Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2025 CHRT 6
Date: January 29, 2025
File No.: T1340/7008

Between:

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 and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Nishnawbe Aski Nation

- and -

Amnesty International

- and -

First Nations Leadership Council

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

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I. Context

[1] In 2016, the Tribunal released *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 [*Merit Decision*] and found that this case is about children and how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families, and their communities. The Tribunal found that Canada racially discriminated against First Nations children on reserve , and in the Yukonin a systemic way, not only by underfunding the FNCFS Program, but also in the manner that it designed, managed, and controlled it. One of the worst harms found by the Tribunal was the FNCFS Program creating incentives to remove First Nations from their homes, families, and communities. Another major harm to First Nations children was that zero cases were approved under Jordan's Principle given the narrow interpretation and restrictive eligibility criteria developed by Canada. The Tribunal found that more than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practices in the best interests of children. The Tribunal ordered Canada to cease the discriminatory practice, take measures to redress and prevent it from reoccurring, and reform the FNCFS Program and the 1965 Agreement in Ontario to reflect the findings in the *Merit Decision*. The Tribunal determined it would proceed in phases for immediate, mid-term, and long-term relief so as to allow immediate change followed by adjustments and finally, sustainable long-term relief, informed by data collection, new studies, and best practices as identified by First Nations experts, the specific needs of First Nations communities and of First Nations Agencies, the National Advisory Committee on child and family services reform and the parties.

[2] The Tribunal also ordered Canada to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope ofJordan's Principle. Jordan's Principle orders and the substantive equality goal were further detailed in subsequent rulings.

[3] On December 12, 2023, the First Nations Child and Family Caring Society of Canada (Caring Society) brought a notice of motion for further relief from the Tribunal, alleging

Canada's non-compliance with some of the Tribunal's orders on Jordan's Principle, and to ensure that this Tribunal's orders of January 26, 2016 (2016 CHRT 2), April 26, 2016 (2016 CHRT 10), September 14, 2016 (2016 CHRT 16), May 26, 2017 (2017 CHRT 14, as amended by 2017 CHRT 35), February 21, 2019 (2019 CHRT 7), July 17, 2020 (2020 CHRT 20) and November 25, 2020 (2020 CHRT 36) are effective.

[4] This motion was made under Rule 3 of the *Canadian Human Rights Tribunal Rules of Procedure* (Proceedings Prior to July 11, 2021), pursuant to Rules 1(6), 3(1), 3(2), and 5(2), and pursuant to the Canadian Human Rights Tribunal's continuing jurisdiction in this matter.

[5] The Caring Society seeks an order that Canada immediately includes, in its definition of "urgent requests," requests from First Nations children who:

a. Have recently experienced the death of a caregiving family member, biological parent(s), and/or siblings, or are reasonably anticipated to experience such a death; or

b. are impacted by a state of emergency proclaimed by a First Nations government, a provincial/territorial government, or the federal government.

[6] The Caring Society seeks an order that Canada immediately revises its National Call Centre calling tree and other contact mechanisms that may exist to ensure that requestors can immediately and easily indicate that their request is urgent or, in the case of an existing request, has become urgent and ensure that ISC staff with authority to review and determine urgent requests are available in sufficient numbers during and outside of business hours;

[7] The Caring Society seeks an order that Canada will, within 45 days of this Tribunal's order, appoint sufficient persons in each ISC region and nationally who are responsible for managing urgent Jordan's Principle cases to ensure that the determinations are made in a manner consistent with the Tribunal's orders;

[8] The Caring Society seeks an order that Canada will, within 7 days of this Tribunal's order, adopt the following measures related to its backlog of unaddressed Jordan's Principle requests:

a. Report back to this Tribunal and the parties to identify the total number of currently backlogged cases, including information regarding the cumulative number of backlogged cases at month's end, dating back 12 months;

b. Contact all requestors in the backlog by email or phone setting out the Tribunal's timeline orders, noting Canada's non-compliant backlogs, and urging requestors with urgent or time-sensitive requests, or non-urgent requests that have become urgent, to contact specific personnel who will, including over the holiday season, determine such requests within 12 hours. The notice should also include timeframes for resolving the backlogs, information on requesting retroactive payments for requestors who had to pay for services, products, or supports due to Canada's non-compliance, and information on measures being taken to prevent backlogs from recurring.

c. Triage all backlogged requests for urgency and communicate with all requestors with undetermined urgent cases to take interim measures to address any reasonably foreseeable irremediable harms; and

d. Report back to this Tribunal and the parties regarding the number of urgent cases identified in the backlog, including the intake backlog, the in-progress backlog, and the reimbursement backlog, and the timeframe by which all urgent and non-urgent backlogged requests will be determined.

[9] The Caring Society seeks an order requiring Canada to adopt the following measures with respect to its National, Regional and other Jordan's Principle contact centres including its call-in lines:

a. Restrict the National Jordan's Principle Contact Centre's practice of referring urgent cases to ISC regional offices (or vice versa) to only situations wherein ISC staff

conduct a live transfer of the requestor and can confirm that the Regional Office (or National Jordan's Principle Contact Centre) has sufficient capacity to determine the case within the timeframe required under the Tribunal's orders;

b. Provide the National and Regional contact centres with the capacity to determine the case within the timeframe required under the Tribunal's orders;

c. Provide the National and Regional contact centres with the capacity to put in place immediate compassionate interventions when a request is placed for urgent services;

d. Within 7 days, Canada must establish, and publicly post on its website and on social media, contact phone numbers, email addresses, and hours of operation for the ISC office in each province/territory and for headquarters, for both requests and payment inquiries;

[10] The Caring Society seeks an order clarifying that, consistent with 2017 CHRT 14 and 2017 CHRT 35, Canada shall immediately "begin the determination clock" when they are in receipt of a letter of recommendation from a professional with relevant expertise or, in the case of requests relating to culture or language, a letter from a community-authorized Elder or knowledge keeper and stop the clock when the requestor is advised of the determination of the case;

[11] The Caring Society seeks an order clarifying that, consistent with 2017 CHRT 14 and 2017 CHRT 35, Canada cannot delay funding for approved services in a manner that creates discrimination for First Nations children, youth, and families including by placing undue hardship on families and service support, or product providers in a manner that risks a disruption, delay, or inability to meet the child's needs.

[12] The Caring Society seeks an order clarifying that, consistent with the reasoning in 2021 CHRT 41, this Tribunal's orders have primacy over any interpretation of the *Financial Administration Act* and related instruments such as "terms and conditions," agreements, policies and conduct that limits the Tribunal's remedial authority, and that Canada shall not rely on the *Financial Administration Act* to justify departures from this Tribunal's orders.

[13] The Caring Society seeks an order that Canada report to the Tribunal, within 7 days of this Tribunal's order, regarding which of the proposed solutions (and timelines for implementation of those solutions) contained in the Caring Society's "Jordan's Principle Work Plan" (attached to this Notice of Motion as Schedule "A") it is prepared to adopt (including timeframes for implementation) and, in the case of any proposed solution Canada is not prepared to adopt, the reason why not and what effective alternative measure Canada proposes to take (and the timeline on which such effective alternative measure will be implemented).

[14] The Caring Society seeks an order convening a case conference within 7 days of Canada's having submitted its response to the Caring Society's "Jordan's Principle Work Plan", at which the Tribunal may make orders, including consent orders, and provide direction and establish a schedule with respect to any matters contained within this Notice of Motion, the Caring Society's "Jordan's Principle Work Plan" and/or Canada's responding report that remain in dispute.

[15] The Caring Society seeks an order that within 45 days, Canada provide a report confirming to the Tribunal that First Nations and First Nations organizations receiving, and/or determining, and/or funding Jordan's Principle requests have sufficient and sustainable resources, including funding, to do so.

[16] The Caring Society further added a request for any additional relief the Tribunal may award to give full effect to its orders; and an order that the Tribunal retain jurisdiction until such time as measures are in place to end the discrimination and prevent its recurrence.

[17] On March 15, 2024, Canada brought a cross-motion in support of reconciliation with a specific view to reducing the existing backlog in Jordan's Principle requests received by Indigenous Services Canada (ISC), while also ensuring that urgent requests can be properly identified and prioritized by applying objective criteria. It also supports ensuring the well-being of First Nations children by allowing Canada to refer requestors to applicable community-based supports that are better suited to determining First Nations children's needs.

[18] Canada requests an order requiring that the complainants, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations, the respondent Attorney General of Canada, and the interested parties including the Chiefs of Ontario and Nishnawbe Aski Nation, seek to co-develop objective criteria, within sixty (60) days of the order, to be used to identify requests, for example those requests for products, “urgent” Jordan’s Principle services and supports directly linked to the needs of a First Nations child who requires urgent medical assistance or is at risk of reasonably foreseeable irremediable harm.

[19] Canada further requests an extension to the Tribunal-ordered deadlines to deal with urgent cases, clarification of the Back-to-basics approach, and the possibility of referring Jordan’s Principle requestors to First Nations to an existing and applicable Jordan’s Principle group request approved and that is being administered by a First Nation or First Nation community organization pursuant to a contribution agreement with Canada; or to an applicable First Nation or First Nation community organization engaged in the administration of Jordan’s Principle pursuant to a contribution agreement with Canada. Furthermore, Canada proposes a safeguard where a request is deemed urgent in accordance with the objective criteria identified by the parties, Canada will first take into account whether or not referring the requestor will enable faster access to the requested product, service or support.

[20] Canada also seeks an order that where Canada enters into a contribution agreement with any First Nation or First Nation community organization to administer Jordan’s Principle, whether through a group request or otherwise, that First Nation or First Nation community organization is not bound by the procedural terms of any of the Tribunal’s Jordan’s Principle orders that are directed at Canada.

[21] The Tribunal in 2024 CHRT 95 granted limited interested party status to the BC First Nation Leadership Council (FNLC).

[22] The Cross-examinations of some affiants (witnesses) took place on April 2-3, 2024 and the Tribunal heard the motion and cross-motion (the motions) on September 10-12, 2024.

[23] On November 21, 2024, the Tribunal released a summary ruling with reasons to follow. The Tribunal believed that the summary ruling would be helpful to the parties to start their discussions immediately while waiting for the full reasons. This summary ruling was in response to the parties' request for clarification and to enable the parties to start their consultations. This was the Tribunal's response to pressing matters in the context of a large number of issues and materials.

[24] The Tribunal mentioned in its summary ruling that it believes it would be beneficial to have all the parties at the table including the Commission and for the parties to be advised by the parties' respective experts (First Nations who are not part of the proceedings, members of local, regional and national Jordan's Principle committees, grassroots experts, First Nations service providers, First Nations Health professionals, etc. They would not be at the negotiations unless all parties agree but the parties could request them to share their valuable input with all the parties). The Tribunal hopes for consent order requests. However, if this is not possible, the Tribunal orders the parties to return to the Tribunal with their respective views and to provide interim options to the Tribunal supported by a plan with clear rationale and supported by available evidence.

[25] The Tribunal released a summary ruling and crafted orders to help the parties begin their consultations immediately and also indicated that its detailed reasons would take more time. The Tribunal included a process to expedite solutions while keeping the door open for adjustments. Moreover, the parties were also invited to return to the Tribunal if they had any significant issues with the wording and/or deadlines set out in the orders. The Tribunal in keeping with the dialogic approach envisioned that this process would be the most expeditious way for parties to voice any challenges with the interim orders while they started working on solutions. Given the need to expedite matters while remaining conscious of possible challenges, the Tribunal found a manner to move things forward and minimize risk by allowing parties to let the Tribunal know if an order was too challenging or unclear. The Tribunal extended a similar invitation in the past and the parties did return to the Tribunal with wording suggestions for orders and the Tribunal accepted them. This was a positive

and expeditious process in keeping with reconciliation and the best interest of First Nations children.

[26] This process was subsequently used by the parties and will be discussed in the update since the Tribunal's summary ruling at the end. The update does not form part of the Tribunal's reasons but is illustrative of the expeditious process for amendments and/or clarifications envisioned in the Tribunal's summary ruling.

[27] The Tribunal is currently looking at interim solutions to address the backlogs and other aspects of Jordan's Principle.

The Motion is granted in part, the Cross-motion is granted in part.

[28] The full reasons supporting the summary ruling and orders are explained below.

II. Summary of the Parties' submissions

[29] Given the length of this ruling and the numerous topics covered, the Tribunal, having thoroughly considered all the parties' extensive submissions, will, for ease of reference, summarize some of the parties' submissions under each topic in the analysis section and will provide reasons at the same time.

III. Applicable Law

[30] Section 53(2)(a) of the *CHRA* gives the Tribunal broad discretion in the making of remedial orders, in keeping with the broad purposes and goals of human rights legislation (2023 CHRT 55 at para 207):

> 53(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures,

> to redress the practice or to prevent the same or a similar practice from occurring in the future, including
> (i) the adoption of a special program, plan, or arrangement referred to in subsection 16(1), or (ii) making an application for approval and implementing a plan under section 17.
> Constructing an effective remedy in a complex case such as this one often demands innovation and flexibility. Section 53(2)(a) and (b) of the *CHRA* provide for this flexibility. Section 53(2)(a) is designed to address systemic discrimination which requires addressing discriminatory practices and attitudes which requires considering historical patterns of discrimination.

[31] The Tribunal reviewed the scope of the *CHRA* remedies and the purpose of the legislation in earlier decisions and more recently summarized it in 2021 CHRT 41, at paragraphs 10-46. The Panel continues to rely on the approach it set out in these previous decisions.

[32] The Tribunal remains seized of all its previous orders except its compensation orders to ensure that they are adequately implemented to eliminate the systemic racial discrimination found and that it does not reoccur in the future.

[33] In retaining jurisdiction, the Tribunal cited *Grover v. Canada (National Research Council),* 1994 CanLII 18487 (FC), 24 CHRR D/390 at paras. 32-33, (Grover), for the proposition that retaining jurisdiction on complex orders designed to address systemic discrimination ensures discrimination is effectively remedied. Moreover, this is especially helpful where the task of determining “effective” remedies was characterized as demanding “innovation and flexibility on the part of the Tribunal…” “the *CHRA* is structured so as to encourage this flexibility”. (2016 CHRT 10 at para 15).

[34] In 2016 CHRT 16, the Panel noted that it is Indigenous Services Canada (ISC) and the federal government’s responsibility to implement the Tribunal’s orders and remedy the discrimination found in the case. ISC must also communicate its response to the other parties and the Tribunal so they can ensure the discrimination has been remedied (para. 9). The Panel also indicated that while it shared the desire to implement a remedy quickly, this is a complex matter and the Panel is committed to ensuring all parties have an opportunity to fully present their positions (para. 13).

[35] The Panel set out why the unique circumstances of this case required Canada to consult with the other parties in the remedial stage (2017 CHRT 14 at paras. 113-120). Section 53(2)(a) sets out the authority to order consultation with the Commission. The Panel distinguished the current case from *Canada (Attorney General) v. Johnstone*, 2013 FC 113 that found that ordering consultation with other parties was not appropriate. The other parties' expertise in this case is invaluable. Furthermore, the Crown has a trust-like relationship with Indigenous peoples which requires Canada to act honourably in its dealings with First Nations and to treat them fairly. This relationship also manifests as a fiduciary relationship and in the duty to consult. Section 1.1 of *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30 confirms that the *CHRA* does not derogate from this relationship. In addition, the best interests of the child are central to this case. The other parties in this case include professionals with specific expertise in First Nations child and family services. These organizations have the knowledge to make recommendations to improve the cultural appropriateness of Canada's response. Finally, consultation with First Nations is consistent with Canada's stated remedial approach in this case.

[36] In 2019 CHRT 7, the Panel described the remedial provisions of section 53(2)(a) of the *CHRA* as an injunction-like power to order that a discriminatory practice cease (paras. 45-55).

[37] The Panel reviewed key case law interpreting the remedial scope of the *CHRA* with a particular focus on *CN v. Canada (Canadian Human Rights Commission*), 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, (Action Travail des femmes) and *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 SCR 84, (2021 CHRT 6 at paras. 59-75). These cases indicate that the Tribunal has significant discretion in awarding remedies but that this discretion must be guided by the purpose of the legislation to prevent and remedy discrimination. The remedies must be effective. It is not to be read narrowly to limit the Tribunal's remedial tools given both general legislative interpretation principles and its quasi-constitutional status. Systemic remedies, such as those supported under section 53(2)(a) of the *CHRA* by reference to section 16(1), are often required in cases of systemic discrimination. The main purpose of such a systemic remedy in *Action Travail des femmes*

is to counter the effects of systemic discrimination including addressing the attitudinal problem of stereotyping.

[38] In 2021 CHRT 12, the Panel reviewed the remedial purpose of the *CHRA* in a consent order (paras. 25-41). The Panel reviewed a number of its prior rulings and findings, some of which are summarized above. In addition, the Panel referred to *Ontario v. Association of Ontario Midwives*, 2020 ONSC 2839. In that case, the Divisional Court approved of the Panel's reasoning in this systemic discrimination case that found that "governments have a proactive human rights duty to prevent discrimination which includes ensuring their funding policies, programs and formulas are designed from the outset based on a substantive equality analysis and are regularly monitored and updated" (*Association of Ontario Midwives* at para. 189), (emphasis added):

[39]

> [189] The Tribunal's findings in this regard are reasonable. Indeed, they are consistent with the SCC's decision in *Moore* and the Canadian Human Rights Tribunal's decision in Caring Society, two cases concerning systemic discrimination in government funding policies. *Moore* and *Caring Society* make clear that governments have a proactive human rights duty to prevent discrimination which includes ensuring their funding policies, programs and formulas are designed from the outset based on a substantive equality analysis and are regularly monitored and updated. Such jurisprudence is directly at odds with the MOH's position that it can wait before acting until midwives – a deeply sex-segregated profession that is highly susceptible to systemic gender discrimination in compensation – have proven that the MOH's conduct constitutes sex discrimination.
> (footnotes omitted).

