Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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 and
NISHNAWBE ASKI NATION

Interested Parties

REPLY WRITTEN SUBMISSIONS OF FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA RE: NON-COMPLIANCE MOTION FILED DEC 12, 2023

June 7, 2024

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OPENING COMMENT ON BEREAVED CHILDREN

1. Dr. Blackstock's January 12, 2024 affidavit recognized the incredible contributions to Jordan's Principle made by Jordan's family, the AFN, COO, and NAN among others. While these reply submissions primarily address matters raised by Canada, the Caring Society must, in good conscience, and as a first order of business, express its deep disappointment with the AFN's minimization of the trauma experienced by children who have lost a parent, sibling, or other close relative and dismissive approach to the vital importance of First Nations children participating in a sacred cultural practice, like a memorial Potlach, for their loved ones.[1]

2. Bereavement is a sacred time for First Nations children. The passing of a parent, sibling or close relative can be particularly traumatic. During these sacred times, children need, on an urgent basis, extra love, ceremony, compassion and the culturally-appropriate supports that Jordan's Principle is designed to provide. The AFN's submissions impugn the urgency of funding, with support of their First Nation's Chief, travel costs for two children to attend two memorial Potlaches for their mom, sibling and another close relative who passed within months of each other.

3. Contrary to the AFN's suggestion, Potlaches are more than just "culturally important", nor is supporting bereaved children's attendance at such events an expansion of the Tribunal's orders, which are based on substantive equality, the best interests of the child and culturally-appropriate services. Potlaches were banned for several decades, disrupting West Coast First Nations' political, economic, legal, social, cultural, and spiritual practices. This had particular impacts for children.

4. The Caring Society also wholeheartedly disagrees that urgent supports are only required for children who experience a parental death after a child welfare removal. The death of a close family member, or multiple family members, is a worst-case scenario for any First Nations child, regardless of their circumstances. The National Inquiry into Missing and Murdered Indigenous Women and Girls, whose conclusions on this point were accepted without reservation by the Tribunal to support approval of the Revised Final Settlement Agreement on compensation, was clear that First Nations children who lose a parent face numerous life-altering risks. Jordan's Principle must be responsive to the needs of these most vulnerable children.

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[1] See paras 81-88 below for reply to the legal/factual aspects of AFN's submissions on this topic.

OVERVIEW

Background

5. The Caring Society's singular focus in bringing this motion is to ensure that Canada discharges its current obligations to every First Nation child under Jordan's Principle, pursuant to their substantive equality rights enshrined in the *Canadian Human Rights Act* ("*CHRA*").[2] There is urgency to ensuring that Canada's non-compliance under the existing orders is redressed. The evidence demonstrates that serious harm can befall First Nations children when the Tribunal's orders are not followed. The heavy burden of Canada's non-compliance needs to be immediately lifted off the shoulders of First Nations children, their families, First Nations, and service providers (including Jordan's Principle service coordinators and professionals).

6. While not the focus of this motion, long-term reform of Jordan's Principle is on the horizon. The Caring Society expects to fully participate in long-term reform of Jordan's Principle but is understandably concerned about Canada's ability to adhere to agreed-upon measures given its clear breach of "The Work Plan to Improve Outcomes under Jordan's Principle based on Indigenous Services Canada's Compliance with the Tribunal's Orders" ("**AIP Work Plan**"),[3] and its refusal to adopt alternative remedies to Indigenous Services Canada's ("**ISC**") serious non-compliance. These proposals, and long-term reform, will benefit from the ongoing First Nations-informed research as ordered by the Panel in 2022 CHRT 8.

7. The Caring Society rejects ISC's assertion that this motion "does not focus on whether First Nations children are receiving the products, services and supports they need pursuant to substantive equality".[4] To the contrary, this is one of the principles animating the solutions-oriented relief sought.[5] Indeed, Jordan's Principle has been transformative for many First Nations children, and the Caring Society acknowledges that these successes, which have been made

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[2] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.
[3] Affidavit of Dr. Blackstock (aff'd Jan. 12, 2024) at Exhibit 61 (AIP Summary) ("**Dr. Blackstock Affidavit**"); Amended Assembly of First Nations Factum dated May 21, 2024 at para 25 ("**Amended AFN Factum**").
[4] Attorney General of Canada Factum dated May 24, 2024 at para 51 ("**AGC Factum**").
[5] Reply Affidavit of Dr. Blackstock (aff'd Mar. 27, 2024) at Exhibit 31 (December 8, 2023 letter from David Taylor to counsel for AIP Parties) ("**Dr. Blackstock Reply Affidavit**").

possible by the Tribunal's Orders and the Back-to-Basics Approach, are to be celebrated as a tribute to Jordan River Anderson and his family. However, these successes cannot (and should not) shield ISC from compliance with the existing orders as they relate to every First Nations child entitled to access Jordan's Principle.

8. Furthermore, the approach taken by ISC (at times supported by the AFN) is from a governmental and operational perspective, concerned with the hardship of government bureaucracy, as opposed to adopting a child-first lens. ISC's response to the solutions proposed by the Caring Society is to reject them based on no evidence, or flimsy evidence, or to indicate that "the Caring Society has not identified practical solutions that ISC could reasonably implement without further increasing the backlog",[6] as opposed to offering creative solutions that will help First Nations enjoy their right to substantive equality.

9. This is not to suggest that the Caring Society is seeking unrealistic, impractical, or unsustainable measures to redress Canada's non-compliance. Nor is the Caring Society seeking to expand the Tribunal's orders. Consistent with the Tribunal's dialogic approach in this human rights complaint, the Caring Society brought this motion to enable the Tribunal to exercise its retained remedial jurisdiction to ensure the **effective implementation** of its Jordan's Principle Orders, to provide clarity to those Orders where the Tribunal determines that doing so is warranted, and to ensure that ISC changes its old mindset and does not repeat its past discriminatory conduct. This is about making sure that all First Nations children have an equal opportunity to benefit from the Orders and that where problems exist, solutions are introduced to entrench the Orders equally.

Structure

10. The Caring Society has organized its reply submissions as follows:

(a) Part I – The Back-to-Basics Approach and Urgency;

(b) Part II – Reimbursement;

(c) Part III – The Dialogic Approach; and

(d) Part IV – Reply and Objections to the AFN's Legal Submissions.

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[6] AGC Factum at para 59.

PART I – THE BACK-TO-BASICS APPROACH AND URGENCY

A. The Evidence Respecting the AIP Work Plan

11. Any suggestion that the tasks set out in the AIP Work Plan signed on December 31, 2021 are complete is not supported by the evidence.

12. First, ISC has not fulfilled its obligations under the AIP Work Plan.[7] The AIP Work Plan was a key milestone reached among the AIP Parties that was designed to ameliorate non-compliance issues with Jordan's Principle.[8] The Caring Society has previously conveyed to the Tribunal its serious concerns about Canada's slow and haphazard implementation of the AIP Work Plan.[9]

13. Second and relatedly, the Caring Society left the AIP process because ISC has failed to fulfil its obligations in implementing Jordan's Principle, including measures under the AIP Work Plan that were specifically developed to mitigate non-compliance issues at the time it was developed,[10] and which ISC failed to implement over the 23-month period before the Caring Society brought this non-compliance motion. ISC is responsible for meeting its human rights obligations on an ongoing basis.[11] It is not enough to provide assurances that an identified problem will be fixed at some indeterminate future date, as ISC has done throughout the lifespan of this human rights complaint.[12] Nor is it enough to fall back on the refrain that the parties will negotiate solutions to current problems at a future and indeterminate point.[13]

B. The Back-to-Basics Approach

14. Following the December 31, 2021 AIP and the AIP Work Plan, ISC implemented the Back-to-Basics Approach in early 2022.[14]

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[7] Dr. Blackstock Affidavit at paras 173-174.
[8] Dr. Blackstock Affidavit at para 173 and Exhibit 61 (AIP Summary).
[9] Dr. Blackstock Affidavit at para 175. See also the Caring Society's October 10, 2023 reporting letter to the Tribunal at pp 11-16.
[10] Dr. Blackstock Reply Affidavit at Exhibit 31 (at p 2).
[11] 2022 CHRT 41 at para 252.
[12] Dr. Blackstock Affidavit at para 30.
[13] Amended AFN Factum at para 25.
[14] Affidavit of Dr. Valerie Gideon (aff'd Mar. 14, 2024) at para 17 ("**Dr. Gideon Affidavit**").

(a) Failure to Address the Limitations of ISC's Evidence on the Self-Identification of Urgent Requests

15. While ISC has identified requestors' self-identification of urgent requests as a practical issue that requires a practical solution,[15] it has not offered a practical or creative solution beyond its suggestion that the parties should co-develop urgency criteria.[16] Notably, neither ISC's nor the AFN's submissions engage with ISC's prior misidentification of urgent cases as non-urgent, which Back-to-Basics aimed to remedy. Furthermore, ISC's witness on misidentification of urgent cases confirmed that ISC had not done any analysis to identify how many urgent cases continue to be misclassified as non-urgent.[17]

16. In reply, the Caring Society agrees that there is room for practical solutions for the misclassification of cases; however, ISC has failed to provide evidence to substantiate the extent of its concerns and has failed to propose a practical solution at the level of the child. Other than pointing to an objective increase in the raw number of urgent cases,[18] ISC's submissions fail to address two evidentiary points regarding the allegedly "likely misclassified" requests:

(a) Taken at its highest, ISC's evidence is that less than one-fifth of all urgent requests (18.5%) may be "likely misclassified" based on ISC's internal analysis of self-identified urgent requests.[19] Thus, at least 81.5% of all self-identified urgent requests are urgent.

(b) Under cross-examination, it became clear that the evidence about the impugned 18.5% of self-identified urgent cases in Dr. Gideon's affidavit is based on multiple levels of hearsay. Dr. Gideon played no part in reviewing this data,[20] which she took at face value[21] and to which she does not have access in any case given her departure from ISC

[15] AGC Factum at para 56.
[16] AGC Factum at paras 57-59.
[17] April 2, 2024 cross-examination of Dr. Valerie Gideon at p 90, lines 8 to 25 [**Dr. Gideon CX**].
[18] AGC Factum at para 35.
[19] Dr. Gideon Affidavit at para 24.
[20] Dr. Gideon CX at p 78, line 14 to p 80, line 19.
[21] Dr. Gideon CX at p 80, line 15 to p 80, line 19.

in November 2023.[22] Dr. Gideon was also unable to explain the discrepancy between the size of the sample of urgent cases studied and other statistics in her affidavit regarding the overall number of urgent cases,[23] stating on at least four occasions that any clarifications should come from ISC's data team.[24] Of course, no member of ISC's data team was made available for cross-examination before the Tribunal.

17. The Caring Society recognizes that the Tribunal has a broad discretion to accept hearsay evidence, and its approach to admissibility is generally highly permissive.[25] In these proceedings, the Tribunal's general approach has been to admit relevant documents, regardless of hearsay, on a case-by case basis as they were introduced and to consider reliability issues at the weighing stage.[26] However, in assessing this hearsay evidence about the impugned 18.5% of self-identified urgent cases, the Tribunal should give it little weight, particularly because of the multiple uncertainties about the data that Dr. Gideon could not answer.

