

**CANADIAN HUMAN RIGHTS TRIBUNAL**

BETWEEN:

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, NISHNAWBE ASKI NATION and the FIRST  
NATIONS LEADERSHIP COUNCIL

Interested Parties

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**WRITTEN SUBMISSION OF THE INTERESTED PARTY,  
THE FIRST NATIONS LEADERSHIP COUNCIL**

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## **PART I - OVERVIEW AND STATEMENT OF FACTS**

1. The First Nations Child and Family Caring Society (the “**Caring Society**”) filed a motion on December 12, 2023, seeking orders to address delays and non-response to urgent requests under Jordan’s Principle, orders to address the issue of backlog in the determination of Jordan’s Principle requests, as well as orders requiring the establishment of a complaints mechanism for addressing failures to adequately determine requests. The Caring Society is seeking a further order confirming that First Nations and First Nations organizations that are administering Jordan’s Principle have sufficient and sustainable resources to meet the needs of First Nations children and families, amongst other relief (the “**Caring Society Motion**”).

2. On March 15, 2024, the Attorney General of Canada (“**Canada**”) filed a cross motion seeking orders that the parties co-develop objective criteria to identify “urgent requests”, requesting an extension of timelines previously set by the Tribunal to respond to Jordan’s Principle requests, and an order allowing Canada to refer Jordan’s Principle requestors to First Nations or First Nations organizations who are administering Jordan’s Principle pursuant to a contribution agreement with Canada, amongst other relief (“**Canada’s Motion**”) (collectively, the “**Motions**”).

3. The First Nations Leadership Council (“**FNLC**”) is a political coalition formed in 2005 by a historic Leadership Accord in which its three member organizations signed a political commitment to work together on issues of common concern to represent and advance the interests of First Nations in BC. The FNLC is comprised of the executive members of the Union of BC Indian Chiefs (“**UBCIC**”), the First Nations Summit (“**FNS**”), and the BC Assembly of First Nations (“**BCAFN**”). Collectively, the member organizations of the FNLC represent the elected Chiefs of the 204 First Nations in BC.

4. On July 2, 2024, the Tribunal granted the FNLC interested party status in the Motions, and FNLC makes these submissions within the parameters of that order.

5. The FNLC’s written submissions set out the FNLC’s perspective and position in response to the arguments advanced and remedies sought by the Caring Society and

Canada, as well as the arguments advanced by the Assembly of First Nations (“**AFN**”) (collectively, the “**Parties**”), in their response to the Caring Society. The FNLC’s argument in this proceeding is grounded in certain fundamental principles. In particular, the implementation of Jordan’s Principle must uphold and give effect to both the inherent rights of First Nations children, including their right to have the highest attainable standard of physical and mental health, the right to physical and mental integrity and to security of their person amongst other rights. This must occur while also upholding and giving effect to First Nations’ inherent right to self government, which includes jurisdiction over child and family services, and which includes the right of First Nations to provide their free, prior and informed consent with respect to administrative and legal decisions that will affect their rights.

6. The FNLC will address specific issues which are of particular concern to the FNLC that are raised in the parties’ arguments as follows: a) administration of requests, including timeliness, urgency and backlogs; b) payments; c) complaints mechanism and accountability; d) administration of Jordan’s Principle by First Nations and First Nations organizations in British Columbia; and e) the preferred pathway for addressing the implementation and reform of Jordan’s Principle.

## **PART II - SUBMISSIONS Guiding Principles for Implementation: Upholding and Advancing First Nations’ Rights**

7. There are two intertwined realities that ground the FNLC’s work, and which inform the FNLC’s perspective in this proceeding. The first is that it is First Nations who hold and exercise rights and jurisdiction,<sup>1</sup> including with respect to the care and well-being of First Nations children and families.<sup>2</sup> As such, First Nations must be consulted,

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<sup>1</sup> The Supreme Court of Canada has recognized that First Nations rights and title derive from the pre-existence of First Nations, who were organized societies and occupied their territorial lands: *R. v. Sparrow*, [1990] 1 SCR 1075 at p. 1094, *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at p 379-382, and title arises from possession of their lands and territories before the assertion of British Sovereignty: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

<sup>2</sup> First Nations’ right to self governance, including jurisdiction in relation to child and family services, is affirmed in *An Act Respecting First Nations, Inuit and Métis children, Youth and Families*, S.C. 2019, c. 24 (“**Federal Act**”).

and be given the opportunity to provide their free, prior and informed consent with respect to decisions, including legislative and administrative measures, including those that impact the care and well-being of First Nations' children and families.<sup>3</sup>

8. The FNLC or the Parties, being political and advocacy bodies, cannot provide free, prior and informed consent with respect to decisions that impact First Nations' rights. The Tribunal has referred to this reality in several previous decisions in this matter, and in particular has noted that interim relief orders or any other orders are not intended to override or prejudice First Nations' rights, including the right to self-determination.<sup>4</sup>

9. The second reality that guides the FNLC's work, and their position with respect to the issues raised in the Motions and on the remedies sought, is that First Nations have inherent rights, which are grounded in their laws, customs, traditions, protocols, and the use and occupation of their lands and waters. The inherent rights of First Nations are held by First Nations children due to the very fact that they are citizens and members of their Nations.

10. The content of First Nations' inherent rights, including First Nations children's rights, are set out, in part, within UNDRIP. These rights include but are not limited to:

- (a) the right to self determination in order to pursue economic, social and cultural development;
- (b) the right to life, physical and mental integrity, liberty and security of person;

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<sup>3</sup> The United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (“**Declaration**” or “**UNDRIP**”) at Article 19.

