

May 24, 2023

By Email

Judy Dubois
Registry Operations
Canadian Human Rights Tribunal
240 Sparks Street, 6th Floor West
Ottawa, ON K1A 1J4

Dear Ms. Dubois:

Re: First Nations Child and Family Caring Society of Canada et al v. Attorney General of Canada (Tribunal File: T1340/7008)

The Caring Society thanks the Panel for permitting it to respond to Canada's May 10, 2023 letter submissions. This letter also supplements the Caring Society's May 10, 2023 responses to the questions posed by the Tribunal on March 16 and 28, 2023.

The Caring Society addresses three main areas of concern for the Panel's consideration: (1) shortcomings in Canada's approach to Jordan's Principle; (2) Canada's unilateral introduction of "registered population on reserve and on Crown land, and in the Yukon based on the total registered population of a First Nation" to determine per capita prevention funding; (3) Canada's failure to apply a "government/department of first contact" approach to prevention activities by First Nations and FNCFS Agencies off-reserve; and (4) issues requiring clarification in response to Canada's letter submissions.

1. Shortcomings in Canada's Approach to Jordan's Principle

In its May 10, 2023, submissions, Canada does not provide a detailed update regarding how its implementation of Jordan's Principle satisfies the Tribunal's order to cease discriminatory conduct and prevent its recurrence. While the Caring Society recognizes that the Tribunal's order in 2017 CHRT 35 sparked a profound increase in the services, products, and supports requested by First Nations children, youth, and families, the Caring Society remains concerned regarding Canada's compliance with the full meaning and scope of Jordan's Principle.

As the Tribunal may recall, the Caring Society previously raised concerns related to Canada's implementation of Jordan's Principle in correspondence dated September 17, 2021. Discussions

between Canada, the AFN, and the Caring Society regarding these concerns led to the implementation of a “Back to Basics” approach, agreed to as part of the Agreement in Principle reached in late 2021.¹ Implementation of the “Back to Basics” approach has not, however, resolved all concerns regarding Canada’s implementation of Jordan’s Principle.

The concerns set out in this letter are informed by the Caring Society’s frequent communications with parents, Jordan’s Principle coordinators, First Nations child and family service agency staff, and other professionals accessing Jordan’s Principle. The Caring Society continues to act as a problem-solving hub when parents or professionals encounter problems accessing the services, products, and supports that First Nations children need and deserve. As a result, the Caring Society often communicates directly with ISC when concerns are brought to the Caring Society’s attention.

Each of the concerns raised in this letter have previously been shared with Canada through ongoing direct Caring Society-ISC communication and at the Jordan’s Principle Operating Committee (“**JPOC**”). Subject to further direction from the Tribunal, the Caring Society plans to report back to the Tribunal in August 2023 regarding progress on the concerns raised in this letter. This will give the parties focused time to address the concerns and determine next steps as necessary.

(i) High-level concerns with Jordan’s Principle Implementation

Concerns with Reimbursement Delays

The Caring Society continues to receive serious concerns from families, service coordinators, and professional service providers regarding long delays in Canada reimbursing for services that have been approved and provided. These reimbursement delays have placed some service providers in a position where they are no longer able to serve children receiving Jordan’s Principle services, meaning that children will not receive the help they are guaranteed under the Tribunal’s orders. As recently as May 9, 2023, the Caring Society has learned of vendors who do not want to work with families being funded through Jordan’s Principle because the reimbursement and direct billing timeline is long (up to 6 months) and inconsistent.

The Caring Society has serious concerns about ISC’s administrative processes continuing to create barriers for children accessing services approved under Jordan’s Principle. These concerns exist both at the “front end” (when First Nations children make requests) and on the “back end” of the process (related to timelines for reimbursement, vendor setup, and restrictions around advance payment).

ISC aims for a 15-business day reimbursement service standard; however, this timeline often is not met. Overall, ISC processed 54.9% of all invoices nationally within 15 business days from April to December 2022. Capacity to meet this timeline appeared uneven across the country: on

¹ For the Tribunal’s reference, the Caring Society attaches an ISC document setting out the “Back to Basics” approach, retrieved online from the Jordan’s Principle Enhanced Service Coordination Hub for BC’s [“Policy Developments”](#) web page. The Caring Society is also providing its own “Back to Basics” information sheet, which is available [online](#).

the low end were Ontario (32.8%) and Manitoba (46.1%); on the high end were British Columbia (82.9%) and Quebec (93.6%).²

It is unclear what is driving this difference in capacity. For instance, it is unlikely that population is the main or sole driver, as there does not appear to be a correlation between a province's First Nations population (as reported by Census data) and ISC's ability to meet timelines for payment.³ Census data indicates that Ontario's First Nations population is roughly 251,000, while British Columbia's is 180,000.