18. ISC has also failed to engage meaningfully with the Caring Society's uncontested evidence regarding social prescription provided by Dr. Giroux, an Indigenous pediatrician and Co-Chair of the Canadian Paediatric Society's First Nations, Métis, and Inuit Child Health Committee.[27] Indeed, ISC and the AFN do not, in any meaningful or critical manner, engage with this important concept.[28]

19. ISC's submissions demonstrate that the Caring Society's proposed solutions regarding the triage function may have been misunderstood.[29] ISC has said that the Caring Society's "proposed solutions to triaging urgent requests are not practical or feasible" given that ISC cannot "reassign potentially miscategorized urgent requests to a lower level of priority" and must consider urgent requests "in the order in which they were received".[30] However, the Caring Society has always

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[22] Dr. Gideon Affidavit at para 1.
[23] Dr. Gideon CX at p 81, line 16 to p 86, line 21; Dr. Gideon Affidavit at paras 21 and 24.
[24] Dr. Gideon CX at p 84, line 9 to p 84, line 19; Dr. Gideon CX at p 84, line 20 to p 84, line 25; Dr. Gideon CX at p 85, line 21 to p 85, line 25; Dr. Gideon CX at p 86, line 17 to p 86, line 21.
[25] 2014 CHRT 2 at paras 67-78; *Clegg v. Air Canada*, 2019 CHRT 4 at para 69.
[26] 2015 CHRT 1 at para 25, citing 2014 CHRT 2 at paras 67-78.
[27] Affidavit of Dr. Ryan Giroux (aff'd Mar. 27, 2024) at para 3 ("**Dr. Giroux Affidavit**").
[28] AGC Factum at para 69; Amended AFN Factum at paras 68-69.
[29] Caring Society Factum at para 98.
[30] AGC Factum at para 67.

taken a solutions-focused approach to addressing substantiated challenges in ISC's implementation of Jordan's Principle. On this motion, the Caring Society seeks to assist ISC in moving towards definitional clarity in assessing urgent claims.[31] In response, ISC has raised concerns regarding misidentification of non-urgent cases as urgent and has provided an "error rate" of 18.5%; however, as noted above, the evidence around that error rate is weak. The Caring Society wants to work with ISC to find, based on stronger evidence, a solution that is tailored to the actual nature and size of the practical problem. Any triage mechanism must be properly tailored for two reasons: (1) on ISC's own evidence, the current process is working at least 81.5% of the time, such that any solution should not prejudice the proper identification of these urgent cases; and (2) the consequences of misclassification of urgent cases as non-urgent can have dire, even life-threatening, results for the requestor.

20. The AFN asserts its strong opposition to requestors' self-identification of urgency, arguing a hardship to ISC, without consideration of the impact on First Nation children waiting for urgent services, products, and supports they need.[32] Without evidence, or reference to a particular legal principle, it asserts that "common-sense dictates that the self-identification of urgent Jordan's Principle requests has not been effective" and is "ultimately resulting in a significant percentage of misclassified requests".[33] The AFN has no response to the Caring Society's evidence from First Nations and First Nations service providers about the harms flowing from ISC's contravention of urgent timelines, including the deaths of two young children in Pikangikum First Nation.[34]

21. Nor does the AFN have a meaningful response to the Caring Society's evidence about social prescription, failing to engage with two key pieces of evidence: (1) Dr. Gideon's admission on cross-examination that toys, one of the impugned categories of "likely misclassified" self-identified urgent requests, had been requested for "children that had autistic disorders and things for calming purposes";[35] and (2) Dr. Giroux's uncontested evidence that social prescribing is a key

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[31] Caring Society Factum at paras 100-102.
[32] Amended AFN Factum at para 65.
[33] Amended AFN Factum at para 68 (citing to Dr. Gideon Affidavit at para 23, which does not support this point but instead discusses how ISC cannot reassign self-identified urgent requests and how ISC treats such requests with the same level of priority).
[34] Amended AFN Factum at para 68; Dr. Blackstock Reply Affidavit at paras 13-30, Exhibits 1-13; Dr. Blackstock Affidavit at paras 73-75, Exhibit 30.
[35] Dr. Gideon CX at p 169, line 23 to p 170, line 4.

tool for redressing health inequities among First Nations children and that these items may be urgent.[36] However, the Caring Society agrees with the AFN that the Tribunal has directed that "In evaluating urgent and/or life-threatening needs due consideration must be given to the seriousness of the child's condition and the evaluation of the child made by a physician, a health professional or other professionals involved in the child's assessment".[37]

(b) Back-to-Basics Does Not Prohibit Clinical Case Conferencing or Referrals to Existing Services

22. ISC asserts that Jordan's Principle is a "particularly attractive option, even when accessible government services already exist", because of a number of factors, including its "prohibition against clinical case conferencing".[38] ISC also asserts that it "is not permitted to redirect requestors to existing accessible services, even when that service is available in First Nations communities or through an existing approved group request […]."[39]

23. Notably, Back-to-Basics does not prohibit clinical case conferencing. Rather, Back-to-Basics provides operational guidance on the use of clinical case conferencing consistent with 2017 CHRT 35. In relevant part, the Back-to-Basics Approach reads as follows:

> ***Clinical Case Conferencing***
>
> For further clarity, per 2017 CHRT 14, and as amended in 2017 CHRT 35, Canada shall **only** engage in clinical case conferencing where it is reasonably necessary to determine the clinical needs of a child. As noted above, ISC will presume that professionals are acting in the best interest of the child, and ISC must not seek a "second opinion" or otherwise override the recommendation of a duly qualified professional.
>
> In the event that clinical case conferencing is required to determine a child's clinical needs, as confirmed by a supervisor, requestors must be immediately notified. Canada will only consult with professionals with knowledge of the child's case, and will only involve other professionals if those already involved in the child's care are unable to provide the clinical information required. Clinical case conferencing must not delay a determination. In the event that a determination cannot be made within CHRT timelines (i.e., within 12 hours of receiving an urgent individual request or within 48 hours of receiving other non-urgent individual requests; or within 48 hours of receiving an

[36] Dr. Giroux Affidavit at paras 13 and 20.
[37] 2019 CHRT 7 at para 89 (emphasis added); Amended AFN Factum at para 59.
[38] AGC Factum at para 30 (citing Dr. Gideon Affidavit at paras 27-28).
[39] AGC Factum at para 31 (citing Dr. Gideon Affidavit at paras 27-28).

> urgent group request or within 1 week of receiving other non- urgent group requests), ISC will work with the requestor to implement a mitigation strategy.[40]

24. In any event, the Tribunal's Order in 2017 CHRT 35 already permits clinical case conferencing in certain circumstances.[41] Back to Basics did nothing to change this. In fact, this reflects the agreement of the parties.[42] Instead, the approach in Back to Basics is focused on the circumstances of the child, to provide ISC employees operational guidance to ensure that delay is avoided whenever possible, and places the onus on ISC (and not the child and their family) to determine that it is reasonably necessary.

25. Furthermore, Back to Basics specifically contemplates connecting families to First Nations Service Coordinators, who are recognized as having detailed knowledge of available services at the community level and can assist with future requests.[43] Referrals to existing services are also consistent with the Tribunal's Order in 2017 CHRT 35.[44]

C. The Caring Society's Relief Sought Concerning Urgency

26. Based on ISC's submissions, there appears to be a misunderstanding regarding the Caring Society's rebuttable presumption solution, as well as a misapprehension regarding caregiver death and state of emergency criteria as clarification of circumstances in which irremediable harm is reasonably foreseeable.

(a) ISC Has Misunderstood the Caring Society's Rebuttable Presumption Solution

27. ISC has argued that the Caring Society's proposed rebuttable presumption of urgency is not workable, partly because Back-to-Basics prohibits ISC from reassigning requests to a lower level of urgency, partly because of information requirements to rebut the presumption, and partly because of the current volume of requests ISC is processing.[45]

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[40] Affidavit of Brittany Mathews (aff'd Jan. 12, 2024) at Exhibit 8 (Back-to-Basics Approach at pp 5-6; emphasis in original) ("**B. Mathews Affidavit**").
[41] 2017 CHRT 35 at Annex (Orders 1(B)(iii)-(iv)).
[42] 2017 CHRT 35 at para 3(b).
[43] B. Mathews Affidavit at Exhibit 8 (Back-to-Basics Approach at p 6).
[44] 2017 CHRT 35 at paras 3(b)(v) and 135(1)(B)(iii).
[45] AGC Factum at paras 69-71.

28. For clarity and in reply, the Caring Society is not proposing a rebuttable presumption of urgency that can never be rebutted.[46] That would be counter productive. As indicated above, exclusive of the palliative care/end-of-life context, the Caring Society has proposed a triage function through which ISC, can address urgent identified needs for the child while addressing non-urgent items within the relevant Tribunal-ordered timelines.[47]

29. Moreover, the proposed rebuttable presumption of urgency is not an order sought on the Caring Society's Notice of Motion but a proposed solution within its Schedule A Jordan's Principle Workplan.[48] To that end, the Caring Society has sought an order that ISC report to the Tribunal on which of the Caring Society's solutions is it prepared to adopt. Where ISC is not prepared to adopt a proposed solution, the Caring Society is asking for an explanation and for ISC to identify the alternate effective measure it will take to fix the problem.[49] While it is clear that ISC does not view the proposed rebuttable presumption as a workable solution, ISC does not clearly identify an evidence-informed alternative approach.[50] As contemplated in Schedule A to the Caring Society's Notice of Motion, there are a number of possible solutions to the problems the Caring Society has identified; however, ISC must first acknowledge that the non-compliance is a problem (other than recognizing its inability to meet the current orders and proposing to weaken the protections in the orders in order to improve its compliance, which topic will be addressed in the Caring Society's factum in response to Canada's cross-motion) and then demonstrate it is serious about fixing it by taking action.

(b) "Caregiver Death" Criterion and the "State of Emergency Criterion"

30. ISC has argued that the Caring Society's proposed urgency criteria could have unintended consequences, although it recognizes that states of emergency and caregiver death can be very distressing for First Nations children.[51] For its part, ISC has raised concerns, based on weak

[46] AGC Factum at para 69.
[47] Caring Society Factum at para 98.
[48] Caring Society Notice of Motion for Relief (December 12, 2023) at Schedule A (Jordan's Principle Work Plan at s 1.1) ("**Caring Society Notice of Motion**").
[49] Caring Society Notice of Motion at para 9.
[50] AGC Factum at paras 69-71.
[51] AGC Factum 72.

evidence, that not all requests for products, services, and supports made on behalf of a First Nations child facing a public emergency or caregiver death would necessarily be urgent.[52]

31. The Caring Society submits that this concern can be addressed by applying the common-sense approach in Back-to-Basics and the principles of best interests of the child, substantive equality, and culturally appropriate services.[53] There is a need to take a child-focused approach to both public emergencies and caregiver or close family member death. Simply raising questions about whether or not all requests in these areas are truly urgent does not assist First Nations children who are making requests in relation to these criteria.

(c) Requests Becoming Urgent Due to Passage of Time or Other Circumstances

32. ISC has not raised a concern regarding a mechanism for requesters to indicate that a request has become urgent with the passage of time or due to other circumstances. The Caring Society acknowledges ISC's lack of apparent objection to this solution and questions the AFN's raising concerns, without evidence, regarding this issue,[54] particularly in light of how quickly the circumstances for First Nations children and families can change, and ISC's reported backlog of children waiting for determinations on requested services.[55]

PART II – REIMBURSEMENT

A. Reimbursement Delays

33. ISC has responded to the Caring Society's concerns regarding ISC's low and uneven compliance with its reimbursement standard across the country, the termination of services due to reimbursement delays, and the prejudicial effects that reimbursement wait times have on vulnerable families by asserting that requestors/vendors waiting for reimbursements is "separate

[52] AGC Factum 72.
[53] Caring Society Factum at para 98.
[54] Amended AFN Factum at para 85.
[55] Attorney General of Canada Responses to Requests for Information (April 12, 2024), at Appendix B.

and apart from the issue of whether the child has received the product, service or support under Jordan's Principle."[56]

34. In reply, the Caring Society has three submissions about how the evidence demonstrates that ISC's current process: (1) causes a financial burden on families and may undermine their access to Jordan's Principle services; (2) puts an additional financial burden on organizations and First Nations, which leads to reductions in supports provided to children; and (3) reduces the long-term provision of Jordan's Principle products, services and supports. These outcomes are all related to whether a child receives a product, service, or support under Jordan's Principle. They also infringe on a child's substantive equality rights and perpetuate systemic discrimination. Moreover, Canada paying for approved products and services within 15 days provides a more solid foundation to set First Nations up for success as they assume a greater role in administering Jordan's Principle.