<sup>4</sup> See: *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 7 at para. 91 (“**2019 CHRT 7**”); *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. 241 (“**2021 CHRT 41**”).

- (c) the right, without discrimination, to the improvement of economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation;
- (d) the right to practise and revitalize cultural traditions and customs; and,
- (e) the right to access, without any discrimination, to all social and health services, and to the enjoyment of the highest attainable standard of physical and mental health.<sup>5</sup>

11. UNDRIP also requires that particular attention be paid to the rights and special needs of Indigenous youth, children and persons with disabilities in the implementation of the Declaration.<sup>6</sup>

12. The inherent rights of First Nations have been affirmed internationally through UNDRIP. The government of Canada has “supported the Declaration and committed to adopt and implement it in accordance with the Canadian Constitution.”<sup>7</sup> *The United Nations Declaration on the Rights of Indigenous Peoples Act*<sup>8</sup> (“**UNDA**”) has incorporated the Declaration into Canada’s positive law, and has “affirmed the Declaration as a universal international human rights instrument with application in Canadian law and provides a framework for the Government of Canada’s implementation of the Declaration.”<sup>9</sup> The preamble of UNDA includes that the implementation of UNDRIP must include concrete measures to address injustices facing Indigenous children and youth.<sup>10</sup> UNDRIP has also been implemented specifically in respect of the provision of Indigenous child and family services in the Federal Act.<sup>11</sup>

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<sup>5</sup> UNDRIP, Articles 3, 7, 11, 24 and 20.

<sup>6</sup> UNDRIP, Article 21.

<sup>7</sup> *Dickson v. Vuntut Gwitchin First Nation*, 2024 SCC 10 (“**Vuntut Gwitchin**”), para 47.

<sup>8</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (“**UNDA**”).

<sup>9</sup> *Vuntut Gwitchin*, para 47.

<sup>10</sup> See: UNDRIP preamble.

<sup>11</sup> *Vuntut Gwitchin*, para 47.

13. There are substantive legal and practical effects arising from Canada's legislative affirmation of the inherent rights of First Nations and the implementation of UNDRIP, both in UNDA and the Federal Act.<sup>12</sup> First, legislative affirmations are very meaningful on the ground, where issues relating to the well-being of children are decided.<sup>13</sup> This point is of particular importance in relation to the implementation of Jordan's Principle where the rights of First Nations children are directly impacted by decisions that are made, or not made, by the Crown.

14. Secondly, legislative affirmations regarding inherent rights of First Nations, both in UNDA and the Federal Act, bind government actors and shape how public powers are exercised.<sup>14</sup> These legislative affirmations engage the honour of the Crown, requiring Canada to take a broad approach to the interpretation of these rights and to act diligently to implement them.<sup>15</sup> This Tribunal has acknowledged that in Canada's dealings with Indigenous peoples, the honour of the Crown is always at stake<sup>16</sup> and that Canada is in a unique fiduciary relationship with First Nations, including First Nations children.<sup>17</sup>

15. In the Merit Decision, the Tribunal noted that while Jordan's Principle is relevant and often intertwined with the provision of child and family services,<sup>18</sup> "it is meant to address all inequalities and gaps in the federal programs destined to First Nations

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<sup>12</sup> *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (CanLII), ("**Reference**") at paras. 56, 89 and 91.

<sup>13</sup> *Reference* at para 60.

<sup>14</sup> *Reference* at para 60.

<sup>15</sup> *Reference* at paras 65-66.

<sup>16</sup> *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 ("**Merit Decision**") at para. 95, citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 17; *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2017 CHRT 14 at para. 116 ("**2017 CHRT 14**").

<sup>17</sup> Merit Decision at paras. 91-95; 2017 CHRT 14 at para. 116.

<sup>18</sup> Merit Decision at para. 362.

children and families.”<sup>19</sup> Jordan’s Principle is grounded in the principle of substantive equality, which is both a right and a remedy in this case.<sup>20</sup> It is intended to provide redress and solutions to Canada’s systemic discrimination against First Nations children and families.

16. The FNLC submits that the remedies being sought by the Caring Society and Canada in the Motions must uphold and give effect to the inherent rights of First Nations children *and* uphold and give effect to First Nations’ inherent right to self government, including jurisdiction over child and family services. That inherent right includes the right of First Nations to provide their free, prior and informed consent with respect to administrative and legal decisions that will affect their rights. Doing so would be consistent with the Tribunal’s previous findings and orders upholding the fundamental human rights of First Nations children in the provision of services, and with Canada’s legislative affirmations and the legal and practical effects related to those affirmations.

17. The FNLC’s position argued below is grounded in the above perspective and core principles.

## **B. Administration of Jordan’s Principle Requests**

### **(1) The BC Context**

18. The orders sought in the Motions have significant short and long-term implications for First Nations, First Nations organizations, and most importantly, First Nations children, in BC. The FNLC submits that First Nations children in BC have not benefited equally from changes to Jordan’s Principle when compared to their peers in other jurisdictions. As noted by the Parties, since 2017 Canada has approved the

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<sup>19</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)*, 2020 CHRT 20 at para. 92 (“**2020 CHRT 20**”).

<sup>20</sup> 2020 CHRT 20 at para. 89.



funding of millions of products, services, and supports through Jordan's Principle.<sup>21</sup> While this should be celebrated and is a fitting tribute to the legacy of Jordan River Anderson,<sup>22</sup> this positive change is not being administered equitably for First Nations children in BC.

