

Canadian Human Rights Tribunal Summary Ruling regarding the Caring Society's Non-Compliance Motion on Jordan's Principle



On November 21, 2024, the Canadian Human Rights Tribunal (Tribunal or CHRT) issued a summary ruling¹ in response to the Caring Society's non-compliance motion filed in December 2023 regarding the Government of Canada's chronic and wilful failure to adhere to the Tribunal's orders on Jordan's Principle. The ruling also responds to Canada's cross-motion filed in March 2024. The Tribunal ruled that the relief sought in the Caring Society's non-compliance motion and Canada's cross-motion are both granted in part.

The Tribunal hopes to have all Parties return to the table to discuss what is needed to improve the current Jordan's Principle operations and delivery. With the consent of all Parties, the Tribunal welcomes First Nations, local, regional, and national Jordan's Principle committees, grassroots experts, First Nations service providers and First Nations Health professionals to share valuable knowledge to inform the Parties' negotiations.

Most notably, the Tribunal affirmed the presumption of substantive equality as a right owed to First Nations children, and emphasized it is both a right and a remedy to address discrimination and prevent its reoccurrence.

The Tribunal has retained jurisdiction until long-term reform of Jordan's Principle is achieved or the Tribunal approves the Parties' evidence-informed agreement that clearly demonstrates how it will eliminate the discrimination and prevent its recurrence.

To read the full summary order, the motions and Parties' submissions, and background information, please go to fnwitness.ca.

This information sheet contains general information about the Tribunal's letter-decision and is ***not legal advice***.

¹ A summary ruling is similar to an oral ruling from the bench, and the Tribunal will release its full reasons in the coming months.

Orders

The Tribunal ordered Canada to ***immediately*** tackle the backlog of Jordan's Principle requests and report to the Tribunal with information on additional matters by December 10, 2024. The Tribunal has ordered the Parties to return with consent orders, or with alternative positions, on additional matters in January and February 2025.

In all, the Tribunal has made orders, or provided guidance, regarding the backlogs, urgent requests, the Back-to-Basics approach, the 24-hour Jordan's Principle call centre and other contact mechanisms, referrals to other services, including to First Nations and First Nations-authorized organizations, determination and reimbursement timelines, Canada's coordination with federal programs, the *Financial Administration Act* (FAA) and a complaints mechanism.

Backlogs

Canada has admitted that there is a backlog of Jordan's Principle requests.² Some of the requests in the backlog have not gone past intake stage, meaning it is uncertain if the requests are urgent or non-urgent. The Tribunal ordered Canada to ***immediately resolve the backlog*** and issued several additional orders regarding backlogs, with the following reporting requirements:

- By December 5, 2024
 - Canada to communicate with requestors with undetermined urgent cases to take interim measures to address reasonably foreseeable irremediable harms.
- By December 10, 2024
 - Canada must provide a detailed plan with targets and deadlines to the Tribunal for immediately

² As part of the non-compliance proceedings, Canada disclosed that, in March 2024, there was a backlog of between 40,000-82,000 Jordan's Principle requests nationally.

resolving the backlog.

- Canada must report the number of currently backlogged requests, nationally and in each region. This includes the number of backlogged requests at intake, in-progress, and the reimbursement backlog.
- Indigenous Services Canada (ISC) must triage all backlogged cases for urgency. If a qualified professional has identified the request as urgent, ISC will consider it urgent until the Parties develop guidelines on urgent requests.
- By January 9, 2025
 - Working with Parties, Canada must identify solutions to reduce and eliminate the backlog.

Back-to-Basics Approach

The Tribunal confirmed that certain aspects of the Back-to-Basics Approach³ are aligned with the Tribunal's orders and should be maintained, while other aspects are not. The aspects in line with the Tribunal's orders that must be maintained include: presumption of substantive equality, minimal supporting documentation and identification of urgent requests by qualified professionals.

Aspects that are not in line with Tribunal's orders and therefore should be eliminated include: self-declaration of urgency without a letter of support from a qualified professional, Canada's interpretation that re-classifying urgent requests as non-urgent is not possible, approaching every request in the same way without flexibility for escalating matters that on their face justify increased attention, and ISC's inability to prioritize matters.

