



Agreement In Principle on Long-Term Reform of the First Nations Child and Family Services Program and Jordan's Principle: Things to Consider



Background

On February 23, 2007, the First Nations Child & Family Caring Society (Caring Society) and the Assembly of First Nations (AFN) filed a human rights complaint alleging that Canada's flawed and inequitable provision of First Nations Child and Family Services and its failure to properly implement [Jordan's Principle](#) were discriminatory. On [January 26, 2016](#), the Canadian Human Rights Tribunal (Tribunal) substantiated the discrimination and ordered Canada to immediately cease its discriminatory conduct. Although Canada acknowledged the finding of systemic discrimination and did not challenge that decision, it has received 21 non-compliance and procedural orders. Canada has challenged the Tribunal's orders in the Federal Court regarding compensation to First Nations children and families and orders about funding the purchase and construction of capital assets for First Nations child and family service agencies and Jordan's Principle.

On [September 29, 2021](#), the Federal Court dismissed Canada's challenge to the Tribunal's compensation orders. On [October 29, 2021](#), Canada appealed the Court's decision to dismiss, and then requested a pause of the appeal. In November of 2021, the Caring Society and other parties consented to Canada's request to pause the appeal for a short time and entered negotiations. On December 31, 2021 negotiations between the Parties reached an [Agreement in Principle](#) (AIP) that sets out a non-binding plan for Canada to satisfy the Tribunal's orders to cease its discriminatory conduct and prevent its recurrence in the provision of child and family services and Jordan's Principle.

The Parties to the negotiations are the Caring Society, the AFN, the Attorney General of Canada (on behalf of Canada), the Chiefs of Ontario (COO) and Nishnawbe Aski Nation (NAN).

Things to Consider

1. What happens to Canada's funding for First Nations child and family services (CFS) in year 6?

The current Agreement in Principle (AIP) sets out \$19.08 billion for reform over 5 years. It is not clear what Canada's funding commitments are after year 6.

2. A Reformed CFS Funding Approach will take effect as of March 31, 2023 (para. 37). What does this look like for each Nation and Agency?

The research to refine and test the needs and outcomes-based funding approach for child and family services described in the AIP (IFSD Phase 3) is just getting underway, with data collection and analysis to be complete by the end of 2023 and testing and modelling of the approach to be completed by mid-2024. Phase 3 includes funding to support the participation of First Nations and First Nations agencies volunteering to be case studies. Learn more [here](#).

3. Why is the Reformed CFS Funding Approach being implemented before the research is completed to inform its development is done?

This is difficult to answer. While the AIP repeatedly references a Reformed Funding Approach, that approach is currently only partially developed and needs further refinement before it can be implemented. Ideally, implementation happens after the model has been modelled and tested.

4. Prevention funding:

The Canadian Human Rights Tribunal (Tribunal) consent order that is to be filed before March 31, 2022 will provide \$2500 per First Nations person on reserve and in the Yukon for prevention effective April 1, 2022. This amount is based on research done for [IFSD Phase 2](#) and presumes an existing service infrastructure.

- a. *First Nations without Agencies*: Pursuant to legal order

2021 CHRT 12, First Nations without agencies are currently receiving approximately \$947 per person on reserve and in the Yukon for prevention. That amount will be increased to \$2500 per person on reserve (or in the Yukon based on membership lists) effective April 1, 2022. There is a needs assessment underway to determine the infrastructure and capacity needs of First Nations without agencies and a capital needs assessment for all First Nations prevention providers (including First Nations and agencies). This needs assessment will be used to ensure First Nations without agencies have the capacity and infrastructure needed to operate prevention programs. The timetable for this work is the winter of 2022/2023. This work is to inform any needed adjustments to support capacity and infrastructure for First Nations delivering prevention programs.

