



The Caring Society's Non-Compliance Motion v. Canada on Jordan's Principle

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 late 2009, the Chiefs of Ontario (COO) and Amnesty International were granted interested party status. In 2016, the Canadian Human Rights Tribunal (Tribunal) ordered the government to stop its discriminatory conduct and take measures to ensure it does not happen again. After this ruling, Nishnawbe-Aski Nation (NAN) was also granted interested party status. Since 2016, the Tribunal has issued over 28 non-compliance and procedural orders against Canada and retains jurisdiction over the complaint.

On December 12, 2023, the Caring Society filed another non-compliance motion with the Tribunal regarding Canada's chronic and wilful failure to adhere to the Tribunal's orders on Jordan's Principle. The Caring Society has filed its first factum, and the Parties will continue to file written submissions until July 2024. A hearing on the matter will take place no later than August 2024, after which the Tribunal could issue a non-compliance order against Canada with specific measures to address the non-compliance.

The Caring Society has taken a solutions-oriented approach on this non-compliance motion, provided constructive recommendations for Canada to remedy its longstanding non-compliance with Jordan's Principle, and invited Canada to provide its own solutions to meet or beat those the Caring Society has put forward. In doing so, the Caring Society's hope is that the best solutions will be implemented following this motion, because First Nations children deserve nothing less.

This information sheet contains general information about the Caring Society's non-compliance motion and is ***not legal advice***. Consult with your legal counsel to seek advice and guidance

about your own needs and circumstances.

Key Questions:

What concerns did the Caring Society raise in the December 2023 non-compliance motion?

In its December 12, 2023, non-compliance motion, the Caring Society identified the following concerns regarding Canada's wilful:

- Narrowing of the Tribunal's orders by imposing additional eligibility criteria and request processing criteria;
- Ineffective methods for receiving and processing Jordan's Principle requests by phone or other formats;
- Chronic failure to adhere to the Tribunal's timelines for determining requests including in urgent cases;
- Failure to adhere to reasonable timeframes to fund approved requests;
- Failure to adopt sufficient accountability measures to ensure that the Tribunal's orders are upheld; and
- Attempting to shield itself from non-compliance by relying on the *Financial Administration Act* and other administrative measures.

You can read [the Caring Society's December 12, 2023 notice of motion](#) for a full sense of the concerns referenced.

What relief is the Caring Society seeking?

Please note that the below is a non-exhaustive summary of the orders the Caring Society seeks on the non-compliance motion. To get a complete picture of the Caring Society's legal arguments and requested orders, please consult its [April 19, 2024 factum](#) and [December 12, 2023 notice of motion](#). To get a complete picture of the Caring Society's evidence, please consult the

Caring Society's [January 12, 2024 affidavits](#) and [March 27, 2024 reply affidavits](#).

Orders sought by the Caring Society:

Urgency:

- An order that Canada will immediately include requests from First Nations children experiencing (or reasonably anticipated to experience) the death of a caregiver, biological parent, or sibling and requests from children impacted by a state of emergency in its definition of "urgent requests".
- An order that Canada will revise the National Call Centre calling tree (and other contact mechanisms) to ensure that requestors can easily indicate that their request is or has become urgent, and that the National Call Centre is sufficiently staffed with employees who have authority to review and determine urgent requests during and after business hours.
- An order that Canada will appoint sufficient persons in each ISC region and nationally to manage urgent Jordan's Principle requests and ensure that determinations are made in a manner consistent with the Tribunal's orders.

Timeliness:

- An order clarifying that Canada will begin the determination clock when a request is received and will stop it once the requestor receives the determination, **or, in the alternative**, an order that the clock will begin when Canada receives a letter of recommendation from a registered professional or a letter of support from an Elder.

Backlogged requests:

- An order that Canada will identify and report back to the Tribunal on the total number of backlogged requests that await determination (including the intake backlog, the in-progress backlog, and the reimbursement backlog), both nationally and in each region dating back twelve months.
- An order that Canada will contact all requestors in the backlog and urge all requestors with urgent or time-sensitive requests, including those requests that have become urgent over time, to contact specific personnel who will determine the requests.

- An order that Canada will triage all backlogged requests for urgency and establish interim measures for those with undetermined urgent cases to address any reasonably foreseeable irremediable harms. Canada will also report back to the Tribunal with timelines for when the backlogged requests will be determined.

Reimbursement and payment delays:

- An order clarifying that Canada cannot delay payment for approved services in a way that creates hardship by imposing a burden on families and risks a disruption, delay, or inability to meet a child's needs.
- An order that the Tribunal's orders have primacy over the *Financial Administration Act (FAA)* and related instruments such as terms and conditions, agreements, policies, and conduct and that Canada will not rely on the *FAA* to depart from the Tribunal's orders.
- An order that Canada report to the Tribunal about 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 to children and families.
- An order that Canada will report to the Tribunal regarding practical solutions to address payment delays, including methods for quick emergency payments (electronic funds transfers, better use of gift cards, etc.), an automated process that presumptively approves all requests under \$500 with a recommendation from a professional or supporting letter from an Elder/Knowledge Keeper, expansion of the use of acquisition cards, and payment of any interest accrued by families and service providers who have had to take out additional loans due to Canada's payment delays.