[40] The Federal Court, in a judicial review initiated by Canada in this case, in *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969, in dismissing all of Canada's arguments, made important comments on the Tribunal's approach to remedies in this case:

> [135] The fact that the Tribunal has remained seized of this matter has allowed the Tribunal to foster dialogue between the parties. The Commission states that the leading commentators in this area support the use of a dialogic approach in cases of systemic discrimination involving government

respondents (Gwen Brodsky, Shelagh Day & Frances M Kelly, “The Authority of Human Rights Tribunals to Grant Systemic Remedies”, (2017) 6:1 Can J of Human Rights 1). The Commission described this approach as bold considering the nature of the Complaint and the complexity of the proceedings.

[136] The dialogic approach contributes to the goal of reconciliation between Indigenous people and the Crown. It 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 decisions. As discussed later in my analysis of the Eligibility Decision, this approach allowed the Tribunal to set parameters on what it is able to address based on its jurisdiction under the *CHRA*, the Complaint, and its remedial jurisdiction.

[137] The Commission states that the dialogic approach was first adopted in this proceeding in 2016 and has been repeatedly affirmed since then. It submits that the application of the dialogic approach is relevant to the reasonableness considerations in that Canada has not sought judicial review of these prior rulings.

[138] I agree with the Tribunal’s reliance on *Grover v Canada (National Research Council*) (1994), 1994 CanLII 18487 (FC), 24 CHRR 390 [Grover] where the task of determining “effective” remedies was characterized as demanding “innovation and flexibility on the part of the Tribunal…” (2016 CHRT 10 at para 15). Furthermore, I agree that “the [*CHRA*] is structured so as to encourage this flexibility” (2016 CHRT 10 at para 15). The Court in *Grover* stated that flexibility is required because the Tribunal has a difficult statutory mandate to fulfill (at para 40). The approach in *Grove*r, in my view, supports the basis for the dialogic approach. This approach also allowed the parties to address key issues on how to address the discrimination, as my summary in the Procedural History section pointed out.

…

[162] I disagree with the Applicant’s characterization of the decisions following the Merit Decision as an “open-ended series of proceedings.” Rather, the subsequent proceedings reflect the Tribunal’s management of the proceedings utilizing the dialogic approach. The Tribunal sought to enable negotiation and practical solutions to implement its order and to give full recognition of human rights. As well, significant portions of the proceedings following the *Merit Decision* were a result of motions to ensure Canada’s compliance with the various Tribunal orders and rulings, (emphasis added).

…

> [281] As noted above, I have determined that the Tribunal did not change the nature of the Complaint in the remedial phase. The Tribunal, exercising extensive remedial jurisdiction under the quasi-constitutional *CHRA*, provided a detailed explanation of what had transpired previously and what would happen next in each ruling/decision (See e.g. 2016 CHRT 16 at para 161). In so doing, it was relying on a dialogic approach. Such an approach was necessary considering the scope of the discrimination and the corresponding efforts to remedy or prevent future discrimination. Most importantly, the Tribunal was relying on established legal principles articulated in *Chopra v Canada* (AG), 2007 FCA 268 at para 37 and Hughes 2010 at para 50 (*Merit Decision* at paras 468, 483). I do not agree that the Tribunal did not provide the parties with notice of matters to be determined, (emphasis added).
>
> …
>
> [301] In my view, the procedural history of this case has demonstrated that there is, and has been, good will resulting in significant movements toward remedying this unprecedented discrimination. However, the good work of the parties is unfinished. The parties must decide whether they will continue to sit beside the trail or move forward in this spirit of reconciliation. [302] I find that the Applicant has not succeeded in establishing that the Compensation Decision is unreasonable. The Tribunal, utilizing the dialogic approach, reasonably exercised its discretion under the *CHRA* to handle a complex case of discrimination to ensure that all issues were sufficiently dealt with and that the issue of compensation was addressed in phases. The Tribunal ensured that the nexus of the Complaint, as discussed in the *Merit Decision*, was addressed throughout the remedial phases. Nothing changed. All of this was conducted in accordance with the broad authority the Tribunal has under the *CHRA,*(emphasis added).

[41] Moreover, the above follows the original approach to remedies taken by this Panel in all its rulings.

[42] The Tribunal's powers to make the requested orders are grounded in section 53(2) of the *CHRA*; Rules 1(6), 3(1), and Rule 3(2) of the *Canadian Human Rights Tribunal Rules of Procedure (Proceedings prior to July 11, 2021)*; the Tribunal's implied jurisdiction to control its own processes, the Tribunal's authority under the *CHRA*, its retained jurisdiction on its previous rulings and orders and the dialogic approach affirmed by the Federal Court as explained above. The Tribunal will now turn to the Tribunal's definition of Jordan's Principle included in 2020 CHRT 20 and 2020 CHRT 36 that are part of the applicable legal principles. Further, in 2020 CHRT 20, a decision upheld by the Federal Court in *Canada*

(Attorney General) v. First Nations Child and Family Caring Society of Canada, 2021 FC 969 (CanLII), [2022] 2 FCR 614, this Tribunal stated that:

> [89] Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the *Charter*, the *Convention on the Rights of the Child* and the *UNDRIP* to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim, (emphasis added).
>
> [92] Furthermore, as already found by this Panel, Jordan's Principle is a separate issue in this claim. It is not limited to the child welfare program; it is meant to address all inequalities and gaps in the federal programs destined to First Nations children and families and to provide navigation to access these services, which were found in previous decisions to be uncoordinated and to cause adverse impacts on First Nations children and families (see 2016 CHRT 2, 2017 CHRT 14 and 2018 CHRT 4).
>
> [93] Moreover, [t]he discrimination found in the [Merit] Decision is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families,
> (2017 CHRT 14 at para. 73), (emphasis added).
>
> [94] There is a need to take a closer look at the differences between the FNCFS Program and Jordan's Principle which is not a Program rather it is a legal rule and mechanism meant to enable First Nations children to receive culturally appropriate and safe services and overcome barriers that often arise

out of jurisdictional disputes within Canada's own organization of Federal Programs and within Canada's constitutional framework including the division of powers. (…), (emphasis added).

[96] Moreover, the Panel agrees with Canada that the evidentiary record and findings focus on Federally funded programs, the lack of coordination and gaps within Federal Programs offered to First Nations children and families and that this is also one important aspect of the service analysis under section 5 of the *CHRA* that Canada was ordered to remedy, (emphasis added).

[99] Jordan's Principle is about ensuring First Nations children receive the services they need when they need them. Jordan's Principle is available to all First Nations children in Canada. Jordan's Principle, as previously ordered by the Panel, 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. In other words, services above the normative provincial and territorial standards account for substantive equality for First Nations children as a result of the entire discrimination found in this case and further clarified in the Panel's rulings especially 2017 CHRT 14 and 35. Those orders bind Canada on or off-reserves. Moreover, Jordan's Principle provides payment for needed services by the government or department that first receives the request and recovers the funds later. A strict division of powers analysis perpetuates discrimination for First Nations children and is the harm Jordan's Principle aims to remedy.

[100] The focus is on the child and is personalized to the child's specific needs to receive adequate services in a timely fashion without being impacted by jurisdictional disputes or other considerations not in line with what the child requires. First Nations children experience those barriers because of race, national or ethnic origin. This is what causes governments and departments to dispute who pays for the service.

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> 6. Urgent cases – Where the child requires urgent assistance or the risk of irremediable harm is reasonably foreseeable, ISC will take positive measures to verbally confirm recognition with the First Nation's Designated Official/Organization. Where applicable, ISC may work with the Jordan's Principle navigator or service coordinator that submitted the request. Where no designation has been made, or where the designated official or organization is unavailable,

the First Nation's Deemed Official(s) may provide verbal confirmation to be followed with written confirmation.

[43] The Tribunal in past rulings has discussed its authority to clarify its rulings and to make further orders to ensure its orders are effective to address the systemic racial discrimination found. The Tribunal continues to rely on its previous rulings.

[44] Moreover, the Tribunal discussed the possibility to refine, clarify orders, if need be, to ensure they effectively compensate the victims (2022 CHRT 41 at para. 269).

[45] This remedial phase requires a complete knowledge and understanding of all the evidence in the record and rulings over the years in this case to properly consider the effectiveness of the Tribunal's orders and their implementation.

IV. Analysis

[46] The Tribunal finds that the evidence in the motions while large in terms of size does not necessarily compensate for its lack of quality. Both Canada and the Caring Society challenge each other on the quality of the evidence put forward and mention that there is double hearsay and triple hearsay, a lack of detail and information, and new evidence provided in reply as opposed to in chief.

[47] However, section 50(3)(c) of the *CHRA* expressly allows the Tribunal to "receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be available in a court of law." As a result, in making decisions under the *CHRA*, it is open to the Tribunal to rely on hearsay or other information, alongside any direct testimony from the parties, victims, or other witnesses. While the Tribunal can accept hearsay evidence and other information, the evidence still needs to be weighed appropriately.

[48] On the specific issues brought forward in the motions, the Tribunal is doing the best that it can with the evidence at its disposal on the motions. Unlike the evidence previously filed in relation to Jordan's Principle, the evidence filed in support of this motion is of lower

quality. Some of the missing information and deficient evidence may be cured by the Tribunal's decision to notify the parties prior to its deliberations that, if the Tribunal has questions while it reviews the evidence, the Tribunal may return to the parties. Another way is to rely on the dialogic approach and permit the parties to report back to the Tribunal to answer the Tribunal's questions and/or further clarify and provide additional information to assist the Tribunal in ensuring that its orders to eliminate systemic discrimination are doing just that. The motions are not viewed by this Tribunal as a stand-alone matter. The Tribunal views this as an interim aspect in the continuity of a series of rulings and orders and the dialogic approach to ensure the Tribunal's orders are effective, flexible, creative, and informed by the parties' expertise and evidence. The end goal is to ensure the orders of this Tribunal are effective in the long-term and not just in the interim. The interim informs what ought to be adjusted and/or what is working well or not. The interim allows for studies and data collection and parties' views for potential improvements. This was always the case and was repeated multiple times in previous rulings. The Tribunal panel is more concerned about doing it right than being right. This means that the Tribunal panel, as demonstrated in the past, has agreed to clarify and amend, when possible, its orders. The Tribunal, as mentioned above, has followed direction and clarification from the Federal Court on the dialogic approach and complex matters.

[49] Further, this also means that this Tribunal has allowed time for studies to be completed informing the long-term aspect of the reform and has kept the openness and flexibility, as instructed by the Federal Court in *Grover*, to make the required changes to ensure the long-term orders are effective and in the best interest of First Nations children.

[50] A very large amount of evidence has been accumulated in the record over the years and informs the Tribunal's approach and decision-making. This process has been ongoing for over 8 years and this Tribunal panel is committed to seeing the fruition of all the parties' work and the Tribunal's to achieve long-term reform and finality in these proceedings.

[51] The Tribunal is hopeful that the parties will all continue to consult on long-term solutions to reform Jordan's Principle and will return to the Tribunal, in the near future, to

request final orders that will effectively eliminate the systemic discrimination found and prevent its recurrence.

The purpose of Indigenous Services Canada and the improvements under Jordan's Principle

[52] ISC's legislative mandate is to work collaboratively with partners to improve access to high ISC quality services for First Nations, Inuit, and Métis peoples. Its vision is to support and empower Indigenous peoples to independently deliver services and address the socioeconomic conditions in their communities.

[53] The Panel recognizes and agrees with Canada that ISC has made fundamental, foundational changes towards the ending of systemic discrimination against First Nations children. As detailed below, ISC has established an entire operational sector within ISC to deliver, administer, and support Jordan's Principle including an arms-length appeal mechanism to ensure that requests are dealt with fairly and in keeping with the Tribunal's orders.

[54] ISC now determines more requests on an annual and daily basis than ever before.

Substantive equality and shift in Jordan's Principle requests

[55] The Tribunal is quite concerned by the apparent shift in some of Jordan's Principle requests that are reported by Canada and some of the evidence in the motions record.

[56] There are modeling headshots and gaming consoles that are being paid for under Jordan's Principle. Even if the Tribunal can appreciate their value in a child or youth's culture, dignity, self-regulation, mental health, etc., this was never what the Tribunal envisioned under Jordan's Principle. It is troubling to know that some communities are living in poverty leaving children in precarious conditions and others would use Jordan's Principle to access services a thousand miles away from the normative standard.

[57] Moreover, the Tribunal read in the evidence that a family who needed to be relocated was authorized to buy furniture in a furniture store with no limits on costs. This is not

reasonable. The Tribunal appreciates Canada's argument that it is enticing to use Jordan's Principle in this manner."

[58] The Federal Court in Federal Court in *Pictou Landing Band Council v. Canada (Attorney General),* 2013 FC 342, stated that Jordan's Principle was not open ended:

> [116] Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and costs that meet the needs of the on reserve First Nation child, (emphasis added).

[59] The Tribunal not only agrees with the Federal Court on this, it relied on its 2016 Merit Decision. The Tribunal determined that an assessment of programs and services based on the needs of First Nations children needed to be done by Canada.

[60] When the Tribunal removed the eligibility requirement of the normative standard it was well aware that this would bring a large influx of requests given the lack of coordination and multiple gaps in Federal programs. Working towards better coordination and closing gaps while implementing Jordan's Principle was necessary. The Tribunal did not envision only one of the two.

[61] The Tribunal's orders on substantive equality are to ensure that the real needs of First Nations children in the context of intergenerational trauma, colonization, and poverty would be met. The Tribunal heard evidence on the intergenerational trauma effects of residential schools and the sixties scoop.

[62] Some First Nations children as a result of the intersection of many contributing health, special education, and social factors may need more services than other non-First Nations children. As discussed in the Tribunal's previous rulings, for example more mental health services than a province's normative standard may be required,.

[63] Fetal Alcohol Spectrum Disorder (FASD) is a condition that is frequently seen in First Nations children because of intergenerational trauma. Provinces and territories may not have normative standards that would address the real needs of First Nations children with FASD, thus the need to go above the normative standard.

[64] Remoteness, lack of surrounding services, the lack of free safe drinking water, lack of road access, safe housing, lack of safe schools or special education services and screenings, assessments, and tools that will impact a child's learning abilities are some important examples that impact the needs of First Nations children. The Tribunal cannot provide an exhaustive list.

[65] This is what the Tribunal had in mind when it ordered services to go above the normative standard. This was based on the best evidence in the record and meant to respond to the real needs of First Nations children.

[66] The Tribunal was asked by the parties to define essential services based on needs (See 2020 CHRT 15), not wants, aspirations, or anything that could improve well-being without any limit.

[67] The Tribunal finds it is unreasonable to interpret substantive equality in a way that could include just about anything, and at the same time, demand Canada to pay for it and to expedite the process for those requests. This places Jordan's Principle at risk and First Nations children with real pressing needs in jeopardy. This was not the evidence supporting the Tribunal's deadlines for non-urgent services. The Tribunal is not against modeling headshots and gaming consoles under Jordan's Principle if this is justified. However, requiring Canada to process all these types of cases in a 48-hour timeline is not what the Tribunal had in mind in 2017. This supports further consultations on the non-urgent timelines under the Tribunal's orders.

[68] Canada had based its definition on the situation of Jordan River Anderson and the Tribunal explained why it was too restrictive.

[69] The Tribunal provided further clarifications in subsequent rulings.

[70] The Tribunal recognized that culture and language were robbed from First Nations as a result of colonization. The Tribunal recognizes the importance of culture and language as at the core of First Nations identity. However, the Tribunal did not envision that any type of cultural event must now be approved in 48 hours under Jordan's Principle. This impacts

the deadlines ordered by the Tribunal. When the deadlines were ordered, the very broad services discussed above were not envisioned.

[71] Under the Back-to-Basics approach, all that is needed is a letter from an Elder to access cultural services. Again, this was not properly put before the Tribunal and could not have been considered by the Tribunal as part of its deadline orders.

[72] While Canada must redress the historical harms in culture and languages as a result of colonization, this was not the Tribunal's focus when it made its deadline orders under Jordan's Principle. The Tribunal wonders if this could also be done through redirections or referrals under First Nations programming, another education or cultural program, or with a transfer of funds to First Nations.

[73] The Tribunal finds this is one of the factors impacting the backlog of Jordan's Principle requests. The Tribunal will also touch on the evidence of false claims under Jordan's Principle services below.

[74] The Tribunal finds it may be beneficial for parties to work on eligibility criteria and timelines for cultural services. The parties will be asked to provide their views on such possible consultations.

Clarification of the Tribunal's definition of urgent services

[75] The parties all agreed that a clarification of the Tribunal's definition of urgent services would be beneficial and would assist them in moving forward to resolve their divergent opinions on what is urgent and what is not urgent under Jordan's Principle. The Tribunal finds there is a need for clarification given the parties' different interpretations. The Tribunal will return to this point below.

