

**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

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**WRITTEN SUBMISSIONS OF THE  
CANADIAN HUMAN RIGHTS COMMISSION**

dated May 10, 2024

(re Caring Society Notice of Motion dated December 12, 2023)

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**I. Introduction**

1. The First Nations Child and Family Caring Society (“Caring Society”) has filed a motion seeking orders aimed at ensuring the effectiveness of the Tribunal’s rulings on the meaning and implementation of Jordan’s Principle.<sup>1</sup> The Attorney General of Canada (“Canada”) has filed a cross motion seeking different relief also related to

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<sup>1</sup> Notice of Motion for Relief of the Complainant First Nations Child and Family Caring Society, dated December 12, 2023.

Jordan's Principle, including variations of past rulings that would extend or eliminate existing timelines for determining requests.<sup>2</sup>

2. The Tribunal set a schedule for the exchange of written submissions.<sup>3</sup> Under that schedule, the Commission was given two deadlines: one for a response to the Caring Society's factum on its motion (May 10, 2024); and one for a response to Canada's factum on its cross motion (June 28, 2024).

3. This document sets out the Commission's position on the remedies sought in the Caring Society motion. In that regard, and as discussed further below, the Commission shares concerns expressed by the Caring Society and others regarding delays, backlogs and other operational challenges that have accompanied the massive and welcome expansion of Jordan's Principle approvals. The Commission therefore broadly supports the types of relief the Caring Society has requested, as measures that can promote effective implementation of the Tribunal's rulings and inform discussions around long-term sustainable reform that may be ongoing.

4. These submissions are based on the documentary evidence exchanged, the testimony of the witnesses who were cross-examined on their affidavits, and the Caring Society's arguments in support of its motion. The Commission looks forward to receiving the submissions still to come from the Assembly of First Nations ("AFN"), Chiefs of Ontario ("COO"), Nishnawbe Aski Nation ("NAN") and Canada. If anything about those submissions causes the Commission to rethink any of the positions expressed in this document, it will make that clear in the further submissions due June 28, 2024.

## **II. Background**

5. In a series of groundbreaking rulings, the Tribunal clarified the full scope and meaning of Jordan's Principle and gave directions on how to effectively implement it in a manner consistent with substantive equality. Among other things, the Tribunal issued a

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<sup>2</sup> Notice of Cross Motion of the Attorney General of Canada, dated March 15, 2024.

<sup>3</sup> See the letter from the Registry to the parties dated April 12, 2024, setting the schedule; and the Registry's subsequent email to the parties dated April 15, 2024, confirming the schedule.

2017 consent order establishing procedures and timelines for determining urgent and non-urgent requests.<sup>4</sup> Guided by these rulings and discussions with the Caring Society, AFN, COO and NAN, Canada has come to approve millions of services, products and supports for the benefit of First Nations children and youth. As the Tribunal has recognized, the increase in Jordan’s Principle approvals has been “...one of the many examples of real change beginning to address the systemic discrimination in this case.”<sup>5</sup> The Commission agrees with the Caring Society that these developments are a tribute to Jordan River Anderson and his family, and something to be celebrated.<sup>6</sup>

6. These developments have undoubtedly been substantial and very positive. At the same time, concerns have been expressed about associated operational challenges. For example, in 2023 the Tribunal asked the parties for updates on their discussions around long-term program reforms. In their respective reporting letters in October of 2023, the Caring Society, the AFN, COO and NAN all mentioned issues with processing times and/or other aspects of Jordan’s Principle implementation.<sup>7</sup>

7. In their October reporting letters, the AFN, COO and NAN indicated their commitment to and/or ongoing involvement in negotiations with Canada about these matters. Although the Commission has not been involved in those negotiations, it understands they were building off the Agreement-in-Principle (“AIP”) reached in December 2021, and the associated “Back to Basics” approach. For the Caring Society, issues around the implementation of Jordan’s Principle were serious enough that by December of 2023, it felt the need to step away from the AIP and file the motion currently before the Tribunal.<sup>8</sup>

8. The Caring Society and Canada placed a substantial volume of evidence before the Tribunal on the current motions, which was then supplemented by cross-

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<sup>4</sup> [\*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)\*, 2017 CHRT 35 at para 10.](#)

<sup>5</sup> [\*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)\*, 2022 CHRT 41 at para 276.](#)

<sup>6</sup> Caring Society Submissions at para 6.

