Tribunal File No: T1340/7008

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

WRITTEN SUBMISSIONS OF THE COMPLAINANT, ASSEMBLY OF FIRST NATIONS RE: NON-COMPLIANCE MOTION FILED DECEMBER 12, 2023

ASSEMBLY OF FIRST NATIONS
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I. OVERVIEW

1. The Assembly of First Nations ("AFN"), a co-complainant in these proceedings, files these written submissions further to the motion filed by the First Nations Child and Family Caring Society (the "Caring Society") on December 13, 2023, alleging non-compliance with the Tribunal's existing orders relating to the meaning and implementation of Jordan's Principle (the "Non-Compliance Motion").[1]

2. Further to the direction of the Tribunal[2], the within submissions speak only to the Caring Society's Non-Compliance Motion, accounting for materials filed by the Caring Society in support of the motion, the Attorney General of Canada's ("Canada") responding materials, as well as the written submissions of the Canadian Human Rights Commission.

3. The AFN acknowledges that challenges exist in the delivery of Jordan's Principle, particularly in relation to the substantial and increasing volume of Jordan's Principle requests that reflect the deep, systemic gaps and barriers to accessing federal supports elsewhere.[3] The AFN has first-hand knowledge of issues with the delivery of services under the Jordan's Principle Back-to-Basics policy, including the problems associated with compliance with the Tribunal's mandated timelines in relation to urgent matters[4]; difficulties in applicants contacting Indigenous Services Canada ("ISC") officials[5]; the backlog on intake and the adjudication of applications[6]; as well as delays in the payment to service providers.[7]

4. However, in considering such issues, the AFN is cognizant of the impacts of the Back-to-Basics policy developed by the Caring Society and Canada by way of an iterative process, which was adopted by Canada as an interim measure pending completion of a final settlement agreement in relation to the reform of Jordan's Principle. Our understanding was that it was intended to put the needs of First Nations children at the centre of service

[1] Notice of Motion for Relief of the Complainant First Nations Child and Family Caring Society, dated December 13, 2023.
[2] See the letters from the Registry to the Parties dated April 12, 2024, and April 15, 2024, confirming the schedule for the delivery of materials on the Non-Compliance Motion and Canada's cross-motion.
[3] Amended Affidavit of Craig Gideon affirmed March 22, 2024 ["C. Gideon Affidavit") at para. 32.
[4] C. Gideon Affidavit at paras.40-42.
[5] C. Gideon Affidavit at paras. 43-46.
[6] C. Gideon Affidavit at paras. 47-49.
[7] C. Gideon Affidavit at paras. 50-54.

delivery.[8] The completion of Back-to-Basics was contemplated in the context of a Jordan's Principle work plan, which was appended to the Agreement-in-Principle reached between the Parties to the Tribunal Proceedings on December 31, 2021 ("AIP").[9]

5. For the AFN, the true path to implementation of the full breadth of Jordan's Principle is properly the subject matter of negotiations, further to terms agreed upon in the AIP, which noted that the Parties thereto would work together to develop an evidence informed implementation approach for the long-term reform of Jordan's Principle.[10] Such an approach is consistent with the directions of the Tribunal, and the ongoing statements of the Courts emphasizing negotiation as a means to advancing reconciliation.

6. The AFN submits that the Tribunal's consideration of Canada's current implementation of Jordan's Principle must duly consider all the contextual realities, including the exponential increase in Jordan's Principle requests, particularly those identified as urgent, and the fact that many of the issues identified are associated with Canada's adoption of the interim Back-to-Basics policy. Many of the implementation concerns identified within this motion are properly the subject of ongoing negotiations relating to reforming the long-term implementation of Jordan's Principle.

7. While some clarifications with respect to the Tribunal's existing orders may be required to ensure that truly urgent matters are duly and expeditiously addressed, and that service providers are reimbursed on a timely basis, any such related orders should be considered interim and ending on a specific date pending the completion of a final settlement agreement on the long-term reform of Jordan's Principle.

II. FACTS

a) Initial Discussions on Jordan's Principle Reforms

8. Shortly after this Panel issued its Merits Decision, the AFN and Canada engaged in

[8] C. Gideon Affidavit at para. 18.
[9] C. Gideon Affidavit at paras 8-10.
[10] C. Gideon Affidavit at paras 8-10.

discussions and explored options for the reform of Jordan's Principle.[11] One concept explored with Canada was the potential to provide funding directly to First Nations governments to enable them to approve Jordan's Principle applications for their citizens.[12] This would enable First Nations to directly access services from providers for their children or enter into contracts with an array of professionals to meet the needs of community members.[13] Under this model, a First Nations person would be able to approach their First Nation government for a Jordan's Principle request. First Nation governments would have the ability to approve these Jordan's Principle requests and pay for the services, products, or treatments directly. This potential exploratory model was consistent with self-determination and would alleviate the volume of requests filed with the federal government.[14]

9. Another concept explored between Canada and the AFN was the Circle of Care model that was developed by First Nations in the Manitoba region. Each First Nation was provided with funding to retain community teams made up of case managers, respite staff, child development workers, special needs advocates, and an administrator who would be able to assess a child's needs.[15] The Circle of Care model placed the child at the centre, with access to various supports. The approach increased collaboration of human service professionals, which reduced barriers related to access to services and qualified service professionals.[16]

10. Unfortunately, the potential of these exploratory reforms, whereby First Nations would assume greater control over the administration and approval of Jordan's Principle requests was not supported by one Party to the negotiations.[17] As the Parties were negotiating on the basis of consensus, the exploration of a First Nations role in the approval of Jordan's Principle requests has since been shelved. Furthermore, the AFN also notes that Back-to-Basics developed between the Caring Society and Canada actually prohibits and/or

[11] April 2, 2024 cross-examination of Dr. Valerie Gideon at p. 157, Transcript of the Cross-Examination of Dr. Valerie Gideon on April 2, 2024 ("Dr. Gideon Transcript").

[12] Pg. 181, of Dr. Gideon Transcript.

[13] Pgs. 157-58, of Dr. Gideon Transcript.

[14] Pg. 159, of Dr. Gideon Transcript.

[15] Pgs. 157-58, of Dr. Gideon Transcript.

[16] Pgs. 158 and 181 of Dr. Gideon Transcript.

[17] Pg. 181, of Dr. Gideon Transcript.

creates barriers for First Nations to administer Jordan's Principle programs and services.[18] The AFN maintains an interest in exploring and collaborating with the Parties to identify long-term, enduring solutions that emphasize First Nations participation.

b) Settlement Negotiations

11. In response to the Tribunal's Merits Decision, wherein the Tribunal ordered Canada to cease applying its narrow definition and to fully implement the full meaning and scope of Jordan's Principle,[19] and the Federal Court's decision on the judicial review of the Tribunal's decision related to compensation and clarifications on eligibility thereto under Jordan's Principle[20], Canada advised the AFN, Caring Society, Chiefs of Ontario ("COO") and Nishnawbe Aski Nation ("NAN") that it wished to enter into negotiations.