19. From 2018 through 2022, BC accounted for only 8.81% of all approved individual requests, and 1.97% of all approved group requests.<sup>23</sup> In fiscal year 2022-23 and the first quarter of 2023-24, the BC-Region had the second lowest number of approved products and services for individual and group requests out of any other region in Canada, representing only 8.12% of the total approved products and services.<sup>24</sup> If calculated on "Total Reach" of approved products and services, in the fiscal year 2022-23 and from April 1 – August 31, 2023, the BC-Region had the lowest numbers out of any other region in Canada, representing only 1.16% of the Total Reach (Approved Products and Services) of Individual and Group requests<sup>25</sup>. The BC-Region has consistently represented some of the lowest approval rates for products and services under Jordan's Principle, despite having the second highest population of registered First Nations when compared to other provinces<sup>26</sup> and representing 1/3 of all First Nations communities in Canada.

20. There is an inconsistent approach to determining eligible Jordan's Principle requests in the BC-Region, leading to higher rates of denials for First Nations children in

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<sup>21</sup> Canada's Written Submissions ("**Canada's Submissions**") at para. 23; Written Submission of the Assembly of First Nations ("**AFN Submissions**") at para. 28; *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 ("**2022 CHRT 41**")

<sup>22</sup> Caring Society Written Submissions at para. 6.

<sup>23</sup> Affidavit of Cindy Blackstock (aff'd January 12, 2024) ("**C. Blackstock Affidavit**") at Exhibit 3 (Jordan's Principle Deep Dive National Package Tables) at p. 87 of pdf.

<sup>24</sup> C. Blackstock Affidavit at Exhibit 4 (ISC Jordan's Principle Report) at p. 176 of pdf.

<sup>25</sup> C. Blackstock Affidavit at Exhibit 4 at p. 175 of pdf.

<sup>26</sup> C. Blackstock Affidavit at Exhibit 46 (Statistics Canada First Nations population by provinces and territories, Canada, 2016) at p. 709-710 of pdf.

BC.<sup>27</sup> In the Merit Decision this Tribunal reviewed the adverse impacts of Canada's discriminatory funding and policy regimes on First Nations children and families in BC in depth, which are exacerbated for those living in rural and remote communities.<sup>28</sup> The inequitable access to family preservation, support services, health care, and access to mental health and education supports has created lingering effects for First Nations children and their families in BC.

21. The evidence before the Tribunal on these Motions demonstrates that First Nations children in BC continue to experience high rates of disparity in the application of Jordan's Principle, including through service gaps, delays, and denials, despite the numerous clarifying orders made by this Tribunal. Contrary to Canada's submissions, the Panel's goals with respect to Jordan's Principle have not been accomplished for First Nations children in BC, resulting in a continuation of the discriminatory practices identified by this Tribunal.<sup>29</sup>

22. In making any orders sought in the Motions, the FNLC urges the Tribunal to consider the real impacts for First Nations children in BC given Canada's inconsistent implementation of Jordan's Principle in BC. The FNLC submits that Canada has not sufficiently responded to the systemic discrimination that has been identified.<sup>30</sup> The inherent, Aboriginal, and human rights of First Nations children should not be delayed or denied while Canada is afforded latitude.

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<sup>27</sup> Affidavit of Brittany Matthews (aff'd January 12, 2024) ("**B. Matthews Affidavit**") at Exhibit 5 (April 2021 Jordan's Principle Concerns Document) at pp. 81, 99, 101, 107-08 of PDF, and at Exhibit 18 (June 2020 Jordan's Principle Concerns Document) at pp. 320, 323, 327 of pdf; C. Blackstock Affidavit at Exhibit 42 (Letter from Jordan's Principle Enhanced Service Coordination Hub on January 2, 2024) at p. 687 of pdf ("**BC Hub Letter**") and at Exhibit 56 (Letter from Taku River Tlingit First Nation) at 767 of pdf.

<sup>28</sup> Merit Decision at paras. 247-53, 307, and 333-34.

<sup>29</sup> Merit Decision at paras. 458, 481.

<sup>30</sup> 2021 CHRT 41 at para. 22.

## (2) Characterization of Urgent Requests

23. The evidence of Canada and the AFN is that the implementation of the Back-to-Basics approach in early 2022<sup>31</sup> (“**Back-to-Basics**”) resulted in a rapid increase in the number of Jordan’s Principle requests marked as urgent. They suggest this is the primary reason for Canada’s low rates of adherence to the Tribunal ordered timelines for determining urgent requests.<sup>32</sup> Canada and the AFN also say that the self-identification process in Back-to-Basics has led to the misclassification of urgent requests,<sup>33</sup> “undermining ISC’s ability to effectively address matters of a truly urgent nature.”<sup>34</sup> To address this issue, Canada seeks an order requiring the parties to co-develop objective criteria for what is designated urgent under Jordan’s Principle.<sup>35</sup>

24. Examples of urgent requests under Back-to-Basics include palliative care, risk of child entering the child welfare system, physical safety concerns, no access to necessities, and mention of suicide. The age and vulnerability of the child are also to be taken into consideration.<sup>36</sup> As noted previously by this Tribunal, the time-sensitive nature of a request may also make it urgent.<sup>37</sup>

25. Canada suggests that since the implementation of Back-to-Basics, approximately 5,800 (18.5%) Jordan’s Principle requests have likely been misclassified as urgent.<sup>38</sup> The FNLC notes that most products and services on the list of likely misclassified requests provided by Canada directly correlate with the Tribunal-ordered definition of Jordan’s Principle,<sup>39</sup> and to specific gaps found to exist for First Nations children in BC,

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<sup>31</sup> Affidavit of Dr. Valerie Gideon (aff’d March 14, 2024) at para. 18 (“**Dr. Gideon Affidavit**”).

<sup>32</sup> AFN Submissions at paras. 65-66; Canada’s Submissions at para. 35.