In correspondence with the Caring Society and ongoing discussions at JPOC, Canada has repeatedly cited workload as the impediment to timely payment; however, this administrative concern has not been effectively addressed by Canada. Moreover, the Caring Society has no knowledge of a serious plan to address the payment issues, nor has it received an explanation for why there is such variation in the reimbursement within some regions. The Caring Society plans to engage Canada in direct discussion on this point in the coming weeks to develop and immediately implement a solution with a view to protecting and promoting the rights of First Nations children and youth under Jordan's Principle.

Concerns with Canada's 24-hour Jordan's Principle Phone Line

The Caring Society also has ongoing concerns about Canada's 24-hour Jordan's Principle line. For example:

- On January 11, 2023, Dr. Blackstock called the 24-hour line 6 times within 3 hours, regarding an urgent case only, to get a voicemail message outlining Canada's response to various Tribunal orders before leaving a phone number. There was no option to indicate the case was urgent. Eventually, Dr. Blackstock was able to reach ISC staff at headquarters at the beginning of the business day, using emails provided to the Caring Society as a part of the CHRT proceedings. Such recourse would not be available to the general public. ISC later revealed that it was not staffing the phone line at all times. It reported taking corrective action to the voicemail and to the staffing issue.
- On May 13, 2023, Dr. Blackstock again called the 24-hour line to report another case requiring ISC's attention. After waiting for a call back for over 4 hours, she sent an email to the regional staff person using the emails provided to the Caring Society (but not the public) and was able to get assistance for the family. The Caring Society was later advised that there had been an outage on May 13, and that the 24-hour line is staffed by sixteen agents on a 24/7 schedule.
- Nevertheless, during the week of May 15 2023, the Caring Society was informed by a parent that they had called the 24-hour line and left a message in relation to a request that had been made in January 2023. That parent is still waiting for a response.

² *Jordan's Principle Payment Timelines, April 1, 2022 to December 1, 2022*, Indigenous Services Canada, Annex A

³ Quebec: Approx 116,500 First Nations persons (93.6% timely payments); Manitoba: Approx 135,000 First Nations persons (46.1% timely payments); British Columbia: Approx 180,000 First Nations persons (82.9% timely payments); Ontario: Approx 251,000 First Nations persons (32.8% timely payments).

The length of time it takes to reach a family after contact with the 24-hour line is an important step in the process. Canada indicates it does not start the “clock” on the CHRT timeframes until it has all the information. The Caring Society’s view is that, based on a child-centred approach, timeframes should begin at the time the family/service provider reaches out. Further discussion between the Parties will be necessary to address this important issue.

Concerns Regarding Timeliness of Determining Requests

The Caring Society continues to have concerns about Canada’s performance towards the Tribunal-mandated timelines for determining requests (12 hours for urgent individual requests, 48 hours for non-urgent individual requests; 48 hours for urgent group requests and 7 days for non-urgent group requests).

ISC’s most recent “Deep Dive” on Jordan’s Principle Administrative data, addressing April 1, 2021 to March 31, 2022 and provided through JPOC, demonstrates that

Canada assesses its own compliance against the Tribunal-mandated timelines in FY 21-22 as follows:

- For urgent individual requests: 53%.⁴
- For non-urgent individual requests: 44%.⁵
- For urgent group requests: 31%.⁶
- For non-urgent group requests: 53%.⁷

The Caring Society remains concerned that by its very definition, an unaddressed need or delay in responding to an urgent case can result in irremediable harm to a child.

Concerns Regarding Imposition of “Attestation” Requirements on Service Providers

Furthermore, the Caring Society recently received a concerning report from an award-winning service provider regarding ISC’s imposed requirement of parental attestations regarding receipt of services.

The Caring Society was advised that ISC requires this professional service provider (who services dozens of First Nations children in rural and remote areas) to have the parents they serve sign an attestation for each service provided to their child during school hours, even though the parents have already signed a consent for the service provision. Many of these families have no internet or phone, meaning that the professional service provider has to make an unnecessary home visit every month to collect these service attestations to support billing to ISC (and are unable to charge ISC for the time this takes away from serving children). This red tape approach is a burden to

⁴ See Deep Dive at p. 77 (Table 71).