12. On or about November 1, 2021, said Parties commenced intensive negotiations, appointing the Honourable Murray Sinclair to act as the chair of same. The objective of these intensive negotiations was to reach a comprehensive settlement on the issue of compensation, as well as a separate settlement on long-term reform of the First Nations Child and Family Services Program ("FNCFS Program") and in relation to the full implementation of Jordan's Principle.[21]

13. On December 31, 2021, the AFN, COO, NAN, the Caring Society and Canada (the "AIP Parties") concluded an Agreement-in-Principle ("AIP") which contemplated a final settlement agreement that would address the long-term reform of both the FNCFS Program and Jordan's Principle. The AIP set out the general terms of settlement, which would guide the Parties to the Tribunal Proceedings negotiations towards a final settlement agreement, including a funding commitment in the amount of $19.807 billion over five years.[22] At the request of the AFN, Canada committed to effecting various immediate measures, which were procured by way of a Consent Order of the Tribunal, in 2022 CHRT 8.[23]

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[18] Affidavit of Candice St. Aubin affirmed March 14, 2024 ["St. Aubin Affidavit") at paras 70-73.
[19] 2016 CHRT 2 ("Merits Decision") at para. 481.
[20] *Attorney General of Canada v. First Nations Child and Family Caring Society et al.*, 2021 FC 969 ("JR Decision").
[21] C. Gideon Affidavit at para. 8.
[22] C. Gideon Affidavit at paras. 8-12.
[23] 2022 CHRT 8 ["2022 CHRT 8"], C. Gideon Affidavit at paras. 11-12.

14. The AIP also established a date of November 30, 2022, for the Parties to conclude a final settlement agreement on reforms to the FNCFS Program and Jordan's Principle. The Parties anticipated that the reformed FNCFS Program and Jordan's Principle would have been implemented commencing on December 1, 2022. Following confirmation by Canada of an extension of its mandate, said date was eventually shifted to March 31, 2023, on agreement by the Parties to the Tribunal Proceedings.[24]

15. Critically, the AIP provided that the AIP Parties would work together to develop an implementation approach for the long-term reform of Jordan's Principle, which would account for research being conducted thereon by the Institute for Fiscal Studies and Democracy ("IFSD").[25]

16. Despite the AIP Parties commitment to working towards a final settlement agreement under the terms of the AIP by March 31, 2023, the Caring Society advised in January of 2023 that it did not have confidence with respect to reaching an agreement on long-term reform of the FNCFS Program or Jordan's Principle by said date. [26]

17. The AFN, further to its mandates from the First Nations-in-Assembly to ensure Jordan's Principle reforms were aligned with evidence and policy-based solutions, collaborated with the Caring Society on a new timeline for negotiations, culminating in the *Joint Path Forward* proposal. The *Joint Path Forward* called for the bifurcation of long-term reform of the FNCFS Program and reform of Jordan's Principle and the completion of separate final settlement agreements for each, reflecting extended timelines consistent with the expected delivery of relevant research by the IFSD. In the context of Jordan's Principle, the Caring Society and the AFN advised the Parties of their desire that a final settlement agreement should be completed by December of 2024, which would incorporate IFSD's research and data and provide for necessary engagement with First Nations.[27] This had the practical effect of splitting the AIP into two separate tracks, allowing for the resolution of the long-term reform of the FNCFS Program and Jordan Principles independently.

[24] C. Gideon Affidavit at paras. 9, 33.
[25] C. Gideon Affidavit at paras. 9-10, 12.
[26] C. Gideon Affidavit at para. 34.
[27] C. Gideon Affidavit at para. 37.

18. COO and NAN did not support the Joint Path forward proposal. Canada, having previously notified the AIP Parties of the fact that any delay to the March 31, 2024, deadline would result in a pause in negotiations as a new mandate would be necessary and was not guaranteed, advised it could no longer proceed with the negotiation of an FSA on a bifurcated basis or otherwise and that it would be seeking instructions. Canada ultimately secured a revised mandate to move forward with the bifurcated approach in the *Joint Path Forward* on October 26, 2023, noting that the mandate provided for an extension of the proposed timeline to March 31, 2024, for FNCFS reforms, and March 31, 2025, for reaching an agreement on Jordan's Principle.[28]

19. As was noted to the Tribunal in the context of the AFN's status update on long-term reform, the AFN was aware as of November 6, 2023, that delays in processing Jordan's Principle requests were occurring across Canada, and that there were a number of ongoing issues associated with Canada's implementation of Jordan's Principle based on the Back-to-Basics policy. The AFN reiterated its commitment to working with Canada and the AIP Parties on solutions to the problems which were identified, including the Tribunal's timelines and response times in the context of urgent requests. The AFN was mindful of the exponential increases in the context of Jordan's Principle requests, and the delays associated with working towards the necessary reforms associated with the AFN and Caring Society's introduction of the *Joint Path Forward* and Canada's need for a revised mandate.[29]

20. Under the *Joint Path Forward* approach, the Parties agreed to focus on the reforms of the FNCFS Program first. Work on Jordan's Principle was to be suspended or delayed until the successful negotiation of a final settlement agreement on long-term reforms of the FNCFS Program.

21. As was previously indicated to the Tribunal, the AIP provided for an interim dispute resolution mechanism agreed to by the parties under the AIP on long-term reform premised on the involvement of an Eminent First Nations Person. While the Caring Society's view was that the negotiation structure was weak, and weaker still with the withdrawal of the Honourable Murray Sinclair, efforts were successfully undertaken by the parties to the AIP

[28] C. Gideon Affidavit at para. 38.
[29] AFN Status Update to the Tribunal dated October 10, 2023.

to locate a suitable replacement.[30]

22. On December 8, 2023, the Caring Society advised the AFN, COO, NAN, and Canada that it would not be bound by the AIP or the terms of the *Joint Path Forward*, citing its decision to bring forward a non-compliance motion as the basis for its withdrawal. Despite the bifurcation of Jordan's Principle and potential for continuing negotiations on long-term reform of the FNCFS Program, the Caring Society ceased participating in negotiations under the AIP and the *Joint Path Forward* citing its desire for negotiations under yet a new "approach".[31]

23. Despite the Caring Society ceasing its participation in negotiations, the AFN, COO, NAN, and Canada have continued to negotiate the suite of reforms outlined in the AIP under the timeframe set by the *Joint Path Forward*.

24. The AFN remains committed to working with the Parties via established fora under the AIP, including the interim dispute resolution process, to address any immediate operational issues with the implementation of Jordan's Principle, as well as addressing the long-term reform of Jordan's Principle by reaching a First Nations-led final settlement agreement which will build upon this Tribunal's efforts with respect to its scope and implementation.[32]

c) Back-to-Basics

25. The AIP provided that Canada would take urgent steps to implement the measures set out in a "Work Plan to Improve Outcomes under Jordan's Principle" (the "Work Plan") which was appended to the AIP as a schedule. This Work Plan made references to a Back-to-Basics approach to Jordan's Principle, however, such an approach was not formalized or agreed upon by the parties to the Tribunal Proceedings at said time.[33] The AIP was clear that such an approach was to be developed by the AIP Parties.

26. The Back-to-Basics approach was a policy drafted through an iterative process

[30] Caring Society Status Update to the Tribunal dated October 10, 2023, at p. 20.
[31] C. Gideon Affidavit at para. 39.
[32] C. Gideon Affidavit at para. 55.
[33] C. Affidavit at paras. 10, 17.

between the Caring Society and Canada from March to May 2022, which was premised on ensuring that First Nations children can access the service and supports as needed, and remove bureaucratic barriers. The AFN, as part of the iterative process, was solely provided opportunity to comment on same. This approach has been responsible for a substantial increase in the number and variety of supports or services requested under Jordan's Principle, extending to school supports, cultural activities, assisted technology and electronics, groceries and housing supports.[34]

27. Back-to Basics has covered a range of services that was based on compromises.[35] As such, Back-to-Basics does not necessarily conform to this Tribunal's Orders on Jordan's Principle. Many services administered by Canada further to Back-to-Basics go above and beyond those ordered by the Tribunal. However, Back-to-Basics was designed to comply with the timeframes ordered by the Tribunal.[36]

28. Of note, between April 1, 2022, and March 31, 2023, 1,274,140 products and services were approved under Jordan's Principle, including 129,167 under individual requests and 1,144,973 under group requests. In comparison, in the 6-month period between April 1, 2023, and September 30, 2023, the number of approved products and services under Jordan's Principle had already exceed those in fiscal year 2022-23. As of September 30, 2023, Jordan's Principle had approved 1,274,148 products and services, including 87,608 under individual requests, and 1,186,540 under group request.[37]