<sup>7</sup> See the letters dated October 10, 2023, from the Caring Society, AFN, COO and NAN, all of which were sent to the Tribunal and other parties by email on that date.

<sup>8</sup> Caring Society Submissions at para 10.

examinations of Canada's affiants. The Commission does not discuss the evidence in detail here. The Caring Society has already provided what appears to be an extensive and fair summary of the relevant evidence in its submissions. Unless the Commission expressly says otherwise, it accepts the Caring Society's statement of the evidence, which appears to show that (among other things):

- a. rates of adherence to Tribunal-ordered timelines for determining both urgent and non-urgent requests, for individuals and for groups, are low and falling;
- b. rates of adherence to internal service standards for making payments or reimbursements in respect of approved services are low and falling;
- c. backlogs have developed including at the intake, determination, and appeal stages;
- d. requests that would genuinely qualify as urgent may be sitting unopened in intake backlogs; and
- e. while there is an internal appeal mechanism that can be triggered where a request has been rejected, Indigenous Services Canada ("ISC") does not have a formal complaints mechanism that can be used in other situations (for example, if there are concerns about processing timelines, staff conduct, or delays in paying service providers or reimbursing families who have paid out of pocket).

### **III. Content of these Submissions**

9. After a brief discussion of the Tribunal's authority to grant the remedies being sought, the Commission will proceed to state its position on the various remedies sought by the Caring Society. In doing so, it will generally address matters according to the same themes and in the same sequence the Caring Society used in its submissions. This means the Commission will deal with (i) the handling of urgent requests, (ii) timeliness of determinations and payments, and (iii) a complaints mechanism and other accountability measures, in that order.

#### **IV. Submissions**

##### **A. The Tribunal has Authority to Grant the Remedies**

10. The Tribunal has adopted a dialogic approach to remedies in this case. This means it has identified discriminatory practices but left aspects of the remedies to be discussed by the parties, while retaining jurisdiction to make further orders when needed to ensure the effective implementation of its rulings. While strongly encouraging parties to find negotiated solutions, the Tribunal has also intervened at times to provide clarification or guidance about immediate, short and mid-term relief measures, pending sustainable long-term reform.

11. The Commission sees the Caring Society's motion and Canada's cross motion as the latest examples of the dialogic approach in action. Consistent with the analysis in earlier rulings regarding that approach, it is open to the Tribunal to grant the relief the Caring Society seeks, if satisfied on the evidence that doing so is necessary to ensure Canada implements Jordan's Principle in an effective manner consistent with the Tribunal's rulings and related notions of substantive equality and the best interests of First Nations children and youth.

##### **B. Handling of Urgent Requests**

12. As mentioned above, the Tribunal issued a ruling in 2017, with the consent of all parties, that fixed timelines for determining Jordan's Principle requests. The timelines varied depending on whether cases were urgent or non-urgent, and whether they were made in respect of an individual or a group.

13. As the Caring Society describes in its submissions, examples of urgency were later agreed upon as part of the Back to Basics approach. That approach says that examples of urgency include "(i) end of life/palliative care, (ii) mention of suicide, (iii) physical safety concerns, (iv) no access to basic necessities, and (v) risk of child entering child welfare system, etc."<sup>9</sup>

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<sup>9</sup> Caring Society Submissions at para 72.

14. The Back to Basics approach says that requestors are best positioned to judge the urgency of their requests, and that focal points and call centre staff will accept their classifications and will not reassign requests to lower levels of urgency. Canada's evidence appears to be that the proportion of requests characterized as urgent has dramatically increased, making it more difficult to effectively identify and triage truly urgent cases.

15. Against this backdrop, the Caring Society has asked for a variety of orders it together describes as "Orders Addressing Urgency." The Commission has the following to say about those requested orders.