⁵ See Deep Dive at p. 77 (Table 71).

⁶ See Deep Dive, at p. 77 (“Table 71: Compliance rate by request type, urgency, and month of sufficient information, fiscal year (FY) 2021-22”).

⁷ See Deep Dive at p. 77 (Table 71).

families and unnecessary as, in this case, the professional is legally required to document their interactions with clients as a part of their licensure. Billing for services that are not required would be a breach of their professional responsibilities (and ISC has made no allegations that the professional has done so).

The Caring Society has been advised that ISC owes this service provider approximately \$600,000 and the professional is not able to continue operating if the arrears are not paid. Indeed, this is the second time this has happened to the service provider. In December 2022, Charlie Angus, the Member of Parliament for the area, had to intervene to ensure Canada paid this service provider.

(ii) *Specific recommendations to improve outcomes for First Nations children, youth, and families under Jordan’s Principle*

The Caring Society believes that the following non-exhaustive measures could be put in place to improve outcomes for First Nations children, youth, and families under Jordan’s Principle. These recommendations have been shared with Canada through the ongoing communicative relationship between the Caring Society and ISC, as well as at JPOC:

- i. ISC should adopt and implement the Spirit Bear Plan to fill the gaps in other under-funded ISC programs that Jordan’s Principle is currently filling (e.g.: medical transportation, educational supports, services for children with autism, etc.).⁸
- ii. ISC must ensure the 24-hour line is properly staffed and that callers can immediately access help for urgent cases and those leaving messages receive a call back within 30 minutes.
- iii. ISC needs to develop and implement effective internal quality control measures and adequate training (including training for finance staff) that ensure the implementation of Back to Basics including a compassionate response.
- iv. ISC should consider putting in place a presumptive approval for “low cost,” life changing items. Per IFSD’s Data Assessment, over 50% of requests are under \$5,000, with many items costing between \$100-999. This could go a long way to addressing delays in determining requests. This approach takes into consideration that the administrative process of adjudicating a request for low-cost items should not outweigh the request itself.
- v. ISC should engage with the Expert Advisory Committee (“EAC”) in areas that have not been addressed, including corrective measures, improving data collection, and an independent audit policy.
- vi. ISC should consider collaborating with IFSD on immediate changes that could be made to GC Case to improve data collection. Concerns about how to do so in a manner that ensures requests are not delayed and privacy rights are upheld could be addressed in tandem with the EAC.

⁸ *Data assessment and framing of an analysis of substantive equality through the application of Jordan’s Principle*, Institute of Fiscal Studies and Democracy at the University of Ottawa (September 1, 2022), at pp. 65,68,69 and 71.

- vii. ISC should ensure that data on ISC’s financial performance (e.g., reimbursements, payments, etc.) is included in reporting to the Parties.
- viii. ISC should engage with IFSD or another appropriate party about the implementation of acquisition cards. Acquisition cards can help ensure that families are not required to pay up front for services, products, and supports, which can be a barrier for many families.
- ix. ISC should clarify when it requires attestations from clients indicating that services have been provided, including from professional service-providers, and explain the legal basis for such requirements.
- x. ISC should clarify the role and public awareness of the ISC Ombudsperson and consider whether the ISC Ombudsperson is sufficiently independent and empowered to effectively assist in addressing issues of non-compliance.

2. Canada’s unilateral limiting criteria for the prevention per capita amount

As indicated in its letter submissions on May 10, 2023, the Caring Society is concerned about ISC’s imposition of eligibility limitations in relation to the per capita amount for prevention funding. In its public communication to recipients in April 2023, ISC indicated that it is limiting prevention funding in the following manner:

Prevention Funding

Prevention funding will be allocated to First Nations and/or FNCFS delegated agencies or service providers at \$2,500 per capita, based on a First Nation’s total registered population on reserve, on Crown land, and in the Yukon, as of December 31, 2022, adjusted annually for inflation. [Emphasis added.]

From the Caring Society’s perspective, there are three main issues here: (1) the “registered” criterion is out of step with the history of the FNCFS Program; (2) irrespective of this “registered population on reserve” criterion or the history of the FNCFS Program, the government department of first contact is still obligated to pay for services under Jordan’s Principle; and (3) at a minimum the department must take positive measures that the excluded children living on-reserve are funded by another source for the statutory services that they are entitled to.