Canada's evidence on the causes of the backlog

[76] According to Canada's affiant, Dr. Valerie Gideon, Deputy Minister in the Department of Crown-Indigenous Relations and Northern Affairs and former Associate Deputy Minister of the Department of Indigenous Services Canada (ISC), Jordan's Principle requests have

grown exponentially since the Tribunal rendered its *Merits Decision*, from 15,887 requests in the 2018-19 fiscal year to 104,193 requests in just the first three quarters of the 2023-24 fiscal year. In accordance with the Tribunal's previous orders, Canada, the First Nations Parties and the Caring Society have successfully raised awareness of Jordan's Principle, resulting in an extraordinary increase in the number of requests. The growth in requests may also be due to needs arising during and after the COVID-19 pandemic, increases in the cost of living, and public safety emergencies such as wildfires. Despite the substantial growth and efficiency of ISC's Jordan's Principle operations, ISC has been unable to maintain strict compliance with the timelines set out in the Tribunal's Jordan's Principle decisions.

[77] The Back-to-Basics Approach has resulted in the redirection of requests into Jordan's Principle and the misclassification of Jordan's Principle requests as urgent. This has added to and complicated a backlog of correspondence and requests.

[78] In the current circumstances, including ISC's inability to reassign potentially miscategorized urgent requests to a lower level of priority, the only practical way for ISC to manage urgent requests is to consider them in the order in which they were received. With ISC determining an average of 386 requests per day, it is not feasible from ISC's perspective, to both triage and determine urgent requests, based on individual or group circumstances, within 12 or 48 hours, while continuing to process non-urgent requests.

[79] ISC approved 1,593,787 products, services, and supports through Jordan's Principle in the first three quarters of the 2023-2024 fiscal year, compared to 140,332 products, services, and supports in the entire 2018-19 fiscal year, demonstrating exponential growth. Due to this increase, ISC has added over 400 additional full-time-equivalent staff to Jordan's Principle since 2018 and has implemented and enhanced the Jordan's Principle Case Management System to accelerate data entry and processing. ISC now determines more requests on an annual and daily basis than ever before. Between July 2016 and January 31, 2024, more than 4.4 million products, services, and supports have been approved under Jordan's Principle by ISC. ISC has seen an exponential growth in the volume of Jordan's Principle requests it has determined since 2018.

[80] The range of approved expenses has shifted notably from Jordan's Principle's initial trend of requests related to health and education to socioeconomic supports like groceries and rent payments, mortgage payments, requests for new homes and renovations, as well as items such as personal vehicles and recreational requests such as sports camp fees. This has contributed to an increased complexity of Jordan's Principle requests and processing times. Case managers must be able to properly determine a wide range of products, services, and supports without the benefit of standardized operating procedures or a pre-determined list of eligible products, services, and supports.

[81] Dr. Gideon's evidence, corroborated by Candice. St-Aubin's evidence, is that there has been a significant increase in correspondence and requests to ISC's Jordan's Principle operations.

[82] The Panel accepts that this evidence, while not sufficiently detailed to attribute the percentage growth to each cause, partly explains the exponential growth of Jordan's Principle. Exponential growth is not surprising to the Tribunal who found that the number of cases is linked to the definition and eligibility criteria (2017 CHRT 14). In 2020, the Tribunal expanded the eligibility criteria to include First Nations children recognized by their First Nation. This was challenged by Canada at the Federal Court. The Federal Court upheld the Tribunal's decision. The Tribunal believes that this also impacts growth.

[83] Canada has advised the Tribunal that it does not retrieve funds from provinces and territories for Jordan's Principle even after the services have been approved. The Tribunal believes this may be another factor for the exponential growth given that provinces may be more inclined to refer children and families to Jordan's Principle if they have no financial part to play in this. Because this hypothesis was not advanced by the parties and is not part of the evidence, the Panel does not base its decision on this point. However, it is yet another example of factors influencing the growth of requests.

[84] Dr. Gideon's evidence is that in about 2018, ISC developed Standard Operating Procedures (SOPs) in response to concerns highlighted by the Caring Society in the context of the parties' discussions at the Jordan's Principle Oversight Committee (later renamed the

Jordan's Principle Operations Committee). The SOPs, an evergreen document, communicated standard processes for review, processing, and reporting of all Jordan's Principle requests. The comprehensive approach to the development of the SOPs took into account comments and recommendations from key stakeholders including Regional focal points, First Nations Child and Family Caring Society, Assembly of First Nations, Chiefs of Ontario, and Nishnawbe Aski Nation.

[85] All ISC employees responsible for Jordan's Principle were required to adhere to the SOPs and report on deviations.

[86] However, the Tribunal finds that another significant and plausible cause for an influx of Jordan's Principle requests is the Back-to-Basics policy that was developed by the Caring Society and was implemented by Canada in 2022.

[87] The parties agreed in 2021 that ISC would adopt a Back-to-Basics Approach worksheet, codeveloped by Canada and the Caring Society, with comments from the AFN and ISC implemented in early 2022. The Back-to-Basics Approach replaced the SOPs pending a final agreement on a long-term approach for Jordan's Principle.

[88] The AFN expressed some reservations about the Back-to-Basics policy and disputes the fact that it was co-developed with them.

[89] The Back-to-Basics Approach was meant to reduce any administrative burden on families seeking support through Jordan's Principle until the parties agreed to a final settlement on a long-term approach for Jordan's Principle. Pursuant to the Back-to-Basics Approach, ISC's operational model takes the following approach:

> ISC starts with a presumption that substantive equality applies when a request is submitted;
>
> ISC does not deny requests based on a normative standard;
>
> ISC's determination of requests centers on the needs and best interests of the child, including consideration of distinct community circumstances; and

> the inclusion of costing information with the request is not required and there are no predetermined caps on the cost of a product, service, or support.

[90] Canada asserts that the Back-to-Basics Approach has led to requests for services accessible through existing government programs being directed instead to Jordan's Principle. Back-to-Basics read with the Tribunal's Jordan's Principle decisions, situates Jordan's Principle as a preferred and accessible option for requests for funding for services for First Nations children that may otherwise be available and accessible under other government programs. Back-to-Basics' minimal documentation requirements, individual needs-based approach for each individual child, rapid determination timelines, and the prohibition against clinical case conferencing are factors that make Jordan's Principle a particularly attractive option, even when accessible government services already exist. The government department of first contact must pay for the services without engaging in administrative case conferencing or service navigation. Therefore, ISC 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 administered by First Nations partners and community organizations via a contribution agreement with ISC. Redirection into Jordan's Principle may also result in ISC duplicating funding in some instances because ISC cannot navigate requestors to existing programs such as Non-Insured Health Benefits, on-reserve income assistance, or education programming. Being unable to redirect requestors to existing accessible services contributes to the backlog for Jordan's Principle correspondence and requests. Instead of determining requests that require products, services, or supports through the Jordan's Principle initiative, ISC must spend time servicing requests that could be addressed through other programs.

[91] The Tribunal finds that it is understandable that families would turn to Jordan's Principle to seek help and access services, especially since the Tribunal found gaps, delays, and denials that amount to systemic discrimination and approved a settlement agreement for compensation for this racial systemic discrimination amongst other systemic discriminatory practices. The Tribunal, in 2017, stated that Jordan's Principle would be the most effective means to eliminate discrimination until the long-term reform is completed.

[92] The Tribunal has cautioned more than once to avoid separating the orders from the findings that led to the orders and has ordered Canada to close gaps as well as coordinate its federal programs to ensure the children do not experience gaps, delays, and denials in services. The elimination of the lack of coordination and the elimination of the rest of the systemic discrimination and Jordan's Principle orders were meant to work together. The Tribunal's plan and previous orders took into consideration that if programming coordination was improved and gaps were assessed and closed, this would assist children and families. This is what the Tribunal found in the evidence and that informed some of its findings.

[93] Aside from the unintended consequences related to substantive equality referred to above and the false claims that will be discussed below, the Panel appreciates that it may very well be appealing to many given the findings of numerous reports in the record (Auditor General, INAC internal reports) that led to the Tribunal making findings of gaps in services and a lack of coordination in Federal Programs offered to children. For example, the Tribunal heard evidence as part of the hearing on the merits that a Federal program funded a wheelchair for a First Nation child without considering the child's growth and needs as part of their eligibility criteria. The eligibility criteria did not consider that the child would eventually outgrow the chair before the child would become eligible for another chair under the program's eligibility criteria. The Tribunal was provided with ample evidence to find that Health Canada and First Nations Health Indigenous Branch (FNHIB) fell short in situations for First Nations children and families.

[94] The list of programs found at page 11 of the AGC's reply submissions includes the names of the programs and other information. While the Tribunal does not dispute that there are other Federal programs that may cover some of the Jordan's Principle requests, the evidence in this case is that they are often too restrictive and narrow and result in gaps and denials. For example, the first program listed at page 11 is dental services. This has been a significant issue in the evidence leading to the findings in this case. The Tribunal heard evidence of children diagnosed for and who should have received orthodontic services and were still denied services under the program. While their condition was listed as a criterion for eligibility under the federal program, children were still denied services under the FNHIB

program and even under Jordan's Principle prior to the Tribunal's rulings. The Tribunal also heard evidence that emergency dental services needed to be pre-approved which defeats the purpose of an emergency service. The Tribunal found that the rationale for denials was not based on the best interest of children.

[95] The same can be said about mental health and medical supplies listed on page 11. The Tribunal has discussed this subject at length in previous rulings. All the listed services on page 11 are part of FNIHB. The Tribunal found that First Nations children were adversely affected by the denials and gaps including in the FNIHB program. The Tribunal does not have sufficient evidence or information to make a finding that the listed program and services eligibility criteria have been improved and no longer adversely affect children.

[96] The AGC may overestimate the eligibility and responsiveness of the other federal programs because this is not what the Tribunal has heard in these proceedings over the years and this is why Jordan's Principle has been so needed. A full analysis of the programs and what they cover in order to adequately determine what are the real gaps is necessary and the Tribunal believes this is underway under the IFSD. While the timing of the study is much later than the Tribunal expected, this is still a positive development. The Tribunal agrees that if there are safeguards in place, referrals to other federal programs could be made if children are eligible.

[97] The Tribunal will return to this point in much greater detail in the coordination section below.

[98] This said, the Tribunal finds there is an immediate need for a shift in Canada's practice as it will be explained below.

[99] The Tribunal agrees with Canada and finds that the Back-to-Basics approach to implementation of the Tribunal's orders, agreed to by the parties in 2021 and implemented in early 2022, has had unintended consequences on Canada's capacity to effectively triage matters and provide support for those individuals facing more serious circumstances.

[100] Dr. Gideon's evidence establishes that the Back-to-Basics Approach also changed how ISC intake officers identify requests as urgent or not. Under the Standard Operating Procedures (SOP) previously in place, urgency was based on an initial assessment by the regional focal point, and urgent requests were defined as "a child requires urgent assistance, is in palliative care, or a risk of irremediable harm is reasonably foreseeable."

[101] Pursuant to the Back-to-Basics Approach, however, the intake officer is required to accept the requestor's identification of the request as urgent and is not permitted to reassign the request to a lower level of urgency notwithstanding the circumstances. Under the Back-to-Basics Approach, the classification of urgent requests has expanded to include requests that do not align with what the Tribunal originally intended.

[102] The Tribunal agrees with Canada and the AFN that the importance of prioritizing and urgently determining a request for a child in palliative care, who may suffer adverse impacts should they not receive medical products, services, or supports as soon as possible, is clear. However, it is difficult to imagine that there is a serious and immediate risk to a child should ISC take longer than 12 hours, or even 48 hours, to determine requests received in the summer for school supplies, hockey equipment, and winter gear. Several examples of requests identified as urgent can be found in Dr. Gideon's revised affidavit dated March 28, 2024, for example Laptops, desktop computers, printers, Zipline kit, Modeling headshots, lawnmower, outdoor play structures, trampolines and playgrounds, social/recreational activities (e.g., movie passes, museum tickets, fair tickets, gym memberships).

[103] The Caring Society cautions the Tribunal to place little weight on these examples given the lack of context. Taking a categorical approach as opposed to a needs-based approach grounded in substantive equality risks failing to meet the unique needs of unique First Nations children.

[104] Dr. Blackstock, in her reply affidavit, sets out a clear example of when a categorical approach can have devastating consequences:

> I have previously raised the dangers of dismissing items as ineligible on their face with ISC, and with Dr. Gideon in particular, after ISC denied requests for

> a backpack, generator, fridge, and other items recommended by a physician for a child in Walpole Island. The child had cystic fibrosis. The generator and fridge were to store medication that required reliable cold storage. The backpack and laptop were for her to participate in schools. […] The child tragically passed away without the requested services ever being approved. Dr. Gideon commissioned a review of this tragic case when she was Assistant Deputy Minister responsible for Regional Operations at the First Nations and Inuit Health Branch at ISC.

[105] The Tribunal entirely agrees that a needs-based approach is necessary and that the example above is a relevant yet sad example. Another important point is the fact that the request was made by a physician and was still denied.

[106] However, the same cannot be said about the other examples mentioned above. The Caring Society also raised a few examples that appear different with added context, some of which will be discussed in the social prescription section below. However, many of their examples would not justify a 12-hour or 48-hour urgent timeline. For example, even with added context such as poverty, compliance with city bylaws, etc. the need for a lawn mower, could never be justified as an urgent need and is questionable for a deadline compliance of 48 hours under non-urgent requests. The Panel does not see these types of needs as urgent requests.

[107] Moreover, while Annex A to Candice St-Aubin's revised affidavit dated March 28, 2024, does not provide sufficient information to determine the entire situation of the listed cases, the Tribunal disagrees with the Caring Society's position that the Tribunal ought to give it little to no weight. The Tribunal finds that while it is insufficient to determine requests or establish the merits of approval or denial or the substantive equality analysis, a number of important aspects can be found useful to support a trend in ISC's responses. The Tribunal has no reason to doubt the veracity of what is included in Annex A. Annex A appears like a login type of chart prepared by staff on a daily basis with summaries of decisions and updates in numerous cases.

[108] The information in Annex A, allows the Tribunal to find that many cases involving a lack of supporting documentation for the request were the reason for causing delays in approvals.

[109] Further, the Tribunal finds that several cases of requests that were deemed urgent by the requestors or the Caring Society were not deemed urgent from ISC's perspective.

[110] The Tribunal found at least one case where ISC was unable to reach the requestor even when calling multiple times.

[111] The Tribunal found at least one case where the requestor was reported admitting that they did not contact ISC for their request.

[112] The Panel agrees with Canada that many of the examples, some mentioned above, do not involve circumstances where the child had a need for a product, service, or support within either a 12- or 48-hour timeframe.

[113] This means that potentially no education support would fit into that urgent category. Moreover, in social services, examples of urgent needs are children at risk of being removed from their families that same day would be considered urgent or caregivers fleeing domestic violence with their children because of an immediate threat. Similarly, children or youth with an imminent plan to commit suicide would also be considered urgent. It is impossible to list all the different situations here or to determine an exhaustive list.

[114] The Panel also agrees that these examples above demonstrate that, following the implementation of the Back-to-Basics Approach, a significant number of “urgent” requests likely do not meet objective criteria for the identification of urgency. Miscategorized “urgent” requests pose a significant challenge to the overall administration of Jordan’s Principle, as they may be prioritized over other urgently needed requests.

[115] Canada is interested in working with the parties to enable the identification of objectively urgent requests, to ensure that those that are objectively most urgent are actioned first. The Panel agrees and is open to hearing any reasonable suggestion as part of the parties’ negotiations as part of their development of objective criteria for urgent.

[116] Canada’s evidence demonstrates that since the implementation of the Back-to-Basics Approach, there has been an immediate and rapid increase in “urgent” labelled requests. Urgent requests grew by over 900% between the 2021-22 and 2022-23 fiscal

years, compared to non-urgent requests which only grew by 88%. The number of urgent requests has continued to increase at a pace far greater than that of non-urgent requests. Due to the increased number and complexity of requests, most of which have arisen since the introduction of Back-to-Basics, a backlog has developed. As a result, ISC must reconsider how best to ensure that First Nations children's ongoing needs can be determined, with a particular focus on those whose individual circumstances are truly and objectively urgent. What is key to addressing the existing backlog is that any definition of "urgent" embraces the spirit and intent of the Tribunal's order in 2017 CHRT 35, wherein objectively urgent requests receive swift attention.

[117] ISC agrees with the Panel Chair and the AFN that when setting timelines for processing Jordan's Principle requests, "urgent meant urgent". ISC also agrees with the AFN that high-priority, objectively urgent requests involve life-threatening, life-limiting, or life-altering needs.

[118] The AFN submits that the importance of prioritizing and urgently determining a request for a child in palliative care, who may suffer adverse impacts should they not receive medical products, services, or supports as soon as possible, is clear. However, it is difficult to imagine that there is a serious and immediate risk to a child should ISC take longer than 12 hours, or even 48 hours, to determine requests received in the summer for school supplies, hockey equipment, and winter gear.

[119] Pursuant to the Back-to-Basics Approach, however, the intake officer is required to accept the requestor's identification of the request as urgent and is not permitted to reassign the request to a lower level of urgency notwithstanding the circumstances. Under the Back-to-Basics Approach, the classification of urgent requests has expanded to include requests that do not align with what the Tribunal originally intended.

