantive equality, best interests of the child and taking into account distinct community circumstances principles, particularly in cases involving basic needs, in which requests are approved as "exceptional measures" or "one-time approvals", for arbitrary three-to-six-month periods, and with the caveat that "Jordan's Principle is not an income supplement program";
- b. Attestation requirements are imposing unreasonable burdens on First Nations families, service providers and coordination groups to which ISC has delegated payment responsibility for some approved requests;
- c. Contrary to the Back-to-Basics approach and the Tribunal's orders, ISC's documentary requirements and administrative procedures are often unreasonable and burdensome; and
- d. ISC is relying on the *Financial Administration Act* when denying some Jordan's Principle requests or in delaying determination, reimbursement or payment for products and services;

21. The Caring Society has noted the following concerns related to ISC's internal processes, which are failing to correct the serious issues noted above, such that for too many First Nations children and families, the discrimination is recurring:

- a. Failure to adopt internal controls and processes to prevent and address backlogs and other incidence of non-compliance;

- b. Failure to adopt effective mechanisms for alerting, and engaging with, the parties regarding new or growing compliance concerns in a timely manner so they can be addressed expediently and before they become a crisis;
- c. Lack of data driven explanation for variability in regional compliance with the Tribunal's orders and ISC's own service standards (which would identify best practices and items of concern); and
- d. Waning of the compassionate, common-sense, and reconciliation-first approach to Jordan's Principle espoused by the Back-to-Basics approach;
- e. Failure to adopt the Government Department of First Contact provision of Jordan's Principle to resolve disputes within ISC and between ISC and other federal entities;

22. Overall, Canada's chronic non-compliance with multiple Tribunal orders has resulted in detrimental and irreparable harms to First Nations children and their families. The Tribunal's orders were made to remediate and mitigate the discriminatory impacts of an unjust and unfair jurisdictional system imposed upon First Nations children, youth, and their families. Canada's consistent failures to comply with the Tribunal's orders since 2018 and avail themselves of opportunities to remedy the non-compliance clearly demonstrates that First Nations children, youth and their families are once again the victims of Canada's discrimination;

23. Consistent with the Tribunal's dialogic approach, the Caring Society's relief sought identifies certain clarifications of the Tribunal's orders that are required to ensure Canada's compliance with the Tribunal's orders;

24. The specific immediate measures identified in the "Jordan's Principle Work Plan", attached as Schedule "A" to this Notice of Motion, set out a number of solutions for resolving areas of Canada's non-compliance with Jordan's Principle that have been identified in this Notice of Motion. The Caring Society does not take the position that the solutions presented in the "Jordan's Principle Work Plan" are the only solutions to the areas of non-compliance identified in this Notice of Motion. To be clear, the Caring Society, has, and continues to demonstrate a child centered and constructive approach to Canada's non-compliance by identifying non-compliance in a timely manner and suggesting remedies to individual and systemic non-compliance.

Consistent with the dialogic approach, the Caring Society welcomes Canada's identification of superior or alternative solutions that will resolve Canada's non-compliance with this Tribunal's Jordan's Principle orders, cease the discrimination, and prevent its recurrence;

25. Doing nothing in the face of clear evidence of non-compliance that creates and sustains discrimination against children, youth and families is not an option. Immediate action is required to ensure that First Nations children and families enjoy the full benefit of this Tribunal's orders and their fundamental human right to make for themselves the lives that they are able and wish to have, as guaranteed by Parliament under the *Canadian Human Rights Act*.

26. Section 53(2) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6;


27. Rules 1(6), 3(1), and Rule 3(2) of this Tribunal's Rules of Procedure; and

28. Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The affidavit of Cindy Blackstock, to be affirmed; and
- (b) Such further and other materials as counsel may advise and this Tribunal may permit.

Dated: December 12, 2023


David P. Taylor
Sarah Clarke
Kevin Droz

Counsel for the Caring Society

ORIGINAL TO: **Canadian Human Rights Tribunal**
c/o Judy Dubois, Registry Officer
240 Sparks Street, 6th Floor West
Ottawa, ON K1A 1J4

Christopher Rupar, Paul Vickery, Sarah-Dawn Norris and Meg Jones
Department of Justice Canada
50 O'Connor Street
Ottawa, ON K1A 0H8

Counsel for the Respondent, Attorney General of Canada

ASSEMBLY OF FIRST NATIONS
Stuart Wuttke and Adam Williamson
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5

Counsel for the Co-complainant Assembly of First Nations

CANADIAN HUMAN RIGHTS COMMISSION
Brian Smith
344 Slater Street, 8th Floor
Ottawa, ON K1A 1E1

Counsel for the Canadian Human Rights Commission

OLTHUIS KLEER TOWNSHEND LLP
Maggie E. Wente, Jessie Stirling and Ashley Ash
250 University Avenue, 8th Floor
Toronto, ON M5H 3E5

Counsel for the Interested Party, Chiefs of Ontario

FALCONERS LLP
Julian N. Falconer, Christopher Rapson and Natalie Posala
10 Alcorn Avenue, Suite 204
Toronto, ON M4V 3A9

Counsel for the Interested Party, Nishnawbe Aski Nation

STOCKWOODS LLP
Justin Safayeni and Stephen Aylward
TD North Tower
77 King Street West, Suite 4130
Toronto, ON M5K 1H1

Counsel for the Interested Party, Amnesty International