- ***"An order that Canada shall immediately include in its definition of "urgent requests" from First Nations children: (a) who 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; and (b) who are impacted by a state of emergency proclaimed by a First Nations government, a provincial/territorial government, or the federal government." (Caring Society Submissions, para 237(a))***

16. The Caring Society has explained its rationale for making these requests, pointing to incidents where requestors whose circumstances fell within these categories encountered barriers when trying to access services. The Commission agrees it would be appropriate to include these categories alongside the other examples that are to be processed in accordance with whatever timelines and procedures come to be applied to urgent cases.

- ***"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." (Caring Society Submissions, para 237(b))***

17. The Tribunal's existing rulings draw a distinction between the handling of urgent and non-urgent requests. The relief sought by both the Caring Society and Canada on the current motion and cross motion also draws that distinction. As a result, regardless of what else may come from the motion and cross motion, it will still be necessary to

distinguish in some way between urgent and non-urgent requests. The Commission therefore supports this request, as a means of helping to ensure that urgent cases can be flagged by requestors and processed accordingly.

- ***“An order that Canada ensure that the National Call Centre staff have authority to review and determine urgent requests and are available in sufficient numbers during and outside business hours” (Caring Society Submissions, para 237(c))***
- ***“An order that Canada will, within 45 days, 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” (Caring Society Submissions, para 237(d))***
- ***“Provide the National and Regional contact centres with the capacity to determine the case within the timeframe required under the Tribunal’s orders” (Notice of Motion, para 5(b))***

18. It appears to the Commission there is some degree of overlap across these three requested remedies. They all aim to promote effective implementation of the Tribunal’s rulings by requiring Canada to (i) empower staff at national and/or regional contact centres to make decisions on urgent requests (thus reducing the need for time-consuming transfers), and (ii) ensure sufficient numbers of staff are available during and outside business hours to make determinations in a manner consistent with the Tribunal’s rulings (however those rulings may stand after decisions are rendered on the motion and cross motion).

19. The Commission agrees these orders would assist with the effective implementation of the Tribunal’s rulings on Jordan’s Principle. To some extent, the requested orders about having sufficient staff in place to determine requests in accordance with the Tribunal’s ruling may be redundant – since if Tribunal-ordered timelines and procedures are to remain (in whatever form), it will already be implicit that Canada must commit enough staff and resources to enable those timelines and procedures to be met. However, the Commission sees no harm in making the obligation express, as requested here by the Caring Society.

- ***“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” (Notice of Motion, para 5(a))***

20. The Tribunal’s existing rulings require that determinations be made within particular timelines. The outcome on this motion and Canada’s cross motion may wind up varying those timelines. Regardless, the Commission anticipates that certain timelines will remain either way. Adherence to these timelines (whatever they may be) will be jeopardized if ISC offices are able to transfer requestors to other offices, without first being satisfied that someone with sufficient capacity is available to receive the requestor. The Commission therefore agrees this remedy would help to ensure the effective implementation of the Tribunal’s rulings on Jordan’s Principle.

- ***“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” (Notice of Motion, para 5(c))***

21. In its 2017 consent ruling, the Tribunal ordered that in cases where irremediable harm is reasonably foreseeable, Canada must make “all reasonable efforts to provide immediate crisis intervention supports until an extended response can be developed and implemented.”<sup>10</sup> The Caring Society’s request for immediate compassionate interventions in urgent cases is an appropriate extension of and is consistent with this previous ruling. The Commission supports this requested order.

- ***“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” (Notice of Motion, para 5(d))***

22. The Commission agrees an order requiring Canada to establish and publish this information in a reasonable time frame would help improve the effectiveness of the

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<sup>10</sup> [First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)](#), 2017 CHRT 35 at [para 10](#) (modifying para 135(2)(A)(ii) of its previous ruling).



Tribunal's orders. Making contact information and hours of operation widely known would allow requestors to more readily submit requests and supporting documents to the right places at the right times, and to ask questions and make follow-up inquiries - thus helping to ensure the efficient processing of their requests.