The “registered” criterion is a limiting factor that is out of step with the history of the FNCFS Program. Appendix B to Directive 20-1 made no mention of “registered” on-reserve populations in its definition of an “Indian resident on reserve”, which meant “(1) currently residing on reserve; or (2) in the case of an Indian who leaves a reserve to be admitted into a social service care facility, residing immediately prior thereto”. Moreover, in discussing the principles underlying the FNCFS Program, Directive 20-1 stipulated at Article 6.1 that: “The department is committed to the expansion of First Nations Child and Family Services on reserve to a level comparable to the services provided-off reserve in similar circumstances” (emphasis added). Nor do the *FNCFS Transitional Terms and Conditions*, which are currently in force, refer to a First Nation’s “registered population on reserve”. Instead, the *FNCFS Transitional Terms and Conditions*

indicate that:

3.1 Purpose

The FNCFS program is intended to provide resources and funding to support the holistic and culturally appropriate delivery of prevention and protection services to meet the needs of children, youth and families ordinarily resident on reserve or in the Yukon. [Emphasis added.] [...]

3.2 Objective

The objective of the FNCFS program is to support thriving children, youth, young adults, families and communities by funding eligible recipients, as outlined in section 4, to deliver prevention and protection services such as child protection, guardianship and support and child maintenance and care for children and families ordinarily resident on reserve or in the Yukon; and in section 7, to deliver First Nations Representative Services. [Emphasis added.]

Order 7 from this Panel’s ruling in 2022 CHRT 8 also makes no mention of a “registered” on-reserve population as a precondition for accessing the per capita amount for prevention funding.⁹ In any event, as the Tribunal held in 2020 CHRT 36, a child ordinarily resident on-reserve is eligible for services pursuant to Jordan’s Principle.¹⁰

Given the foregoing, the Caring Society would benefit from an explanation from ISC as to why it is now imposing a limiting requirement on the per capita amount for prevention funding at this stage of the proceedings. 2022 CHRT 8 was an order made on consent and at no time did the Caring Society agree to limit the scope of Order 7 to only those “registered” on-reserve.

3. Canada’s must adopt a “government or government department of first contact” approach to First Nations or FNCFS Agencies providing prevention services off-reserve

The Caring Society has also been made aware of First Nations Child and Family Services Agencies (“FNCFS Agencies”) whose activities to provide prevention services to First Nations children residing off-reserve are being questioned by ISC. The Caring Society acknowledges that the FNCFS Program has aimed to provide services to First Nations children, youth, and families who are ordinarily resident on reserve. However, when it is the government of first contact, Canada is ultimately responsible for ensuring that these services are provided to First Nations children and youth under Jordan’s Principle. This Panel has ordered that “Jordan’s Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve”, and that the government or department of first contact is pay for the service to a First Nations child.¹¹

FNCFS Agencies often do not distinguish between those who are ordinarily resident on reserve (or registered on reserve) or not: FNCFS Agencies provide child and family services to First

⁹ See [2022 CHRT 8](#), at para [172](#).

¹⁰ See [2022 CHRT 36](#), at para [56\(4\)](#).

¹¹ See [2017 CHRT 35](#) (orders amending 2017 CHRT 14) (emphasis added).

Nations children and youth within their jurisdiction and pursuant to *An Act respecting First Nations, Inuit and Métis children, youth and families* and provincial/territorial legislation. The Caring Society has become aware that FNCFS Agencies making actual claims are being met with questions, delays, and denials of services for First Nations children and youth due to ISC's residency requirements.

The Caring Society is concerned that ISC is creating bureaucratic barriers and jurisdictional conflicts for FNCFS Agencies seeking to access funding for First Nations children and youth in need of services. Where a FNCFS Agency makes a request for reimbursement under the FNCFS Program that is deemed ineligible due to ISC's residency requirements, the request is not automatically considered for approval under Jordan's Principle. Instead, FNCFS Agencies are often left without recourse: the FNCFS Agency may be unaware that the First Nations children and youth they are serving could access services under Jordan's Principle or the FNCFS Agency is required to start a new application process, with different requirements, which, in the result, delays the delivery of the service to the First Nations child or youth. This approach is not in keeping with the best interests of First Nations children and youth.

Simply put, Canada must pay, one way or another, or through one program or department or another. As this Panel has made clear, "Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them".¹² Holding otherwise would permit Canada to create the sort of jurisdictional or departmental dispute that Jordan's Principle and this Tribunal's orders have sought to do away with.