<sup>33</sup> Canada’s Submissions at para. 34; Affidavit of Dr. Gideon at para. 24 and Exhibit C (Misclassified Urgent Items).

<sup>34</sup> AFN Submissions at para. 65.

<sup>35</sup> Canada’s Submissions at para. 82(a).

<sup>36</sup> Affidavit of Dr. Gideon at Exhibit B.

<sup>37</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 7 at para. 58 [2017 CHRT 7].

<sup>38</sup> Affidavit of Dr. Gideon at para. 24 and Exhibit C.

<sup>39</sup> 2017 CHRT 14 at para. 35.

such as mental health and education supports and support for basic needs. The FNLC adopts the position of the Caring Society regarding the importance of social prescribing as a prevention tool to address gaps in accessing mental health services,<sup>40</sup> and urges the Tribunal to consider the role and importance of social prescription in addressing the health inequities of First Nations children, particularly in rural and remote areas of BC.

26. The FNLC agrees there are likely some requests currently misclassified as urgent, and others that could be classified at a different level of urgency. The FNLC disagrees with the inference that Canada should be permitted to unilaterally reclassify urgent requests as non-urgent. Canada's history of non-compliance, grounded in a restrictive approach to Jordan's Principle, does not support this approach as being in the best interest of First Nations children.

27. The criteria in Back-to-Basics to determine urgency incorporates the Tribunal's direction on urgency, including the principles of substantive equality, while also providing a proactive response to prevent First Nations children from coming into the care of the child welfare system. The examples outlined in Back-to-Basics, which was co-developed by the Parties,<sup>41</sup> already provide objective criteria for the determination of urgent requests while also being responsive to the systemic discrimination found by the Tribunal.<sup>42</sup>

28. The FNLC submits that the order sought by Canada is more properly addressed by jointly developing a process to triage urgent requests based upon an immediate risk to the life, liberty or security of a child.

### **(3) Expanded Definition of Urgent Requests**

29. In emergency circumstances, there must be a means for First Nations to access urgent products, supports, and services. This is a stark reality for BC First Nations who

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<sup>40</sup> Affidavit of Dr. Ryan Giroux (aff'd March 14, 2024) at para. 13 and at Exhibit 1 (2024 Commentary by Caitlin Muhl, Susan Bennett, Stephanie Fragman and Nicole Racine).

<sup>41</sup> Canada's submissions at para. 28; Reply Submissions of the Caring Society ("**Caring Society Reply**") at Annex A; C. Gideon Affidavit at para. 18.

<sup>42</sup> 2022 CHRT 41 at para. 22.

have been navigating the twin traumas of an opioid and poisoned drug supply crisis and states of emergencies from wildfires and flooding. While the AFN and Canada suggest the order sought by the Caring Society would create further backlogs and delays in the processing and determination of Jordan's Principle requests<sup>43</sup>, the FNLC urges the Tribunal to consider this from the lens of First Nations children and families who face sudden and increased gaps in services during emergencies, or upon the death of a close family member or caregiver.

30. The orders sought by the Caring Society expanding the definition of urgent requests, which the FNLC endorses, must also be considered against the backdrop of Canada's previous attempts to narrowly define and apply Jordan's Principle, particularly in the BC-Region. The FNLC submits that the orders sought by the Caring Society do not expand the definition of urgent requests, but instead provide important clarification on the current understanding of urgency that will help ensure First Nations children are able to access Jordan's Principle during these times of crisis without delay.

31. The FNLC adopts the submissions of the Caring Society that First Nations bereavement is a sacred time that requires supports, ceremony, and compassion.<sup>44</sup> There are many factors which may create a need for urgent support for a bereaved First Nations child, including transforming an otherwise non-urgent request into an urgent one. Creating administrative hurdles to accessing support in these circumstances is offensive to basic human dignity.<sup>45</sup>

32. Contrary to the position taken by the AFN, and in addition to the submissions of the Caring Society, times of death may also include important cultural responsibilities in accordance with Indigenous laws. The ability to participate in these processes is both an inherent right and a protective factor against disconnection and mental health crises

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<sup>43</sup> Canada's Submissions at para. 72; AFN Submissions at para. 79.

<sup>44</sup> Caring Society Reply at para. 85.

<sup>45</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para. 53.

by providing familial and social support.<sup>46</sup> The comments made by the AFN in its submissions regarding the Potlatch ceremony are insensitive and dismissive of First Nations in BC who have experienced significant socio-cultural losses through the interruption of the Potlatch system.

33. The Potlatch is the principal social, cultural, economic and regulatory institution of many First Nations in BC.<sup>47</sup> In times of death, the Potlatch is where urgent and important work takes place, including the passage of names, wealth, and cultural belongings and responsibilities.<sup>48</sup> The FNLC adopts the submissions of the Caring Society regarding the importance of the Potlatch in BC, with specific acknowledgement of the words of Chief Dr. Robert Joseph<sup>49</sup> and emphasis on the point that there is a higher degree of support owed by Canada to ensure First Nations children who come from Potlatch societies can participate in these important social, political and legal processes, and to achieve substantive equality.<sup>50</sup> Such an approach upholds and supports the inherent rights of First Nations, including the right to self-government and the right of Indigenous peoples to maintain their distinct political, legal, economic, social and cultural institutions.<sup>51</sup>

34. The FNLC further supports the order sought by the Caring Society to expand the definition of urgent requests to include First Nations children impacted by a declared state of emergency. This is particularly important in BC, given the devastating impact of

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<sup>46</sup> In *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 at 143 [2023 CHRT 44], this Tribunal noted the findings in *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* vol. 1a and vol. b which found that social and familial support was the strongest protective factor against youth suicide.