[120] Canada further adds that to ensure the best interests of First Nations children are met in a proper and timely way, Canada requires the ability to reassign the priority of requests to meet the most objectively urgent needs. The Tribunal agrees that this is necessary.

[121] Canada submits that while recognizing that requestors may be in the best position to identify a subjectively urgent request, presently, under the Back-to-Basics Approach, ISC may not re-assign the request to a lower level of urgency. Canada treats all self-identified urgent requests with the same level of priority. This is of great concern to the Panel and was not the intent of the Tribunal's orders. The Tribunal agrees with Canada further that to ensure the best interests of First Nations children are met in a proper and timely way, Canada must have the ability to reassign the priority of requests to meet the most objectively urgent needs.

[122] Dr. Gideon's evidence shows that from a sample of 31,258 urgent requests between January 1, 2022, and December 31, 2023, ISC identified 5,800 (18.5%) requests which were likely misclassified as "urgent" following the implementation of the Back-to-Basics Approach.

[123] Canada submits that notwithstanding the backlog, those First Nations children with urgent needs continue to receive the products, services, and supports that they need. ISC has made and will continue to make every effort to ensure the safety and protection of every First Nations child in a culturally safe and appropriate manner informed by experts,especially First Nations.

[124] While this may be true, this does not account for all the potential urgent requests that may be found in the backlog of unreviewed and unopened requests.

[125] Canada's evidence shows that with the increased volume of requests and follow-up correspondence, ISC is experiencing backlogs in:

> Reviewing incoming email correspondence, and determining requests that have been entered into Jordan's Principle Case Management System.

[126] Furthermore, Canada's evidence shows backlogs in email correspondence and requests awaiting determination vary at any given time and across regions. Overall, approximately 55% of backlogged correspondence in Jordan's Principle general request inboxes are new requests, while approximately 45% are other correspondence related to existing requests. All regions report a steep and continuing increase in the volume of requests. Most regions have noted a further increase in volume following the implementation

of the Back-to-Basics Approach in 2022 and a growing public awareness of Jordan's Principle.

[127] As set out in the Tribunal's order in 2017 CHRT 35, ISC must determine requests on the following timelines:

12 hours for urgent individual requests;
48 hours for all other individual requests;
48 hours for urgent group requests;
and 1 week for all other group requests.

[128] Canada agrees with the Caring Society that ISC has been unable to maintain compliance with these timelines for reasons that include the increased volume. Canada has developed and is implementing operational initiatives to address this issue.

[129] ISC's analysis demonstrates that its timeline compliance rate declined following the implementation of the Back-to-Basics Approach. ISC's timeline compliance rate has been negatively affected by the increase in the volume of requests (both urgent and non-urgent) and the increase in the rate of urgent requests. For example, between the first quarter of the 2022-23 fiscal year and the third quarter of the 2023-24 fiscal year, the number of determined requests increased from 21,918 to 34,877 and the rate of urgent requests increased from 2% to 26%.

[130] During that same timeframe, ISC's compliance rate decreased from 41% to 29%.

[131] Notwithstanding declining timeline compliance, ISC submits that they determine the majority of requests without unreasonable delay. For the first three quarters of the 2023-24 fiscal year, 62% of all requests were determined in a 15-day timeframe, while 70% of all requests were determined within 30 days. The Panel finds that this also means that 30 % of all requests wait for more than a month.

[132] During cross-examination, when asked by AFN counsel Kassis, Ms. St-Aubin could not speak to the other 30% of requests that were determined in more than 30 days.

[133] Candice St-Aubin, Senior Assistant Deputy Minister in the Department of Indigenous Services Canada (ISC), First Nations and Inuit Health Branch (FNIHB), asserts that the

Tribunal's timelines imposed in 2017, were not based on objective evidence such as standardized child welfare service timelines or standard claims processing industry timelines. Given the significant evolution and expansion in the number and complexity of requests stemming from the Tribunal's orders in relation to Jordan's Principal, the initial timelines are not realistic.

[134] The Panel reiterates that the timelines were not imposed but agreed on consent of all the parties including Canada, so this assertion is simply not true. Moreover, Candice St-Aubin's assertion that the timelines were not based on objective evidence is also incorrect. Ms. St-Aubin, when asked questions by the Panel Chair, showed that she had limited knowledge of the Tribunal's rulings and evidence that led to the Tribunal's findings. The Panel finds it peculiar that Ms. St-Aubin would refer to standardized child welfare service when most urgent requests envisioned by the Panel are health-related. Moreover, even Canada refers to terms like palliative care and medical products, services or supports as opposed to summer camps, school supplies, hockey equipment and winter gear. Many of Jordan's Principle findings were supported by evidence that were health-related and that involved Health Canada, FNIHB, and ISC. The Tribunal's interim 2019 CHRT 7 relied on medical evidence, leading to the term life-threatening, a term that even ISC uses in its submissions and evidence.

[135] As it will be demonstrated below, Ms. St-Aubin was successfully challenged by the Caring Society on the standardized child welfare and industry points during cross-examination.

[136] The Caring Society contends that to the contrary, the evidence led by the Caring Society and Ms. St-Aubin's admissions on cross-examination demonstrate that ISC's proposed changes are unjustified. Canada argues that the Tribunal-ordered determination timelines should be modified as they were not based on objective evidence such as child welfare standards.

[137] However, the Caring Society further submits that this argument ignores the evidence that Canada's senior official gave in 2017. It also fails to note that child welfare standards do not support Canada's approach to timeframes for determining urgent cases.

[138] First, contrary to the assertion in Ms. St-Aubin's revised affidavit dated March 28, 2024, the current CHRT timelines were based on the evidence of Robin Buckland, a senior ISC official.

[139] Ms. Buckland was cross-examined during an earlier stage of this proceeding, in February 2017. Notably, she advised that ISC sought to deal with urgent cases within 12 hours. In general, however, Ms. Buckland's evidence on her cross-examination demonstrates that, prior to the Tribunal's orders in 2017 CHRT 14 and 2017 CHRT 35, ISC's service standards were to determine:

a. Urgent individual cases within 12 hours, non-urgent individual cases within 5 days, and cases "outside the normative standard" within 7 days; and
b. Large group requests within 7 days, though in reality, it was closer to 14 days.

[140] Ms. St-Aubin was unaware of Ms. Buckland's evidence in these proceedings. During her cross-examination, Ms. St-Aubin admitted that she was not aware that it was the First Nations and Inuit Health Branch's practice to try to deal with urgent Jordan's Principle cases in 12 hours. Nor was she aware that Ms. Buckland's evidence was that ISC's voluntarily adopted non-urgent service standard for Jordan's Principle was 5-7 days. Given that Ms. St-Aubin was unaware that Canada's own evidence informed the Tribunal-ordered timelines, the views on the appropriateness of the Tribunal-ordered timelines expressed in the St-Aubin revised affidavit should be given little weight.

[141] Second, Ms. St-Aubin criticizes the Tribunal's timeline as "not based on objective evidence" such as standardized child welfare service timelines or standard claims processing industry timelines ("child welfare standards"). However, the present timelines are indeed aligned with, and supported by many child welfare standards, while Canada's suggested timelines ignore the very same objective evidence it sought to use to undermine the Tribunal's timeline. Numerous child welfare standards support prompt action to address

urgent situations, with the majority requiring action within 24 hours, rather than the longer 48-hour (for individuals) and one-week (for groups) periods that Canada now seeks.

[142] This is the rationale that the Panel used to arrive at its urgent timelines. The Parties subsequently agreed to the same timelines on at least two occasions namely, 2017 CHRT 35 and 2020 CHRT 36.

[143] The Panel agrees with the Caring Society on this and rejects Ms. St-Aubin's evidence on these points.

[144] The Tribunal found that the evidence supported an order for an Independent Appeals process for Jordan's Principle with an Independent Committee composed of health professionals and other professionals that can review denials of Jordan's Principle requests (see 2019 CHRT 7 at paras.55 and 75). Canada's evidence shows that in the 2022-23 fiscal year, 1,258 appeals were determined under the new appeals process, and 59% of the determinations under appeal were overturned by the Chief Science Officer, on the recommendation of the Appeals Committee. Between April 1 and December 31, 2023, 625 appeals were determined, with 46% of those determinations overturned by the CSO, on recommendation of the Appeals Committee. This illustrates the Panel's point well.

[145] Canada has submitted that in the current circumstances, including ISC's inability to reassign potentially miscategorized urgent requests to a lower level of priority, the only practical way for ISC to manage urgent requests is to consider them in the order in which they were received.

[146] Canada points to their factum dated May 24 for the point that triaging self-identified urgent requests is not feasible, given the current volume of urgent requests and the 12-hour timeline. They submit that the answer is not to create categories of urgency, thus adding a further layer of complexity and decision-making to request administration. Instead, ISC must be able to easily identify and prioritize objectively urgent requests. While the Panel agrees with ISC on most of this assertion, the Panel disagrees that this distinction cannot be made. Canada itself mentions the complexity of the requests and the need for attention to each one with some requiring escalation and discussion and that each First Nations child is

deserving of and receives individual consideration, taking into account their distinct needs and circumstances. Canada requests the Tribunal to allow them to reassign a request labelled urgent to a lower level of priority if the ISC staff believes it is not urgent.

[147] The Panel agrees that Canada ought to be allowed to do this and this exercise will need a minimum of assessment from the ISC staff allowing for an immediate and 12-hour triage with the benefit of objective criteria. The Panel is open to hearing the parties' negotiated solutions.

[148] Canada strongly supports an approach in which the parties co-develop objective criteria to identify urgent Jordan's Principle requests. Co-development is consistent with Canada's approach to reconciliation with Indigenous people and ensures a focus on solutions. Co-developed solutions also reduce the risk that any one party's proposal would have adverse unintended outcomes. The Panel agrees that this co-development is needed.

[149] The Panel is open to hearing the parties' negotiated solutions.

[150] The Tribunal agrees with Canada and further finds there is a need to develop objective criteria to be used to identify requests, for example, those requests for products, "urgent" Jordan's Principle services and supports directly linked to the needs of a First Nations child who requires urgent medical assistance or is at risk of reasonably foreseeable irremediable harm as it will be explained below. No one opposes this.

[151] The Tribunal in accordance with the dialogic approach in this case and recognized by the Federal Court and pursuant to section 53 (2) (a) of the *CHRA* and the Tribunal's previous Jordan's Principle orders and retained jurisdiction, orders Canada to consult with the parties in the manner of their choice (mediation, conflict resolution, negotiations, etc.) to arrive at consent order requests if possible and if not, with options for orders supported by rationale and available evidence and to report back to the Tribunal by January 9, 2025. The FNLC may only participate on the consent of all the parties. The parties' consultations will include but are not limited to the following aspects:

[152] • Parties will seek to co-develop objective criteria to be used to identify urgent Jordan's Principle requests by January 9, 2025.

[153] Furthermore, the parties will also include in their consultations, all the Tribunal's consultation orders found below.

[154] The Tribunal, on the consent of the parties, has determined two levels of urgent services in 2020 CHRT 36, referred to above:

1. urgent cases involving reasonably foreseeable irremediable harm (requiring immediate response); and
2. the other urgent ones requiring action within 12 hours (see 2020 CHRT 36 Annex A).

[155] This urgent Jordan's Principle timeline is not meant to replace 911 or paramedics or other emergency services.

[156] The Tribunal confirms that "life-threatening cases", and cases involving end-of-life/palliative care, risk of suicide, the risk to physical safety, and no access to basic necessities (the Tribunal orders that this must be defined by the parties as part of their consultations on objective criteria to be used to identify urgent Jordan's Principle requests), or risk of entering the child welfare system are urgent. The Tribunal has also been clear that the "time-sensitive nature" of a case could also make it urgent. Some life-threatening situations may require immediate response while others may require a timely response.

[157] The Tribunal agrees with the Caring Society that urgent must include caregivers and children fleeing from domestic violence in the definition of other urgent cases requiring action within 12 hours. Cases of domestic violence involving children already form part of the Tribunal's evidentiary record. Canada was cautious to redact identifying information. Moreover, while other services such as shelters for people fleeing domestic violence may best respond to the immediate needs of the caregivers and children, the Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, vol 1 a, (MMIWG report) also states that some shelters may not accept those who also have mental health issues or addictions and that gaps and delays exist at the community level:

> For example, according to the most recent Statistics Canada Transition House Survey, there were 627 shelters for abused women operating across Canada on a snapshot on April 16, 2014. On that day, 338 women and 201 accompanying children were turned away from shelters. In 56% of these cases, the reason for being turned away was a lack of space, though other
>
> reasons included drug and addiction issues, and mental health issues, (MMIWG report), p.575, volume 1 a. (…) In other cases, witnesses testified about how there weren't enough services, or they didn't know how to navigate them, which forced some people to stay in unsafe situations. Josie Nepinak explained that in 2015–16, 16,359 women were turned away from shelters in Alberta and, of these, 65% identified as Indigenous women.127 Sandra Montour, the executive director of Ganohkwasra Family Assault Support Services in Ontario, likewise talked about how a lack of services for Indigenous women and children experiencing violence means that they are often turned away or forced to wait sometimes for months in order to get services.
>
> Our women's community counselling program has 20 to 30 women waiting every single month. Our men's counselling program, Sahoˆnikonrí:ione, "his mind has been healed," that has a waiting list usually about anywhere from 15 to 20. Our children's program, Gaodwiyá:noh, they have a waiting list usually in the 20s and 30s. We cannot keep up. And this has been like this for years. I lay awake at night and I worry about losing our people to death as they're waiting on our waiting list, (MMIWG report at p.576).

[158] The MMIWG report is in the Tribunal's evidence and was relied upon by this Tribunal in previous rulings. The Tribunal finds this report relevant and reliable. Moreover, Canada accepted the report.

[159] The Tribunal appreciates that other social programs at the federal, provincial, and community levels may be available and responsive to caregivers and children fleeing domestic violence and ISC may be able to assist and refer them to those existing services.

[160] However, this requires an understanding of the services that are available in the community or elsewhere and the gaps in services. Jordan's Principle services should bridge some of those gaps. A simple referral because a list of other services exists, may not be responsive to the children's needs.

[161] The Tribunal orders Canada to consult with the parties and seek to co-develop objective criteria and guidelines for these cases as part of their consultations on objective criteria to be used to identify urgent Jordan's Principle requests.

[162] The Tribunal agrees that a child with no access to food or other basic necessities is considered an urgent case requiring action within 12 hours. The Tribunal also agrees that once food or other basic necessities have been provided it is appropriate to refer the family to other non-discriminatory services and, if the services include barriers, to eliminate those barriers. The Tribunal orders Canada to consult with the parties and seek to co-develop objective criteria and guidelines for these cases as part of their consultations on objective criteria to be used to identify urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025.

[163] The Tribunal accepts Canada's evidence that there are other services meant to support fire evacuations but Jordan's Principle may still be engaged. However, a clear coordination between Jordan's Principle and the other services ought to be established. In other words, referrals to other services are acceptable if the services are culturally appropriate, timely, effective, and address needs in a meaningful way. The Tribunal accepts that a request could be multifaceted involving some aspects under Jordan's Principle and other aspects under other emergency response services.

[164] The Tribunal agrees that an entire region such as British Colombia experiencing tragedies such as emergency fire evacuations should not use Jordan's Principle as a first resort when other effective mechanisms and services are available. This being said some requests may qualify under Jordan's Principle.

[165] Therefore, the Tribunal orders Canada to consult with the parties and to seek to co-develop guidelines on this coordination aspect and on how to triage and respond to the multifaceted requests that also involve Jordan's Principle aspects as part of their consultations on objective criteria to be used to identify urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025.

[166] The Tribunal agrees that bereavement is a sacred time for First Nations children and that the passing of a parent, sibling, or close relative can be particularly traumatic. The Tribunal agrees that in some cases urgent services may be required and in other cases, it may be time-sensitive (more than 12 hours) but not urgent. The Tribunal also recognizes that cultural ceremonies of many forms are important services in line with substantive equality and also agrees with the AFN that all types of ceremonies should be considered, not only potlaches. The Tribunal agrees that First Nations children who lose a parent face numerous life-altering risks and may need Jordan's Principle services even in the absence of a child welfare removal. The Tribunal will review the objective criteria to be used to identify urgent Jordan's Principle requests developed by the parties and will revisit this request at that time.

[167] The Tribunal confirms that Canada is not bound by the Back-to-Basics policy under the Tribunal's orders and clarifies that some of the main aspects are in line with the Tribunal's orders and some are not. For clarity, the Tribunal does not discuss every aspect of the Back-to-Basics policy, only some that stand out.

[168] Aspects that are in line with the Tribunal's orders: presumption of substantive equality*, supporting documentation kept minimal**, and professionals identifying urgent cases. (However, the Tribunal orders Canada to consult with the parties and seek to co-develop objective criteria to determine who is a qualified professional with relevant competence and training as part of their consultations to develop objective criteria to be used to identify urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025).

[169] The Tribunal clarifies the above should be maintained.

[170] * A presumption of substantive equality is a means to break down accessibility barriers and remove burdens on requestors of having to prove how their requests meet the substantive equality test. The Tribunal has no intention to deny ISC's right of rebuttal or say in assessing the requests.