29. As a policy document, Back-to-Basics sought to clarify and expand upon the Tribunal's related orders, includes revised measures in relation to identifying urgent cases and broadening/clarifying the scope of supports and services available, emphasizing the principle of substantive equality, best interest of the child and distinct community circumstances.[38]

30. While Back-to-Basics was subject to an iterative process, it was not the subject of

[34] C. Gideon Affidavit at paras. 20-23.
[35] Pg. 176, of Dr. Gideon Transcript.
[36] Pgs. 178-79 of Dr. Gideon Transcript.
[37] C. Gideon Affidavit at paras. 25-26.
[38] C. Gideon Affidavit, Exhibit "C", Back-to-Basics Approach at p. 2.

lengthy discussion or negotiations between all the Parties to the Tribunal Proceedings or the AIP Parties. Notably, the AIP specifically contemplated that improvements would be necessary as information regarding the efficacy of Back-to-Basics measures became available. It was also clear that the workplan, including the development and adoption of the Back-to-Basics approach (to be developed), remained subject to the Parties commitments to develop an evidence informed implementation approach for the long-term of Jordan's Principle further to the terms of the AIP in the context of the development of a final settlement agreement.[39] For clarity, Back-to-Basics was negotiated solely with the Caring Society. While the AFN provided commentary, our views were not taken into consideration in terms of its final iteration.

d) Results of Back-to-Basics – Jordan's Principle concerns

31. While the exponential growth in relation to the approval of products and services Jordan's Principles is to be applauded, its implementation has resulted in certain issues impacting timeframes for response contributing to the delays it sought to end.

i. Compliance with Tribunal timelines

32. ISC's compliance with the Canadian Human Rights Tribunal ordered timelines has decreased. In the 2021-22 fiscal year, 61,988 individual requests were submitted to ISC. ISC was only able to comply with the established timeframes in 53% of the urgent requests and 44% of the time for non-urgent requests. With respect to group requests, Canada received a total of 3,237 group requests. ISC was able to process 31% of urgent requests and 54% of non-urgent cases within the established timeframe.[40]

33. In the 2022-23 fiscal year, 101,806 individual requests were submitted to ISC. ISC was only able to comply with the established timeframes in 33% of urgent requests and 36% of the time for non-urgent requests. With respect to group requests, Canada received a total of 6,506 group requests. ISC was able to process 30% of urgent group requests and 66% of non-urgent group requests within the established timeframes. While compliance for group requests improved only marginally, the compliance rates for urgent and non-urgent

[39] C. Gideon Affidavit at paras. 10, 18.
[40] C. Gideon Affidavit at para. 28.

individual requests marks a significant decline over the previous year.[41]

34. The AFN heard from an individual making an urgent request under Jordan's Principle associated with wildfire evacuations in May 2023, whose request for supports for their child's basic needs as a result of evacuation and had not received a response over 5 months later. AFN intervention was required to ensure a response and a decision.[42] In another instance, a family at risk of experiencing homelessness was denied interim support pending permanent housing being obtained. The matter was adjudicated over a 14-day period, and support was only obtained after AFN intervention.[43]

ii. Applicants experiencing difficulties contacting ISC officials

35. The AFN has heard concerns on multiple occasions in relation to the challenges of contacting ISC at the national and regional levels, particularly in the context of urgent requests or updating the urgency of requests. The AFN notes that ISC continues to build capacity in this area, but the ever increasing number of Jordan's Principle requests continues to provide operational challenges.[44]

iii. Backlogs on Intake and Adjudication of Jordan's Principle requests

36. The AFN has been apprised of the fact that a significant backlog has developed in the context of the intake and adjudication of requests, including individuals notifying the AFN of 9-month periods where a request had yet to be adjudicated, which required AFN intervention. The AFN was also informed of a 2,000 call backlog in the context of the British Columbia region. Unfortunately, ISC reported an ongoing decline in the context of compliance both in the context of urgent and non-urgent request, noting a rate in fiscal year 2021-22 of 53% and 44% respectively, down to 33% and 36% in fiscal year 2022-23.[45]

iv. Delays in reimbursement

37. The AFN has also heard from service providers of significant delays in the context of Canada reimbursements for services rendered to clients, which often requires the AFN's

[41] C. Gideon Affidavit at para. 29.
[42] C. Gideon Affidavit at para. 41.
[43] C. Gideon Affidavit at para. 42.
[44] C. Gideon Affidavit at para. 43-46.
[45] C. Gideon Affidavit at para. 47-49.

assistance. Such service providers have expressed concerns with the sustainability of continuing to render such services, in light of the ongoing delays. This issue has also been advanced by requestors advancing individual requests, who have noted that despite such requests being approved, payments took several weeks to several months to be received.[46]

III. ISSUES

38. The issues to be determined by the Tribunal include:

a) Is the Back-to-Basics policy consistent with the Tribunal's Orders on urgency?

b) Is interim relief required in relation to the reimbursement of service providers and individual requestors for approved Jordan's Principle services?

IV. SUBMISSIONS

a) Tribunal's retained jurisdiction on Jordan's Principle

39. The Tribunal has consistently expressed its retention of jurisdiction in the context of its Jordan's Principle orders matter, being an exercise of its remedial jurisdiction further to subsection 53(2) of the *Canadian Human Rights Act* ("CHRA")[47], which establishes the broad remedies available to the Tribunal. As was noted in 2020 CHRT 36:

> [59] The Panel retains jurisdiction on all its Jordan's Principle orders including the order in this ruling and will revisit its retention of jurisdiction as the Panel sees fit in light of the upcoming evolution of this case or once the parties confirm the eligibility criteria and mechanism is implemented and effective. This does not affect the Panel's retention of jurisdiction on other issues in this case.

40. Such retention if jurisdiction is an appropriate exercise of the Tribunal's "broad" and "extensive" statutory jurisdiction to fashion appropriate remedies[48] further to the quasi-

[46] C. Gideon Affidavit at para. 50-54.
[47] *Canadian Human Rights Act*, R.S.C., 1985 c. H-6.
[48] JR Decision at para. 126.

constitutional nature of the *CHRA* as human rights legislation[49], often described as a pre-eminent category of legislation.[50] As noted by the Tribunal, in retaining jurisdiction, the Tribunal is monitoring if Canada is remedying discrimination in a responsive and efficient way, and providing a pathway for the Parties to the complaint to avoid the need for duplicative proceedings to address the implementation of the Tribunal's orders.[51]

41. The Federal Court has also made it clear that that effective remedies in the context of human rights legislation require "innovation and flexibility on the part of the Tribunal" and the *CHRA* is structured to facilitate this flexibility, reflecting on such principles supporting the Tribunal's dialogic approach.[52]

42. In the context of its retention of jurisdiction, the Tribunal recently communicated to the Parties to the Tribunal Proceedings, noting that the Panel would continue balancing the dialogic approach, creating space for parties to negotiate meaningful remedies while retaining jurisdiction in order to adjudicate any issues which may arise.[53]

43. While the ongoing dialogic approach and flexibility to consider the implementation of its orders remain properly within the Tribunal's jurisdiction, the Tribunal must remain diligent in the exercise of same and imposing new remedies, particularly where the First Nations parties to the Tribunal Proceeding remain engaged and committed to a negotiated resolution, in this case in the context of the long-term reform and implementation of Jordan's Principle.