<sup>47</sup> *Delgamuukw v. British Columbia*, [1993] BCJ No 1395 (QL) at para 1059.

<sup>48</sup> Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation, The Final Report of the Truth and Reconciliation Commission of Canada*, vol 6 (Montreal: McGill-Queen's University Press, 2015) at pp. 72-73.

<sup>49</sup> Caring Society Reply at paras. 86-87.

<sup>50</sup> *Withler v. Canada (Attorney General)*, 2011 SCC 12 at paras. 59, 63; Merits Decision at para. 465.

<sup>51</sup> UNDRIP Art. 4 and 5; By affirming these rights in UNDA, the honour of the Crown is also engaged: *Reference* at paras. 63-64.

climate emergencies and the opioid crisis on First Nations in BC. In 2016 a public state of emergency was declared in response to the toxic drug crisis and has remained in place since that time.<sup>52</sup> Courts in BC have taken judicial notice of the specific impacts of the opioid crisis on First Nations communities.<sup>53</sup> A 2023 BC Coroner's Report indicated the highest number of unregulated drug deaths ever recorded in a year and noted a 5% increase from the year prior.<sup>54</sup>

35. Climate emergencies have had devastating impacts on First Nations in BC, resulting in the loss of homes, infrastructure, lands and river systems, and roadways which connect communities to one another.<sup>55</sup> The exclusion of First Nations from emergency management responses on their territories, and jurisdictional disputes between provincial and federal governments in times of emergencies, has perpetuated the social, economic, and health inequities faced by First Nations communities, including First Nations children.<sup>56</sup>

36. First Nations children who are affected by declared states of emergency must be able to access supports and services to meet their needs on an urgent basis. In times of emergency, there is an increased urgency for First Nations children to access needed supports and services through Jordan's Principle in order to ensure their needs are met, and as a preventative measure. The order sought by the Caring Society is proactive rather than reactive.

37. In supporting the relief sought by the Caring Society respecting the expansion of urgent requests to address emergencies, the FNLC submits that any order should make clear this would include emergencies that have been declared by First Nations and would not be impeded in any way by provincial authorities attempting to usurp First Nations' inherent jurisdiction in their own emergency response measures.

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<sup>52</sup> *R. v. Kim*, 2022 BCSC 518, aff'd 2023 BCCA 313, at para. 29; *R. v. Cavanagh*, 2023 BCSC 2309 at para. 19.

<sup>53</sup> *R. v. Brodek*, 2023 BCSC 1562 at para. 22; *R. v. Ellis*, 2022 BCCA 278

<sup>54</sup> As cited in: *R. v. Wellington*, 2024 BCPC 114 at para. 40.

<sup>55</sup> Cloy-e-lis Judith Sayers, *First Nations and Canada's Emergencies Act*, 2023 46-1 Manitoba Law Journal 151 at pp. 154, 158 ("**Sayers Report**").

<sup>56</sup> Sayers Report at pp. 158-59.

38. The FNLC further proposes that Canada should use surge teams during emergencies to ensure timely responses to requests, given the increased vulnerability of First Nations children during emergencies and the likelihood of increasing backlogs. As the Caring Society and Canada noted in their evidence, surge teams have successfully been used to address timeliness issues.<sup>57</sup>

#### **(4) Backlogged Jordan's Principle Requests**

39. For First Nations children in BC to fully benefit from Jordan's Principle, there must be immediate and ongoing measures put in place to ensure requests are processed and determined in a timely way. Determination delays in the BC-Region beyond the Tribunal-ordered timelines have been raised with Canada since 2020.<sup>58</sup> In fiscal year 2021-22 ISC had a 39% overall compliance rate in the BC-Region.<sup>59</sup> The FNLC highlights that these low rates of compliance pre-date the implementation of Back-to-Basics. By comparison, in their September 2023 compliance report, ISC indicated a 65% compliance rate for urgent requests and 28% compliance rate for non-urgent requests in the BC-Region.<sup>60</sup> At the time this compliance report was issued, it was also acknowledged that the BC-Region had a backlog of 1000 undetermined Jordan's Principle requests in queue, and a further backlog of 2000 unopened email requests.<sup>61</sup> Unless an unopened email request had been marked as urgent by the requestor, it likely would not have been categorized as such in ISC's tracking system.<sup>62</sup>

40. Canada continues to assert that its administration of Jordan's Principle is hindered by its inability to case conference with other government departments or to

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<sup>57</sup> Caring Society Submissions at para. 117.

<sup>58</sup> B. Matthews Affidavit at Exhibit 18 (June 2020 Jordan's Principle Concerns Document) at p. 321 of pdf.

<sup>59</sup> C. Blackstock Affidavit at Exhibit 3 (Jordan's Principle Deep Dive National Package Tables) at p. 159 of pdf.

<sup>60</sup> C. Blackstock Affidavit at Exhibit 27 (ISC September 2023 Compliance Report) at p. 547 of pdf.

<sup>61</sup> C. Blackstock Affidavit at Exhibit 41 (Email chain between B. Matthews and R. Hallgren on August 10, 2023) at p. 681 of PDF; Affidavit of B. Matthews at Exhibit 17 (JPOC Draft Record of Decision dated September 19, 2023) at p. 307 of pdf.