35. Many families make a Jordan's Principle request because they do not have the financial resources to purchase the product, service, or support in the first place.[57] The uncontested evidence demonstrates that delayed reimbursements cause significant financial consequences and stress on families and may even disincentivize families from seeking future Jordan's Principle support.[58] This has a clear negative impact on children.

36. Delayed reimbursements also impact service providers' ability to provide necessary services and to front funding.[59] For example, delayed reimbursements for approved Group Requests have resulted in a multi-million-dollar deficit for the Blood Tribe's Recreation Department. This limits their ability to deliver much-needed programming to their child and youth population.[60] Indeed, in 2018 CHRT 4, the Tribunal found that "[d]eficits impact service delivery and the children who receive those services."[61]

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[56] AGC Factum at para 60.
[57] Dr. Gideon CX at p 123, line 6 to p 124, line 1; Dr. Blackstock Affidavit at paras 132-133, 136-140.
[58] Dr. Blackstock Affidavit at paras 124, 129-134.
[59] Dr. Blackstock Affidavit at paras 130-135.
[60] Dr. Blackstock Affidavit at paras 134-135, 137, Exhibit 37.
[61] 2018 CHRT 4 at para 371.

37. Finally, reimbursement delays have led to the loss of several service providers or have pushed vendors to request pre-payment for services that families cannot afford.[62] ISC has not responded or contested most of the evidence on this point, aside from disputing the allegation that service providers in Northwestern Ontario have discontinued servicing clients because of reimbursement delays. However, the data cited by ISC to support its assertion that "vendors in Northwestern Ontario continue to provide Jordan's Principle and Jordan's Principle Allied Services at increasingly high rates"[63] does not necessarily support its assertion. The data provided in Ms. St-Aubin's Affidavit indicates that a majority of recurring service providers (10 invoices or more over three years) have increased billing. This evidence does not contradict Ms. Mathews' reported concerns regarding reimbursement delays. Notably, ISC does not provide information regarding:

(a) Whether the total number of invoices has increased;

(b) Whether the geographical distribution of services has remained the same;

(c) Whether the types of services have remained the same.

38. Furthermore, the Minister's briefing notes for a May 2023 parliamentary committee appearance noted that, in 2022, a service provider suspended services for 22 First Nations children due to late payments.[64] Decreases in the accessibility of services or in the types of services offered directly impact a child's receipt of a Jordan's Principle product, service, or support. Furthermore, information about Northwestern Ontario provides no information regarding the trends in other areas of the country. Discontinued services resulting from Canada's poor accounting practices create delays in accessing Jordan's Principle services and may even lead to denials of services.

B. The Financial Administration Act

39. ISC (again supported by the AFN) asserts that ISC's interpretation of the *Financial Administration Act* ("***FAA***") has not impacted ISC's compliance with determining Jordan's Principle requests.[65] ISC further asserts that there is no evidence of a conflict between this Tribunal's orders and the *FAA*, and that if any requestor believes there is a true conflict, it is a

[62] Dr. Blackstock Affidavit at paras 129-132, Exhibit 36.
[63] Affidavit of Candice St-Aubin (aff'd Mar. 14, 2024) at para 40 ("**C. St-Aubin Affidavit**").
[64] Dr. Gideon CX at Exhibit 1D (Excerpts from parliamentary briefing May 29, 2023).
[65] AGC Factum at para 76; Amended AFN Factum at para 92.

matter for determination by the Federal Courts.[66] However, ISC misapprehends and mischaracterizes the evidence on this point. Further clarity is required from the Panel to entrench the substantive equality rights of First Nations children.

(a) The Uncontested Evidence Demonstrates that ISC has Invoked the FAA as a Basis to Depart from the Tribunal's Orders

40. Despite ISC's (and the AFN's) assertions that there is no evidence to support the Caring Society's position that ISC's interpretation of the *FAA* has resulted in a departure from the Tribunal's orders on certain occasions,[67] Dr. Blackstock's uncontested Affidavit evidence indicates that ISC has used its interpretation of the *FAA* as a basis to deny Jordan's Principle group requests in Alberta Region and to deny a reimbursement request from an organization.[68] This evidence reflects exactly the scenario that concerned the Tribunal in 2021 CHRT 41, when it identified the distinction between Canada "applying its discretion in the *Financial Administration Act*'s interpretation to facilitate the implementation of the Tribunal's orders" or interpreting the *FAA* "in a way that hinders the Panel's quasi-judicial statutory role under the *CHRA*."[69]

41. As reflected in the evidence, the Caring Society has been advised that ISC Alberta-Region invoked the *FAA* as the basis for not approving Blood Tribe's new Jordan's Principle requests.[70] This does not reflect a substantive equality analysis, nor does it reflect a culturally appropriate or best interests of the child analysis. Instead, ISC adopts a bureaucratic approach that runs contrary to the Tribunal's reasonings and orders.[71]

42. The evidence also demonstrates that ISC denied an organization's reimbursement request following the approved purchase of two gift cards, due to the lack of an itemized receipt.[72] This indicates that ISC has invoked the *FAA* as a basis to depart from the Tribunal's orders. ISC has

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[66] AGC Factum at paras 74, 77.
[67] AGC Factum at paras 74, 76-77; Amended AFN Factum at para 92.
[68] Dr. Blackstock Affidavit at paras 141-147, Exhibits 37, 53-54.
[69] 2021 CHRT 41 at para 337.
[70] Dr. Blackstock Affidavit at Exhibit 37 (at p 2).
[71] 2016 CHRT 2 at paras 379-382; 2016 CHRT 10 at paras 30-33. See also 2019 CHRT 39 at para 13; 2019 CHRT 7 at para 73.
[72] Dr. Blackstock Affidavit at Exhibit 54 (at pp 2-5).

stated that the itemized receipt is requested due to a reporting requirement imposed on ISC, not on the end user.[73] As such, even if ISC requires itemized receipts to complete its reconciliation, this does not justify denying reimbursement, in particular due to the Tribunal already having ruled that the government should not engage in administrative procedures before the service is approved and funded.[74] In fact, ISC's internal requirement to reconcile grocery gift cards is predicated on the notion that they are "advance payments", and thus that a payment has already been made.[75]

43. ISC has already acknowledged that its requirement of itemized receipts creates an administrative burden on First Nations children and families.[76] However, both ISC and the AFN dispute that this amounts to discrimination.[77] This fails to engage with the ultimate question on this motion, which is whether the Tribunal's orders are being implemented effectively in order to resolve discrimination at the level of the child and their family. The evidence the Caring Society has led shows that the receipt requirement is preventing effective implementation of the Tribunal's orders. Service providers face difficulty in collecting itemized receipts from end users.[78]

44. Families also report being questioned by ISC for making certain purchases.[79] This scrutiny even extends to dire circumstances such as natural disasters, where ISC has told a First Nations family fleeing wildfires that certain items could not be purchased, even though those same items can be found on Canada's basic emergency kit list.[80] ISC's approach infringes on First Nations families' dignity and adds additional stress and complication to their lives, furthering their disadvantage. Administrative processes that bar First Nations children from accessing essential services are by definition discriminatory particularly as evidence before the Tribunal links Canada's role in residential schools and the discriminatory funding of First Nations services to the deep levels of poverty many First Nations families are predisposed to.

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[73] Dr. Blackstock Affidavit at Exhibit 53 (at p 1).
[74] 2017 CHRT 35 at para 135.
[75] Dr. Blackstock Affidavit at Exhibit 54 (at p 2).
[76] Dr. Blackstock Affidavit at paras 146-147, Exhibit 53 (at p 3).
[77] AGC Factum at para 61; Amended AFN Factum at para 94.
[78] Dr. Blackstock Affidavit at Exhibit 53 (at p 4).
[79] Dr. Blackstock Affidavit at para 141.
[80] Dr. Blackstock Affidavit at paras 137-140, Exhibits 51-52.

45. The Tribunal has previously recognized the importance of developing a remedy that alleviates the burden on families.[81] ISC acknowledges that placing an administrative burden on requestors, and causing delay, is contrary to the spirit of this Tribunal's Jordan's Principle decisions, which focuses on the need for administrative efficiency.[82] As such, any interpretation of the *FAA* that unnecessarily increases the burden on families hinders the implementation of the Tribunal's orders and should be corrected.

(b) Federal Court judicial review is not a necessary or appropriate avenue for recourse

46. ISC, which has access to significant legal resources, submits that, to the extent any requestor believes there is a conflict between the *FAA* and this Tribunal's orders, that should be determined by the Federal Court.[83] This ignores that First Nations families, who live in the deepest levels of poverty in the country, do not have access to legal aid for such judicial reviews. This is not a practical way of ensuring that the Tribunal's orders are effective. Indeed, this Tribunal has found that it would be unfair to require new proceedings to be commenced to seek implementation of its orders.[84] Moreover, ISC's view that an independent complaints process akin to the Caring Society's role is unwarranted should provide no assurance regarding First Nations families' access to justice in seeking to remedy discrimination the Tribunal has already substantiated.

47. The Caring Society's relief sought falls squarely within the Tribunal's jurisdiction, given that it requests a clarification based on the Tribunal's previous reasoning. The Tribunal has been clear that its orders and reasons should be read in tandem.[85] The relief sought would provide much needed guidance to ISC related to the Tribunal's reasoning regarding the *FAA* in 2021 CHRT 41.

48. The Caring Society is also concerned that this is another attempt by Canada "to take the position that the Tribunal does not have the power to make remedies on policy and public funds", which the Tribunal has already warned would "prevent[] the Tribunal from fulfilling its quasi-constitutional mandate to protect fundamental human rights."[86] To be clear, the Caring Society

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[81] 2021 CHRT 6 at paras 80-93.
[82] AGC Factum at para 70, citing to 2017 CHRT 35 at para 10(1)(b)(iii-iv).
[83] AGC Factum at para 77.
[84] 2018 CHRT 4 at para 53.
[85] 2018 CHRT 4 at para 407.
[86] 2018 CHRT 4 at para 44.

submits that ISC has interpreted the *FAA* in a manner that hinders the implementation of the Tribunal's orders, and that the Tribunal's orders have primacy over that interpretation.