The government or department of first contact should pay for the service and sort out payment after the delivery of the service, thus ensuring that First Nations children, youth, and families do not experience service gaps or delays or denials of services. Further, Canada should not wait for a dispute between governments or departments to arise, as this Panel has also ordered that "a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle".¹³

4. Specific submissions in response to Canada's May 10, 2023 letter submissions

The Caring Society would like to clarify certain aspects of Canada's letter submissions:

- i. In its "Annex A", Canada states that "[t]he Parties are currently discussing methods to support First Nations without agencies to spend their prevention funding." The Caring Society notes that IFSD anticipates that it will provide Parties with an update regarding the Non-Agency Needs Assessment in September 2023. Evidence-informed discussions will take place at that time in response to IFSD's update.
- ii. In its "Annex A", Canada states, with respect to post-majority support services, that "First Nations and First Nations authorized service providers can submit funding requests for the

¹² [2017 CHRT 35](#) (orders amending 2017 CHRT 14).

¹³ See [2017 CHRT 35](#) (orders amending 2017 CHRT 14).

reimbursement of costs through the actuals process (beginning April 1, 2022, until March 31, 2024)". "Annex B" states that "ISC will continue to pay Post-Majority Support Services at their actual cost until March 31, 2024". However, there is no consensus on an end-date for Post-Majority Support Services. The Caring Society's view is that those services ought to continue to be available at actuals until the Reformed Funding Approach is in place or until the Tribunal otherwise orders.

- iii. In its "Annex B", Canada states, with respect to ISC departmental reform, that "[t]he EAC's Terms of Reference and a Project Concept were voted to be adopted by a majority of Committee members present at the last meeting on March 24, 2023." The Caring Society is not of the view that the Terms of Reference for the EAC have been adopted or finalized. While the Caring Society has provided initial comments on the Terms of Reference and Project Concept it made clear that further feedback is forthcoming.
- iv. In its "Annex B", Canada states, with respect to cultural competency training, that "each employee is expected to complete a mandatory 15 hours, or 2 days of Indigenous cultural competency learning on an annual basis". Further, "[s]upervisors at both departments have the delegated authority to manage and assess the performance of each of their employees and to support their learning and development plans, including cultural competency learning." The Caring Society has concerns about the sufficiency of this allotted training and the impact, if any, it will have in correcting the old mindset at ISC. The Caring Society also questions the adequacy of measures, protections, policies and/or safeguards put in place by ISC to ensure supervisors tasked with fostering their subordinates' cultural competency are positioned to do so.
- v. In its "Annex B", Canada does not address the inflation factor regarding Order #7 under 2022 CHRT 8. The Caring Society is concerned as the inflation factor being applied has not kept pace with market conditions since the time 2022 CHRT 8 was made. Moreover, the inflation and population adjustments were not applied to the allocation of funds that were provided on April 1, 2023, and there is no clear public confirmation that Canada will use the Consumer Price Index rate of inflation to adjust the \$2500 per capita as opposed to using discriminatory approaches such as a flat 2% figure or its Final Domestic Demand Implicit Price Index ("FDIPI") approach. This remains a significant point of concern for the Caring Society.

The Caring Society would be pleased to provide further clarification to the Panel as requested.

Yours very truly,



David P. Taylor

DPT/jk

Encl.

Copy to: **Christopher Rupar, Paul Vickery, Jonathan Tarlton, Patricia MacPhee,
Kelly Peck, Sarah-Dawn Norris, and Meg Jones**
Co-counsel for the respondent Attorney General of Canada

**David Nahwegahbow, Stuart Wuttke, Adam Williamson, Jeremy Kolodziej
and Lacey Kassis**
Co-counsel for the complainant Assembly of First Nations

Brian Smith
Counsel for the Canadian Human Rights Commission

Maggie Wente, Sinéad Dearman, Jessie Stirling and Darian Baskatawang
Co-counsel for the interested party Chiefs of Ontario

Justin Safayeni and Stephen Aylward
Co-counsel for the interested party Amnesty International

Julian Falconer, Christopher Rapson and Natalie Posala
Co-counsel for the interested party Nishnawbe Aski Nation

Sarah Clarke, Anne Levesque, Alyssa Holland and Kevin Droz
*Co-counsel for the complainant First Nations Child and Family Caring Society
of Canada*