<sup>62</sup> Cross Examination of Candice St-Aubin, April 3, 2024, at pp. 196-97 ("**C. St-Aubin CX**").



refer to existing services, leading to a duplication in the provision of services and Jordan's Principle being used as a preferred source for products and services that may be available through other government departments.<sup>63</sup> This is the same argument Canada has attempted to advance on numerous occasions, and which the Tribunal has held "is not the approach that is required to remedy discrimination."<sup>64</sup>

41. The FNLC submits that it is Canada's continued lack of coordination amongst federal programming that is contributing to ongoing issues of delay, which the Tribunal has repeatedly ordered Canada to address.<sup>65</sup> As summarized by this Tribunal:

This administrative hurdle or delay, and the clear lack of coordination amongst federal programming to First Nations children and families, should be borne by Canada and not put on the shoulders of First Nations children and families in need of service.<sup>66</sup>

42. Against this backdrop, the FNLC urges the Tribunal to reject Canada's request for an order extending the timelines set out in 2017 CHRT 35. The evidence before the Tribunal on these Motions shows that First Nations children in BC continue to face barriers in accessing Jordan's Principle, resulting in ongoing disadvantage.

43. The FNLC also asks the Tribunal to consider the positive impact that the implementation of Back-to-Basics appears to have had on First Nations children in BC, by facilitating access to, and approvals for, products and services under Jordan's Principle that First Nations children in BC have not, until now, fully benefited from. The current policy framework under Back-to-Basics upholds and advances First Nations children's rights, including their inherent rights, and advances the implementation of UNDRIP.

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<sup>63</sup> Canada's Submissions at para. 31; Affidavit of C. St-Aubin at para. 79; Cross-Examination of Dr. Valerie Gideon at p. 127 ("**Dr. Gideon CX**"); C. St-Aubin CX at p. 270.

<sup>64</sup> 2017 CHRT 14 at para. 74.

<sup>65</sup> Merit Decision at para. 381; 2019 CHRT 39 at paras. 33 and 222; 2021 CHRT 41 at para. 63.

<sup>66</sup> 2017 CHRT 14 at para. 98.

44. The FNLC supports the relief being sought by the Caring Society to address backlogs as it relates to triaging of backlogged urgent requests, reporting, and ensuring sufficient regional staffing levels. The FNLC further suggests that where sufficient staffing levels cannot be maintained, surge teams are used to address unreasonable backlogs in the BC-Region, as this has been shown to have success.<sup>67</sup>

## **C. Payment Processing**

### **(1) Reimbursement for Approved Jordan's Principle Requests**

45. Backlogs and delays in processing reimbursements for approved Jordan's Principle requests furthers the disadvantage experienced by First Nations children and families in BC and have created administrative burdens for First Nations organizations who are already challenged with capacity issues. The FNLC submits that this is a continuation of systemic discrimination found in the Merit Decision. Canada cannot purport to be compliant with the Tribunal's orders while at the same time creating a circumstance that increases disparity by putting First Nations families in a precarious financial situation.

46. According to a representative of the BC Jordan's Principle Enhanced Service Coordination Hub ("**BC Hub**"), as of January 2, 2024, the BC-Region had a backlog of 2850 vendor invoices in its payment queue and receives an average of 50 calls a day following up on payment requests. Canada has entered into agreements with Enhanced Service Coordinators ("**ESCs**") in BC to implement an Approved Request Contingency Fund ("**ARC Fund**"), which allows ESCs to process reimbursements to families and service providers and address the delay in processing payments.<sup>68</sup> Canada suggests this process will assist in addressing the backlog and delays related to processing reimbursements and payments for approved Jordan's Principle requests.<sup>69</sup> However, a

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<sup>67</sup> Caring Society Submissions at para. 117; Canada's Response to Request for Information at Appendix B, p. 16 of pdf; CX of C. St-Aubin at p. 210.

<sup>68</sup> BC Hub Letter: C. Blackstock Affidavit at Exhibit 42, p. 686 of pdf.

<sup>69</sup> Affidavit of Dr. Gideon at para. 74.

representative of one of the ESCs in BC has indicated that their organization is overwhelmed with the volume of ARC Fund payments they are required to process.<sup>70</sup>

47. The FNLC rejects Canada's submission that the issue of timely reimbursement for approved services, products and supports under Jordan's Principle is "separate and apart" from the Tribunal's orders<sup>71</sup> and supports the order sought by the Caring Society clarifying that Canada cannot delay reimbursements in a way that creates additional hardship on a child or family. Such an order upholds and advances the rights of First Nations children and families and is consistent with the previous orders of this Tribunal. Delaying reimbursement to vulnerable families for approved services and supports under Jordan's Principle perpetuates the disadvantage for children and families who are experiencing service gaps, particularly those who may already be living in poverty.

48. The FNLC also supports the order sought by the Caring Society clarifying that this Tribunal's orders have primacy over the *Financial Administration Act*<sup>72</sup> and adds that the *FAA* must also be interpreted in accordance with UNDRIP.

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

49. As noted by the Canadian Human Rights Commission, the record shows that Canada has no formal complaints mechanism to deal with certain types of concerns, such as those relating to the conduct of staff in processing requests, or delays in making determinations or payments.<sup>73</sup> A group of experts, jointly commissioned by the Caring Society and Canada, recommended the creation of an independent accountability mechanism to address this, and other concerns.<sup>74</sup> The Caring Society's

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<sup>70</sup> Reply Affidavit of Cindy Blackstock (aff'd March 27, 2024) ("**C. Blackstock Reply Affidavit**") at Exhibit 19 ("**R. Hallgren to B. Matthews**").

<sup>71</sup> Canada's Written Submissions at paras. 60-61.

<sup>72</sup> *Financial Administration Act*, R.S.C. 1985, c. F-11 [**FAA**]

<sup>73</sup> Written Submissions of the Canadian Human Rights Commission at para 34.