49. Finally, the impact of ISC's interpretation on this Tribunal's orders has led to denials of services and serious reimbursement delays that have imperilled service access for children. The absence of a "true conflict" is also supported by ISC's correspondence with the Caring Society on this very issue. In January 2023, ISC informed the Caring Society that, as part of its work to reduce the administrative burden on requestors, it has engaged with the Chief Finances, Results and Delivery Office to explore alternative approaches to itemized receipts that would still meet its financial delegation obligations under the *FAA*.[87] This indicates that the itemized receipt issue is a policy choice not a fundamental requirement of the *FAA*. As such, the relief sought by the Caring Society would make clear to ISC that it must interpret the *FAA* in a way that does not hinder the Tribunal's orders. As of September 2023, ISC was still "giving additional consideration to the issue" but did not have a further response as to whether any changes had been made.[88]

(c) The Caring Society Has Correctly Interpreted the Tribunal's Reasons

50. The AFN's suggestion that the Caring Society has misinterpreted the Tribunal's reasons regarding the *FAA* ought to be rejected.[89] The Tribunal has made it clear that its orders should be read alongside its reasoning: taking a human rights and child-focused approach makes clear that ISC cannot, "in the event of a conflict", allow the *FAA* to usurp the substantive equality rights of First Nations children. This is directly in keeping with the Caring Society's argument and in line with the Tribunal's guidance, principles, reasoning and human rights approach in this case.[90]

51. Further, the Tribunal has directed that Canada's policy choices, when implementing the Tribunal's orders, must not perpetuate inequalities.[91] If Canada continues to discriminate in a

[87] Dr. Blackstock Affidavit at Exhibit 53 (at p 3).
[88] Dr. Blackstock Affidavit at Exhibit 54 (at p 1).
[89] Amended AFN Factum at paras 92-94.
[90] 2018 CHRT 4 at para 407.
[91] 2021 CHRT 41 at para 352.

systemic way and negatively impacts children, this warrants the Tribunal's intervention – including where ISC is attempting to use the *FAA* to shield it from its human rights obligations.[92]

PART III – THE DIALOGIC APPROACH

A. The Law on the Dialogic Approach

52. The Federal Court has endorsed the Tribunal's dialogic approach in this case. Justice Favel found that the dialogic approach helps further reconciliation efforts and "gives the parties opportunities to provide input, seek further direction from the Tribunal if necessary, and access information about Canada's efforts to bring itself in compliance with [the Tribunal's] decisions".[93] The dialogic approach is grounded in the fact that determining effective remedies under the *CHRA* requires "innovation and flexibility" on the Tribunal's part.[94]

53. As the Tribunal further explained in its December 2022 decision reviewing the class action compensation settlement reached by Canada, the AFN, and other parties, the dialogic approach is intended to assist the Tribunal in facilitating the implementation of its Orders.[95] Doing so enables negotiation and giving full recognition of human rights, as Justice Favel put it.[96]

54. The dialogic approach also serves an important oversight function in the Tribunal's management of complex cases. This approach ensures, among other things, that perpetrators cannot circumvent Tribunal and Court orders by negotiating or contracting out of human rights obligations.[97] Moreover, the Tribunal has found that:

> it would undermine the *CHRA*'s ability to protect human rights if respondents were able to avoid liability by reaching an agreement with only certain parties to a human rights case to remove the case from the Tribunal's jurisdiction in favour of an alternative forum.[98]

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[92] 2021 CHRT 41 at para 456.
[93] 2021 FC 969 at para 136 (emphasis added).
[94] 2021 FC 969 at para 138, citing *Grover v Canada (National Research Council)* 1994 CanLII 18487 (FC).
[95] 2022 CHRT 41 at para 262.
[96] 2021 FC 969 at para 162.
[97] See e.g. 2022 CHRT 41 at para 502.
[98] 2022 CHRT 41 at para 253.

55. The dialogic approach remedies these concerns. In the context of the present litigation, the dialogic approach ensures that Canada remains responsible for fulfilling its human rights obligations, "both in general and the specific orders from the Tribunal."[99]

56. The Tribunal has also made comments about the intent and purpose of its retained jurisdiction over its orders, including those respecting Jordan's Principle. In particular:

(a) In part, the Tribunal chose to retain its jurisdiction given the complexity and systemic nature of the remedies and the necessity to assess whether the remedies were effectively implemented.[100] Retaining jurisdiction in this matter both enables the Tribunal to ensure that its remedial orders are effectively implemented and provides the opportunity to provide further clarity to its orders, if necessary.[101] Indeed, the Tribunal found that it could not "simply make final orders and close the file".[102]

(b) The Tribunal's continued jurisdiction also enables it to ensure that "mindsets are […] changed" within Canada's decision-making to ensure that further discrimination does not occur.[103] Remaining seized allows the Tribunal to monitor whether Canada is remedying discrimination efficiently and "without repeating the patterns of the past".[104] It also ensures that previously-identified adverse impacts are addressed while other issues in this case evolve.[105]

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[99] 2022 CHRT 41 at para 252.
[100] 2019 CHRT 7 at para 47. See also 2016 CHRT 10 at para 37; 2016 CHRT 16 at para 161; 2020 CHRT 20 at para 324; 2020 CHRT 36 at para 59; 2021 CHRT 41 at para 529; 2022 CHRT 41 at para 523.
[101] 2016 CHRT 10 at para 36, citing *Grover v Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 24 CHRR D/390 (FC) at paras 32-33; 2017 CHRT 14 at para 135; 2017 CHRT 35 at para 135.
[102] 2018 CHRT 4 at para 387.
[103] 2018 CHRT 4 at para 388.
[104] 2018 CHRT 4 at para 50.
[105] 2017 CHRT 14 at para 31.

57. The Tribunal reiterated its retained jurisdiction over its rulings and orders "to ensure that they are effectively implemented and that systemic discrimination is eliminated" in its most recent decision in this litigation.[106]

B. The Caring Society's Non-Compliance Motion Is an Example of the Dialogic Approach in Action

58. Canada says that it is "time for a new path" that "requires that Canada, the First Nations Parties and the Caring Society co-develop solutions to problems, including with non-party First Nations and the organizations that represent them."[107] For its part, the AFN asserts that many of the Caring Society's implementation concerns are "properly the subject of ongoing negotiations"[108] (albeit ones that do not include the Caring Society) and that this motion is "contrary to the dialogic approach".[109] The AFN even goes as far as to say that the Tribunal "must ensure that it is not giving with the right hand, while taking away with the left" when considering how its existing orders are implemented.[110] The AFN also asserts that the Tribunal "must remain diligent" in "imposing new remedies, particularly where the First Nations parties to the Tribunal Proceeding remain engaged and committed to a negotiated Resolution".[111]

59. As this Tribunal has already found, Canada cannot use negotiations to contract out of its human rights obligations.[112] The product of negotiations must always be "appropriate and just in light of the specific facts of the case, the evidence presented, [the Tribunal's] previous orders and the specifics of the [relief] sought."[113] This Tribunal has also found that the need for ongoing discussions with Indigenous peoples, provinces and territories should not preclude mid-term relief while those discussions are ongoing.[114]

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[106] 2023 CHRT 44 at para 227.
[107] AGC Factum at para 54.
[108] Amended AFN Factum at para 6.
[109] Amended AFN Factum at paras 97-99.
[110] Amended AFN Factum at para 44.
[111] Amended AFN Factum at para 43.
[112] 2022 CHRT 41 at para 253.
[113] 2023 CHRT 44 at para 53, citing 2020 CHRT 36 at para 51.
[114] 2018 CHRT 4 at para 168.

60. ISC asserts that the issues on this motion are "growing pains" to which it needs to be given space to "react flexibly".[115] However, the evidence demonstrates that despite the laudably high level of Jordan's Principle approvals in recent years, there have been widespread delays within ISC's implementation of Jordan's Principle, including in urgent cases. Where it has responded, ISC's reactions have been slow and limited, even when it saw problems on the horizon, many months in advance.[116] As such, in bringing this motion after negotiation-based approaches failed to address serious and longstanding concerns about ISC's implementation of Jordan's Principle,[117] the Caring Society is embracing the dialogic approach by seeking direction from the Tribunal to address ongoing compliance issues which perpetuate past discriminatory conduct, rather than allowing those concerns to persist until long-term reforms are negotiated, which may or may not resolve the underlying concerns.[118] The Caring Society has stepped away from the AIP and its dispute resolution process. Nothing prevents the Caring Society from bringing the within motion.[119] Notably, this course of action is consistent with First Nations in Assembly Resolution 40/2022, in which the First Nations-in-Assembly also resolved as follows:

> 8. Ensure that the FSA does not detract from the right of the Parties to the current complaint before the CHRT from seeking orders from the Tribunal to ensure that all First Nations children, youth, and families will be free from discrimination and its recurrence for all generations to come.[120]

61. Contrary to the AFN's assertion that the Caring Society is attempting to "circumvent First Nations participation in the context of ongoing negotiations relating to the long-term reform Jordan's Principle",[121] the Caring Society has expressed its commitment to long-term reform throughout this process, notably in its December 8, 2023 letter to Parties' counsel.[122] In this regard, the Caring Society stepped away from the AIP process to bring this motion, after trying for years

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[115] AGC Factum at para 53.
[116] April 3, 2024 cross-examination of Candice St-Aubin at p 383, line 12 to p 395, line 4; Dr. Gideon CX at p 32, line 9 to p 40, line 6; Dr. Gideon CX at Exhibits 1C and 1D.
[117] Dr. Blackstock Affidavit at paras 29-30, 34, 172-176.
[118] 2021 FC 969 at para 136.
[119] Dr. Blackstock Reply Affidavit at Exhibit 31 (December 8, 2023 letter from David Taylor to counsel for AIP Parties).
[120] Amended Affidavit of Craig Gideon (aff'd Mar. 22, 2024) at Exhibit A ("**Amended C. Gideon Affidavit**").
[121] Amended AFN Factum at para 98.
[122] Dr. Blackstock Reply Affidavit at Exhibit 31.

to negotiate via consensus, given its serious and longstanding concerns about ISC's implementation of Jordan's Principle and ISC's refusal to take the action needed to resolve the discrimination. This included Canada agreeing to the AIP Work Plan on Jordan's Principle which was the subject of negotiation and then breaching it. Negotiation is only the best pathway if it achieves non-discrimination and prevents its recurrence for First Nations children.

62. This Tribunal has made clear that "negotiation cannot be used to take a step backwards from what the Tribunal has already ordered".[123] Such steps backward should also not be permitted while negotiations are ongoing, as ISC has existing human rights obligations to fulfil, including those grounded in the Tribunal's Orders.[124] In the Caring Society's view, the dialogic approach does not contemplate the parties being beholden to an ineffective process under the AIP, particularly where the AIP specifically contemplates that parties must exit the process to seek relief before the Tribunal.[125] This is not the road to the "new path" that Canada seeks.

63. Moreover, the Caring Society rejects the AFN's implication, without evidence, that the relief the Caring Society seeks asks the Tribunal to condone another form of discrimination.[126] The Tribunal has observed that "[t]he purpose of the Tribunal's retained jurisdiction on compensation was always to clarify, add and refine the orders. It was never to reduce, disentitle or remove victims/survivors from the purview of its orders".[127] The Caring Society is not asking for amendments to existing orders that would amount to a collateral attack on the Tribunal's Orders or disentitle individuals who would otherwise benefit from the current orders. Notably, neither the AFN nor ISC have identified derogations from the Tribunal's existing orders in the Caring Society's relief sought. Rather, the Caring Society is asking this Tribunal to ensure the effective implementation of, and to clarify, its existing orders.

64. Furthermore, the Caring Society has indicated its continued commitment to long-term reform and the *Joint Path Forward* with the AFN.[128] To suggest that the Caring Society is seeking final

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[123] 2023 CHRT 44 at para 23.
[124] 2022 CHRT 41 at para 252.
[125] Dr. Blackstock Reply Affidavit at Exhibit 31 (December 8, 2023 letter from David Taylor to counsel for AIP Parties).
[126] Amended AFN Factum at para 44.
[127] 2022 CHRT 41 at para 513.
[128] Dr. Blackstock Reply Affidavit at Exhibit 31.

orders which will obviate the need for a final settlement agreement on Jordan's Principle is incorrect and out of step with the evidence on the motion and cross-motion.[129] To the extent that there is any confusion in the evidence or in the Caring Society's previous submissions, the Caring Society seeks to be very clear in this respect: the Caring Society is committed to engaging in a negotiated solution to a long-term approach for Jordan's Principle grounded in culturally relevant evidence and pursuant to an approach that honours Jordan River Anderson and his family, and that is transparent and accountable to First Nations.

65. However, as the Tribunal has recognized, "[w]hile [consensus] is ideal, it may not always be possible."[130] The Caring Society places significant weight on the obligation to end and prevent Canada's discrimination. A negotiated settlement is only one important tool to achieve non-discrimination and prevent its recurrence. However, as the First Nations in Assembly have recognized in their Resolution 40/2022, negotiated agreements cannot prohibit the parties from pursuing relief to end Canada's discrimination and prevent its recurrence.