44. Further, where the Tribunal is placed in a position where it must consider the implementation of its exiting orders, as in the within motion, it must ensure that it is not giving with the right hand, while taking away with the left. As noted by the Tribunal:

> [264] Additionally, this Panel has already indicated its desire to ensure remedies do not condone another form of discrimination:

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[49] *Battlefords and District Co-operative Ltd v. Gibbs*, [1996] 3 S.C.R 566 at para. 18.
[50] *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 339.
[51] 2020 CHRT 20.
[52] JR Decision at para. 138.
[53] Email to the parties to the Tribunal Proceedings from the Tribunal, provided by Amelie Sabourin, and dated November 6, 2023.

> The Panel also wants to ensure to craft effective remedies that eliminate discrimination and prevent it from reoccurring. Needless to say, it cannot condone a different form of discrimination while it makes its orders for remedies. (2019 CHRT 7 at para. 22).

b) Negotiations are key to finalizing reform and advancing reconciliation

45. It is the AFN's view that the necessary reforms to Jordan's Principle to ensure its full implementation are best left to negotiations between Canada and the First Nations parties who have and continue to represent rights-holders in the context of the Tribunal Proceedings. The reconciliation of First Nations and their respective claims and interest with those of the Crown is effectively the fundamental objective of the modern law of Aboriginal and treaty rights[54] and negotiation has frequently been cited as the preferred pathway by the Courts as it provides certainty for both parties and as "true reconciliation is rarely, if ever, achieved in courtrooms"[55], or in these circumstances, proceedings before the Tribunal.

46. As was noted by the Federal Court in the JR Decision:

> Negotiations are also seen as a way to realize the goal of reconciliation. It is, in my view, the preferred outcome for both Indigenous people and Canada. Negotiations, as part of the reconciliation process, should be encouraged whether or not the case involves constitutional issues or Aboriginal rights. When there is good will in the negotiation process, that good will must be encouraged and fostered before the passage of time makes an impact on those negotiations.[56]

47. We cannot forget that, as provided for in the pre-amble of the UN Declaration, that "agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States".[57]

48. Such sentiments have frequently been echoed by the Tribunal. Speaking to working towards reconciliation in the context of the Tribunal Proceedings, the Tribunal noted the

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[54] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 1.
[55] *R. v. Desautel*, 2021 SCC 17 at para. 87.
[56] JR Decision at para. 300.
[57] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.

following:

> [41] On this journey towards change, I hope trust can be rebuilt between the parties. Effective and transparent communication will be of the utmost importance in this regard. Words need to be supported by actions and actions will not be understood if they are not communicated. Reconciliation cannot be achieved without communication and collaboration amongst the parties. While the circumstances that led to the findings in the Decision are very disconcerting, the opportunity to address those findings through positive change is now present. This is the season for change. The time is now. [58]

49. The Tribunal has also strongly encouraged and highlighted its preference for the parties to resolve the remedial issues through negotiations rather than adjudication, in the interest of advancing reconciliation. The Tribunal remains cognizant of the Parties' to the Tribunal Proceedings concern that unilateral remedial orders could have potentially unintended adverse consequences.[59]

50. Accordingly, it is critical that the Tribunal only take such measures as necessary to ensure that immediate issues are addressed on an interim basis, pending a First Nations-led final resolution embodied in a final settlement agreement, which will be presented to both the First Nations-in-Assembly and the Tribunal for approval. Such approval by rights-holders and related engagement are the subject of various AFN mandates.[60]

c) Contextualizing Jordan's Principle under Back-to-Basics and Canada's adherence to the Tribunal's directed timelines

51. While the Caring Society remains focused on Canada's existing implementation of the Back-to-Basics policy, it is important that any consideration of same be considered in context. As noted, Back-to-Basics reflects an interim policy adopted by Canada and the Caring Society further to limited engagement with the AFN, which are not necessarily in alignment with the Tribunal's orders, nor what an eventual agreement on the long-term implementation of Jordan's Principle will encompass.

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[58] *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 10 paras. 41-42.
[59] 2023 CHRT 44 at para. 22, 2016 CHRT 10 at para. 43.
[60] C. Gideon Affidavit, Exhibit "A", AFN Resolution – 40-2022.

i. Tribunals existing directions

52. The scope of Jordan's Principle has been considered by the Tribunal on several different occasions. In one of its most recent decisions related thereto, the Tribunal spoke to its scope:

> [99] Jordan's Principle is about ensuring First Nations children receive the services they need when they need them. Jordan's Principle is available to all First Nations children in Canada. Jordan's Principle, as previously ordered by the Panel, applies to all public services, including services that are beyond the normative standard of care to ensure substantive equality, culturally appropriate services, and to safeguard the best interests of the child. In other words, services above the normative provincial and territorial standards account for substantive equality for First Nations children as a result of the entire discrimination found in this case and further clarified in the Panel's rulings especially 2017 CHRT 14 and 35. Those orders bind Canada on or off-reserves. Moreover, Jordan's Principle provides payment for needed services by the government or department that first receives the request and recovers the funds later. A strict division of powers analysis perpetuates discrimination for First Nations children and is the harm Jordan's Principle aims to remedy.[61]

53. This was considered by the Federal Court in its consideration of the history of the Tribunal Proceedings in the JR Decision:

> The Tribunal gave precise directions on how to process Jordan's Principle claims, reiterating two of its key purposes. First, an important goal of Jordan's Principle is to ensure that First Nations children do not experience gaps in services due to jurisdictional disputes. Second, because First Nations children may have additional needs, the delivery of services can go beyond what is otherwise not available to other persons. The Tribunal noted that a key concept of Jordan's Principle is that it is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve.

54. The Tribunal established timelines associated with the processing and determination of Jordan's Principle cases, providing 48 hours for individual request; 12 hours in urgent cases; reasonable efforts for immediate crisis intervention supports where irremediable harm is reasonably foreseeable; one week for group requests, and in the case of urgent group request, 48 hours.[62] However, it is important to note that when this Order was made, there were relatively few Jordan's Principle requests being advanced by First Nations parents and

[61] 2020 CHRT 20 at para. 99.
[62] 2017 CHRT 35 at para. 135.

children.

55. The Tribunal has also spoken generally to how urgent matters could be determined, and the expected process in which urgency would be established. In 2020 CHRT 36, the Tribunal adopted an Annex negotiated by the Parties to the Tribunal Proceedings on eligibility criteria. In the context of evaluating applications in the context of urgency, the Tribunal highlighted that:

> [44] For urgent cases relying on recognition by a First Nation, provisions are made for verbal confirmation of eligibility and for cases where a designated official is not able to be contacted. The determination of eligibility will not delay a substantive review of the request and an inability to confirm recognition will not delay measures to provide the child with urgent assistance or to address the reasonably foreseeable risk of irremediable harm. Requests related to children in end-of-life and palliative care are urgent.
> ……..
>
> [46] Cases will be examined and approved by Jordan's Principle Focal Points. If the Focal Point recommends denying a request based on eligibility, the case will be immediately escalated for review and determined by an official with the ADM delegated authority to deny requests. For urgent requests, this will occur as soon as the child's needs require it and no later than a 12-hour timeframe.

56. Annex A, as endorsed by the Tribunal, elaborated on the administration processes in relation to urgent cases as follows:

> **5. Application** – Family, child, organization or Jordan's Principle navigator and service coordinator will send in a request for services, supports and products to the Jordan's Principle Focal Point. Confirmation of Recognition or Consent to Communicate must accompany the request. Where the First Nation Designated or Deemed Official/Organization has confirmed recognition, the case can be adjudicated and approved by the applicable Jordan's Principle Focal Points.
>
> **6. Urgent cases** – Where the child requires urgent assistance or the risk of irremediable harm is reasonably foreseeable, ISC will take positive measures to verbally confirm recognition with the First Nation's Designated Official/Organization. Where applicable, ISC may work with the Jordan's Principle navigator or service coordinator that submitted the request. Where no designation has been made, or where the designated official or organization is unavailable, the First Nation's Deemed Official(s) may provide verbal confirmation to be followed with written confirmation.
>
> In an urgent case, ISC will consider the substantive request for services and products related to the urgency while it confirms recognition. Where recognition is not confirmed

> before ISC is prepared to make a determination, ISC will confirm recognition subsequent to a determination being made on interim measures to provide the child with the urgent assistance required or to address the reasonably foreseeable risk of irremediable harm. Services and products not related to the need for urgent assistance or the reasonably foreseeable risk of irremediable harm will be considered subject to the usual recognition process.
>
> For greater certainty, requests related to children in end-of-life or palliative care are considered urgent.