[171] ** While documentation should be kept minimal, this does not mean that it is unreasonable to request some supporting documentation. The higher the complexities or costs the more reasonable it is to require supporting documentation.

[172] Aspects that are not in line with the Tribunal's orders:

- Self-declaration of urgent cases when no health or other qualified professional is involved (the Tribunal will revisit this once the parties have defined the terms "qualified professional" as they co-develop objective criteria to be used to identify urgent Jordan's Principle requests).
- Canada's interpretation that there is no possibility of re-classifying an urgent case as a non-urgent case.
- The requirement that once identified, every request must be dealt with in the same way with zero flexibility for escalating matters whose facts, on their face, could justify increased attention.
- The inability of ISC to prioritize matters.

[173] The Tribunal clarifies the above should be eliminated.

Processing of requests and Addressing the backlog:

[174] Dr. Gideon's revised affidavit evidence clearly describes the Jordan's Principle requests' Intake Process. The Tribunal accepts her evidence as reliable generally and on this point.

[175] When Jordan's Principle was initially implemented in 2016, requests were submitted through email and fax only. General inquiries, initial contacts, and Jordan's Principle requests may now be received by ISC in one of the following ways:

a. by phone call to the National Call Centre; or
b. by phone call, fax, or email to an ISC regional office, often referred to as a "regional focal point;" or
c. through a "service coordinator" (a First Nation or First Nation organization funded by Canada to assist requestors in making group or individual requests).

[176] ISC uses Jordan's Principle Case Management System to process and approve all requests submitted under Jordan's Principle and Inuit Child First Initiatives, as well as to submit approved requests to its financial SAP program to issue payment.

[177] ISC staff use Jordan's Principle Case Management System to provide 24 hours a day, 7 days a week critical services to Indigenous children in response to requests submitted by email, phone, fax, and mail.

[178] In February 2018, ISC announced the creation of Jordan's Principle 24/7 bilingual National Call Centre (Call Centre). The Call Centre is currently staffed by employees including a manager, supervisor, quality assurance staff, a technical specialist, and call agents, who are scheduled 24/7. ISC has also brought in contracted call agents from time to time, to supplement services when required (for example, during the Public Service Alliance of Canada labour disruption in 2023).

[179] The Call Centre is intended to provide support and assistance to requestors in making their requests, but Call Centre agents do not determine requests. Requestors receive one-on-one service through the Call Centre, where call agents work with the requestor to complete their requests. After a request is received via the Call Centre, it is transferred to the ISC regional focal point for determination.

[180] Other than submitting a new request or seeking a status update on an existing request, callers may not know exactly what products, services, or support they want to request through Jordan's Principle to meet the child's needs. Since requests can involve multiple components, call agents often engage in lengthy conversations to help callers identify the child's needs, including providing information on the available supports in their region and general information about Jordan's Principle.

[181] The Call Centre has designated overnight call agents. Outside of regular business hours, if a case is urgent or a consult is required, a national on-call designated decision maker is available to make a determination. When a request falls outside the Call Centre's scope (being intake, information, and possible updates), callers are redirected to the appropriate regional focal point.

[182] While urgent requests for products, services, and supports may be submitted via the Call Centre, the Call Centre is not intended to provide emergency medical or public safety response in the nature of police, firefighting, or paramedic response. It does not provide 911 services and does not function like a 911 service, nor is it intended to do so. Call Centre staff are not trained to handle emergency situations. In any situation involving a child in immediate danger, the Call Centre redirects callers to 911 and/or local emergency services.

[183] Regional intake officers are responsible for the intake and triage of all incoming requests, according to applicable regional practices. Each ISC regional office operates as a "focal point" for Jordan's Principle requests. Most focal points maintain Jordan's Principle call lines that are available during regular business hours in their region, as well as generic e-mail boxes for email requests. Regional call lines currently forward calls to the Call Centre after hours. While the Quebec regional focal point does not have its own phone line, it works closely with the Call Centre and supports intake and after-hour calls.

[184] The ISC regional focal point receives individual requests by phone, email, fax request form, or through Service Coordinators (discussed below). If the request has come through the Call Centre, the focal point is to contact the requestor by phone or email within one calendar day to acknowledge receipt of the request. A regional intake officer will then review the request to ensure all supporting information has been provided and complete an Intake Form. For urgent requests, requestors are not required to provide documentation at this intake stage.

[185] The regional focal point is permitted to approve requests where the eligibility criteria are met and the supporting documentation sufficiently links the requested product, service, or support to the child's unmet need. Focal points may approve individual requests for products, services, or supports under $100,000, and group requests for products, services, or support under $500,000.

[186] When individual or group requests exceed these amounts, the regional focal point escalates the request to the National Review Team for determination. The regional focal point notifies requestors when their request is escalated for determination.

[187] Canada submits that the Back-to-Basics Approach has led to requests for services accessible through existing government programs being directed instead to Jordan's Principle. Back-to-Basics read with the Tribunal's Jordan's Principle decisions, situates Jordan's Principle as a preferred and accessible option for requests for funding for services for First Nations children that may otherwise be available and accessible under other government programs. Back-to-Basics' minimal documentation requirements, individual needs-based approach for each individual child, rapid determination timelines, and the prohibition against clinical case conferencing are factors that make Jordan's Principle a particularly attractive option, even when accessible government services already exist.

[188] Therefore, Canada seeks orders that permit service navigation in appropriate circumstances, and orders to facilitate the transfer of control over Jordan's Principle administration and other services to willing First Nations and First Nations community organizations.

[189] As mentioned above, the AGC submits that there has been a significant increase in correspondence and requests to ISC's Jordan's Principle operations as a result of multiple factors, including successful awareness campaigns, impacts related to the COVID-19 pandemic, increased costs of living, and public safety emergencies (Dr. Valerie Gideon Affidavit at para 7; ISC's Response to Request for Information, Appendix A at 7 and 9). Despite the substantial growth and efficiency of ISC's Jordan's Principle operation and corresponding funding, ISC has been unable to maintain strict compliance with the timelines set out in the Tribunal's Jordan's Principle decisions, (Dr. Valerie Gideon Affidavit at paras 6, 12, 29–74; St-Aubin Affidavit at para 8).

[190] Canada submits that despite over $5 billion in Jordan's Principle expenditures by Canada since 2016, and the development of ISC's Jordan's Principle operations in collaboration with the parties, Canada cannot determine all Jordan's Principle requests within the consent timelines set out in 2017 CHRT 35: 12 hours for urgent individual requests; 48 hours for all other individual requests; 48 hours for urgent group requests; and 1 week for all other group requests. Current circumstances have led to a backlog of Jordan's Principle correspondence, including requests.

[191] Canada has proposed several measures in its cross-motion, supported by the affidavit evidence, which Canada submits are necessary to address the backlog. These include a proposal for the collaborative development of an objective definition of the word urgent in the context of Jordan's Principle requests and additional time to make determinations on requests for which a longer determination time will not have an immediate adverse impact on the child.

[192] Canada contends that ISC has implemented ongoing operational initiatives in an effort to address the backlog, such as call volume initiatives, updated contact information, surge teams, additional staffing, staff retention initiatives, and technology initiatives, which have led to significant progress.

[193] From ISC's perspective, there is no readily available formula that can determine the number of sufficient staff required to administer ISC's Jordan's Principle initiative, given the constantly fluctuating level of complexity and volume of incoming requests. Nonetheless, ISC has grown from 65 full-time-equivalent staff in the 2018-19 fiscal year to approximately 476 full-time-equivalent staff administering Jordan's Principle in the 2023-24 fiscal year. This is an increase of over 600%. Each staff member must receive the training necessary to fulfill their job responsibilities with compassion and cultural sensitivity, and all hiring must be done in accordance with the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13, applicable bargaining agreements, and departmental hiring policies.

[194] ISC has implemented ongoing operational initiatives in an effort to address the backlog, which Canada submits have led to significant progress. These include:

> Call volume initiatives: ISC has updated the National Call Centre's technological systems, including by implementing an automated callback system and a separate urgent callback queue with an average callback time of 20 minutes. National Call Centre agents now enter all requests into ISC's Jordan's Principle Case Management System, and the Quality Assurance team evaluates calls and provides surge support. Further call tree enhancements are planned for the 2024-25 fiscal year to shorten the call tree and redirect callers to live agents as needed. ISC is also consolidating all ISC regional offices (or focal points) into the National Call Centre's toll-free number in 2024. This will allow warm transfers and is expected to reduce the

> administrative burden on requestors. ISC has also increased staffing for the 24/7 Call Centre shift schedule.
>
> Updated contact information: As recommended by the Caring Society, ISC has already updated its website to include contact phone numbers, e-mail addresses, and hours of operation for regional offices and headquarters, for both requests and payment inquiries.
>
> Additional staffing: From ISC's perspective, there is no readily available formula that can determine the number of sufficient staff required to administer ISC's Jordan's Principle initiative, given the constantly fluctuating level of complexity and volume of incoming requests. Nonetheless, ISC has grown from 65 full-time equivalent staff in the 2018-19 fiscal year to approximately 476 forecasted full-time-equivalent staff administering Jordan's Principle in the 2023-24 fiscal year. In an effort to address the growing volume of requests and backlogs, ISC has also needed to increase overall Jordan's Principle staffing. For example, in the 2022-23 fiscal year, ISC planned to employ 252 full-time equivalent staff, however, it employed 360 full-time equivalent staff, which is approximately 43% higher than anticipated. The total number of full-time equivalent staff reported here support both Jordan's Principle and the Inuit Child First Initiative. These additional full-time equivalent employees provide a temporary solution to managing increased volume and complexity, while other operational modifications are considered.

[195] Canada submits that this is an increase of over 600%. Each staff member must receive the training necessary to fulfill their job responsibilities with compassion and cultural sensitivity, and all hiring must be done in accordance with the *Public Service Employment Act*, applicable bargaining agreements, and departmental hiring policies.

[196] From Canada's perspective, the Caring Society's proposed solution of appointing "sufficient staff" within 45 days for urgent determination purposes, set out on page 3 of their Notice of Motion, is not feasible for several reasons: there is no readily available formula that can determine the number of sufficient staff, giving the constantly fluctuating level of complexity and volume of requests.

[197] ISC must abide by budget allocation and is fully expending its annual salary envelope for full-time equivalent employees, and hiring federal public servants must be done in accordance with the *Public Service Employment Act*, applicable collective bargaining agreements, and departmental hiring policies. These administrative steps are inherent to

the federal public service and are more time-consuming than when First Nations communities hire and train staff directly, and all new staff must receive appropriate training prior to working in the Jordan's Principle initiative. Training timelines are variable and depend on the individual's position, experience, learning speed, approach, and adaptability. Very generally speaking, required training takes from 4 to 6 weeks. However, some positions require significantly longer training of up to 6 months.

[198] Further initiatives from ISC to address the backlog include:

A. Surge team support: ISC has and will continue to mobilize surge teams, consisting of existing staff within ISC and the Department of Crown-Indigenous Relations and Northern Affairs Canada, to assist with the backlog, facilitate faster determinations and provide ongoing support to ISC's regional offices. Surge teams review backlogged correspondence and provide data entry support so that regional offices can focus their efforts on determining requests and other matters that require their greater knowledge and expertise. Surge teams have been making progress in addressing the backlog and will continue to do so moving forward.
B. Staff retention initiatives: ISC's Jordan's Principle operating environment is extremely difficult and emotional. To address the high rate of employee turnover, ISC has approved 100% remote work for Call Centre staff and has introduced new technological system capabilities.
C. Technology initiatives: ISC has launched a series of operational initiatives to improve the intake process, including the implementation of enhancements to the Jordan's Principle Case Management System to accelerate data entry and processing, which represents 80% of frontline staff workload. By fall 2024, ISC expects that its notification process will be enhanced to provide requestors with automated updates on the status of their requests. ISC is also working to develop new technological solutions, including automatic entry of request forms sent by fax or email, web-based request submission, status updates for community service providers, and interoperability between ISC's financial systems and the Jordan's Principle Case Management System. ISC is undertaking a comparative analysis of regional

> implementation methodologies to identify best practices and improve timeliness, consistency, and effectiveness. ISC is also streamlining payment processes across regions to facilitate automation. In addition, ISC is working on automating determinations.

[199] The Caring Society has also requested several other measures to address the backlog. The Caring Society requests an order for Canada to revise its National Call Centre calling tree, within 45 days of this Tribunal's order, and appoint sufficient persons in each ISC region and nationally who are responsible for managing urgent Jordan's Principle cases. The Caring Society also seeks an order that Canada report to the Tribunal, within 7 days of this Tribunal's order, regarding which of the proposed solutions (and timelines for implementation of those solutions) contained in the Caring Society's "Jordan's Principle Work Plan" (attached to this Notice of Motion as Schedule "A") it is prepared to adopt (including timeframes for implementation) and, in the case of any proposed solution Canada is not prepared to adopt, the reason why not and what effective alternative measure Canada proposes to take (and the timeline on which such effective alternative measure will be implemented).

[200] The Tribunal, while understanding the Caring Society's requests and without determining that they would be effective or not, prefers to avoid dictating all the management details and instead orders consultations amongst the parties to arrive at the best workable solutions. Therefore, the Tribunal focuses its reasons on the requests that the Tribunal finds are supported by sufficient evidence and relevant information and that it agrees to incorporate as part of its orders. In terms of the issue of having sufficient staff and triaging the urgent requests in the backlogs, the Tribunal will return to this below.

Urgent Timelines:

[201] Canada requests an order extending the timelines set out in the Tribunal's order in 2017 CHRT 35, subparagraph 135(2)(A)(ii) and (ii.1):

> i. for individual requests:

1. from 12 hours to 48 hours for urgent individual requests or such other timeline as Canada and the First Nations Parties may from time to time agree;
2. from 48 hours to without unreasonable delay for all other individual requests, or such other timeline as Canada and the First Nations Parties may from time to time agree; and

ii. for group requests:

1. from 48 hours to one week for urgent group requests, or such other timeline as Canada and the First Nations Parties may from time to time agree; and
2. from one week to without unreasonable delay for all other group requests, or such other timeline as Canada and the First Nations Parties may from time to time agree.

[202] Canada submits that despite the substantial growth and efficiency of ISC's Jordan's Principle operations ISC has been unable to maintain strict compliance with the timelines set out in the Tribunal's Jordan's Principle decisions. As already mentioned, Canada submits that urgent requests grew by over 900% between the 2021-22 and 2022-23 fiscal years and the number of urgent requests has continued to increase at a pace far greater than that of non-urgent requests. Due to the increased number and complexity of requests, most of which have arisen since the introduction of Back-to-Basics, a backlog has developed. As a result, ISC must reconsider how best to ensure that First Nations children's ongoing needs can be determined, with a particular focus on those whose individual circumstances are truly and objectively urgent.

[203] Canada submits that ISC has carefully considered the problems and has already introduced operational measures to help address backlogs. These measures have been specifically designed to take into account the operating environment and government-wide policies and practices including privacy, information technology, and ongoing staffing requirements including hiring, training, and employee wellness.

[204] The Tribunal does not agree to change timelines for urgent services at this time. The Tribunal believes that adjusting Jordan's Principle operations, with the Tribunal's clarifications explained in this ruling, would reduce and help to reclassify some of the allegedly urgent cases that are not truly urgent and allow Canada to manage the truly urgent cases in the Tribunal-ordered timelines. Canada will be able to report following the Tribunal's

clarifications and other orders and the parties' consultations and, if needed and supported by the available evidence, the Tribunal can make additional orders.

[205] The Tribunal agrees with Canada that what is key to addressing the existing backlog is that any definition of "urgent" embraces the spirit and intent of the Tribunal's order in 2017 CHRT 35, wherein objectively urgent requests receive swift attention.

[206] Therefore, instead of making extensions to the urgent timelines ordered on consent that no other party than Canada agrees to extend, it appears far more prudent to clarify previous orders, co-develop objective criteria for urgent requests, remove, at Canada's request, the self-identification of urgent requests and other problematic policy aspects than to accept Canada's unilateral decision to extend the urgent timelines without sufficient reasonable evidence that this is in the First Nations children's best interests. The Tribunal finds that one of the significant contributors to the backlog is the application of the Back-to-Basics policy discussed above. Canada identified several solutions that as a whole would help reduce the pressures and backlogs in Jordan's Principle. Moreover, the Tribunal has agreed to most of Canada's initiatives and order requests including referrals that will be discussed below but does not agree to the extension of the urgent timelines.

[207] Moreover, the Tribunal believes that it is unreasonable to place this burden on children and families with real urgent needs, especially without sufficient evidence that establishes that it is not feasible for Canada to process urgent requests with the staff that it has currently if all other proposed measures and clarifications are put in place. The urgent timelines are evidence-based as discussed above and should be linked to real urgent requests not subjectively urgent requests. This is what the Tribunal had in mind when it made its orders. Furthermore, if all the changes are put in place in sum, co-develop objective urgent criteria, no self-identification unless supported by a qualified professional, the right to reclassify urgent requests, etc., this may alleviate the pressures identified by Canada. An assessment following the implementation could inform any needed changes to timelines.