C. The Caring Society's Complaints Mechanism Request Is Consistent with the Dialogic Approach

66. Despite having agreed in the December 2021 Jordan's Principle AIP Work Plan that a complaints mechanism should be developed with respect to Jordan's Principle, ISC argues that broader First Nations collaboration would be required if a complaints mechanisms were to be developed and that imposing one could have unintended consequences.[131] For its part the AFN argues that "[t]he Tribunal must be wary of endorsing a complaints approach which has not been subject to the dialogic approach or reconciliatory negotiations with the First Nations parties".[132]

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[129] Amended AFN Factum at para 103.
[130] 2021 CHRT 41 at para 61.
[131] AGC Factum at para 73.
[132] Amended AFN Factum at para 96.

67. In reply to ISC, given ISC's existing commitments in the AIP Work Plan and the evidence of its own witnesses on this motion, there can be no question about "if"[133] or whether a complaints mechanism is to be developed.[134] There is broad agreement that this is required.

68. In reply to the AFN, the Caring Society's request for a complaints mechanism is an example of the dialogic approach in action. The AIP Parties agreed to the need for a complaints mechanisms in the AIP Work Plan on December 31, 2021,[135] but no such complaints mechanism was implemented by December 12, 2023 when the Caring Society brought its non-compliance motion, nor in the roughly six months since the motion was filed. To be clear, the relief sought in the Caring Society's motion does not seek the imposition of a particular complaint process. The Caring Society seeks parameters for an effective independent process consistent with access to justice to identify and remedy any discrimination arising from Canada's conduct. The details of the proposed complaints process would, of course, have to be determined in consultation with experts and First Nations.[136] The Caring Society is looking for action. The *status quo* endorsed by Canada and the AFN cannot persist as children are being seriously harmed and, in some cases, tragically, dying.[137]

D. ISC's Refrain that the Caring Society Does Not Represent First Nations Leadership Ignores the Support from Rights Holders for the Caring Society's Motion

69. At various points, ISC observes that the Caring Society does not represent First Nations[138] and argues that "[a]s the Caring Society does not speak on behalf of First Nations, its views on Jordan's Principle should not eclipse the views and preferences of First Nations and the organizations who represent them".[139]

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[133] AGC Factum at para 73.
[134] Dr. Blackstock Affidavit at Exhibit 61 (AIP Executive Summary, in which ISC committed to "Develop and implement Indigenous Services Canada internal quality assurance measures, including training on various topics, a complaint mechanism, and an independent office to ensure compliance").
[135] Dr. Blackstock Affidavit at Exhibit 61.
[136] Caring Society Factum at para 237(m).
[137] Dr. Blackstock Reply Affidavit at paras 13-29, Exhibits 1-12.
[138] AGC Factum at paras 5, 47, 49.
[139] AGC Factum at para 49.

70. This submission does not account for the First Nations in Assembly's Resolution 40/2022 and fails to meaningfully engage with the Caring Society's evidence about the support it has received from rights holders for its non-compliance motion. While the Caring Society neither speaks for rights holders nor claims to do so, there is clear evidence of support for this non-compliance motion among First Nations leadership and First Nations:

(a) The British Columbia Assembly of First Nations has passed the following resolution: "the BCAFN Chiefs in Assembly fully support the First Nations Child and Family Caring Society's December 2023 Jordan's Principle non-compliance motion, and direct the AFN to fully support the non-compliance motion including in its oral and written submissions."[140]

(b) Taku River Tlingit First Nation has provided a letter of support for the Caring Society in order to "share [its] experiences and concerns regarding the Jordan's Principle program" in Atlin, British Columbia, and in which it indicated its belief that "sharing [its] experiences contributes to a more comprehensive understanding of the issues faced by remote communities in British Columbia and underscores the urgent need for improvements in the implementation of the Jordan's Principle program".[141]

(c) Chief Roy Fox of the Blood Tribe (Alberta) has provided a letter of support for the Caring Society, including for "the Caring Society's request that familial deaths and First Nations self-identified States of Emergency be included in the Urgent Request category. We also support the Caring Society's December 2023 Motion to the Tribunal".[142]

(d) The Federation of Sovereign Indigenous Nations (Saskatchewan) has advised that "FSIN Chiefs-in-Assembly, support 'the Caring Society respecting Canada's approaches to Compensation and Long-Term Reform' and supports the Caring Society's non-compliance motion on Jordan's Principle against Canada" and that

[140] Dr. Blackstock Reply Affidavit at Exhibit 34 (BCAFN Special Chiefs Assembly Resolution 07/2024 at Resolution #6) (emphasis added).
[141] Dr. Blackstock Affidavit at Exhibit 56 (letter from Taku River Tlingit First Nation).
[142] Dr. Blackstock Affidavit at Exhibit 37 (letter from Chief Fox) (emphasis added).

"FSIN calls on Canada to immediately comply with the Canadian Human Rights Tribunal ('CHRT') orders and implement the measures suggested in Annex A of the Caring Society non-compliance motion'".[143]

(e) Cowessess First Nation (Saskatchewan) has resolved that "Cowessess First Nation governing body or service provider hereby fully supports the non-compliance motion filed by the Caring Society respecting Canada's approach to Jordan's Principle filed on December 12, 2023 and calls on Canada to immediately comply with the Canadian Human Rights Tribunal orders and implement the measures suggested in Annex A of the Caring Society noncompliance motion".[144]

(f) The Assembly of Manitoba Chiefs has provided a letter that is "intended to provide perspectives and endorse the First Nations Child & Family Caring Society Notice of Motion to the Canadian Human Rights Tribunal (the Tribunal) on December 12, 2023, seeking relief to ensure that Canada complies with the Canadian Human Rights Tribunal's orders (2016 CHRT 2) which ordered Canada to immediately and properly implement Jordan's Principle to ensure First Nations children have timely access to culturally relevant services, supports and products as stipulated by the Tribunal".[145]

(g) Independent First Nations (Ontario) Executive Chair Chief Roundpoint provided a support letter for the Caring Society's motion that concluded with the "request that immediate action be taken, ensuring that our children, youth, and families enjoy the full benefit of the Order and their Human Right to have the fullest life they are able to and want to have".[146]

71. Accordingly, there is evidence before the Tribunal of support for the Caring Society's motion from First Nations leadership and rightsholders.[147] Neither ISC nor the AFN has disputed the

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[143] Dr. Blackstock Reply Affidavit at Exhibit 20 (FSIN letter dated March 25, 2024) (emphasis added). See also Dr. Blackstock Affidavit at Exhibit 58.
[144] Dr. Blackstock Affidavit at Exhibit 34 (Cowessess First Nation Resolution) (emphasis added).
[145] Dr. Blackstock Affidavit at Exhibit 59 (letter from the Assembly of Manitoba Chiefs) (emphasis added).
[146] Dr. Blackstock Affidavit at Exhibit 33.
[147] Dr. Blackstock Reply Affidavit at para 21.

letters appended to the Caring Society's evidence. Nor have they produced any evidence from First Nations leadership and rightsholders that they support the positions adopted by the AFN and Canada in this motion. Representation requires clear authority not just an assertion of power. The voices of First Nations leadership should not be eclipsed by ISC's formalist arguments.

E. The Caring Society Rejects the Notion that It is Not Forward-Looking or Committed to First Nations Involvement in Jordan's Principle

72. ISC has asserted that the Caring Society's relief sought "does not facilitate a path for willing First Nations to assume greater control over services to First Nations children, including Jordan's Principle",[148] and that its "proposed solutions are also not forward-looking, in that they do not contemplate a role for First Nations' involvement in community-based service delivery to First Nations children".[149] Such an interpretation misplaces the Caring Society's focus on holding the government accountable and protecting the substantive equality rights of First Nations children.

73. Indeed, the Caring Society has no opposition to a greater role for First Nations in implementing Jordan's Principle. To the contrary, the Caring Society is seeking to support First Nations who choose to fulfill this role.[150] This is consistent with the culture change the Supreme Court of Canada notes as underlying the recent *Act respecting First Nations, Inuit and Métis children, youth and families*, which aims to "help to inculcate new attitudes or approaches that will further promote a culture of respect for and reconciliation with Indigenous peoples in Canada."[151]

74. However, as the Supreme Court of Canada also recognized, "reconciliation is a long-term project. It will not be accomplished in a single sacred moment, but rather through a continuous transformation of relationships and a braiding together of distinct legal traditions and sources of power that exist."[152] As a result, First Nations and First Nations organizations must be set up for success, including with sufficient and sustainable resources, including funding, to administer Jordan's Principle effectively. There is a difference between First Nations and First Nations

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[148] AGC Factum at para 4.
[149] AGC Factum at para 68.
[150] Caring Society Notice of Motion at para 11.
[151] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 81 [*SCC Reference*].
[152] *SCC Reference* at para 90 [citations omitted].

organizations administering Jordan's Principle in a sustainable manner and for the long term, and ISC offloading Jordan's Principle administration on ill-funded and otherwise inadequately resourced First Nations and First Nations organizations. In this regard, the Caring Society's concerns are shared by the Assembly of Manitoba Chiefs, which advised the Caring Society that:

> First Nations service coordinators in Manitoba continue to raise concerns about Canada's delegation of Jordan's Principle responsibilities without adequate resources, disclosure of liability, nor a long-term plan to ensure First Nations service coordinators can meet the needs of children and families in a manner that is compliant with the Tribunal's orders. As identified by First Nations service coordinators, they feel directly impacted by Canada's non-compliance with the Tribunal's orders.[153]

75. The Caring Society agrees with ISC that all parties to this human rights complaint "share a common goal: ensuring that First Nations children have access to products, services and supports in accordance with substantive equality, including through the ongoing success of Jordan's Principle".[154] Ensuring the ongoing success of Jordan's Principle, however, requires that First Nations and First Nations organizations are sufficiently resourced to deliver Jordan's Principle—otherwise, they are just being set up to fail.

F. Jordan's Principle Is Not a Fait Accompli for ISC, Which Has Ongoing Human Rights Obligations Respecting Jordan's Principle

76. ISC has asserted that it responded to the Tribunal's orders through negotiations and operational changes to Jordan's Principle,[155] and that "[t]he Panel's goals with respect to Jordan's Principle have been accomplished" such that the Caring Society's requested orders are not required as ISC is now moving forward and not repeating history.[156] ISC also asserts that it is the only party with experience in administrating Jordan's Principle within the architecture of the federal government.[157]

77. First, ISC has presented a truncated account of this human rights litigation in asserting that the two main ways in which it has responded to the Tribunal's orders have been through negotiations

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[153] Dr. Blackstock Affidavit at Exhibit 59.
[154] AGC Factum at para 6.
[155] AGC Factum at para 10.
[156] AGC Factum at para 44.
[157] AGC Factum at para 64.

and adopting operational changes to its implementation of Jordan's Principle.[158] The Tribunal has previously found that "[t]hroughout these proceedings, Canada opposed the complaint and tried to shield itself by arguing that it did not provide the services directly, it opposed remedies, it narrowed the interpretations of the orders on multiple occasions, etc.".[159] ISC has also judicially reviewed several of the Tribunal's decisions, in all but one case only abandoning those judicial reviews when compromises or clarifications are reached.[160]

78. Second, in reply to ISC's submission that "[t]he Panel's goals with respect to Jordan's Principle have been accomplished",[161] the Caring Society submits that Jordan's Principle is not a *fait accompli* for ISC. The Caring Society submits that Jordan's Principle is a child-first principle, based in substantive equality, that applies equally to all First Nations children, whether they are resident on-reserve or off-reserve.[162] ISC has ongoing human rights obligations respecting Jordan's Principle, including through the Tribunal's orders.[163]

79. Finally, in reply to ISC's argument about its being the only party with relevant implementation experience in the architecture of the federal government,[164] ISC has previously recognized that the Caring Society's interventions "have brought administrative and timeline issues to ISC's attention and have assisted families and children".[165] In the absence of a formal complaints mechanism, and given the Caring Society's longstanding efforts to aid ISC in a variety of fora,[166] the Caring Society's only avenue to aid ISC in course correcting is to bring the within non-compliance motion.