Complaints mechanism and accountability measures:

- An order that Canada will establish a credible, effective, and independent Jordan's Principle complaints mechanism with authority to approve urgent cases and publicly report on ISC's compliance.
- An order that Canada will report to the Tribunal to confirm that all First Nations and First Nations organizations who have taken on the delivery of Jordan's Principle have sufficient and sustainable

resources, including funding, to do so.

- An order that Canada report to the Tribunal regarding which of the proposed solutions set out in the Caring Society's Schedule A Jordan's Principle Workplan it is prepared to adopt, and that, where it is not prepared to adopt a solution, Canada explain why and propose effective alternative measures.

What relief is Canada seeking?

To be clear, Canada opposes the Caring Society's non-compliance motion. Canada filed its notice of cross-motion on March 15, 2024, and sought several orders (a non-exhaustive summary of which is below). For a full sense of Canada's evidence on the Caring Society's motion and its own cross-motion, please consult [Canada's March 15, 2024 affidavits and notice of cross motion](#).

Orders sought by Canada:

Urgency:

- An order that the Parties will collaborate on the development of objective criteria to be used to identify "urgent" Jordan's Principle requests.

Timelines:

- An order extending determination timelines as follows:
 - Individual urgent requests: from 12 to 48 hours.
 - Individual non-urgent requests: from 48 hours to without unreasonable delay.
 - Group urgent requests: from 48 hours to one week.
 - Group non-urgent requests: from one week to without unreasonable delay.

Ability to refer requestors:

- An order that when ISC is the government department of first contact, Canada can refer requestors either (a) to an existing approved Jordan's Principle group request administered by a First Nation or community organization through a contribution agreement, or (b) to a First Nation or community organization administering Jordan's Principle through a contribution agreement—except (c) in urgent cases when this may

negatively impact the child's timely access to the product, service, or support.

Accountability measures:

- An order that any First Nation or community organization entering into a contribution agreement with Canada to administer Jordan's Principle is not bound by the procedural terms of the Tribunal's orders that are directed at Canada.

What positions have the AFN, COO, NAN, and the Commission taken?

AFN's positions:

The AFN supports some, but not all, of the relief sought by the Caring Society. The AFN will submit its first factum on May 17, 2024. You can get a sense of the AFN's evidence by reading the [AFN's March 22, 2024 affidavit](#).

COO's positions:

COO has not taken a position on the Caring Society's non-compliance motion. COO will submit its first factum on May 10, 2024, if it supports the motion, or on May 24 if it opposes the motion.

NAN's positions:

NAN has not taken a position on the Caring Society's non-compliance motion. NAN will submit its factum on May 10, 2024, if it supports the motion, or on May 24 if it opposes the motion.

Canadian Human Rights Commission's positions:

The Commission supports the Caring Society's non-compliance motion. The Commission will file its first factum on May 10, 2024.

Key dates:

As a result of the [AFN's April 5, 2024 request to amend](#) the schedule on this motion, the Tribunal has directed the following revised schedule on the non-compliance motion:

- April 12, 2024: Answers to requests for information
- April 19, 2024: Caring Society factum
- May 10, 2024: Commission factum (and any of COO/NAN supporting)
- May 17, 2024: AFN factum (supporting and opposing)

elements)

- May 24, 2024: Canada factum (and any of COO/NAN opposing)
- June 7, 2024: Caring Society reply and Canada's cross-motion factum
- June 28, 2024: Caring Society/AFN/Commission/COO/NAN response to Canada's cross-motion factum
- July 19, 2024: Canada reply factum

The Tribunal has indicated that an in-person hearing will take place in Ottawa, over the course of two or three days, no later than August 2024.

Once any documents are publicly available, they will be posted to fncaringsociety.com/i-am-witness.

Who is responsible for administering the Tribunal's orders on Jordan's Principle?

The Government of Canada is legally obligated to implement Jordan's Principle in compliance with the Tribunal's orders. The Tribunal has ordered that Jordan's Principle must be implemented based on the principles of substantive equality, culturally appropriate service provision, the child's needs and best interests, and must take distinct community circumstances into account.

Some First Nations are also working to ensure that their citizens have access to Jordan's Principle. This is a positive step but does not absolve Canada from its ultimate legal responsibility to ensure Jordan's Principle is being implemented in a manner consistent with the Tribunal's orders.

What is a non-compliance order?

A non-compliance order is a legal order issued by the Tribunal with specific measures to ensure that Canada follows its existing legal orders. In 2016, the Tribunal ordered Canada to immediately stop the discrimination at the level of the FNCFS Program and Jordan's Principle and prevent it from recurring. Canada did not immediately do so. As a result, the Tribunal has issued more than 28 subsequent orders, many of them non-compliance orders.

What happens if a non-compliance order is issued?

If the Tribunal determines that a non-compliance order is warranted, Canada will be ordered to provide immediate relief in the area(s) captured by the Tribunal's non-compliance order. Non-compliance orders are legally binding and set out specific measures Canada must take to comply with the Tribunal's orders and often include mandatory reporting to the Tribunal. For example, Canada could be ordered to take certain measures to address the significant backlogs in Jordan's Principle requests, among other things.

Is the Tribunal's hearing on the non-compliance motion public?

Yes, there will be an in-person hearing taking place in Ottawa no later than August 2024. Updated information, including the location of the hearing, will be posted on our website as it becomes available.