[208] Moreover, analyzing the source of the spike in urgent cases is more important than simply extending timelines. Canada admits that urgent requests have exponentially

increased for several reasons and that a lot of requests have changed in nature. Canada submits that the COVID-19 pandemic and states of emergency fire evacuations also have played a role in the higher number of requests. The Tribunal appreciates that this could not have been anticipated by ISC. At the same time, we are now in a post-pandemic period and Canada contends that other emergency response services are far more effective to respond to needs than ISC. Therefore, some COVID-19 context requests may not reoccur, and referring and even redirecting many states of emergency and fire evacuation requests to existing local and regional services can reduce some of those urgent requests.

[209] Once the immediate and short-term measures are put in place and if an analysis shows that the problem persists such that Canada is still unable to meet the urgent timelines and has the evidence to support this, the Tribunal is open to receiving the parties' evidence and amendments suggestions. The parties can discuss this during their series of future negotiations. Moreover, the mechanism to leave the door open for parties to report and return to the Tribunal in the absence of agreements or with new agreements will ensure that needed clarifications or amendments are evidence-based and dealt with in a comprehensive manner and as expeditiously as possible.

[210] In this analysis, one must not forget that this is a human rights case involving vulnerable First Nations children in need of urgent services. Therefore, the Panel has opted to grant several of Canada's other order requests such as the elimination of the potentially miscategorized urgent requests that will help to focus on the truly urgent ones. Considering truly urgent requests as such and implementing the Tribunal's clarifications and other orders, followed by monitoring and analysis could inform the next steps. Canada could consult with the parties and return to this Tribunal. The Tribunal is open to hearing Canada and the parties on this issue.

[211] Given that there is insufficient evidence and rationale supporting that extending the urgent timelines will truly resolve the current issues and the other solutions will not work without the extension to urgent timelines, such an argument for an amendment to the Tribunal's urgent timeline orders is unconvincing at this time.

[212] Finally, on this point, Canada describes their cross-motion in support of reconciliation and the importance of First Nations decision-making; however, none of the First Nations parties agree to amend the Tribunal's ordered timelines for urgent requests.

Triaging of urgent requests

[213] Canada submits that in considering the Caring Society's proposed solutions, the Tribunal should consider whether ISC has the ability to both triage and determine all requests labeled as urgent within the prescribed timelines (particularly given the high number of requests labelled as urgent since the Back-to-Basics approach was adopted). In the first three-quarters of the 2023-24 fiscal year alone, ISC determined 20,715 urgent individual and group requests and 83,478 non-urgent individual and group requests. That breaks down to approximate averages of 6,905 urgent requests and 27,826 non-urgent requests every quarter; or 2,301 urgent requests and 9,275 non-urgent requests every month; or 77 urgent requests and 309 non-urgent requests every day, for a total of 386 determinations every day.

[214] Canada submits that the Caring Society's proposed solutions to triaging urgent requests are not practical or feasible. In the current circumstances, including ISC's inability to reassign potentially miscategorized urgent requests to a lower level of priority, the only practical way for ISC to manage urgent requests is to consider them in the order in which they were received. With ISC determining an average of 386 requests per day, it is not feasible for ISC to both triage and determine urgent requests, based on individual or group circumstances, within 12 or 48 hours, while continuing to process non-urgent requests.

[215] The Commission submits that the Caring Society has also pointed to evidence that backlogs have developed, spread across all stages of the process, from intake to determinations, to redeterminations, to appeals. The Commission relies on the Caring Society's Submissions at paras 129-131, 137-138 and 143-144. Of primary concern is the backlog at intake, as there are requests that sit unopened, without having been screened for potential urgency. Requests that would genuinely qualify as urgent may be sitting unopened in intake backlogs.

[216] Based on the evidence filed with the Tribunal, there is a legitimate concern that genuinely urgent cases may be languishing or even sitting unopened in intake backlogs.

[217] The Commission agrees that ordering Canada to take the required triage steps with respect to backlogged urgent cases is appropriate to ensure the effective implementation of the Tribunal's rulings regarding Jordan's Principle.

[218] The Commission notes that depending on the volume of backlogged cases at the time the Tribunal's order is made, it may or may not be possible for Canada to complete these tasks within just seven days. However, if the Tribunal is inclined to make the requested orders, it would be appropriate to direct best efforts to accomplish the tasks as quickly as possible.

[219] The Caring Society submits that the current "in progress backlog" is significant and of serious concern, particularly as it is leading some requests to linger for many months.

[220] However, according to the Caring Society numbers, the backlog amounts to less than one month of ISC's processing capacity, regardless of whether the low-end or high-end estimates more accurately capture the realities of this backlog.

[221] The Caring Society submits that ISC's evidence does not reveal the full picture respecting the scope of its intake backlogs. As a result, it is unclear how many urgent cases are awaiting determination in unopened emails in regional inboxes.

[222] As of March 27, 2024, it is estimated that Jordan's Principle has between 40,000 and 82,000 backlogged requests.

[223] Therefore, the Caring Society submits that the fact that ISC's estimated request-in-process backlog as of March 27, 2024, was between 34,116 on the low end and 75,397 on the high end suggests that the Parties' and the Tribunal's concerns about this specific backlog should be modulated.

[224] The Tribunal accepts that requests require more than ticking a box and that many of these requests were complex and required escalation and discussion and that each First

Nations child was deserving of and received individual consideration, taking into account their distinct needs and circumstances. This said, in 2022-2023, the Jordan's Principle staff went up to 360 and was forecasted to be 476 for 2023-2024. Dr. Gideon provided a detailed description of the different teams and their tasks, as explained above. Moreover, Dr. Gideon's evidence shows the important fact that one requestor may have multiple requests in the same request that ISC counts as separate requests.

[225] Furthermore, ISC submits that it cannot process more requests and triage at this capacity. As stated by Dr. Gideon during her cross-examination, to meet existing Tribunal timelines based on current demands, ISC would likely need to double the amount of full-time equivalent staff, if not more.

[226] Aside from explaining the exponential growth in urgent requests and the need to potentially double the amount of full-time staff or more to deal with the large increase in requests, there is insufficient evidence as to how ISC arrives at this calculation. The Tribunal reserved the right to ask questions and will do so as part of future reporting.

[227] The Tribunal findsthat it is unclear how many urgent cases are awaiting determination in unopened emails in regional inboxes. With these uncertainties, the Tribunal is unable to make a finding that Canada cannot process and triage urgent requests in an expedited manner.

[228] The Caring Society had the following exchange with Candice St-Aubin during her cross-examination about the possible different categories in the backlog:

> (…) would you agree that at one point where there could be a backlog is at the initial stage when a case comes in which is the email intake stage?
> A. Yes.
> Q. So that would be an email that's essentially unopened in an inbox and it's waiting to be processed?
> A. It could be, yes.
> Q. And then a second possible backlog point would be after the email has been opened and intake has been completed and the request is then waiting with a focal point to make a recommendation about what to do with it?
> A. I assume, yes, it could be. But sorry, just to clarify, you mean to make determinations?

> Q. Yes. So essentially my understanding of how the process works is someone will email, they will do an intake email, and then it goes to a focal point for a determination?
> A. Correct.
> Q. And so the focal point will have to, you know, look at the intake, complete an intake, make a recommendation (…).

[229] The above is helpful in understanding the potential locations of backlogs.

[230] Moreover, Candice St-Aubin affirmed in her revised affidavit dated March 28, 2024, that given the increased volume of requests and follow-up correspondence, ISC is experiencing backlogs in reviewing incoming email correspondence, and determining requests that have been entered into the Jordan's Principle Case Management System.

[231] Backlogs in email correspondence and requests awaiting determination vary at any given time and across regions. Overall, approximately 55% of backlogged correspondence in Jordan's Principle general request inboxes are new requests.

[232] Furthermore, in the evidence, affirmed by the AFN's affiant, Craig Gideon, in his amended affidavit dated March 22, 2024, the (AFN) Social Development Sector has heard concerns from multiple callers about the challenges contacting Indigenous Services Canada at the national and regional levels, particularly in the context of making an urgent request or updating the urgency of a request.

[233] Moreover, there is some evidence showing that urgent requests are waiting in the backlog as indicated in an email from Debra Bear, Director Jordan's Principle services, Council of Yukon First Nations, to Brittany Mathews, dated March 26, 2024, attached to the affidavit of Cindy Blackstock dated March 27th, 2024 as Exhibit 22, and included in the AGC's compendium. Debra Bear reported that: "some applications have been waiting in the queue for over a year and some were marked as urgent. In our region, we have noted previous significant backlog on adjudication of applications."

During Dr. Gideon's cross-examination, Caring Society counsel asked her if she agreed the backlog requests could include urgent requests for a child. Dr. Gideon responded that she agreed.

[234] While Canada submits that urgent requests are being addressed, there is evidence that this is not always the case. The Tribunal finds that there may be urgent requests in the backlog queue justifying the need to triage the backlog on an expedited basis and to start this immediately. Furthermore, there may be non-urgent requests that become urgent because of the passage of time. The Tribunal finds that applying the Tribunal's clarifications immediately to the current backlog will assist with the triage of urgent requests.

[235] The Tribunal believes that if the timelines/deadlines to triage the requests ordered by the Tribunal are too ambitious, Canada is provided a way to quickly return to the Tribunal to adjust those timelines if they encounter significant issues with the wording and/or deadlines set out in the orders. The same applies to the other parties. Given the nature of the services involved and those who receive them, the children, the Tribunal prefers to order tighter deadlines first and reassess later if parties provide sufficient reasons to amend those deadlines.

[236] The Tribunal will not be making orders to hire more staff. The Tribunal panel does not desire to dictate the specifics of the daily operations of Jordan's Principle or how Canada ought to reduce the backlogs as this is not its expertise. Rather, this Tribunal panel has in-depth knowledge of the tens of thousands of pages of evidence in this case considered over a period of more than 8 years leading to its numerous Jordan's Principle rulings that cannot be dissociated from the motions. This Tribunal panel has in-depth knowledge of the systemic racial discrimination found, the findings and orders to remedy it and prevent its reoccurrence, and of the Jordan's Principle system as ordered by this Tribunal panel. This Tribunal panel remained seized over the years to ensure that while data was collected and new First Nations processes were developed, the parties could come back to this Tribunal panel for further orders, preferably on consent when possible. The goal is to ensure the orders are effective and are adjusted as the quality of the information improves, and new studies and best practices are developed, (see 2018 CHRT 4, at para. 237). The Tribunal panel's expertise is on the Jordan's Principle system and the cumulated evidence over the years not the daily operations within ISC especially if sufficient evidence is lacking. The orders in the summary ruling take this into consideration and are meant to be flexible.

[237] The ultimate objective is to achieve sustainable long-term reform informed by the many studies, expert committees, First Nations, the parties, etc. for generations to come. The Tribunal has always hoped for a settlement on long-term reform by way of consent order requests, if possible, similar to the compensation settlement agreement for both Jordan's Principle and the FNCFS Program. However, if this is not possible, the Tribunal can make systemic long-term orders informed by the parties to eliminate the systemic discrimination found. This is not optimal without the expert input of the parties including the First Nations Chiefs' knowledge and decisions expressed in the Chiefs-in-Assembly resolutions.

[238] The Tribunal consistently found that reform must reflect the specific different needs of First Nations and that they are best positioned to determine what this should look like in the long-term. The long-term aspect is not the object of the Tribunal's interim orders here.

[239] Furthermore, there is evidence that Jordan's Principle may be abused and play a role in the backlog and there may be a need for the development of objective criteria and guidelines in consultation with the parties to avoid false claims and/or abuses under Jordan's Principle.

[240] Exhibit "41" attached to the Affidavit of Cindy Blackstock dated January 12, 2024, and included in the AGC's compendium, includes an email from Rhoda Hallgren to Brittany Mathews dated Thursday, August 10, 2023:

> Subject: RE: Jordan's Principle.
>
> Hello Brittany, At our last meeting with ISC, they did indicate that they are short-staffed and that they had put in for additional staffing, but that has to go through the treasury board.
>
> Samantha was in attendance and they indicated that they are severely short staffed because there has been a 400% increase in applications coming in. Only 46% of those applications go through service coordinators which means that the review staff in Vancouver are assisting families with the application process.
>
> As of July 28th, they had 1000 applications in queue and 2000+ applications that are unopened in their inbox waiting for review.

> There are also issues arising from misinformation being spread through social media where people are making false claims regarding what Jordan's Principle will cover – this takes up ISC reviewers time as well because clients are calling into ISC for coverage based on Facebook posts (i.e. Facebook post stated that if you call ISC and show them your insurance and registration, Jordan's Principle will pay for your vehicle insurance for one year). Ultimately, the backlog is due to short staffing and the increase in applications.

[241] The Tribunal finds this problematic and that it does impact backlogs.

[242] Exhibit 42 attached to the Affidavit of Cindy Blackstock dated January 12, 2024, and included in the AGC's compendium, includes a letter from Karen Isaac, Executive Director, BC Aboriginal Child Care Society to Cindy Blackstock, undated. This letter references potential ''abuses'' of Jordan's Principle services for basic necessities.

> Jordan's Principle has become known in BC to be slow but effective. This means that families are making multiple repeat applications for services and items. There is a concern by stakeholders in the Network that families are not utilizing already in place systems.
>
> As an example, within the request queue there are multiple requests for 'necessities of life' support in the form of food, rent, and utilities from the same family. Families could be repeatedly accessing Jordan's Principle to actively by-pass in place systems, or to supplement income as a letter of recommendation is all that is required to substantiate need. Jordan's Principle is faster in these cases as 'necessities of life' are considered 'Urgent' requests.
>
> There is a concern that Jordan's Principle is being/could be 'abused,' thus delaying or denying access to children for whom Jordan's Principle would be a necessity. Those needs that are 'Urgent' for other reasons may not be addressed in a timely manner.
>
> Regional disparities in approvals.
>
> It is generally known that BC Region, and other regions in Canada, do not share the same adjudication 'criteria.' Communication has expanded between the various delivery regions of Jordan's Principle and there is solid evidence that each region 'approves' uniquely. This is a concern because the argument of 'unique' regional differences has been used to justify not approving items or services that have been recommended and that have been approved in other regions.
>
> Recommendations

> 1. First Nations leadership of BC to empower a body to designate a set standards of practice that Service Coordinator's in BC are to follow. This will allow management in partnership with the Hub to support delivery and Service Coordinators. Service Coordinators have recognized this need and have begun their own process. It would be beneficial if they had leadership's support. ISC is currently looking to the Network and the Hub, as its support, to develop policy around standards of practice.
>
> 2. First Nations leadership of BC to have a direct role in policy development, delivery planning and oversight and the monitoring of the Network and ISC BC.
>
> 3. Aggregated regional data to be collected and analysed so that a detailed understanding of BC's 'needs' can be achieved independent of ISC shared data. This would support policy development and advocacy for local communities and organizations.

[243] The Tribunal finds that this example supports the need for adequate referrals to existing community services once an emergency situation has been handled. As discussed further below, the Tribunal agrees that referrals to existing community services would assist Jordan's Principle operations if referrals are done appropriately with safeguards in place. The Tribunal hopes that the parties will co-develop proactive solutions as part of their consultations.

[244] The Caring Society requests immediate changes to address the backlog to protect children and families, while Canada requests that no orders be made on that end and for it to be left to work through this in discussions with the parties. It has been almost a year since the notice of motion was filed in December 2023 and the evidence shows that the issues have been going on for quite some time. Canada was aware of the issues and admitted the existence of backlogs and this formed part of the hearing in September 2024. Given that the evidence shows that there is a real possibility that there are urgent requests in the backlogs, there is a need to go through the backlog as soon as possible in the best interest of the children involved. The Tribunal believes that it is more prudent to order immediate to short-term measures with a possibility of adjustments if the parties face significant issues implementing them than to not make any orders or to make orders with an indefinite timeline. The issues of backlogs have been ongoing for quite some time and an order to ensure that the Tribunal's orders are effective is required. Jordan's Principle is meant to also eliminate

delays in accessing services. Long delays to be approved for Jordan's Principle services can sometimes be considered as denials, especially if the requests were urgent or time-sensitive and were left unaddressed. While the Tribunal is very pleased with Canada's implementation of Jordan's Principle orders and the huge success that Canada's implementation efforts have yielded, the thousands of backlogged cases undermine the Tribunal's orders to ensure that all First Nations children have access to Jordan's Principle services when they need them.

[245] Therefore, the clarifications on the Tribunal's orders and the Back-to-Basics policy above should be implemented immediately to assist in reducing the backlogs. The Tribunal also agrees that Canada's other efforts mentioned above should be continued immediately and other solutions developed in consultation with the parties in the short-term and on an interim basis. The Tribunal agrees with Canada that they should be allowed to continue their efforts above to reduce the backlog while removing the aspects of the Back-to-Basics policy that the Tribunal finds have largely contributed to a large influx of urgent requests.

[246] The orders in this ruling are interim in nature to allow the parties to ideally arrive at a resolution of the long-term reform of Jordan's Principle. The orders are very flexible to allow the parties to quickly come back to the Tribunal with any issues and need for quick adjustments to optimize the dialogic approach upheld by the Federal Court. This coupled with negotiation orders is an efficient way to move the parties away from litigation as much as possible while correcting the issues in a timely fashion in the best interest of children.

[247] Canada shall monitor cases after implementing the Tribunal's clarifications of urgent requests and report back to the Tribunal by January 9, 2025.

[248] The backlog was admitted by Canada and, while parties may have different views on the number of backlogged cases, the existence of a backlog is undisputed. There is a backlog of cases and some of them may very well be urgent and this will be established when Canada reviews the email requests in the backlog.