The Tribunal confirmed that Canada is not bound by Back-to-Basics per its orders.

Urgent requests

The Tribunal confirmed that there are two levels of urgent requests it has previously ordered on consent of the Parties. The two levels are:

1. Urgent requests involving foreseeable harm (requiring an immediate response); and
2. Other urgent requests requiring action within 12 hours.

³ Implemented in 2022 when the Parties agreed that a "back-to-basics" approach to Jordan's Principle was required to get ISC

The Tribunal confirmed that the following cases are considered urgent:

- life-threatening cases;
- cases involving end-of-life/palliative care;
- risk of suicide;
- risk to physical safety;
- a child with no access to food or other basic necessities;
- risk of child entering the child welfare system;
- caregivers and children fleeing from domestic violence; and
- certain time-sensitive cases.

The Tribunal agreed that bereavement is a sacred time for First Nations children and that some requests relating to the passing of a close family member may be considered urgent, while others may be considered time-sensitive (not urgent). The Tribunal agreed that access to cultural ceremonies is in keeping with substantive equality.

The Tribunal made additional orders on urgent requests with the following reporting requirements:

- By December 10, 2024
 - Canada to confirm that there are sufficient numbers of staff, including at National and Regional contact centres, who have the authority to determine urgent requests, within and outside of business hours, and that requestors can immediately and easily indicate that their request is urgent.
 - Canada to ensure that requestors who submitted a non-urgent request that has since become urgent, have an accessible way to communicate the change of urgency.
- By January 9, 2025
 - Parties must co-develop objective criteria and guidelines for identifying urgent requests.
 - Parties to co-develop guidelines on coordinating between Jordan's Principle and emergency services, and how to triage and respond to multifaceted

closer to compliance with the Tribunal's orders, the Back-to-Basics approach guides ISC's operations of Jordan's Principle.

requests.

24-Hour Jordan's Principle Call Centre and Other Contact Mechanisms

The Tribunal confirmed that, consistent with its previous orders, Canada must provide National and Regional contact centres with the capacity to put in place immediate compassionate interventions when a request is placed for urgent services.

The Tribunal also ordered that by December 10, 2024:

- Canada must confirm that contact phone numbers, email addresses, and hours of operation for provincial/territorial ISC offices and headquarters, for both requests and payment inquiries are clearly available on ISC's website and social media.

Referral of Jordan's Principle requests to other services, including First Nations and First Nations-authorized organizations

The Tribunal confirmed that its orders already enable Canada to consult with First Nations and professionals when reasonably necessary without engaging in services delays due to administrative case conferencing, policy review, service navigation, or any similar administrative before the recommended services are approved and funding is provided.

The Tribunal confirmed that Canada can refer requestors to First Nations so long as Canada does not transfer its legal obligations or set First Nations up to fail the children they serve. Canada must ensure that First Nations have the sufficient resources, including funding, to do this work. The Tribunal noted that insufficient resourcing would be like the systemic discrimination found and would likely be considered a transfer of Canada's legal obligations. The Tribunal also confirmed that Canada maintains legal responsibility and First Nations and First Nations-authorized organizations taking on Jordan's Principle work are not bound by the Tribunal's ordered timelines or procedures.

Canada may refer requestors to First Nations or First Nations organizations under an existing group request or contribution agreement in the interim. If the request is urgent ISC must consider whether or not the referral will allow the individual or group quicker access to the product, service or support.

The Tribunal further ordered that:

- By January 9, 2025

- Canada must provide information regarding whether First Nations and First Nations organizations who have taken on various aspects of Jordan's Principle work have the sufficient and sustainable resources, including funding, to do so.
- By February 12, 2025
 - Parties must develop an interim mechanism to ensure that requestors referred to other services have their needs met in a timely manner and that is culturally appropriate, without encountering underfunding, lack of coordination or programs or funding restrictions.