<sup>74</sup> C. Blackstock Reply Affidavit at Exhibit 26.

evidence is that through the workplan appended to the Agreement-in-Principle related to long term reform, the Parties agreed to establish a complaints mechanism.<sup>75</sup>

50. Canada argues that if a mechanism were to be developed, broader First Nations collaboration would be required. We agree that the imposition of a new mechanism without collaboration with First Nations rights and title holders, specifically non-party First Nations, could have unintended consequences.<sup>76</sup>

51. AFN argues that the requested complaints mechanism/accountability measures would only serve to undermine efforts to negotiate a long-term approach in relation to disputes, which would be subject to approval by the First Nations-in-Assembly. The AFN also argues that the introduction of a complaints mechanism does not reflect any mandate provided by the First Nations Chiefs-in-Assembly, who have directed the AFN to develop evidence and policy-based options for the long-term reform of Jordan's Principle that includes mechanisms that enable and support self-determination.<sup>77</sup>

52. The FNLC does not entirely agree with the AFN that the establishment of a complaints and accountability mechanism is outside of the mandate provided by the Chiefs-in-Assembly, at least from the BC context. For example, the BCAFN passed a resolution asking the AFN to support and adopt the submissions of the Caring Society in respect of the Motion, which included submissions related to a complaints mechanism to address the concerns noted above.<sup>78</sup>

53. The FNLC's position is that a balanced approach is necessary to ensure Canada meets its obligations to First Nations children, including upholding their inherent rights, while also ensuring that First Nations rights to self-government and self-determination is respected and upheld. Such an approach is necessary, and supported in the Doing Better Report, which recommends a complaints mechanism for Jordan's Principle be

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<sup>75</sup> C. Blackstock Reply Affidavit at Exhibit 26 (Metallic, Naiomi et. Al., *Doing Better for Indigenous Children and Families: Jordan's Principle Accountability Mechanisms Report* ("**Doing Better Report**").

<sup>76</sup> Canada's Written Submissions at para 73.

<sup>77</sup> AFN Written Submissions at paras 95 and 96.

<sup>78</sup> C. Blackstock Reply Affidavit at paragraph 97 and Exhibit 34.

established and the complaints mechanism draw on Indigenous laws and dispute resolution processes to resolve complaints wherever possible.<sup>79</sup>

54. For these reasons, the FNLC respectfully submits that it is within the Tribunal's jurisdiction to grant relief relating to the development of a complaints mechanism and that the Tribunal should make an order requiring the parties to move toward the development of a complaints mechanism, with specific timelines for that work. However, the Parties must consult with First Nations rights and title holders, including those who are not parties to this proceeding, regarding the development of a complaints mechanism and the timelines should be reflective of that requirement.

#### **E. Administration of Jordan's Principle by First Nations and First Nations Organizations in British Columbia**

55. First Nations themselves are the rights holders and must be properly consulted on any orders that will directly impact their inherent right of self-government, and autonomy in financial matters. First Nations and First Nations governments must be properly consulted on any orders that will directly affect their rights.

56. In BC there are 32 community partnered organizations hosting 39 Service Coordinators, and one Jordan's Principle Enhanced Service Coordinator Hub. As of January 2024, 10 of these sites also held a contract to process payments to families and service providers under the ARC Fund. Payments of a request by an ARC Fund holder must be preapproved by Canada.<sup>80</sup>

57. Canada is seeking an order clarifying that the procedural orders of the Tribunal will not apply to First Nations and First Nations organizations who are administering Jordan's Principle under a coordination agreement. The FNLC supports the order sought by Canada in principle, however, submits that any order in this regard must not absolve Canada of its legal obligations to ensure the systemic discrimination found by the Tribunal is remedied, which includes adequately resourcing First Nations and First Nations organizations to develop and maintain capacity to administer Jordan's Principle.

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<sup>79</sup> Doing Better Report at p. 12

<sup>80</sup> BC Hub Letter: C. Blackstock Affidavit at Exhibit 42, p. 686 of pdf.

Very recently, this Tribunal held that Canada was underfunding First Nations administering their own police services through an agreement with Canada.<sup>81</sup> It is important to ensure discriminatory funding practices do not continue as Canada enters into coordination agreements with First Nations for the administration of Jordan's Principle.

58. ESCs in the BC-Region have indicated the current demand for support under Jordan's Principle "has exceeded the capacity of the ESC network and will continue to do so at a time when Jordan's Principle is becoming well known in BC as the first and/or final funding option for Indigenous children for whom the normative systems have failed."<sup>82</sup> As noted above, ESC's in the BC-Region have indicated they are over capacity in administering payments through the ARC Fund. This ESC also noted that Canada has changed their coordination agreement to now require individual service coordinators to complete 10 group requests, creating an additional burden on their organization and staff.<sup>83</sup>

59. Canada has suggested that First Nations' administration of Jordan's Principle will alleviate issues related to duplication of services and referrals to other community-based and government services as First Nations will not be bound by the same restrictions regarding case conferencing, a barrier it consistently cites regarding its administration of Jordan's Principle.<sup>84</sup> Though Canada presents this as one way it is upholding its commitment to First Nations inherent rights and governance,<sup>85</sup> the FNLC is concerned Canada will use this approach to offload their legal obligations to First Nations children onto First Nations while not addressing the issue of lack of coordination between its own departments. Canada has acknowledged that First Nations and First

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<sup>81</sup> *Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v. Public Safety Canada*, 2022 CHRT 4; *Takuhikan c. Procureur général du Québec*, 2022 QCCA 1699; *Canada (Attorney General) v. Pekuakamiulnuatsh First Nation*, 2023 FC 267.