57. The AFN submits that the expectation based on the Tribunal's adoption of the Annex was that Jordan's Principle applications, including urgency and eligibility of cases, were implicitly decisions to be made by Jordan's Principle Focal Points. This seems inferred by reference to its previous orders, which addressed situations in which Canada was in fact making determinations as to urgency.[63]

58. Urgent situations – or the notion of a child requiring urgent assistance, are clearly supposed to be defined as matters which require immediate action or attention. They are on an elevated level, requiring expeditious action in relation to their determination. This is clear considering the Tribunal's affiliation of this term with cases where "the risk of irremediable harm is reasonably foreseeable" [64], "life threatening cases"[65] and with respect to the comments of the Tribunal that urgent requests include those related to "end-of-life or palliative care".[66] The Tribunal has also been clear that the "time-sensitive nature" of a case could also make it urgent.[67]

59. The definition thereof was previously an issue for the Tribunal, who sought to provide some clarity with respect to same[68] and accordingly adopted the following considerations in the context of an interim order:

> In evaluating urgent and/or life-threatening needs due consideration must be given to the seriousness of the child's condition and the evaluation of the child made by a physician, a health professional or other professionals involved in the child's

[63] 2019 CHRT 7 at para. 73.
[64] 2017 CHRT 35 at para. 10.
[65] 2019 CHRT 7 at para. 82
[66] 2020 CHRT 36 at para. 44.
[67] 2019 CHRT 7 at para. 58.
[68] 2019 CHRT 7 at para. 83.

assessment. Canada should ensure that the need to address gaps in services, the need to eliminate all forms of discrimination, the principle of substantive equality and human rights including Indigenous rights, the best interests of the child, the UNDRIP and the Convention on the Rights of the Child guide all decisions concerning First Nations children.[69]

ii. Back-to-Basics –effects

60. It is critical that the Tribunal consider the issues raised in this motion on the implementation of Jordan's Principle in light of its existing orders, as considered above, and the shifting landscape and context arising from Canada's implementation of the interim Back-to-Basics policy. As noted, while supported by the AFN and Caring Society, Back-to-Basics was not subject to extensive negotiation or the pending evidence from IFSD which will ultimately inform an eventual final settlement agreement. As an interim approach, it has however been provided to Focal Points to inform decision-making, replacing the previous Standard Operating Procedures.

61. In the context of Back-to-Basics, the AFN would note the following aspects which contextualize, in the AFN estimate, Canada's current implementation of Jordan's Principle and the circumstances giving rise to difficulty with its ongoing implementation:

a) Decisions are guided by various presumptions, including substantive equality applying to all cases and that First Nations children need services going above those available to non-First Nations children. ISC has applied this standard, having extended the scope of Jordan's Principle to school supports, cultural activities, assisted technology and electronics, groceries and housing supports.[70] As noted, there has accordingly been an exponential growth in Jordan's Principle requests, with ISC having approved more requests during the six month period from April 1, 2023 and September 30, 2023, than the entirety of the previous fiscal year.[71]

[69] 2019 CHRT 7 at para. 89, cited in 2020 CHRT 36 at para. 9.
[70] C. Gideon Affidavit at para. 20-23.
[71] C. Gideon Affidavit at paras. 25-26.

b) Identification of urgent cases are not subject to Jordan Principle Focal Point consideration, but instead Back-to-Basics reflects an assumption that the requestor is best positioned to judge the urgency of a request. Focal Points and call centre staff are directed to accept the requestor's identification of the request as urgent and may not re-assign the request to a lower level of urgency. This principle has ultimately had the effect of increasing the number of requests that ISC receives marked urgent year over year, to the tune of 25% of request in 2023-24 now being treated as urgent by ISC versus 1% in 2021 As a result of Back-to-Basics, no evaluation of the request can be made to ensure consistency with the Tribunal's previous direction on urgency.

62. The AFN notes that Jordan's Principle is in a very different state from the date of Tribunal's consent order in 2017 CHRT 35, and previous non-compliance motions that addressed Canada's narrowing of the scope of Jordan's Principle as a legal principle, and failure to fully give effect to same.[72] Instead, we find ourselves in a situation where Canada's non-compliance with aspects of the Tribunal's orders are arguably based on it assuming too much, including an increased commitment to Jordan's Principle and the expanded breadth of services and supports. These include modeling headshots, gaming consols, and toys.[73] Other services approved under Back-to-Basics include zip line kits, Sports equipment, summer camp registration, movie tickets and glowsticks.[74] Furthermore, the *Joint Path Forward* puts the determination of the urgency into the hands of the applicants themselves.

63. For the purpose of the within motion, the AFN submits that the above-noted contextual factors are important considerations for the Tribunal in weighing the Caring Society's requested relief.

[72] 2016 CHRT 10; 2016 CHRT 16 and 2017 CHRT 14.
[73] Pgs. 177-78 of Dr. Gideon Transcript.
[74] Affidavit of Dr. Valerie Gideon affirmed March 14, 2024 ["Dr. Gideon Affidavit") at para. 24.

d) Immediate Implementation Concerns with Jordan's Principle

i. Urgent requests - "when everything is urgent, nothing is."

64. The Caring Society seeks to expand the scope of urgent circumstances to request that are not in alignment with the Tribunal's orders, despite the fact that the Back-to-Basics policy and its current provision for the self-identification of urgency by requestors has already resulted in a disproportionate number of cases being marked urgent. [75]

65. It is patently obvious that Back-to-Basics and the requirement on ISC to accept the self-identification of urgent matters has ultimately had the effect of undermining ISC's ability to effectively address matters of a truly urgent nature. It is human nature for people, particularly in the context of parents seeking support, services or products for their children, to take the path of least resistance in relation to advancing a request. The AFN would highlight that no evidence has been adduced in the context of the development of Back-to-Basics or otherwise reflecting the need for such an approach – it was and remains a policy decision, agreed to by way of bilateral discussions between Canada and the Caring Society, and not reflective of the Tribunal's priorities as it pertains to urgent request. While the AFN was given an opportunity to comment on same further to an iterative process[76], which included noting <u>significant</u> concern with self-identification and that it would result in inordinate numbers of urgent requests, it was adopted without change. Despite the work plan appended to the AIP calling for agreement on Back-to-Basics, it does not reflect such consensus.[77]

66. One need only consider Canada's evidence reflecting that the rate of urgent request increased from 2% to 26% from the first quarter of the 2022-23 fiscal year to the third quarter of 2023-24. Unfortunately, commensurate with this spike ISC's compliance with the Tribunal's timeframes decreased from 41-29%.[78] It is unsurprising that ISC would have experienced urgent requests growing by over 900% compared to non-urgent requests (which

[75] Factum of the Caring Society at para. 83.
[76] C. Gideon Affidavit at para. 20-23.
[77] Factum of the Caring Society at para. 71.
[78] Affidavit of Candic St- Aubin affirmed March 14, 2024 ["C. St.-Aubin Affidavit"] at para. 11.

only grew by 88%).[79]

67. The Caring Society cites a lack of evidence in the context of the increases in the number of urgent requests[80], citing a number of general concerns which in fact are generally unsupported speculation that it believes may support the increases to urgent requests. It further cites concern that Canada is attempting to build a narrative that negatively associates the rising number of urgent requests with the Back-to-Basics approach. The AFN submits that the Caring Society is equally trying to build a narrative that Back-to-Basics is somehow an optimal approach, when the work plan associated with its creation itself contemplated that improvements would be necessary as information regarding the efficacy of Back-to-Basics measures became available.[81]

68. For the AFN, common-sense dictates that the self-identification of urgent Jordan's Principle requests has not been effective, and as noted in the Affidavit of Dr. Gideon, is ultimately resulting in a significant percentage of misclassified requests.[82] This remains so, despite the Caring Society's submissions in relation to their "uncontested evidence regarding social prescription" which attempts to provide a basis for situations in which a a request for "glow stick" or a "gaming system" may be urgent.[83] The AFN fundamentally disagrees with the evidence tendered and submits that it should be given little, if any weight, in the context of considering the issues associated with self-identification and prioritization in the context of urgent requests.