[249] Moreover, the Tribunal finds there is insufficient evidence to determine the exact number of urgent and non-urgent requests in the backlog and there is a need to understand this.

[250] The Tribunal believes that if Canada immediately applies the Tribunal's clarifications and referral orders when it goes through the backlog, this will eventually help reduce the backlog.

[251] Pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, the Tribunal orders Canada to:

A. Immediately deal with the backlog with the assistance of the Tribunal's clarifications mentioned above and return to the Tribunal with its detailed plan with targets and deadlines by December 10, 2024.
B. Report back to the Tribunal and the parties by December 10, 2024, to identify the total number of currently backlogged cases both nationally and in each region, including the intake backlog, the in-progress backlog, and the reimbursement backlog, including with information regarding the cumulative number of backlogged cases at month's end, dating back 12 months.
C. Triage all backlogged requests for urgency with the assistance of the Tribunal's clarifications mentioned above. ISC shall review all self-declared urgent requests and evaluate if the requests are in fact urgent as per the Tribunal's clarifications and, if not, reclassify them as non-urgent by December 10, 2024. If a qualified professional with relevant competence and training has deemed them urgent, and until such time as the parties develop a definition for a qualified professional with relevant competence and training, ISC shall deem the requests urgent.
D. Communicate with all requestors with undetermined deemed urgent cases as per the Tribunal's clarifications to take interim measures to address any reasonably foreseeable irremediable harms within fourteen days of the Tribunal's order and report back to the Tribunal by December 10, 2024.

E. Consult and work with all parties to co-develop solutions to reduce and eventually eliminate the backlog that are efficient and effective and that can work within a government context (this does not mean that red tape should be excused or permitted in this system) and report back to the Tribunal by January 9, 2025.

[252] However, the Panel is mindful that this may not be possible in the immediate term and, therefore, the Tribunal has provided a way in the summary ruling and these full reasons to combine returning to this Tribunal for extension requests of the orders and/or word changes in the orders to adjust to developments. The orders to provide a report and plan to assist the Tribunal and the parties to understand the corrective measures and their evolution to ensure the children and families have access to the services they need. This may be useful as part of the ordered consultations.

Other orders on urgent requests

[253] The Caring Society seeks an order that Canada immediately revise its National Call Centre calling tree and other contact mechanisms that may exist to ensure that requestors can immediately and easily indicate that their request is urgent or, in the case of an existing request, has become urgent. ISC should also ensure that staff with the authority to review and determine urgent requests are available in sufficient numbers during and outside business hours.

[254] Canada objects to the Caring Society's requested orders. ISC has implemented ongoing operational initiatives in an effort to address the backlog, which have led to significant progress.

[255] The Tribunal understands the merit of this requested order in light of the backlog evidence discussed above. The Tribunal has reviewed ISC's ongoing operational initiatives and finds them to be proactive. The Tribunal, in light of the nature of the requests involving children, requests confirmation that indeed staff have the authority to review and determine urgent requests and are available in sufficient numbers during and outside business hours and that requestors can immediately and easily indicate that their request is urgent.

[256] The Tribunal prefers leaving the operational aspect of this to Canada without dictating the manner in which to implement it. The Tribunal orders Canada to report and confirm that this is in fact in operation.

[257] The Tribunal pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to confirm by December 10, 2024, that staff have authority to review and determine urgent requests and are available in sufficient numbers during and outside business hours and that requestors can immediately and easily indicate that their request is urgent.

[258] The Caring Society seeks an order for ISC to enable requestors to flag when their request has become urgent while awaiting determination. Requests may become urgent after they have initially been made for a variety of reasons, including urgency created by time passing while a request is backlogged in one of the regions, by a change in the child's condition, by a state of emergency, or by the death of a caregiver. Accordingly, requestors should be able to flag to ISC that the level of urgency of their request has changed because of changed circumstances.

[259] Canada objects to the Caring Society's requested orders. ISC has implemented ongoing operational initiatives in an effort to address the backlog, which have led to significant progress.

[260] Again, the Tribunal understands the merit of this requested order in light of the backlog evidence discussed above. The Tribunal has reviewed ISC's ongoing operational initiatives and finds them to be proactive. The Tribunal finds that it is unclear, in the context of the backlog, if requestors who have made an existing non-urgent request that has become urgent have an effective and expeditious way to indicate that the status of their non-urgent request has now changed to urgent.

[261] The Tribunal finds that it is necessary to ensure that requestors who have placed a non-urgent request that now has become urgent can rapidly indicate the change in status of their request. However, given the many proactive measures already put in place by

Canada, the Tribunal prefers leaving the operational aspect of this to Canada without dictating the manner in which to implement it.

[262] The Tribunal pursuant to section 53 (2) (of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to ensure that by December 10, 2024 requestors who have made an existing non-urgent request that has become urgent have an effective and expeditious way to indicate that the status of their non-urgent request has now changed to urgent.

[263] The Caring Society seeks an order requiring Canada to provide the National and Regional contact centres with the capacity to put in place immediate compassionate interventions when a request is placed for urgent services.

[264] However, in 2017 CHRT 35, the Tribunal already ordered that, in cases where irremediable harm is reasonably foreseeable, Canada must make "all reasonable efforts to provide immediate crisis intervention supports until an extended response can be developed and implemented." The Tribunal finds the requested order is consistent with this previous ruling and there is no need to make additional findings in support of another order here.

Relevant contact and other information provided to the public

[265] Canada submits that they have updated their public information on Jordan's Principle following the Caring Society's suggestions. The Tribunal believes this is a great initiative to improve accessibility for families and other requestors such as organizations who assist First Nations children. The Tribunal would appreciate confirmation with the level of details that is publicly available on their website and social media pages.

[266] In previous rulings, the Tribunal made similar orders in terms of posting public information to ensure accessibility. The Tribunal continues to rely on the same intent expressed in its previous orders.

[267] The Tribunal pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to confirm if its website and social media pages clearly indicate the relevant contact phone

numbers, email addresses, and hours of operation for the ISC office in each province/territory and for headquarters, for requests and payment inquiries. Canada will provide this information to the Tribunal by December 10, 2024.

Timelines for non-urgent Jordan's Principle cases:

[268] Canada requests an order extending the timelines for non-urgent requests set out in the Tribunal's order in 2017 CHRT 35, subparagraph 135(2)(A)(ii) and (ii.1):

> i. (…) for individual requests from 48 hours to without unreasonable delay for all other individual requests, or such other timeline as Canada and the First Nations Parties may from time to time agree; and ii. (…) for group requests: from one week to without unreasonable delay for all other group requests, or such other timeline as Canada and the First Nations Parties may from time to time agree.

[269] With respect to Canada's position on adjustments to all other individual requests and group requests to a timeline of "without unreasonable delay", the AFN is concerned with the indeterminate nature of such an order.

[270] While some comfort may be drawn from Canada's commitments to engaging with the First Nations Parties in the context of adjustments thereto, the AFN notes its preference for a fixed period as a starting point, designed to provide sufficient flexibility to address the backlog, while ensuring that as the backlog is addressed, the timeline will be commensurately tightened, all on an interim basis and subject to the completion of a final settlement agreement on the long-term reform of Jordan's Principle.

[271] The point is to ensure a path forward that will allow for the back-log to be appropriately addressed, and after it is addressed, the return to a tightened reasonable period for the determination of requests which will provide certainty for requestors. Based on this approach, the AFN submits that the Tribunal should aim for an interim order that seeks to achieve a middle ground between the extremes presented by the Caring Society (no flexibility or consideration for the context giving rise to the backlog) and Canada (too much flexibility, no consideration for re-tightening the timeline after back-log addressed other than consultation with the First Nations parties).

[272] The AFN also highlights its preference that such interim changes to the existing orders be informed by discussions between the Parties further to the dialogic approach and suggests that any interim order addressing said points provide an opportunity for such engagement.

[273] For non-urgent requests, Canada requested in its cross-motion that the timeline be changed to “without unreasonable delay.” However, Canada in reply, acknowledges the AFN’s preference that a fixed period of time be used instead. ISC is prepared to consider and discuss an alternative fixed period while maintaining its request that any fixed period that is ordered must be subject to change by way of agreement between ISC and the First Nations Parties.

[274] Canada agrees that timeliness and responsiveness are key values to be respected and implemented in Jordan’s Principle administration, including for non-urgent requests. However, in determining timelines for non-urgent requests, the specifics and nature of requested products, supports and services should also be taken into consideration.

[275] Further, due to the complexity, scale, and scope of group requests – whether urgent or non-urgent – ISC requires sufficient time to review proposals to avoid duplication or diversion of funding. This will ensure that funding through Jordan’s Principle group requests remains prioritized for direct services and supports to First Nations children.

[276] Canada would be pleased to discuss these points and others in the context of mediation, as well as long-term reform discussions. This willingness to sincerely consider other parties’ concerns highlights the need for a cooperative approach between the parties, involving compromise and a genuine openness to addressing concerns as partners.

[277] The Caring Society submits that for non-urgent requests, ISC proposes eliminating the timeline by replacing the existing 48-hour (individual) and one-week (group) timeframes with an aspirational goal based on the undefined objective of avoiding “unreasonable delay”.

[278] Instead of leading evidence in support of its proposal, ISC criticizes the evidentiary basis for the current timeframes and points to its inability to keep up with current demand,

despite having led no evidence on why timeline modification is the appropriate option for responding to its operational challenges.

[279] The Tribunal's stated approach to amending its orders makes clear that Canada has simply not provided the Tribunal with a basis for granting the relief sought. In 2022 CHRT 41, the Tribunal was clear that once it has reviewed the evidence and made findings and found that orders are warranted, the Tribunal cannot change its mind and rescind this unless it made an error, a reviewing Court overturns a finding or new and compelling evidence justifies it." No such new and compelling evidence justifies the relief sought on ISC's cross-motion.

[280] The Caring Society contends that, to the contrary, the evidence led by the Caring Society and Ms. St-Aubin's admissions on cross-examination demonstrates that ISC's proposed changes are unjustified. Canada argues that the Tribunal-ordered determination timelines should be modified as they were not based on objective evidence such as child welfare standards. However, the Caring Society further submits this argument ignores the evidence that Canada's own senior official gave in 2017. It also fails to note that child welfare standards do not support Canada's approach to timeframes for determining urgent cases. This evidence was discussed in greater detail above.

[281] In any event, the Caring Society advances that Canada has failed to indicate why the child welfare standards referred to in Ms. St-Aubin's revised affidavit provide a compelling reason for changing the current approach. Instead, when specifically asked on cross-examination what was meant by the reference in paragraph 13 of her affidavit to standardized child welfare timelines, Ms. St-Aubin indicated that the comment was "more around just the uses to – standards within and timelines within the systems related to children" but did not provide further clarification than that. This generalized assertion does not provide the Tribunal with solid ground on which to modify timelines that have been in place for seven years.

[282] In addition to Canada not having provided any evidence to support this timeline, the Caring Society submits the Tribunal should reject this "without unreasonable delay" determination timeline for three reasons.

[283] First, Ms. St-Aubin, Canada's Senior Assistant Deputy Minister proffered to give evidence regarding Canada's current implementation of Jordan's Principle, rejected the proposed service standard on cross-examination, saying: "I would never use [that] as a standard." She agreed that Canada's proposed service standard was not clear, measurable, or ambitious. The Tribunal should have no confidence in a service standard that is not supported by the federal official called to give evidence in support of it.

[284] Second, irrespective of Ms. St-Aubin's views, Canada's proposed standard flies in the face of the Treasury Board's own Guideline on Service and Digital ("the Treasury Board Guideline"). The Treasury Board Guideline applies to the federal government as a whole, including ISC. Ms. St-Aubin agreed that it should have informed Canada's approach on this cross-motion. Accordingly, Canada's failure to comply with its own voluntarily-adopted Treasury Board Guideline, which should be the bare minimum against which its proposal should be evaluated, should give the Tribunal serious concerns regarding the viability of Canada's proposed approach.

[285] On cross-examination, Ms. St-Aubin agreed that establishing a timeline within which cases should be dealt with is a service standard. Pursuant to the Treasury Board Guideline, such service standards usually have "three key components": (1) a service standard, being a clear and measurable statement on the level of service a client can expect; (2) a service performance target, which is a clear and measurable statement on the extent or frequency to which the standard will be met; and (3) a service performance result, which is the actual performance against the standard target and which is to be reported. Moreover, one of the characteristics of a good service standard is that it is measurable, in the sense that it is quantifiable and linked to the monitored activities.

[286] The "without unreasonable delay" metric does not meet any of the Treasury Board's three components for a service standard. It is not measurable. Being undefined, it cannot

lend itself to producing measurable accounts of the extent or frequency with which a performance target could be met. Accordingly, it does not enable performance results to be measured against standard targets. It is therefore too vague to operationalize.

[287] Third, there is no evidence of any consultation by ISC on the proposed “without unreasonable delay” determination timeline. This is also contrary to the Treasury Board Guideline, which provides that service standards should be “developed or reviewed in consultation with clients, managers, staff and other partners in service delivery to ensure that they are meaningful to clients and match the organization’s mandate and capacity”. No such consultation process has occurred. Instead, in her cross-examination, Ms. St-Aubin’s evidence was that Canada’s proposal is “based on discussions internally and then partners have proactively come to us to say that they’re also challenged to meet the timelines”. The Tribunal should reject Canada’s “amend first, consult later” approach.

[288] The Tribunal entirely agrees with the Caring Society’s explanation of the evidence above on this point and what led to the Tribunal’s timeline findings under Jordan’s Principle.

[289] As discussed above, including in the urgent timeline section, the Tribunal places little weight on Ms. St-Aubin’s evidence on this point. This is concerning to hear for the Tribunal from a Senior Assistant Deputy Minister in the Department of Indigenous Services Canada (ISC), First Nations and Inuit Health Branch (FNIHB) and why this prompted the Panel chair to ask her a series of questions on the Tribunal’s previous rulings on Jordan’s Principle. Having full knowledge of the immensity of evidence and orders in this case since 2016, the Panel chair easily identified Ms. St-Aubin’s incorrect assumptions expressed in her affidavit and testimony and her lack of knowledge of the evidence that led to the multiple rulings in this case.

[290] In all fairness, Ms. St-Aubin had been in the position that she is in for only a few months at the time that she was cross-examined.

[291] This said, Canada advances the evidence of rapid growth in Jordan’s Principle requests and their inability to respect the Tribunal’s ordered timelines for non-urgent cases at all times. Canada advanced several contributing factors and, as explained above and

below, the Tribunal agrees to many of Canada's proposed measures that are directly linked to the evidence and are reasonable.

[292] The Tribunal also agrees with the AFN's principled approach above and with Canada's request for discussions with the parties.

[293] Without ordering a change in timelines at this time, the Tribunal agrees to receive options from the parties that would arise from their discussions in the format that they so choose (mediation, negotiations, conflict resolution, etc.) and in light of the Tribunal's clarifications.

[294] The Tribunal, pursuant to section 53 (2) (a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to consult with the parties to seek to co-develop potential options supported by rationale and available evidence to present to this Tribunal in regards to timelines for non-urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025.

[295] However, the Tribunal rejects the proposed terms "without unreasonable delay". This concept is vague and does not align with the best interest of the child or any reasonable practice standard. As even immediately and urgent were not understood the same way by everyone, the term "without unreasonable delay" would likely cause other misunderstandings.

Determination clock for Jordan's Principle cases:

[296] The Caring Society requests an order clarifying that, consistent with 2017 CHRT 14 and 2017 CHRT 35, Canada shall immediately: (a) "begin the determination clock" when a request on behalf of a First Nations child or youth is received, and (b) stop the clock when the requestor is advised of the determination of the case.

[297] In the alternative, an order that the determination clock shall start to run when ISC has received a recommendation/authorization from a professional or a letter of support from a community-authorized Elder/knowledge holder.

[298] The Caring Society is concerned that ISC only starts the "clock" on the timeframes for determination when ISC is satisfied that it has the documentation required as opposed to when the requestor first submits their request. ISC is skirting its compliance with the Tribunal's orders, which require meeting First Nations children's needs in a timely manner. It does this by creating and relying on systems that make it very difficult for requesters to have their requests considered. Its 24-hour line results in calls that are unreturned or receive significantly delayed callbacks. Its email intake has resulted in many thousands of requests that remain unopened or unentered into ISC's database. ISC then does not count these requests in its timeline compliance as ISC has not "satisfied itself" that the required documentation has been included. Indeed, when asked on cross-examination when ISC starts the determination clock on Jordan's Principle requests, Ms. St Aubin's evidence was as follows:

> Q. Do you know when they're starting the clock on that? When does the day count starts?
> A. So when does the clock start and when the request begins to –
> Q. Yes.
> A. -- process, for lack of a better word?
> Q. For the purpose of this, you know, how old a request is –
> A. Right. So it's when the file is completely entered into the case management system with the relevant information (indiscernible).
> Q. And that would be the end of the intake process?
> A. Yes.
> Q. So if a file is in the email queue, the time that's spent in the email queue isn't counted towards that 15 or 30-day standard?
> A. As far as I know it's not. (…).