<sup>82</sup> BC Hub Letter: C. Blackstock Affidavit at Exhibit 42, p. 686 of pdf.

<sup>83</sup> R. Hallgren to B. Matthews.

<sup>84</sup> C. St-Aubin Affidavit at para. 79.

<sup>85</sup> Dr. Gideon Affidavit at paras. 32-24.

Nations organizations administering Jordan's Principle are challenged with capacity issues.<sup>86</sup>

60. The Caring Society seeks an order that Canada provide a report to the Tribunal that First Nations and First Nations organizations who are administering Jordan's Principle have sufficient and sustainable resources to do so. While the FNLC supports this order in principle, it urges the Tribunal to take into account the inherent rights of First Nations to self-govern, including autonomy in allocating and managing its resources,<sup>87</sup> and to ensure any orders in this regard do not infringe on First Nations autonomy.

61. The FNLC supports an order that requires Canada to provide sufficient and sustainable resources to First Nations and First Nations organizations for the administration of Jordan's Principle that is needs-based and based in policy and research, such as that being prepared by the Institute for Fiscal Studies and Development.<sup>88</sup> Such an order is consistent with the inherent rights of First Nations children, and the principles of substantive equality that are central to Jordan's Principle and human rights.

#### **F. The Preferred Pathway for Addressing the Implementation and Reform of Jordan's Principle**

62. The pathway forward requires a wholistic approach that upholds the rights of First Nations, including First Nations children. Nation-to-Nation negotiations must occur between First Nation title and rights holders and Canada regarding the implementation of Jordan's Principle and long-term reform. At the same time, First Nations children must receive the services they need on an ongoing basis, without discrimination, so that they can thrive and continue to exercise their rights.

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<sup>86</sup> C. St-Aubin Affidavit at 255, 272, and 501.

<sup>87</sup> *Canada (Attorney General) v. Pekuakamiulnuatsh First Nation*, 2023 FC 267 at paras. 78-81.

<sup>88</sup> C. Blackstock Affidavit at Exhibit 63 (IFSD Jordan's Principle Final Report).

63. The Tribunal has previously stated that its statutory role is to ensure the discrimination found is eliminated and does not reoccur. Any orders made by the Tribunal flow from the claims made, the systemic discrimination found, and the requirement to remedy that discrimination.<sup>89</sup> With respect to Jordan's Principle, the Tribunal has also said that it is a human rights principle founded in substantive equality and 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 and 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.<sup>90</sup> In other words, Jordan's Principle, when implemented by Canada without discrimination, upholds and supports the inherent rights of First Nations children, meets Canada's obligations with respect to implementing UNDRIP, and upholds the honour of the Crown in its relationship with First Nations people.

64. Canada and the AFN assert that the preferred pathway is through a negotiated settlement between Canada and the First Nations Parties and, on this basis, AFN asks that any orders of the Tribunal be interim in nature.<sup>91</sup>

65. The FNLC respectfully submits that the Tribunal ought to retain jurisdiction and oversight over the implementation of Jordan's Principle and make orders that are necessary to address Canada's non-compliance and uphold First Nations children's rights, including those that we have advocated for in these submissions, to the extent that Canada is responsible for any aspect of the administration of Jordan's Principle.

66. Although FNLC fully supports long-term reform of Jordan's Principle through Nation-to-Nation negotiated outcomes, as the AFN and Canada have submitted, First Nations children who need these services each day until long term reform is actually implemented cannot be ignored or sacrificed. Such an approach would not be upholding

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<sup>89</sup> 2021 CHRT 41 at para. 255.

<sup>90</sup> 2020 CHRT 20 at para 89.

<sup>91</sup> AFN Submissions at para. 105.



the rights of First Nations children, be in keeping with Canada's legal obligations, or meet the requirements of the *Canadian Human Rights Act*.<sup>92</sup>

67. The FNLC also notes the cross-examination evidence of Canada's affiants, which seems to suggest that Canada will continue to play a role in the administration of individual requests for the foreseeable future, which means continued oversight of the Tribunal may be warranted.<sup>93</sup> Until long-term reform is complete and includes mechanisms to hold Canada accountable, it is the position of the FNLC that there must be some form of an accountability mechanism to ensure Canada's compliance with implementing the full scope of Jordan's Principle.

68. The FNLC also supports the Caring Society's position in its response to Canada's submissions about the role of First Nations and First Nations community organizations assuming greater control over Jordan's Principle administration.<sup>94</sup> As highlighted in the Caring Society's submissions, the ongoing success of Jordan's Principle requires that First Nations and First Nations organizations are sufficiently resourced to deliver Jordan's Principle.<sup>95</sup>

69. To achieve such an outcome requires both Canada negotiating in good faith with First Nations rights and title holders on all aspects Jordan's Principle reform, including funding, and the Tribunal's continued oversight to ensure Canada meets its legal obligations. The promise of Nation-to-Nation negotiations must not detract from Canada's obligation to uphold the inherent and human rights of First Nations children.

70. The extent to which the Tribunal should remain engaged will depend on whether long-term reform addresses and remedies the discrimination that has been found. Determining this will require, in part, First Nations rights and title holders, including those who are not parties to these proceedings, participating in developing the

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<sup>92</sup> R.S.C., 1985, c. H-6.

<sup>93</sup> Cross Examination of Dr. Valerie Gideon at pp. 73-74; C. St-Aubin Affidavit at para. 76.

<sup>94</sup> Canada's submissions at para 48.

<sup>95</sup> Caring Society's submissions at para 75.

proposed reforms to Jordan's Principle, understanding how they will be implemented in the long term to prevent discrimination, and providing their consent to the reforms proposed.

71. ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of July 2024.



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