### **C. Timeliness of Determinations and Payments**

23. In its submissions, the Caring Society describes evidence showing that the rate of compliance with Tribunal timelines for determining urgent cases is low and has generally been declining. For example, in 2023/24 so far, the rate of compliance has been 24% for urgent individual cases, and 28% for urgent group cases – down from 53% and 31% for fiscal 2021/22.<sup>11</sup> The Caring Society also describes evidence showing the rate of compliance with ISC's internal 15-business day standard for making payments or issuing reimbursements is also low. For example, in December of 2023, only 43% of payments were issued within the standard.<sup>12</sup>

24. The Caring Society has also pointed to evidence that backlogs have developed, spread across all stages of the process, from intake, to determinations, to redeterminations, to appeals.<sup>13</sup> Of primary concern is the backlog at intake, as there are requests that sit unopened, without having been screened for potential urgency.

25. Based on these and other considerations, the Caring Society has asked for a variety of orders it has grouped under the headings of "Orders addressing Timeliness and Backlogs" and "Orders addressing Reimbursement and Payment Delays". The Commission's position on those requests is as follows.

- ***“An order clarifying that, consistent with 2017 CHRT 14 and 2017 CHRT 35, Canada shall immediately: (a) “begin the determination clock” when a request on behalf of a First Nations child or youth is received; and (b) stop the clock when the requestor is advised of the determination of the case” (Caring Society Submissions at para 237(f))***

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<sup>11</sup> Caring Society Submissions at para 18.

<sup>12</sup> Caring Society Submissions at para 131.

<sup>13</sup> Caring Society Submissions at paras 129-131, 137-138 and 143-144.

- ***“In the alternative to (f), an order that the determination clock shall start to run when ISC has received a recommendation/authorization from a professional or a letter of support from a community-authorized Elder/knowledge holder” (Caring Society Submissions at para 237(g))***

26. The Commission agrees it would be helpful for the Tribunal to clarify the directions in its prior ruling regarding the starting and stopping of the determination clock. For example, the Tribunal’s consent order on Jordan’s Principle implementation says urgent individual requests shall be determined “within 12 hours of the initial contact for a service request,” but also acknowledges that clinical case conferencing may take place where more information is reasonably necessary to the determination of a request.<sup>14</sup> It is not entirely clear how the timeline would apply in such situations. Similarly, the ruling says non-urgent individual cases shall be determined “without 48 hours of the initial contact for a service request,” but adds that where reasonably necessary information cannot be obtained within that time frame, Canada will work with the requestor to enable the determination to be made as close to the 48-hour time frame as possible.<sup>15</sup> Again, the precise operation of the timeline is not entirely clear.

27. In the Commission’s view, it would be reasonable to start the determination clock once Canada receives a request supported by a professional or community-authorized Elder or knowledge holder. If the Tribunal adopts that approach, it should also clarify that if a requestor submits a request that is missing the required proof of support, Canada will promptly work with the requestor to make clear what additional documentation would be required to allow the determination clock to start and the request to be determined.

- ***“An order that Canada shall within seven days of the Tribunal’s order (i) Report back to the Tribunal and the parties to identify the total number of currently backlogged cases both nationally and in each region, including the intake backlog, the in-progress backlog, and the reimbursement backlog, including with information regarding the cumulative number of***

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<sup>14</sup> [\*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)\*, 2017 CHRT 35 at para 10](#) (modifying para 135(2)(B)(ii) of its previous ruling).

<sup>15</sup> [\*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)\*, 2017 CHRT 35 at para 10](#) (modifying para 135(2)(B)(ii) of its previous ruling).

***backlogged cases at month's end, dating back 12 months" (Caring Society Submissions at para 237(h)(i))***

28. The Commission agrees that requiring Canada to take this step on a reasonable time frame would help to ensure the effective implementation of the Tribunal's rulings. Requiring this data be compiled and shared would help Canada and the parties identify trends and necessary next steps and contribute to the ongoing dialogic process.

- ***"An order that Canada shall within seven days of the Tribunal's order ... (ii) Contact all requestors in the backlog, including those in the in-take backlog, the in-progress and the reimbursement backlog by email or phone setting out the Tribunal's timeline orders, noting ISC's non-compliant backlogs and urging requestors with urgent or time sensitive requests, including non-urgent requests that have become urgent, to contact specific personnel who will 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" (Caring Society Submissions at para 237(h)(ii))***

29. The Commission takes no position on this request, other than to express some concern that making individual contact with all those having backlogged requests could consume substantial time and resources better spent elsewhere. If the Tribunal feels that dissemination of this information is needed to ensure effective implementation of its rulings, another possibility might be to order Canada to post the information on its website and/or social media accounts, and have staff make individual contact only with those who are found through the triage process described below to have undetermined urgent cases.