PART IV – REPLY AND OBJECTIONS TO THE AFN'S LEGAL SUBMISSIONS

80. As set out below, the AFN has inappropriately and inaccurately considered and discussed the evidence while mischaracterizing and misapprehending the Caring Society's positions. These submissions also malign the Caring Society's decision to bring this motion, with inaccurate

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[158] AGC Factum at para 10.
[159] 2022 CHRT 41 at para 251.
[160] See e.g., 2021 FC 969 at para 1.
[161] AGC Factum at para 44.
[162] 2017 CHRT 35 (Order 1(B)(a)).
[163] 2022 CHRT 41 at para 252.
[164] AGC Factum at para 64.
[165] C. St-Aubin Affidavit at para 15.
[166] Dr. Blackstock Affidavit at para 29.

allegations, made by AFN counsel for the first time in legal submissions, related to settlement privileged discussions that are not in evidence, to which the Caring Society is in a poor position to respond given the impact of that privilege. Put simply, the Caring Society will not breach settlement privilege to respond to AFN's breaches of settlement privilege. For this reason, significant portions of the AFN's submissions should be given no weight on this motion.

A. The AFN's Discussion of the Potlach Evidence

81. The Caring Society notes, with deep concern, the AFN's representation of children attending a memorial Potlach for their mom and sibling and, months later, another close relative:

> While important culturally, the AFN would note that the adoption of the original request in and of itself was unprecedented- and certainly an expansive interpretation of the Tribunal's existing orders, which are focused on addressing gaps in services and ensuring that "First Nations children receive the services they need when they need them" and that it "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."[167]

82. The AFN's statement is problematic for several reasons. The first is the misunderstanding that Jordan's Principle only deals with gaps in services. Jordan's Principle is, first and foremost, about meeting First Nations children's needs in a substantively equal and culturally appropriate manner, consistent with the child's best interests. Addressing gaps is only one way in which Jordan's Principle may meet those needs. Gap-filling should not be read as limiting the balance of the Tribunal's guidance cited by the AFN in the paragraph noted above.

83. Crucially, the Tribunal has reasoned that the "normative standard of care should be used to establish the minimal level of service only" and that "[t]o ensure substantive equality and the provision of culturally appropriate services, the needs of each individual child must be considered and evaluated, including taking into account any needs that stem from historical disadvantage and the lack of on-reserve and/or surrounding services."[168] To the extent the AFN is suggesting that Jordan's Principle supports that meet First Nations children's needs should not be approved once they exceed a certain distance from the normative standard, the Caring Society rejects this

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[167] Amended AFN Factum at para 77 (citing to 2020 CHRT 20 at para 99) (emphasis in original).
[168] 2017 CHRT 14 at para 69.

proposition. As the Tribunal has made clear, Jordan's Principle addresses children's needs, and Jordan's Principle requests should be determined in consideration of those needs and the best interests of children, to ensure substantive equality and culturally-relevant service provision. Indeed, it is for this reason that it is entirely appropriate for the Back-to-Basics Approach to contemplate culture and language as a central part of Jordan's Principle by recognizing that Elders and Knowledge Keepers can write letters to support Jordan's Principle requests within their domains of expertise.[169]

84. The case that the AFN describes as being an "unprecedented- and certainly an expansive interpretation of the Tribunal's existing orders"[170] involves two young children being cared for by their grandmother (an Elder). The children tragically lost their sibling and mom within months of one another during the pandemic. ISC refused to fund the children's attendance at the memorial Potlach ceremony for their mom and sibling, prompting the Elder to send ISC a PowerPoint on the importance of Potlaches.[171] The Caring Society paid for the children to attend and was eventually reimbursed by ISC.[172] Months later, another close relative died and the First Nations Chief signed a letter supporting the children's attendance at the memorial Potlach.[173] While ISC approved this second request, they did so for a limited time. The Potlach took longer than ISC had approved, and the Elder asked for reimbursement for two additional days.[174] ISC continued to demand additional information and documentation, despite the fact that the details of the ceremony were provided in the initial letter of support, and reiterated by the Elder.[175] After the Caring Society intervened, ISC finally reimbursed the expense.[176] This request supported these children at a time of family crisis. It was not unprecedented, nor was it an expansion of the Tribunal's orders. The AFN's failure to engage with these uncontested facts is disheartening.

85. The AFN ought to know, given its role of representing First Nations, that First Nations children's bereavement is a sacred time that requires supports, ceremony, and compassion. The

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[169] B. Mathews Affidavit at Exhibit 8 (at pp 2-4).
[170] Amended AFN Factum at para 77.
[171] B. Mathews Affidavit at para 49, Exhibits 12A, 12B.
[172] B. Mathews Affidavit at Exhibit 12A (at p 5).
[173] B. Mathews Affidavit at Exhibit 12A (at pp 5, 8).
[174] B. Mathews Affidavit at Exhibit 12A (at pp 8, 13-18).
[175] B. Mathews Affidavit at Exhibit 12A (at pp 7-9).
[176] B. Mathews Affidavit at Exhibit 12A (at pp 1-5).

AFN should also know that the Potlach was outlawed under Canada's *Indian Act*[177] and thus Canada owes a higher substantive equality duty to ensure that this generation of children can participate in Potlaches, particularly ones as important as these to the children in that case.

86. Indeed, the AFN's witness Elder Robert Joseph spoke about the importance of Potlach in his 2014 testimony to these proceedings,[178] and the loss associated with Canada's colonial ban:

> The teachings that we might have gotten from those processes were broken and interrupted and […] we began to lose that sense of belonging somewhere. We lost the oratory of millennia of history that said who we are and where we came from. We lost the very immediate response that we ought to have had when we were stood up in front of all of our people in our ceremonies and said this child was so and so and so and his name is so-and-so, and we should honour and revere and respect this child, and we ask all of you, community, to walk with the child in his life journey, to support him, to hold him up.[179]

87. Elder Joseph spoke eloquently about Potlaches as politically, spiritually, and socially vital to his community, and to the wellbeing of children and families.[180] At no point in his testimony did Elder Joseph characterize Potlach as simply "important culturally". In its implementation of Jordan's Principle, Canada has a positive obligation to consider the intergenerational effects of its colonial practices, like the historic banning of Potlach and removal of First Nations children from their families, communities, and knowledge systems (which includes Potlach).[181]

88. The AFN's submission that the evidence before the Tribunal only supports tying the death of a caregiver to harm to a First Nations child should also be rejected.[182] The death of a close family member, or multiple family members, are a worst-case scenario for any First Nations child, regardless of their circumstances. In its decision approving the Revised Final Settlement Agreement on compensation, the Tribunal accepted without reservation the National Inquiry into

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[177] *Thomas and Sadiku's First Nation v Rio Tinto Alcan Inc,* 2022 BCSC 15 at para 172.
[178] January 13, 2014 Examination-in-chief of Chief Robert Joseph at p 21, line 21 to p 24, line 5 ("**Jan 13 Chief Joseph Transcript**"); January 14, 2014 Examination-in-chief of Chief Robert Joseph at p 25, line 6 to p 34, line 4 ("**Jan 14 Chief Joseph Transcript**").
[179] Jan 13 Chief Joseph Transcript at p 51, line 17 to p 51, line 5.
[180] Jan 14 Chief Joseph Transcript at p 25, line 6 to p 34, line 4.
[181] 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)*, 2020 CHRT 20 at para 89.
[182] AFN Factum at para 78.

Missing and Murdered Indigenous Women and Girls' clear conclusion that First Nations children who lose a parent face numerous life-altering risks.[183]

B. Inaccuracies in the AFN's Submissions

89. The AFN's Amended Factum contains inaccuracies and statements that are not supported by the evidence. The Caring Society addresses these inaccuracies in its "Annex: Clarifications of and Objections to Factual Statements in the AFN's Written Submissions" ("**Annex A**").

C. Breaches of Settlement Privilege in the AFN's Submissions

90. During the January 25, 2024 case management conference, the AFN made a point of raising concerns about potential and unspecified breaches of settlement privilege by the Caring Society in its January 12, 2024 affidavits.[184] The AFN's insistence on such unsubstantiated concerns, in a public forum, is particularly confounding given that the AFN has now breached settlement privilege multiple times on this motion.[185] Dr. Blackstock's Reply Affidavit addressed inaccurate disclosures of settlement privileged information in the AFN's affidavit, limiting its reply to correcting misapprehensions that might arise.[186] The AFN's submissions again disregard settlement privilege in making allegations about the Caring Society's positions in the context of settlement privileged discussions. This stark breach of settlement privilege is compounded by the AFN having inaccurately described events and circumstances that are covered by settlement privilege, leaving the Caring Society, and this Panel, in an unfortunate and unfair position.

91. Subsection 50(4) of the *CHRA* precludes the Tribunal from considering privileged information:

> **Limitation in relation to evidence**

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[183] 2023 CHRT 44 at paras 137 and 142-147.
[184] January 30, 2024 Summary of the January 25, 2024 Case Management Conference with Member Lustig (at p 1).
[185] Affidavit of Craig Gideon (aff'd Mar. 15, 2024) at Exhibit C (AIP Work Plan); March 22, 2024 email from Lacey Kassis to the Panel attaching the Amended C. Gideon Affidavit (aff'd Mar. 22, 2024); March 26, 2024 Direction from the Panel.
[186] Dr. Blackstock Reply Affidavit at paras 84-88.

> **(4)** The member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.[187]

92. The Supreme Court of Canada has explained the importance and protected nature of settlement privilege, setting out the following principles:

a) Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found "when the justice of the case requires it";[188]

b) Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible. The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed;[189] and

c) the protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement.[190]

93. Where settlement privilege has been breached, its content ought to be disregarded and further disclosures discouraged. Indeed, while a party might seek a tactical advantage by relying on exchanges made in unsuccessful settlement negotiations to gain a litigation advantage, our law does not allow for this as settlement privilege ensures that these communications are inadmissible. The British Columbia Human Rights Tribunal explained the importance of settlement privilege in the human rights context as follows:

> … There is a significant public interest in the promotion of the efficient and timely resolution of disputes by promoting their settlement. If parties to a human rights complaint are aware that their settlement communications could

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[187] *CHRA*, s 50(4).
[188] *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37 at para 12 [*Sable Offshore*].
[189] *Sable Offshore* at para 13.
[190] *Sable Offshore* at para 17. See also *Association de médiation familiale du Québec v Bouvier*, 2021 SCC 54 at para 95.

> be used in support of an application to dismiss the complaint at some later date, or be used against them in some other fashion, this could have a chilling effect on their willingness to engage in settlement negotiations. For these reasons, in the context of ongoing settlement discussions, it should be assumed that the communications are privileged in the absence of some clear indication that they are made on a "with prejudice" basis.[191]

94. The Caring Society addresses the AFN's breaches of settlement privilege in Annex B to these submissions. Its responses, however, are necessarily limited by settlement privilege and the fact that the record on the motion and cross-motion is now closed. For present purposes, the Caring Society submits that the AFN has inappropriately sought to introduce evidence about the context or state of long-term reform negotiations under the AIP process for the first time in its legal submissions. The Tribunal should pay no heed and give no weight to the AFN's breaches of settlement privilege, as identified in the Caring Society's Annex B. The Tribunal should do so both to give effect to s. 50(4) of the *CHRA* and because many the AFN's its assertions are not in evidence on the motion and cross-motion. Moreover, they are inaccurate. The Caring Society does not agree with the characterizations the AFN makes about the status of long-term reform negotiations, which in any case is not relevant to the issues on the motion and cross-motion and is not supported by the closed evidentiary record in these proceedings.