69. While Canada, further to discussions and negotiations with the Parties, may consider such "non-medical prescription" in the context non-urgent request, such items must not be allowed to continue to undermine Canada's capacity to address truly urgent requests, consistent with the spirit and intent of the Tribunal's orders in relation to urgent matters.

70. The AFN is concerned that real and legitimate urgent requests for First Nations children are not being acted on in a timely manner because of the self-identification

[79] Affidavit of Valerie Gideon affirmed March 14, 2024 {"V. Gideon Affidavit"] at para. 21.
[80] Caring Society Factum dated April 19, 2024 at para. 70.
[81] C. Gideon Affidavit at paras. 10, 18.
[82] V. Gideon Affidavit at para. 23.
[83] Factum of the Caring Society at paras. 50-51.

requirement of Back-to-Basics, and are problematic, despite the Caring Society's position to the contrary.[84] For the AFN, the delays in responding to truly urgent request put First Nations children in unnecessary risk of harm or death.

71. While aspects of Back-to-Basics certainly provide some level of clarity to Focal Points in the context of the administration of urgent request[85] and should properly be considered in the context of the development of an final settlement agreement, such efforts are undermined by the foundational presumption that requestors are best positioned to judge the urgency of the request and the requirement that once identified, every request must be dealt with the same way with zero flexibility for escalating matters whose facts, on their face, could justify increased attention.

72. Intake remains entirely subject to the discretionary and subjective initial identification of urgency by a requestor, who may not understand the concept of urgency, despite the onus on Focal Points to provide a "plain language" description of same.[86] Considering the problems the Parties to the Tribunal Proceedings experienced in addressing how urgent Jordan's Principle requests should be processed, and the ongoing clarifications provided by the Tribunal therewith[87], it is entirely fair that a requestor, faced with making a request for their child and/or children, could have issues in terms of identifying whether their matter was urgent, or be incentivized to label their matter as such as a result of the associated priority.

73. For the AFN, the concerns with the inability to prioritize matters certainly amounts to an entrenchment on the Tribunal's orders and undermines the Tribunal's clear provisions in relation to the determination of urgency. When everything is considered urgent, and must be treated with equal priority in terms of intake, it effectively renders such a distinction moot. It also reasonable to see that such a reality would render it difficult, nigh impossible, for Focal Points to prioritize matters in the context of intake in a manner which ensures that requests where irremediable harm is reasonably foreseeable, that immediate intervention supports must be made available- they must ultimately accept the urgency of the matter as

[84] Factum of the Caring Society para. 73.
[85] Factum of the Caring Society at para. 81.
[86] C. Gideon Affidavit, Exhibit "C" Back-to-Basics at p. 3.
[87] 2019 CHRT 7 at para. 89.

stated by the requestor, with no discretion as to the application of finite resources in the context of the adjudication of a request.[88] This is a fundamental issue, particularly with the increasing and exponential growth in requests under Jordan's Principle, and disproportionate increases in the context of the number of urgent requests, as discussed above.

74. The issue of self-identification and lack of prioritization of truly urgent requests, as contemplated by the Tribunal, also seem to be recognized by the Caring Society, who note that "a working triage function would be assistive" in "appropriately-defined circumstances" to identify items, services or supports, noting the elevated nature of requests associated with a need for professional or therapeutic supports, emergency basic necessities etc.[89] While the AFN categorically disagrees with the Caring Society's specific attempts to expand the criteria of urgent circumstances beyond that ordered by the Tribunal in its explanation of the need for triage[90], such efforts being properly the subject of negotiations between the parties, it is clear that the Caring Society recognizes that there are fundamental urgent situations which need to be prioritized, which the AFN submits Back-to-Basics is not addressing appropriately.

75. While the Caring Society's motion infers that such issues could be resolved in the context of staffing, requiring the appointment of "sufficient persons" both regionally and nationally responsible to manage urgent Jordan's Principle cases to ensure consistency with the Tribunal's orders[91], the AFN is mindful of the burdens that such efforts place on individuals providing such services, particularly in the context of its delivery of an information help desk in the context of the compensation.[92] The AFN accepts that Jordan's Principle would certainly be an extremely difficult operating environment; that the 13% to 19% annual turnover would not be unexpected; that ensuring appropriate capacity for such workers would require significant training; as well as the complications associated with the

[88] 2017 CHRT 35 at para. 135.
[89] Factum of the Caring Society at para. 98.
[90] Factum of the Caring Society at para. 98.
[91] Factum of the Caring Society at para. 107.
[92] Note: The First Nations Child and Family Services, Jordan's Principle and Trout Class Settlement Agreement, as approved by the Tribunal, at Article 9 provides for the delivery of a help desk by the AFN to provide culturally appropriate support to First Nations.

federal governments legislative commitments in the context of hiring.[93]

76. In relation to urgent requests, the Caring Society is also seeking an order that Canada immediately include in its definition of "urgent requests" requests from First Nations children who have recently experienced the death family members (caregivers, parent(s) and siblings) or are anticipated to experience such death, or impacted by a state of emergency.[94] Such a request was premised on an instance where an individual was seeking to extend already funded supports under Jordan's Principle[95] for the attendance of two children at a potlatch ceremony.

77. While important culturally, the AFN would note that the adoption of the original request in and of itself was unprecedented- and certainly an expansive interpretation of the Tribunal's existing orders, which are focused on addressing gaps in services and ensuring that "First Nations children receive the services they need when they need them" and that it "applies to all public services, including services that are beyond the normative standard of care to ensure substantive equality, culturally appropriate services, and to safeguard the best interests of the child."[96] This is beyond simply exceeding the normative standard based on substantive equality.

78. For clarity, the evidence relied upon by the Caring Society in its arguments on this point tying the death of a caregiver to harm[97] have also been taken entirely out of context, having been advanced in the context of a child having been separated from their caregiver, and during such separation or after reunification, having the caregiver passed away. Such evidence was advanced to address the indignity suffered in the context of a breach of fundamental human rights, and not to support a general blanket statement that support should be urgently provided to children, First Nations or otherwise, who lose their parents, which is effectively what the Caring Society is seeking in this context.

79. For the AFN, the scenario relied upon the Caring Society reflects the positive nature

[93] V. Gideon Affidavit at para. 59, 64-65.
[94] Factum of the Caring Society at para. 83.
[95] Factum of the Caring Society at para. 86.
[96] 2020 CHRT 20 at para. 99.
[97] Factum of the Caring Society at para. 85.

of Back-to-Basics in pushing the envelope and scope of the Tribunal's orders, and how such effects can be achieved in the context of resolution outside of the Tribunal Proceedings, i.e. by way of negotiated settlement. It does not reflect a basis for returning to the Tribunal and seeking orders expanding the scope of the Tribunal's orders in relation to urgency and would only further exacerbate the existing problems associated with the self-identification of urgent matters.