- ***"An order that Canada shall within seven days of the Tribunal's order ... (iii) Triage all backlogged requests for urgency and communicate with all requestors with undetermined urgent cases to take interim measures to address any reasonably foreseeable irreparable harms" (Caring Society Submissions at para 237(h)(iii))***
- ***"An order that Canada shall within seven days of the Tribunal's order ... (iv) Report back to this Tribunal and the parties regarding the number of urgent cases identified in the backlog, including the intake backlog, the in-progress backlog, and the reimbursement backlog, and the timeframe by***

***which all urgent and non-urgent backlogged requests will be determined”  
(Caring Society Submissions at para 237(h)(iv))***

30. Based on the evidence filed with the Tribunal, there is a legitimate concern that genuinely urgent cases may be languishing or even sitting unopened in intake backlogs. The Commission agrees that ordering Canada to take the required triage steps with respect to backlogged urgent cases is appropriate to ensure the effective implementation of the Tribunal’s rulings regarding Jordan’s Principle. Depending on the volume of backlogged cases at the time the Tribunal’s order is made, it may or may not be possible for Canada to complete these tasks within just seven days. However, if the Tribunal is inclined to make the requested orders, it would be appropriate to direct best efforts to accomplish the tasks as quickly as possible.

- ***“An order clarifying that Canada, consistent with 2017 CHRT 14 and 2017 CHRT 35, cannot delay paying for approved services in a manner that creates hardship by imposing a burden on families that risks a disruption, delay or inability to meet the child’s needs” (Caring Society Submissions at para 237(i))***

31. The Commission understands the Caring Society to seek an order clarifying that where Canada has approved a request, it cannot then delay making payments in a way that would risk a disruption, delay, or inability to meet the needs the approved service was intended to address. If that understanding is correct, the Commission agrees the requested clarification would be consistent with the underlying purposes of Jordan’s Principle. Once a request is approved, payment should be made in a timely way unless doing so would somehow cause undue hardship to Canada within the meaning of ss. 15(1)(g) and 15(2) of the CHRA.

- ***“An order clarifying that, consistent with the reasoning in 2021 CHRT 41, the 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 hinder implementation of the Tribunal’s orders, and that Canada shall not rely on the Financial Administration Act to justify departures from this Tribunal’s orders” (Caring Society Submissions at para 237(j))***

32. The Commission agrees that in the absence of express statutory language to the contrary, the CHRA has primacy over the *Financial Administration Act* and government

policies or agreements. As a result, these instruments are to be read harmoniously with remedial orders made under the *CHRA*, and in the event of a conflict, the remedial orders will render conflicting provisions inoperable. While the Tribunal has already said as much in previous rulings<sup>16</sup>, the Commission has no objection to the Caring Society's request for further clarification.

- ***“An order that Canada report to the Tribunal within 7 days of this Tribunal’s order regarding whether it will adopt and adhere to a 15-calendar day payment standard for service providers and a 5-calendar day payment standard for reimbursements directly to children and families, as set out in section 4.1 of the Schedule A Jordan’s Principle Workplan” (Caring Society Submissions at para 237(k))***
- ***“An order that Canada report to the Tribunal within 7 days of the Tribunal’s order regarding practical and operational solutions to redress the hardship imposed by reimbursement and payment delays, including with respect to the following options: (i) mechanisms to issue emergency payments for urgent cases, including electronic funds transfers and more effective use of gift cards; (ii) an automated process that presumptively approves all Jordan’s Principle requests under a \$500 threshold accompanied by a recommendation from a professional or letter of support from a community-authorized Elder/Knowledge Keeper; (iii) expanding the use of acquisition cards, including the types of expenditures allowable and spending limits, and ensure that the number of ISC employees authorized to use acquisition cards meets the demands in the community and is well-publicized; and (iv) within 60 days, paying in full any interest charges or bank fees for service providers, individuals, and families who took on additional financing due to payment delays beyond Canada’s 15-business day standard” (Caring Society Submissions at para 237(l))***