- b. *First Nations with Agencies*: The \$2500.00 per person effective April 1, 2022 will replace funding at actuals for prevention only (all other CHRT orders will remain in effect). It will also be subject to further refinements in Phase 3 (noted above). This work is anticipated to be completed in early winter of 2023. It is unclear what happens in 2023 regarding the \$2500.00 per person for prevention or the actuals funding for other CFS work (protection, building repairs, legal, etc.).

5. Post-Majority Services:

The Tribunal consent order referred to above will also provide funding reimbursed at actual cost for post-majority care supports to federally funded youth aging out of care and First Nations young adults who have aged out of care up to age 26. Ongoing funding for post-majority will be informed by further research, and it is unclear what it will look like for the fiscal year 2023/2024 and beyond. Importantly, this funding does not extend to youth who were removed off-reserve and funded by the province. Therefore, leadership should be pressing provinces to match the federal program to ensure all First Nations youth benefit. First Nations Youth in Care Advisors in partnership with the Assembly of Seven Generations (A7G) have prepared **two reports** to guide post-majority care, compensation and reform of the CFS program and Jordan's Principle.

- a. *First Nations with Agencies*: First Nations agencies will be able to bill staffing costs to support youth aging out of care and young adults who have left care and are

currently under age 26 effective April 1, 2022. Over time they will be able to work with First Nations to determine the best way to provide supports to youth.

- b. *First Nations without Agencies*: Youth and young adults from care will also be eligible for post-majority services. It is recommended that First Nations identify service providers who can provide these services to young people in the short term (effective April 1, 2022) while longer-term approaches are considered. Possible options for immediate post-majority service delivery include, but are not limited to, contracting with a First Nations child and family service agency, youth center or having the province/territory deliver the services in consultation with First Nations.

6. The AIP suggests that a consent order to end the Tribunal's jurisdiction could be filed as soon as November 2022. What happens after the Tribunal's jurisdiction ends?

- a. The AIP contemplates that the Final Settlement Agreement will, subject to the Tribunal's approval, be the final order resolving the human rights complaint.
- b. Once the Tribunal's jurisdiction ends, the AIP contemplates some form of ongoing dispute resolution mechanism to hold Canada accountable. This mechanism has not been developed and will be reviewable by the Federal Court. The AIP suggests that an Indigenous dispute resolution mechanism will be established. This is an exciting possibility and will need to account for the distinct legal traditions.
- c. Generally, if a First Nation or First Nations agency wants to enforce the final order, then it needs to go to Federal Court to do so. There is no ability to go back to the Tribunal to enforce an order after its jurisdiction on a complaint is done. It is possible to file a new human rights complaint, but as we have seen in this case, that can take years to resolve (this case took nine years to get a decision and was hard-fought by Canada even after the discrimination was substantiated).

7. How specific do the final Tribunal orders need to be to ensure they can be enforced after the Tribunal's jurisdiction ends?

- a. The more specific the order describes the long-term

funding approaches, the easier it is to enforce. However, we will want to structure the order so that there is maximum flexibility for First Nations while still holding Canada accountable for minimum standards and non-discrimination.

- b. The less specific the order describes the long-term funding approach, the more difficult it will be to enforce in court or in the proposed alternative dispute mechanism per the AIP.
- 8. If a Nation has affirmed its jurisdiction per Bill C-92, is it eligible for the funding provided in the AIP?**

This is an important question that requires more clarity.

- a. Canada's official position is that the Tribunal orders no longer apply when a First Nation draws down jurisdiction.
- b. The AIP includes a commitment by Canada that First Nations operating under C-92 will not get less than under the Reformed Funding Approach. The Tribunal decision in 2016 found that both funding levels and structures are vital to ensuring non-discrimination. The AIP only mentions funding levels – not structures. However, it is unclear if any of the funding increments for prevention or post-majority or the capital order will apply to those First Nations operating under C-92.

It is not clear if the \$2500 per person in prevention funding or the post-majority services will be provided to First Nations operating per C-92 as these funding increments relate to the Tribunal orders.

For more information on the Tribunal case and the latest updates, please visit fnwitness.ca.