80. The AFN has been and remains committed to working with the AIP Parties to resolve Jordan's Principle implementation issues related to urgency, but in light of this motion, would reiterate that Back-to-Basics is an interim policy. While it has had positive changes in the context of the number approval of Jordan's Principle request and increased requests under same, it remains imperfect and, for the AFN, has inappropriately diverged from the Tribunal's directions regarding truly urgent matters, particularly in the context of self-identification and inability for Focal Points to prioritize concerns. The AFN echoes the comments as noted by the Tribunal Chair in the context of the cross-examination of Ms. Valerie Gideon- when the tribunal set the timelines, "urgent meant urgent".[98] For the AFN, urgent meant urgent, and still means urgent.

ii. Backlogs and unanswered Requests

81. There are significant backlogs observed in Jordan's Principle intake and adjudication. In August 2023, the AFN was for the first time made aware of the extent of unanswered emails and Jordan's Principle requests. At the Jordan's Principle Operations Committee on September 19, 2023, the AFN was advised that the British Columbia Region had a backlog of over 2,000 unanswered emails.[99]

82. ISC's Jordan's Principle March 2022 Compliance Report notes that from April 1, 2021 to March 31, 2022, Canada's compliance rate for urgent individual requests was 53%, and for non-urgent is 44%.[100] ISC's March 2023 Compliance Report also noted that from April 1, 2022 to March 31, 2023, the compliance rate for urgent individual requests was

[98] Cross Examination of Valerie Gideon, April 4, 2023, at page 123, lines 15-20.
[99] C. Gideon Affidavit, at para 48.
[100] C. Gideon Affidavit, at para 47

33%, and for non-urgent was 36%".[101]

83. The AFN remains concerned that thousands of Jordan's Principle requests remain unopened. This is especially problematic where a child needs urgent services to prevent a death or permanent harm.

84. While the AFN is of the view that action must be taken by ISC to address the backlog, the AFN does not agree with the Caring Soceity's requested relief. For example, the Caring Society seeks an order that Canada immediately revise its National Call Centre calling tree and other contact mechanisms to ensure that requestors can immediately designate or elevate a request to an urgent level. Allowing any requestor to mark their requests as urgent will only add to the stresses, and result in further backlogs, in the processing of Jordan's Principle requests. The ability for Requestors to self-designate their requests for services is allowable under Back-to-Basics, but is not contemplated in the Tribunal's Orders.

85. Furthermore, the Caring Society seeks an order to allow Requestors to elevate the status of their request to "urgent" while awaiting determination. This solution is impractical as it will allow for Requestors to jump the queue and will require additional administrative steps among ISC officials to respond to changes in the status of request.

86. The AFN also notes that some of the Caring Society's proposed solutions were already considered by the Parties and not pursued for various reasons. As will be elaborated on below, it appears that the Caring Society is attempting to get through the back door what it was not able to get through the front door, namely seeking to obtain an order from the Tribunal in an effort to compel the Parties to adopt the Caring Society's positions.

87. For instance, the Caring Society seeks to expand the use of acquisition cards or gift cards to assist families in purchasing goods and services. The Caring Society seeks an order to expand the use and range of eligible expenses on acquisition cards and enable purchases of gift cards up to an amount of $500. This issue the AFN has with the Caring Society's

[101] C. Gideon Affidavit, at para 47.

proposal is that it will enable individuals to make purchases or approvals up to $500 with no questions asked and with the ability to make purchases without the need to provide proper receipts. This could create problems for families should Canada require proper receipts later down the road, and be liable for any products not authorized by ISC. In addition, there are rules with respect to spending public funds, which the Caring Soceity's proposal do not conform with.

iii. Request Timelines

88. The AFN is cognizant of the difficulties that have been raised by Canada with respect to meeting the Tribunal's mandated timelines for the determination of Jordan's Principle requests as a result of the exponential increase in the number of both urgent and non-urgent requests. Having noted the issues observed in the context of the intake and determinations as to urgency under the Back-to-Basics, the AFN would simply note that for it, urgent continues to mean urgent, and it reserves its submissions on this topic for its factum on Canada's cross-motion in these proceedings.

iv. Reimbursement Delays

89. As noted, the AFN has also heard from both service providers and individual applicants of significant delays in the context of Canada reimbursing or providing payments further to approved Jordan's Principle requests, such delays extending weeks, if not months.

90. The AFN notes Canada's commitment to faster reimbursement by way of adjustments to acquisitions cards and commitment to a 15-business day standard for the processing of all payments.[102]

91. In light of such commitments, and further to the issues raised in depth by the Caring Society, the AFN is generally supportive of an interim order in relation to the reimbursement of service providers and individuals, and reserves the details of such an approach for its submissions on Canada's cross-motion.

[102] V. Gideon Affidavit at para. 68-70.

v. Financial Administration Act

92. The Caring Society's position on the Tribunal's comments related to the *Financial Administration Act* appears to be grounded in a misinterpretation of the ruling. The Caring Society asserts without any evidence that ISC continues to use the Financial Administrations Act as a barrier to Jordan's Principle requestors, refuse to reimburse families who use gift cards supplied, and deny Jordan's Principle service provision altogether.[103] In particular, the Carng Society takes issue with ISC requiring individuals to furnish itemized receipts for items purchased using gift cards supplied by ISC. It appears that the Caring Society suggests that individuals be permitted to expend public funds with no accountability or rules at all. In essence, the Caring Society appears to suggest that individuals be given a blank cheque.

93. The position advanced by the Caring Society does not conform to this Tribunal's discourse on the *Financial Administration Act*. In 2021 CHRT 41, this Tribunal stated:

> [377] Further, the Tribunal's orders are to be read harmoniously with the *Financial Administration Act* and, in the event of conflict, the orders made under the *CHRA* have primacy over an interpretation of the *Financial Administration Act* that limits the Tribunal's remedial authority.
>
> > [I]n *Franke v. Canada (Canadian Armed Forces)*, [1998] C.H.R.D. No. 3 (Can. Human Rights Trib.) [Franke], the Respondent argued that, pursuant to section 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985 c. C-50 [CLPA] and section 111 of the *Pension Act*, R.S.C. 1985 c. P-6 [PA], the Tribunal was precluded from awarding damages for economic loss to the Complainant because she was receiving a pension from Veterans Affairs in respect of this loss. The Tribunal found that there was a conflict between those provisions and the remedies provisions of the *Act*. Relying on *Heerspink, Craton, Action Travail des Femmes, Druken* and *Uzoaba*, the Tribunal dismissed the Respondent's argument and affirmed the primacy of the *Act* noting that, as the legislature had not spoken to the contrary, the *Act* superseded the provisions of the *CLPA* and the *PA* and therefore damages for economic loss could be awarded: *Franke* at paras. 644 - 678.
> >
> > (*Andrews v. Indian and Northern Affairs Canada*, 2013 CHRT 21 at para. 87, emphasis ours).

[103] Factum of the Caring Society at para 173.

94. In respect of expending public funds, there is not discrepancy as the Caring Society suggests. For instance, this Tribunal does not have to authority to order Canada to provide gift cards to recipients and ignore the requirement to account for and itemize what the public funds were spent on. The AFN is of the view that there is no breach of the panel's orders in requiring individuals to produce such receipts. While the provision of a receipt may amount to a nuisance, it does not amount to discriminatory conduct.

vi. Complaints Mechanism/Accountability Measures

95. The AFN remains committed to reaching a final settlement agreement on the long-term reform of Jordan's Principle, further to the bifurcated approach as called for by the AFN and the Caring Society, which will include a culturally informed alternative dispute resolution mechanism. The specific requested relief has not been the subject of discussion or negotiations with the AFN and accordingly, the requested complaints mechanism/accountability measures would only serve to undermine efforts to negotiate a long-term approach in relation to disputes. As noted, a final settlement agreement would be endorsed by the First Nations Parties, who represent rights-holders, and further to the mandates of the AFN, be subject to approval by the First Nations-in-Assembly.