D. The AFN's Failure to Particularize Submissions

95. The AFN has failed to particularize its relief sought for interim orders concerning reimbursement and urgency[192] and has indicated that it "reserves" the details of its approach to the reimbursement of service providers and individuals for its submissions on ISC's cross-motion.[193]

96. The AFN's failures to particularize its relief sought and lead submissions on the Caring Society's motion have prejudiced the Caring Society and denied it procedural fairness, as discussed in the Caring Society's Annex A.

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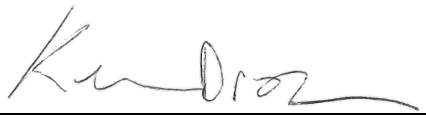
[191] *Dar Santos v University of British Columbia*, 2003 BCHRT 73 at para 74.
[192] Amended AFN Factum at para 105.
[193] Amended AFN Factum at para 91.

97. To that end, the Caring Society is providing notice that it may seek a sur-reply to the AFN's written submissions on ISC's cross-motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of June, 2024.



David P. Taylor
Sarah Clarke
Kevin Droz

Counsel for the Caring Society

PART V - LIST OF AUTHORITIES

Tab	Description
	Legislation
1.	*Canadian Human Rights Act*, R.S.C. 1985, c. H-6
2.	*Financial Administration Act*, R.S.C. 1985, c. F-11
3.	*Indian Act*, RSC, 1985, c 1-5
	Case Law
4.	*Association de médiation familiale du Québec v. Bouvier*, 2021 SCC 54
5.	*Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969
6.	*Canada (Attorney General) v. Grover*, 1994 CanLII 18487
7.	*Clegg v. Air Canada*, 2019 CHRT 4
8.	*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
9.	*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
10.	*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 35
11.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2018 CHRT 4
12.	*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 39
13.	*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 6

14.	*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
15.	*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
16.	*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs)*, 2016 CHRT 16
17.	*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
18.	*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 36
19.	*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 14
20.	*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
21.	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2014 CHRT 2
22.	*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)*, 2015 CHRT 1
23.	*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
24.	*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 10
25.	*Dar Santos v. University of British Columbia*, 2003 BCHRT 73
26.	*Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5

27.	*Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37
28.	*Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15

ANNEX A

CLARIFICATIONS OF AND OBJECTIONS TO FACTUAL STATEMENTS IN THE AFN'S WRITTEN SUBMISSIONS

Para #	AFN Statement	Clarification/Objection
10	"Furthermore, the AFN also notes that Back-to-Basics developed between the Caring Society and Canada actually prohibits and/or creates barriers for First Nations to administer Jordan's Principle programs and services" [citing paragraphs 70-73 of C. St-Aubin Affidavit].	Paragraphs 70-73 of Ms. St-Aubin's affidavit address Canada's desire for a greater role for First Nations in administering Jordan's Principle. Other than noting correspondence from the AMC stating that larger numbers of families are failing to connect with services at the local level when they contact ISC directly for support, these paragraphs do not state that Back-to-Basics creates the barriers alleged. To the contrary, Back-to-Basics supports connecting families to local supports and services that are available at the community level (B. Mathews Affidavit at Exhibit 8 (Back-to-Basics at p 6)).
26	"The Back-to-Basics approach was a policy drafted through an iterative process between the Caring Society and Canada from March to May 2022, which was premised on ensuring that First Nations children can access the service and supports as needed, and remove bureaucratic barriers. The AFN, as part of the iterative process, was solely provided [an] opportunity to comment on same. […]"	First, see Amended C. Gideon Affidavit at para 18 for the evidence that the AFN's Affiant has affirmed to be true and which differs from the AFN's written submissions: 18. I have been advised that around March 1, 2022, the documentation regarding the Back-to-Basics approach for implementing Jordan's Principle was being developed between the AFN, Caring Society and Canada for implementation in the 2022-23 fiscal year. […] The policy was drafted through an iterative process between the AFN, Caring Society and Canada throughout March to May 2022. A copy of the Back-to-Basics Policy is attached and marked as Exhibit "C".

		Second, the AFN is improperly seeking to introduce evidence about the origins of Back-to-Basics through its written submissions. The notion that "[t]he AFN, as part of the iterative process, was solely provided opportunity to comment on same" is not in evidence on this motion.
27	"Back-to-Basics has covered a range of services that was based on compromises. As such, Back-to-Basics does not necessarily conform to this Tribunal's Orders on Jordan's Principle. Many services administered by Canada further to Back-to-Basics go above and beyond those ordered by the Tribunal." [citing Dr. Gideon CX at p 168][194]	Dr. Gideon agreed that Back-to-Basics was "an negotiated document resulting from back and forth compromises" [see Dr. Gideon CX at p 168, lines 17-20]. She specifically went on to say that the basis for decision-making under Jordan's Principle remained the same when asked if more services are being provided under Back-to-Basics than what the Tribunal initially ordered [see Dr. Gideon CX at p 168, line 21 to p 169, line 7]: I just -- it's difficult to be definitive on that question. Because I think that Back-to-Basics has supported a greater number of requests coming forward. So on that basis, I would say yes. But I just don't want to construe it in the fact that we were -- like, I think the basis for decision making has remained the same. It's more the processing of those requests which has then generated a greater number of requests.
30	"While Back-to-Basics was subject to an iterative process, it was not the subject of lengthy discussion or negotiations between all the Parties to the Tribunal Proceedings or the AIP Parties. Notably, the AIP specifically contemplated that improvements would be necessary as information regarding the efficacy of Back-to-Basics measures became available. It was also clear that the	First, the Tribunal should reject the AFN's assertion that Back-to-Basics was developed solely between the Caring Society and Canada as it is out of step with the AFN's own evidence and ISC's evidence on the motion: • The AFN's October 10, 2023 correspondence to the Tribunal indicated that the parties all agreed to Back-to-Basics. See October 10, 2023 letter from

[194] The AFN's cross-examination pinpoints do not correspond to the pinpoints in the Caring Society's versions of the transcripts. As such, the Caring Society has cited to its own versions of the transcripts, which it will file prior to the hearing.

	workplan, including the development and adoption of the Back-to-Basics approach (to be developed), remained subject to the Parties commitments to develop an evidence informed implementation approach for the long-term of Jordan's Principle further to the terms of the AIP in the context of the development of a final settlement agreement. For clarity, Back-to-Basics was negotiated solely with the Caring Society. While the AFN provided commentary, our views were not taken into consideration in terms of its final iteration." [citing Amended C. Gideon Affidavit at paras 10, 18]	Stuart Wuttke to the Tribunal at p 3. • Dr. Gideon's affidavit evidence was that "[t]he parties agreed in 2021 that ISC would adopt a Back-to-Basics Approach worksheet, co-developed by the parties, which ISC implemented in early 2022". See Dr. Gideon Affidavit at para 17. • The AFN's affidavit evidence was that it was the result of an iterative process among the AFN, the Caring Society, and Canada. See Amended C. Gideon Affidavit at para 18. • The evidence that AFN counsel obtained from Dr. Gideon during her cross-examination was that Back-to-Basics was a negotiated document resulting from back-and-forth compromises and that it was jointly developed by the Caring Society and Canada with some feedback from the parties. See Dr. Gideon CX at p 168, line 11 to p 168, line 20. Accordingly, the Tribunal should reject the AFN's attempts to downplay the extent to which Back-to-Basics is a negotiated document and its own involvement in the negotiations.
65	"It is patently obvious that Back-to-Basics and the requirement on ISC to accept the self-identification of urgent matters has ultimately had the effect of undermining ISC's ability to effectively address matters of a truly urgent nature. It is human nature for people, particularly in the context of parents seeking support, services or products for their	The AFN has overlooked the evidence about the need for a back-to-basics approach: • In her January 12, 2024 affidavit, Ms. Mathews discusses the origins of the Back-to-Basics Approach. In Fall 2021, the Caring Society met with senior ISC officials, including Dr. Valerie

	children, to take the path of least resistance in relation to advancing a request. The AFN would highlight that no evidence has been adduced in the context of the development of Back-to-Basics or otherwise reflecting the need for such an approach – it was and remains a policy decision, agreed to by way of bilateral discussions between Canada and the Caring Society, and not reflective of the Tribunal's priorities as it pertains to urgent request. […]" [citing Amended C. Gideon Affidavit at paras 20-23 and Caring Society Factum at para 71]	Gideon (then Associate Deputy Minister at ISC), to discuss Canada's approach to Jordan's Principle. At those meetings, "ISC acknowledged that, despite their length and detail, the SOPS were not working". That acknowledgement led to the decision that "ISC needed to take an approach that got 'back-to-basics' of Jordan's Principle, ultimately replacing the SOPs". See B. Mathews Affidavit at paras 11-12. • Dr. Gideon's affidavit evidence also indicates that the parties agreed in 2021 that "ISC would adopt a Back-to-Basics Approach worksheet, co-developed by the parties", and that ISC implemented this in early 2022. See Dr. Gideon Affidavit at para 17. It would be unreasonable to infer that the parties, including the AFN, would agree to a Back-to-Basics Approach if there was no need to do so.
65	"While the AFN was given an opportunity to comment on same further to an iterative process, which included noting significant concern with self-identification and that it would result in inordinate numbers of urgent requests, it was adopted without change. […]" [citing to Amended C. Gideon Affidavit at paras 20-23.]	There is no evidence to support the notion, raised for the first time in the AFN's May 21, 2024 legal submissions (despite the parties' having provided multiple updates to the Tribunal on Jordan's Principle since May 2023) that the AFN provided commentary but that its views were not taken into consideration in the final interaction. There is no evidence before the Tribunal to support the notion that the AFN allegedly "not[ed] significant concern with self-identification and that it would result in inordinate numbers of urgent requests", nor is there any support provided for this statement in the AFN's legal submissions. Paragraphs 20-23 of Mr. Gideon's Affidavit do not address

		the development of Back-to-Basics or any concerns regarding urgency. As noted above, Mr. Gideon addresses the development of Back-to-Basics at paragraph 18. The Tribunal should reject the AFN's efforts to submit evidence via counsel, long after the period for evidence on this motion has concluded.
87	"For instance, the Caring Society seeks to expand the use of acquisition cards or gift cards to assist families in purchasing goods and services. The Caring Society seeks an order to expand the use and range of eligible expenses on acquisition cards and enable purchases of gift cards up to an amount of $500. This issue the AFN has with the Caring Society's proposal is that it will enable individuals to make purchases or approvals up to $500 with no questions asked and with the ability to make purchases without the need to provide proper receipts. This could create problems for families should Canada require proper receipts later down the road, and be liable for any products not authorized by ISC. In addition, there are rules with respect to spending public funds, which the Caring Soceity's [*sic*] proposal do not conform with."	First, the AFN has provided no evidence or support regarding its assertion that the Caring Society's proposal does not conform to rules with respect to spending public funds. Furthermore, if the non-specified "rules" surrounding the use of acquisition cards AFN raises hinder the implementation of the Tribunal's orders, they should be updated to adhere to principles of substantive equality. In any event, this concern is misplaced given ISC's previous changes to its acquisition card policy, which included increases to the acquisition card thresholds, in December 2023. See Dr. Gideon Affidavit at para 68. Second, in reply to the assertion that the Caring Society is seeking an order to enable purchases of gift cards up to an amount of $500, beyond the current $100 limit, the Caring Society submits that the AFN has incorrectly conflated two separate proposals from the Caring Society: (1) the development of mechanisms to issue emergency payments for urgent cases, including electronic funds transfers and more effective use of gift cards; and (2) the implementation of an automated process that presumptively approves all Jordan's Principle requests under a $500 threshold accompanied by a recommendation from a professional or a letter of support from a community-authorized Elder/Knowledge-Keeper. See Caring Society Factum at para 171.