33. On their face, these two requested orders would require that Canada report to the Tribunal and parties on its willingness to adopt measures suggested by the Caring Society and/or its proposed solutions for certain matters. In principle, ordering Canada to provide such information can be consistent with the dialogic approach to remedies that has been employed throughout this case. If needed to resolve an impasse or advance discussions in a timely way, these types of orders can assist with the effective implementation of the Tribunal’s rulings. On this understanding, the Commission has

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<sup>16</sup> See for example [First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada \(representing the Minister of Indigenous and Northern Affairs Canada\)](#), 2021 CHRT 41 at [para 377](#).

no objection to an order requiring Canada to provide the requested reports within a reasonable time.

#### **D. Complaints Mechanism and Accountability Measures**

34. Tribunal rulings in 2017 required Canada to establish an independent appeals mechanism for Jordan's Principle determinations. There is currently a committee of independent professionals who can decide appeals of ISC decisions denying requests. However, ISC has no formal national complaints mechanism for dealing with other types of concerns that might be raised, for example with respect to the conduct of staff in processing requests, or delays in making determinations or payments. The record shows the Caring Society and others have stepped in by (i) receiving complaints and inquiries from families, service providers and communities, (ii) tracking and reporting on trends, and (iii) raising concerns with Canada in efforts to find solutions. However, the Caring Society has also said it was never intended to fill this role on a long-term basis and does not have capacity to keep up with demand.<sup>17</sup>

35. In 2020, the Caring Society and ISC jointly commissioned a report from three experts that recommended the creation of independent accountability mechanisms. However, it does not appear any of the resulting recommendations have been implemented to date.<sup>18</sup>

36. Against this backdrop, the Caring Society has asked for several orders it groups together under the theme of "Orders Addressing a Complaint Mechanism and Accountability Measures." The Commission has the following to say about those requests.

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<sup>17</sup> See for example Caring Society Submissions at para 235.

<sup>18</sup> Caring Society Submissions at para 182 (referring to Naomi Metallic, Hadley Friedland and Shelby Thomas, *Doing Better for Indigenous Children and Families: Jordan's Principle Accountability Mechanisms Report*, published in 2022).

- ***“An order that within 45 days, ISC shall 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 resources, including funding, to do so and sustainable resources, including funding, to do so” (Caring Society Submissions at para 237(n))***

37. The Tribunal has repeatedly emphasized the goal of reconciliation, the need to recognize and support First Nations’ rights of self-governance, and the importance of ensuring that First Nations have the resources required to meaningfully exercise those rights. The relief sought by the Caring Society appears to be consistent with those principles. Subject to a consideration of comments to come from the AFN, COO and NAN, the Commission agrees the production of such a report within a reasonable time would help ensure effective implementation of the Tribunal’s rulings on Jordan’s Principle.

- ***“An order that Canada shall, within 90 days of the order, and with the advice of the expert on service request contact centres serving children and youth, including those in urgent situations, establish a credible and independent national and effective Jordan’s Principle complaints mechanism with authority to approve urgent cases and publicly report on ISC’s compliance” (Caring Society Submissions at para 237(m))***

38. The Commission agrees that establishing a credible, transparent and effective Jordan’s Principle complaints mechanism within a reasonable time period would assist the effective implementation of the Tribunal’s rulings.

39. The Tribunal has repeatedly held that Jordan’s Principle is a necessary component of achieving substantive equality in the delivery of critical services to First Nations children and youth. If Jordan’s Principle is not implemented properly in a given case, the potential result is a denial of substantive equality. In such circumstances, it is a best practice to have a responsive complaints mechanism in place that would allow potential issues to be raised and addressed quickly and efficiently. The Commission agrees with the Caring Society that analogies can appropriately be drawn to the

workplace context, where it is common for the Tribunal to order the creation of policies that include formal procedures for receiving, investigating, and resolving complaints.<sup>19</sup>

40. The Caring Society has asked that the complaints mechanism be independent. Human rights decision makers have made such orders on occasion. For example, the Human Rights Tribunal of Ontario has ordered the appointment of third-party monitors and/or use of external investigators where compelling evidence showed a respondent was unwilling or unable to respond appropriately to internal complaints over time.<sup>20</sup> If the Tribunal is satisfied such circumstances exist in this case, it could consider making a comparable order.