96. The Tribunal must be wary of endorsing a complaints approach which has not been subject to the dialogic approach or reconciliatory negotiations with the First Nations parties. The exhaustive proposal of the Caring Society and introduction of such efforts in the context of these proceedings relating to a complaints mechanism do not reflect any mandate of the First Nations-in-Assembly, who have directed the AFN to seek an agreement on long-term reform, and specifically as it relates to Jordan's Principle, develop evidence and policy based options for the long term reform of Jordan's Principle that includes mechanisms that enable and support self-determination.

e) Relief must include consideration for the nation-to-nation relationship

97. The AFN would note that the relief sought by the Caring Society within these proceedings have been presented as modifications to the Tribunal's orders, versus interim measures aimed at addressing immediate concerns relating to the existing interim approach to implementing Jordan's Principle. For the AFN, these proceedings have been advanced in

such a way that the Caring Society's preferences in relation to Back-to-Basics - as the sole party who negotiated same – would be cemented as a Tribunal order.

98. The Tribunal must be wary of any such efforts to circumvent First Nations participation in the context of ongoing negotiations relating to the long-term reform Jordan's Principle.

99. The AFN submits that such an approach is contrary to the dialogic approach, the Tribunal and the Courts' emphasis on negotiation as a reconciliatory exercise, as well as the commitments made under the AIP, to which the AFN subscribes. Critically, it also fails to duly consider First Nations inherent rights to self-determination and self-government, both internationally recognized in the *United Nations Declaration on the Rights of Indigenous Peoples*[104], as incorporated domestically by way of the *United Nations Declaration on the Rights of Indigenous Peoples Act*.[105] The Tribunal has consistently noted its respect and commitment to same. As noted by the Tribunal in 2020 CHRT 20:

> [130] The Panel already mentioned it recognizes First Nations' human rights and inherent rights to self-determination and to self-governance and the importance of upholding those rights. (see 2019 CHRT 7 at paras. 23, 89 and 91).
>
> [131] Moreover,
>
> > [d]uring the January 9, 2019 motion hearing, Panel Chair Marchildon, expressed the Panel's desire to respect Indigenous Peoples' inherent rights of self-determination and self-governance including their right to determine citizenship in crafting all its remedies to respect Indigenous Peoples' inherent rights of self-determination and of self-governance including their right to determine who their citizens are. Another important point is that the Panel not only respects that these rights are inherent to Indigenous Peoples, the Panel also finds they are also human rights of paramount importance. The Panel in its Decision and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada's programs and systems (see for example 2016 CHRT 2 at para. 402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account. In fact, in 2018 CHRT 4, the Panel crafted a creative and innovative order to ensure it provided effective immediate relief remedies to First Nations children while respecting the

[104] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15 ("*UN Declaration*").
[105] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 ("*UNDRIPA*").

> principles in the *UNDRIP*, the Nation-to Nation relationship, the Indigenous rights of self-governance and the rights of Indigenous rights holders. It requested comments from the parties and no suggestions or comments were made by the parties on those specific orders. The Panel has always stressed the need to ensure the best interests of children is respected in its remedies and the need to eliminate discrimination and prevent it from reoccurring. (see 2019 CHRT 7 at para 23, emphasis omitted).
>
> [132] Additionally, in the interim ruling, the Panel stressed "the importance of the First Nations' self-determination and citizenship issues", and added that the "interim relief order or any other orders is not intended to override or prejudice First Nations' rights" (see 2019 CHRT 7 at para. 91, emphasis omitted).

100. Such efforts also run counterintuitive to the mandate of the First Nations-in-Assembly, who have directed the AFN to seek an agreement on long-term reform, and specifically as it relates to Jordan's Principle, develop evidence and policy based options for the long term reform of Jordan's Principle that includes mechanisms that enable and support self-determination.[106]

101. Save for the limited interim relief requested below, the AFN therefore takes exception to the Caring Society's substantive requests for relief herein and reiterates that such relief is not explicitly endorsed by the First Nations Parties, nor the First Nations-in-Assembly. Should the Tribunal considered any such request for relief warranted, any related orders should be interim in nature, pending the completion of a final settlement agreement on the long-term reform of Jordan's Principle, or March 31, 2025, to incentive efforts at reaching a final settlement agreement.

f) Conclusion

102. The AFN, COO, NAN, and Canada are in active negotiations on reforms to the FNCFS Program and Jordan's Principle. Any relief granted under this motion should be interim in nature and should not place prohibitions on the suite of reforms said Parties may explore in the negotiating process.

103. In consideration the Caring Society's request for final relief within these proceedings, this Tribunal must continue to consider both its own statements with respect

[106] C. Gideon Affidavit, Exhibit "A", Resolution 40/2022 TBIR 3-4.

to negotiations promoting reconciliation, as well as it ongoing commitment to promoting the self-determination and self-government rights of First Nations. Unfortunately, the Caring Society has opted to circumvent the processes developed for the purpose of addressing the long-term reform of Jordan's Principle, including the numerous issues identified within this motion. The Caring Society has opted to circumvent such reconciliatory efforts, which to be clear were mandated by the First Nations-in-Assembly. While issues remain, the AIP continues to provide an effective interim dispute resolution process, which the AFN continues to subscribe to. Such action is unfortunately reflective of a pattern of behaviour wherein the Caring Society opts to circumvent existing processes in favours of pathways that it views as more favourable to its ends, an approach that, in the AFN's opinion, undermines efforts at achieving a negotiated settlement which advances reconciliation, is endorsed by our First Nations, and is ultimately to the benefit of our children.

104. Finally, the AFN notes that the Caring Society demanded that any discussions on reforms to Jordan's Principle be delayed until March 2025 under the *Joint Path Forward*. Otherwise, a final settlement would have likely been completed in March of 2023. It is not lost on the AFN that the problem areas currently associated with Jordan's Principle raised in this motion could have been dealt with by way of a binding agreement over a year ago.

V. ORDER REQUESTED

105. The AFN respectfully request that the Tribunal;

a. order interim relief in relation to the reimbursement of service providers and individual requestors, subject to such detail as provided in future submissions;

b. order interim relief clarifying its Orders on the determination of urgent requests; and

c. ensure that any relief ordered by the Tribunal in these proceedings be interim in nature, subject to a final settlement agreement or an expiry date of March 31, 2025.

d. that all final relief sought by the Caring Society be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: May 21, 2024

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VI. LIST OF AUTHORITES

	PRIMARY SOURCES
	Legislation
1.	*Canadian Human Rights Act*, R.S.C., 1985 c. H-6
2.	*United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14
	Jurisprudence
3.	*Attorney General of Canada v. First Nations Child and Family Caring Society et al.*, 2021 FC 969
4.	*Battlefords and District Co-operative Ltd v. Gibbs*, [1996] 3 SCR 566
5.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2016 CHRT 2
6.	*First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 10
7.	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Norther Affairs Canada),* 2016 CHRT 16
8.	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Norther Affairs Canada),* 2017 CHRT 35
9.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs),* 2017 CHRT 7
10.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2017 CHRT 14
11.	*First Nations Child & Family Caring Society et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs),* 2019 CHRT 7
12.	*First Nations Child & Family Caring Society of Canada v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2020 CHRT 20
13.	*First Nations Child & Family Caring Society of Canada v Attorney General of Canada*, 2020 CHRT 36
14.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs)*, 2022 CHRT 8
15.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2023 CHRT 44
16.	*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388
17.	*R. v. Desautel*, 2021 SCC 17
18.	*Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321
	International
19.	*United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15*