		Therefore, the AFN's responses to the Caring Society on these issues do not engage with the actual orders sought on the motion. Gift cards or acquisition cards are not a service in themselves; to the contrary, they are but one means of paying for products, services, and supports that are approved under Jordan's Principle.
103	"Such action is unfortunately reflective of a pattern of behaviour wherein the Caring Society opts to circumvent existing processes in favours of pathways that it views as more favourable to its ends, an approach that, in the AFN's opinion, undermines efforts at achieving a negotiated settlement which advances reconciliation, is endorsed by our First Nations, and is ultimately to the benefit of our children."	There is no evidence before the tribunal of this litigation undermining ongoing negotiations. The AFN cannot introduce evidence through its written submissions. Moreover, the AFN cannot provide its "opinion" on the impact of this litigation on ongoing long-term reform negotiations.
105	The AFN respectfully request that the Tribunal; a. order interim relief in relation to the reimbursement of service providers and individual requestors, subject to such detail as provided in future submissions; b. order interim relief clarifying its Orders on the determination of urgent requests; and c. ensure that any relief ordered by the Tribunal in these proceedings be interim in nature, subject to a final settlement agreement or an expiry date of March 31, 2025. d. that all final relief sought by the Caring Society be dismissed.	The AFN has not particularized all the relief it is seeking from the Tribunal on the Caring Society's non-compliance motion. Doing so has prejudiced the Caring Society and denied it procedural fairness. First, the AFN has denied the Caring Society the opportunity to reply to its relief sought on the Caring Society's non-compliance motion and denied it procedural fairness in doing so. The AFN has said that it seeks interim orders about reimbursement "subject to such detail as provided in future submissions". Without those "details", the Caring Society cannot reply to the AFN, as the Caring Society cannot intuit what orders the AFN is seeking on the Caring Society's motion. The AFN does assert that it is "generally supportive of an interim order in relation to the reimbursement of service providers and individuals" (see Amended AFN Factum at para 91), but the Caring

		Society has no sense of what general support the AFN may or may not lend to an interim order on reimbursement or what form that such an order may take. Nor can the Caring Society respond to the order sought for "interim relief clarifying [the Tribunal's] Orders on the determination of urgent requests", given that the AFN has failed to identify what clarifications it is seeking of the Tribunal's existing orders respecting urgency in its relief sought. This is a denial of procedural fairness, and it is not the first time that the AFN has failed to specify amendments it is seeking to existing Orders made by this Tribunal: the Tribunal has previously found, in 2022 CHRT 41, that it "agree[d] with the Caring Society that the AFN and Canada failed to specify the amendments they seek. This lack of specificity undermines procedural fairness". See 2022 CHRT 41 at para 484. Second, the AFN's decision to withhold details of its relief sought on the Caring Society's motion, and to fail to particularize its relief sought, is contrary to the Panel's Direction on the revised schedule of the motion and cross-motion. See Panel Direction dated April 12, 2024 to the Parties. The Panel directed the AFN to submit its factum respecting "supporting and opposing elements" of the Caring Society's motion on May 17, 2024 and its "response to Canada's cross-motion factum" on June 28, 2024. The AFN has not meaningfully done so, since the Caring Society is unclear about the relief that the AFN is requesting on the Caring Society's motion and is unable to respond to it. This is improper and prejudices the Caring Society. Third, the AFN's approach in its factum is at odds with the

		stance it took respecting procedural fairness in its letter submissions to the Panel in seeking to amend the schedule on the motion and cross-motion. See April 5, 2024 and April 10, 2024 letters from Stuart Wuttke to the Panel. On April 5, 2024, the AFN argued that "[t]he denial of the AFN's right to respond to Canada's written submissions in the cross-motion would constitute a denial of natural justice", as well as that "[t]he AFN's right to file a response to Canada's factum is rooted in procedural fairness, which includes the AFN being provided with adequate notice of the case being advanced by Canada, as well as an opportunity to properly prepare and respond to the arguments raised by Canada". Despite having voiced these concerns regarding its own procedure, the AFN has not provided the Caring Society with adequate notice of the case advanced by the AFN on the Caring Society's motion. Nor can the Caring Society properly prepare and respond to the AFN on the urgency and reimbursement issues in writing on the timelines set out in the revised schedule. Fourth, the Caring Society may request the right to submit sur-reply submissions in writing in order to reply to the AFN's relief sought on the Caring Society's motion. The Caring Society requests a right to do so in writing following receipt of the AFN's factum on ISC's cross-motion, subject to the Panel's direction.

ANNEX B

SETTLEMENT PRIVILEGE

Para #	AFN Statement	Clarification/Objection
10	"Unfortunately, the potential of these exploratory reforms, whereby First Nations would assume greater control over the administration and approval of Jordan's Principle requests was not supported by one Party to the negotiations. As the Parties were negotiating on the basis of consensus, the exploration of a First Nations role in the approval of Jordan's Principle requests has since been shelved." [citing to Dr. Gideon CX at p 173]	The AFN has implied, and all but asserted, that the Caring Society was opposed to the potential reforms the AFN discusses at paragraphs 8-10 of its factum in the context of settlement privileged negotiations. This is improper and the Tribunal should give no weight to this statement. The Caring Society's reply is necessarily limited by privilege and the evidence that was actually put before the Tribunal on the motion and cross-motion, and so the Caring Society simply submits that the AFN's statement goes further than the evidence AFN counsel adduced from Dr. Gideon during her cross-examination: *Q. Thank you. And not getting into any settlement privilege, but would it be safe to say that not everybody agreed to this concept?* *A. Yes.* [See Dr. Gideon CX at p 173, line 22 to p 173, line 25.] To remedy the breach of settlement privilege introduced by the AFN, all that can be taken from the evidence on the motion is that not all parties to the negotiations agreed to the concepts discussed. Any further inferences, including the basis of the parties' negotiation or any impact on timing of consideration of this concept, cannot reasonably be made.
22	"Despite the bifurcation of Jordan's Principle and potential for continuing negotiations on long-term reform	The AFN does not cite the actual correspondence sent by the Caring Society prior to its filing its non-compliance motion. In

	of the FNCFS Program, the Caring Society ceased participating in negotiations under the AIP and the *Joint Path Forward* citing its desire for negotiations under yet a new "approach". [citing Amended C. Gideon Affidavit at para 39]	that letter, the Caring Society stated that it remained "fully committed to the AFN/Caring Society Path Forward and working with all Parties to achieve Final Settlement Agreements in both child and family services and Jordan's Principle" and that it remained "ready and willing to aim for a draft Final Settlement Agreement on long-term reform of First Nations child and family services so it can be presented to the First Nations in Assembly at the AFN's Annual General Assembly in July 2024 […]" [Dr. Blackstock Reply Affidavit at Exhibit 31]. Due to the dictates of settlement privilege the evidence does not, and cannot, reveal whether the Caring Society "ceased participating" in negotiations towards a final settlement agreement or was excluded after withdrawing from the AIP to bring this motion. The Tribunal cannot draw any inferences in this regard.
86-87	"The AFN also notes that some of the Caring Society's proposed solutions were already considered by the Parties and not pursued for various reasons. As will be elaborated on below, it appears that the Caring Society is attempting to get through the back door what it was not able to get through the front door, namely seeking to obtain an order from the Tribunal in an effort to compel the Parties to adopt the Caring Society's positions. For instance, the Caring Society seeks to expand the use of acquisition cards or gift cards to assist families in purchasing goods and services. The Caring Society seeks an order to expand the use and range of eligible expenses on acquisition cards and enable purchases of gift cards up to an amount of $500. […]"	First, the Caring Society objects to the AFN's assertions that some of the Caring Society's proposed solutions have been proposed in the context of settlement privileged negotiations under the AIP process. That is improper. It is also not in evidence on the motion or cross-motion. There is, of course, no evidence before the Tribunal regarding the reasons why solutions proposed did not proceed, or even whether AFN raised the concerns now voiced in its legal submissions during those discussions. Nor should there be, given the settlement privileged nature of that forum. The Tribunal should therefore accord no weight to the AFN's assertion, both on privilege grounds and on evidentiary grounds. Second, the Caring Society objects to the AFN's characterizations of the Caring Society's motion as "attempting to get through the back door what it was not able to get through the front door, namely seeking to obtain an order from the

		Tribunal in an effort to compel the Parties to adopt the Caring Society's positions". The Caring Society has stepped away from the AIP process, as contemplated in that process, and is not barred from seeking relief at the Tribunal. At the client level, the Caring Society provided the AFN, COO, NAN, and ISC advance notice of its intention to step away from the AIP process in order to bring the non-compliance motion. Moreover, the Caring's Society's non-compliance motion is consistent with the dialogic approach, as discussed above. The dialogic approach does not limit the remedies available to address discrimination to those that Canada will voluntarily implement. Nor should it. See Dr. Blackstock Reply Affidavit at Exhibit 31. Third, the Tribunal should reject the notion that the Caring Society's relief sought regarding gift cards and acquisition cards has been considered and not pursued in settlement privilege negotiations. The Tribunal should do so both on privilege grounds and on evidentiary grounds, given that this notion is not in evidence on the motion or cross-motion.
104	Finally, the AFN notes that the Caring Society demanded that any discussions on reforms to Jordan's Principle be delayed until March 2025 under the Joint Path Forward. Otherwise, a final settlement would have likely been completed in March of 2023. It is not lost on the AFN that the problem areas currently associated with Jordan's Principle raised in this motion could have been dealt with by way of a binding agreement over a year ago.	First, AFN's partisan recounting of a position that the Caring Society allegedly took, and its unsubstantiated allegation of a "demand" that the Caring Society allegedly made, all relate to settlement privileged negotiations under the AIP process. Doing so is improper, and these allegations are not in evidence on the motion and cross-motion. The Tribunal's giving any credence to this submission would prejudice the Caring Society not the least due to settlement privileged concerns and, even if the submissions were proper, due to the Caring Society's entire inability to address the factual components of these allegations given their timing. Second, the Caring Society rejects the notion that it took this

		position or "demanded that any discussions on reforms to Jordan's Principle be delayed until March 2025" in the AIP negotiations. The Caring Society's reply to the AFN's breach of privilege is necessarily limited by settlement privilege concerns and evidentiary concerns on this motion. However, the Caring Society's evidence is that it brought its motion after having exhausted all reasonable efforts to seek redress for the serious, systemic, and urgent concerns contained within the motion, with the Caring Society having previously engaged the AIP mediation process before stepping away from the AIP process. This evidence is entirely inconsistent with any allegation the Caring Society put these issues "on ice" until March 2025. See Dr. Blackstock Affidavit at paras 28-29. Third, it is simply not the case that the issues raised on this motion could have been dealt with over a year ago by way of binding agreement. The AFN and the Caring Society jointly presented their *Joint Path Forward* document on March 15, 2023 after collaborating on "new negotiation timelines that aligned with IFSD's research and uphold First Nations rights to FPIC". See Amended C. Gideon Affidavit at paras 35-36. ISC then took more than 7 months to receive a mandate to complete bifurcated long-term reform agreements on FNCFS and Jordan's Principle and only received this revised mandate on October 26, 2023. Given the AFN's and the Caring Society's joint concerns about IFSD evidence and First Nations' free, prior, and informed consent on long-term reform in early 2023, and then the 7 months that elapsed following the advent of the Joint Path Forward document, it is difficult to see how the AFN could suggest that long-term reform of Jordan's Principle could have been dealt with more than a year ago.