- ***“An order that Canada report to the Tribunal, within 7 days of the Tribunal’s order, regarding which of the proposed solutions set out in the Schedule A Jordan’s Principle Workplan (not otherwise covered in paragraphs 237(k) and (l) herein) it is prepared to adopt (including timeframes for implementation) and, in the case of any proposed solution ISC is not prepared to adopt, the reason why not and what effective alternative measure ISC proposes to take (and the timeline on which such effective alternative measure will be implemented)” (Caring Society Submissions at para 237(o))***
- ***“An order, as set out in paragraph 10 of the Notice of Motion, convening a case conference within 7 days of Canada’s having submitted its response to the Schedule A Jordan’s Principle Workplan” (Caring Society Submissions at para 237(p))***

41. On their face, these requested orders require that (i) Canada report on its willingness to adopt additional measures that have been proposed by the Caring Society, and (ii) the Tribunal convene a case management call, presumably to discuss potential next steps based on the content of Canada’s report. In principle, such orders

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<sup>19</sup> Caring Society Submissions at paras 223-228.

<sup>20</sup> See for example: [Ontario Human Rights Commission v. Ontario \(Correctional Services\)](#), 2002 CanLII 46519 at “Orders – B.8” (directing external investigation of workplace complaints); [McKinnon v. Ontario \(Correctional Services\)](#), 2005 HRTO 23 (generally clarifying the order for external investigation); and [McKinnon v. Ontario \(Correctional Services\)](#), 2007 HRTO 4 at paras 7(B)(8) and 207-208 (describing non-compliance issues with respect to the external investigation orders, and stating the orders were based on “...the well-founded mistrust in both the ability and the integrity of managers regarding WDHP matters”). See also [Lepofsky v. Toronto Transit Commission](#), 2005 HRTO 21 at paras 1-2, and [Lepofsky v. TTC](#), 2007 HRTO 23 (appointing a third-party monitor based on evidence “...the TTC has failed to provide a reliable accommodation for in excess of 10 years, notwithstanding numerous complaints and internal documents showing that the accommodation was not being properly provided”).



are consistent with the dialogic approach to remedies that has been employed throughout this case. If needed to resolve an impasse or advance discussions in a timely way, such orders can assist with the effective implementation of the Tribunal's rulings. On this understanding, the Commission has no objection to orders requiring that Canada deliver the requested report within a reasonable time, and that a CMCC be scheduled shortly thereafter.

#### **E. The Motion and Cross Motion and Ongoing Negotiations**

42. The record before the Tribunal shows the Caring Society, AFN, COO, NAN and Canada had been working together to negotiate long-term solutions regarding the implementation of Jordan's Principle. These discussions led for example to the AIP and the Back to Basics approach described in the record before the Tribunal.

43. The Commission was not involved in the negotiations that led to the AIP and the Back to Basics approach, or in subsequent negotiations that may have taken place up to the time of the Caring Society's decision to bring its motion. The Commission also does not know whether the AFN, COO, NAN and/or Canada have continued since that time to discuss potential immediate or long-term resolutions of the matters now at issue.

44. If any negotiations are ongoing, the Commission acknowledges the relief sought in the motion and cross motion may have practical implications for those discussions. However, because the Commission has not been and is not currently involved in any such discussions, it is difficult to say more about such matters at this time. If any of the submissions still to come from the other parties raise issues or concerns about the relationship between this process and ongoing negotiations, the Commission will consider and respond to those issues in its next round of written submissions due June 28, 2024.

#### **V. Conclusion**

45. The Commission hopes these submissions will be helpful to the Tribunal. As mentioned earlier, the positions set out in this document are based on an assessment of the evidence filed and the Caring Society's Factum. The Commission looks forward to

receiving the submissions of the AFN, COO, NAN and Canada, and will be sure to advise the Tribunal and parties in due course if any of its views have changed upon reviewing those materials.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 10, 2024



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