Determination timelines

The Tribunal ordered that the timeline for determining urgent requests will be maintained. At this time, the Tribunal will not order changes to the non-urgent timeline and has rejected Canada's "without unreasonable delay" standard as it is vague and is not aligned with the best interest of the child.

The Tribunal confirmed that its existing orders mean that the determination clock starts when a request is received by ISC, except in the event clinical case conferencing is required.

The Tribunal further ordered that by January 9, 2024:

- Canada is to report on its performance on urgent determination timelines.
- Parties to co-develop evidence-based options for non-urgent determination timelines.

Reimbursements

The Tribunal confirmed that, as previously ordered, Canada cannot delay paying for approved services or supports in a way that creates hardship by imposing a burden on families and risks delay or leads to a child's needs going unmet. The Tribunal indicated that a system that requires low-income families to assume the costs of services is placing Canada's legal obligations on to the children and families requiring services.

The Tribunal affirmed the reimbursement structure will need to be fixed in the long-term and, in the short-term, solutions must be implemented. The Tribunal found that the current timelines for reimbursing service providers are reasonable if there are no delays.

The Tribunal further ordered that:

- By December 10, 2024
 - Canada to provide any existing guidelines on avoiding reimbursement delays.
- By January 9, 2025
 - Parties to co-develop evidence-based interim solutions to redress hardship imposed on requestors by the reimbursement and payment delays.

Coordination of federal programs

The Tribunal found that there is insufficient evidence to prove Canada has successfully coordinated federal programs, which it had been ordered to do in 2016. The Tribunal also agreed that while programs designed and delivered by First Nations, when funded properly, are optimal, Canada must also reform its federal programs to improve its implementation of Jordan's Principle.

The Tribunal ordered that by January 9, 2025:

- Canada to provide a detailed report on its progress in coordinating federal programs, including a plan, targets, and deadlines for implementation.

The *Financial Administration Act* (FAA)

In the absence of sufficient evidence, the Tribunal does not find Canada to have used the *FAA* to deviate from the Tribunal's orders. If there is reason to believe this may have happened, it is to be assessed on a case-to-case basis.

In light of this, the Tribunal reaffirmed that Canada cannot rely on the *FAA* and any other related instruments like terms and conditions, policies, agreements or conduct in a way that justifies departures from the Tribunal's orders. The Tribunal's orders are to be read harmoniously with the *FAA*, and in the event of a conflict, the Tribunal's orders have primacy over the *FAA*.

Complaints mechanism

The Tribunal agreed that an independent national complaints mechanism is needed and the Tribunal has the authority to order such a mechanism. Until First Nations can be consulted on a permanent complaints mechanism, the Tribunal indicated that a simplified and effective independent complaints mechanism should be implemented in the interim.

The Tribunal ordered that by February 22, 2025:

- Canada to consult with the Parties with the goal of arriving

at a consent order if possible and, if not, with options for orders for an evidence-based interim national complaints mechanism.

Background

In 2007, the First Nations Child & Family Caring Society (Caring Society) and the Assembly of First Nations (AFN) filed a human rights complaint against Canada for its inequitable provision of the First Nations Child & Family Services (FNCFS) Program and flawed approach to Jordan's Principle. In 2016, the Tribunal ordered the government to immediately stop its discriminatory conduct and take measures to ensure it does not happen again. Since 2016, the Tribunal has issued over 31 non-compliance and procedural orders against Canada and retains jurisdiction over the complaint.

On December 12, 2023, the Caring Society filed a non-compliance motion with the Canadian Human Rights Tribunal (the Tribunal) regarding the Government of Canada's chronic and wilful failure to adhere to the Tribunal's orders on Jordan's Principle. Canada opposed the Caring Society's motion, and the Assembly of First Nations (AFN) opposed most of the Caring Society's requested orders. As interested parties, the Chiefs of Ontario (COO) and Nishnawbe Aski Nation (NAN) are not taking a position on the motion. The Canadian Human Rights Commission and First Nations Leadership Council generally supports the non-compliance motion. Hearings were held September 10, 11 and 12, 2024.