[299] The Caring Society submits that ISC's approach to "starting and stopping the clock" amounts to a public relations response. It does not account for the real needs of children, youth, and families who are in good faith trying to contact ISC to make requests and have their cases determined in a timely manner. This echoes the evidence heard during the hearing on the Merits, which described similar strategies used by Canada to shield itself from allegations of discriminatory conduct. This old mindset approach focuses on how the Department looks and deflects energy from meeting the real needs of those who are the primary beneficiaries of the Tribunal's orders. Indeed, there was a time when Canada's position was simply that it was upholding Jordan's Principle because there were no Jordan's

Principle cases. Grounded in its longstanding concerns about when ISC "starts the clock", the Caring Society's position is that the determination clock should start to run when the requestor first attempts to make a request. Such an approach is grounded in the following:

A. Children, youth, and families cannot control how and when ISC receives or reviews a request – the Tribunal's timeline orders are in place to protect and promote the substantive equality rights of First Nations children and their families. The administrative burden of processing a request ought to be borne by the government and not those seeking to access a needed service, product, or support;
B. The Back-to-Basics Approach stipulates that Jordan's Principle must be implemented in a way that minimizes the administrative burden on families. Urgent requests can be determined before all documentation is submitted and ISC only needs a minimum amount of information to determine a request. To this end, the timelines ought to be for the benefit of First Nations children and not be defined in a way that provides an administrative shield that protects the government in relation to compliance issues;
C. Using the date a request is made also fosters a collaborative relationship between ISC and the requestor, ensuring that ISC will raise any concerns with the documentation in a timely way while avoiding multiple requests for additional documentation so that the requestor can either address those concerns at once or submit a new request; and
D. Using the date a request is made also more accurately captures the time the child is waiting. Indeed, when a professional makes a professional recommendation for a particular service, product, or support, that child is entitled to receive the same at the time the professional makes its recommendation, in line with the Tribunal's orders.

[300] The Commission submits that it would be helpful for the Tribunal to clarify the directions in its prior ruling regarding the starting and stopping of the determination clock. For example, the Tribunal's consent order on Jordan's Principle implementation says urgent individual requests shall be determined "within 12 hours of the initial contact for a service request," but also acknowledges that clinical case conferencing may take place where more

information is reasonably necessary to the determination of a request. It is not entirely clear how the timeline would apply in such situations. Similarly, the ruling says non-urgent individual cases shall be determined “within 48 hours of the initial contact for a service request,” but adds that where reasonably necessary information cannot be obtained within that timeframe, Canada will work with the requestor to enable the determination to be made as close to the 48-hour time frame as possible. Again, the precise operation of the timeline is not entirely clear.

[301] In the Commission’s view, it would be reasonable to start the determination clock once Canada receives a request supported by a professional or community-authorized Elder or knowledge holder. If the Tribunal adopts that approach, it should also clarify that if a requestor submits a request that is missing the required proof of support, Canada will promptly work with the requestor to make clear what additional documentation would be required to allow the determination clock to start and the request to be determined.

[302] The Tribunal finds that while Ms. St-Aubin did testify on her knowledge of when the day count clock start request begins to process or in other words when the determination time starts on Jordan’s Principle requests. She also mentioned: As far as I know, it's not, however, [indiscernible]. Like that's the information [indiscernible].

[303] The transcripts of the audio record mention inaudible. The Tribunal recalls that she did have hesitation. Therefore, at best, Ms. St-Aubin’s evidence is inaccurate and does not reflect ISC’s practice. At the worst, ISC’s practice is non-compliant with the Tribunal’s previous orders. The Tribunal cannot repeat all its findings of how Jordan’s Principle functions here; nor is it necessary for the time being given that the Tribunal cannot make the worst-case scenario finding. The same can be said about a finding of the best-case scenario.

[304] The Tribunal can confirm that its consent orders in 2017 CHRT 14 and 2017 CHRT 35 were originally meant to start the determination clock at the reception of a request except in the circumstances where further information is reasonably necessary to assess the clinical needs appropriately. The Tribunal’s orders include the specific wording: (…) when

clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs information was required.

[305] The Tribunal finds all the above shows the need for clarification of the Tribunal's orders and the need for consultations between the parties to elaborate formal and clear guidelines/procedures to address this issue. The Tribunal is open to suggestions from the parties, hopefully on consent, to clarify when and how the determination clock starts if coordinated with formal and clear guidelines agreed to by the parties and rooted in the available evidence.

[306] Again, when the orders were made, they were supported by the evidence presented at the time and did not envision pandemics, fire evacuations, and many requests that are non-urgent such as false claims, gaming consoles, etc. that impact Jordan's Principle services and could be processed in a much longer time frame without the clock starting at their reception. The Tribunal is concerned that non-urgent requests now have such a large spectrum that it would be unreasonable to require the clock to start at the reception every time. The Tribunal is concerned that a child in need of an important assessment to access special education for example would be treated on the same level as the request for a lawnmower. For example, if requests are questionable and require more information, the determination clock could be paused. Therefore, the Tribunal finds there is a need to establish clear guidelines on this aspect and will revisit this issue once the parties consult and return to the Tribunal.

[307] Given the current backlog and the Tribunal's clarifications on the term urgent and the Tribunal's other consultation orders, the Tribunal pursuant to section 53 (2) (a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction, orders Canada to consult with the parties and seek to co-develop guidelines on this aspect and return to the Tribunal with their options by January 9, 2025.

Reimbursements:

[308] Canada submits that ISC has established service standards for payment of approved Jordan's Principle requests and a variety of mechanisms to process payments. These include direct payments to vendors, acquisition cards, gift cards, and contribution agreements. In some regions, ISC has also partnered with third parties to improve payment processing.

[309] Canada submits that to increase the efficiency of the reimbursement process, ISC must work directly with the First Nations Parties to find solutions. This will also require that First Nations support ISC in its efforts to ensure that the necessary information is obtained from requesters in a timely manner. This includes supporting invoices, and the establishment of practices and procedures to ensure that the necessary information can be provided and transmitted in a form that can be readily processed by Canada's financial systems.

[310] ISC does not favour imposing a specific timeline. As a reminder, with regard to both First Nations children and their families, it may be an option for ISC to make a direct payment for any requested product, service, and support that may be required. With respect to First Nations service providers, ISC agrees that any long-term agreement on Jordan's Principle should address invoice processing issues, possibly by reducing reliance on federally-driven processes and increasing First Nations service providers' capacity.

[311] Canada also submits that ISC works collaboratively with regional and First Nations partners to support First Nations-led service coordination of Jordan's Principle requests. The Jordan's Principle service coordination function is delivered by one of several service delivery organizations regionally (for example, First Nations communities, Tribal Councils, Health Authorities, and Indigenous Non-governmental Organizations), funded through almost 600 separate contribution agreements with ISC.

[312] Canada further submits that ISC is also streamlining payment processes across regions to facilitate automation.

[313] According to Canada, some of the issues raised in the Caring Society's submissions are indirectly related to the backlog problem, such as reimbursement. In some cases, requestors pay for a product, service, or support upfront, while in other cases ISC pays vendors directly or purchases gift cards for requestors. While requestors or vendors may have to wait for the reimbursement process to be completed, that issue is separate and apart from the issue of whether the child has received the product, service, or support under Jordan's Principle.

[314] ISC submits that paying in advance for certain products, supports, or services and seeking receipts or other documentation from the requestor later fully complies with this Tribunal's decisions, which have focused on ensuring that administrative requirements do not prevent a child from receiving the support in a timely manner. ISC is permitted to seek information from requestors after the fact, to confirm that payments made by ISC resulted in the child obtaining the approved product, service, or support.

[315] The Caring Society submits that even if ISC regularly abided by its 15-business day timeline, it would still be too long to meaningfully assist families in need who are often living in deep poverty. For example, a 15-business day standard may not meet the urgent needs of children whose guardians may be required to expend significant amounts of money upfront and await reimbursement. Financially vulnerable families, or those fleeing domestic violence and natural disasters, may feel this strain more acutely when, following Jordan's Principle approval from ISC, they purchase everyday essentials such as clothing, diapers, or food, and must wait 15 business days, or more, to be reimbursed. These families may lack control or certainty over their cash flow and therefore may be unable to "cash manage" when their money is tied up in services, products, or supports that the federal government has agreed to provide pursuant to Jordan's Principle because they are important to their children's needs. As one Indigenous family and child support agency put it, "if [families] had the money, they would not have applied to Jordan's Principle for the assistance."

[316] During Dr. Gideon's cross-examination, Panel Chairperson Marchildon and Dr. Gideon shared the following exchange:

> THE CHAIR: […] Would you agree with me that if a family is poor and that's been recognized earlier, and in your evidence that we are -- you're dealing with families that are poor, that could be extremely difficult for them to even advance for three days, seven days and wait for reimbursement, even if it takes the 14 days that you've mentioned? Would you agree that poverty can [make] this very difficult for a family?
> DR. GIDEON: I would agree with that, that's why we've set up some advanced payment options, including gift cards in some context, but there are value limits to those payments. The best is for us to set up a direct arrangement or, if it's the landlord, we can issue a payment to the landlord. If it's the grocery store and they will take a direct billing from us. Could be Home Depot, right, we set-up arrangements with Home Depot. Like, that is the preferred mechanism for supporting a family that is living in poverty.

[317] The Tribunal finds that a system that requires poor or low-income families to assume the costs of services is essentially displacing Canada's obligations to the people in need of services. Even if for a short time, this may be too onerous for some. In the long-term, this should be fixed. When considering that Jordan's Principle exists to avoid governments or departments within governments fighting over who should pay for the service and rather approve and pay for the service and recover the funds later, it is somewhat strange that it would shift into the government approving but asks First Nations requestors to pay and seek reimbursements later.

[318] In the interim, some solutions must be implemented. The Tribunal finds that Canada has already started to develop solutions and should continue with the assistance of the other parties as part of consultations.

[319] The Tribunal agrees with Dr. Valerie Gideon's preferred mechanism for families living in poverty if this mechanism is available for them.

[320] However, the AFN's evidence demonstrates that the Social Development Sector was contacted by a parent several times between January and May 2023 regarding payment delays that resulted in extreme financial hardship for the family. The parent noted that requests were approved but payments took several weeks to several months to be received.

[321] Craig Gideon also affirms that the AFN's Social Development Sector was contacted by a parent who had the approval to purchase and then be reimbursed for a costly service

for their child through Jordan's Principle. The parent paid for the service on their credit card in September 2023 but was still awaiting reimbursement in March 2024. The balance of the credit card was causing the parent financial hardship. The parent had tried several times to contact ISC to inquire about the status of their reimbursement but was unable to reach anyone through the call centre.

[322] Craig Gideon's evidence is that the Social Development Sector was contacted by a service provider in January 2024 inquiring about the status of a reimbursement for services rendered to clients under Jordan's Principle that were several months past due. After multiple unsuccessful attempts to contact ISC, they sought the AFN's help. The service provider noted that they continued to provide services on good faith but shared concerns about the sustainability of doing so.

[323] Similarly, Craig Gideon affirms that the Social Development Sector was contacted by a different service provider in July 2023 regarding outstanding payments owed by Jordan's Principle for services rendered over 12 months prior, despite multiple attempts to contact ISC.

[324] The Social Development Sector was contacted by a parent in August 2023, who had a request for services approved in March 2023 but the vendor had not yet received payment and was thus not able to render the services.

[325] The Tribunal accepts the AFN's uncontested evidence above. The Tribunal finds it relevant and reliable especially that, while it is hearsay and must be given the appropriate weight, these affirmations originate from the Social Development Sector that has extensive experience in assisting First Nations families' requestors and Jordan's Principle on a regular basis. Nothing in the affiant's affirmations gives this Tribunal reasons to find it unreliable or to give it little to no weight. Moreover, in reviewing the evidence as a whole, Canada did not challenge this specific evidence as opposed to similar evidence provided by the Caring Society.

[326] Canada had the opportunity to cross-examine the other parties' affiants including Craig Gideon and chose not to. While this is not a guarantee that the unchallenged evidence

will be relied upon by the Tribunal, it remains evidence that can be considered and weighed by the Tribunal. The Tribunal finds this evidence supports a finding that some issues with payment reimbursements occurred and caused hardships to some families and some service providers.

[327] The Tribunal finds this concerning and far from the intent of its rulings.

[328] The Tribunal agrees with the Caring Society that Dr. Valerie Gideon's ideas discussed above such as advanced payment options, including gift cards and direct payments, while helpful for some families, as demonstrated by the AFN's examples above, are not currently in place or sufficient for all families.

[329] This raises the question of what happens to parents who do not have the assistance of the AFN or the Caring Society or another organization and are in the same situation as the examples above where they cannot reach anyone at ISC or, even if they reach someone, have to wait for long periods?

[330] In risk management complaints or the AFN's examples are helpful to improve the quality of service and should not be ignored. They are symptomatic of underlying issues in a system.

[331] The AFN submits that the FNLC highlights the issues in terms of payment processing for individuals and service providers and supports the Caring Society's relief sought in relation to same. The AFN agrees that the issue of timely reimbursement is not somehow "separate and apart" from the Tribunal's orders as provided by Canada and, as noted, supports an interim order providing a 10-business day standard for individual reimbursement, and a 15-business day standard for service provider reimbursement.

[332] The Tribunal agrees that the issue of timely reimbursement is not separate and apart from the Tribunal's orders. If families cannot financially support the advance payment costs while they wait to be reimbursed, they may have to stop using the services. As demonstrated above, some have experienced serious hardships in supporting payments and waiting to be reimbursed. In many cases, the timely reimbursement is directly linked to accessing the

service, especially if it's on a recurring basis. This risks causing a disruption, delay, or inability to meet the child's needs. Further, this can become a barrier to accessing services for children when Jordan's Principle is meant to remove those barriers.

[333] The Caring Society requests that the Tribunal order interim relief in relation to reimbursement, including within 10 business days for individual requestors and 15 business days for service providers.

[334] The Caring Society submits that the 15-business day service standard does not consider the financial realities of Jordan's Principle requestors, who often cannot wait three weeks for reimbursement. Shorter reimbursement timelines are required to provide certainty, confidence, and public trust in Jordan's Principle, in line with the spirit of the Tribunal's focus on the impacts on First Nations children.

[335] The Caring Society submits that a shorter service standard of five calendar days is required for individual requestors to ensure that families are not put under financial strain. This revised timeline respects the fact that many First Nations families accessing Jordan's Principle do not have the funds to pre-purchase necessary products, services, and supports. It also provides certainty and bolsters trust in Jordan's Principle by reassuring First Nations parents that they will have the supports their children need in hand at a pre-determined time.

[336] The Caring Society requests an order clarifying that consistent with 2017 CHRT 14 and 2017 CHRT 35, ISC cannot delay paying for approved services in a manner that creates hardship by imposing a financial or administrative burden on families that risks a disruption, delay, or inability to meet the child's needs.

[337] The Tribunal finds that an order is required to ensure that First Nations families, especially those who are in difficult financial situations, do not experience financial hardships in supporting advance payments in order to receive the services that their children need. This runs contrary to what Jordan's Principle is all about: provide the service and deal with the funding later. In a lot of cases, the advance payments are borne by the requestors themselves rather than ISC or a province or Territory, which for the Tribunal is concerning and is not in line with the Spirit of Jordan's Principle or the Tribunal's orders.

[338] The Tribunal is not applying this analysis to potential false claims, or questionable or unreasonable requests that may require further investigation.

[339] The *CHRA* is structured in a way to protect vulnerable groups and provide for special programs, plans, or arrangements designed to prevent or eliminate disadvantages suffered by any group of individuals by improving opportunities respecting goods and services:

[340] Special programs

> 16 (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

[341] In 2018 CHRT 4, the Tribunal made findings on section 16(1) of the *CHRA* and relied on *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare*) T.D.3/97, pp. 30-31) and *CN v. Canada (Canadian Human Rights Commission),* 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, [*Action Travail des Femmes*]). The Tribunal continues to rely on those findings.

[342] As part of their consultations, the parties can discuss solutions for First Nations families that protect their privacy, do not require proof of poverty or cause embarrassing situations for the families.

[343] The Tribunal, pursuant to section 53 (2) (a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to consult with the parties to seek to co-develop interim practical and operational solutions supported by rationale and available evidence to redress the hardship imposed on individuals and families (requestors) by reimbursement and payment delays and report back to the Tribunal by January 9, 2025.

[344] The Tribunal, pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, clarifies that

consistent with its orders in 2017 CHRT 14 and 2017 CHRT 35, Canada cannot delay paying for approved services in a manner that creates hardship by imposing a burden on families that risks a disruption, delay or inability to meet the child's needs.

[345] The Tribunal finds the current standard deadlines for service providers to be reasonable if there are no delays. The evidence discussed above confirms that, in some cases, service providers experience long delays that go well beyond 15 days.

[346] The Tribunal is unaware if ISC's procedures include safeguards against unnecessary delays.

[347] As a matter of good practice, guidelines should be in place to avoid unnecessary delays in reimbursements. Canada will report back to the Tribunal to inform the Tribunal if they have such guidelines/procedures and if so, provide a copy of the guidelines/procedures by December 10, 2024. The Tribunal will revisit this once it has received Canada's information and/or guidelines.

Social prescription:

> Social prescribing is a means for trusted individuals in clinical and community settings to connect people who have non-medical, health-related social needs to non-clinical supports and services within the community through a non-medical prescription. Evaluations of social prescribing programs for the pediatric population have demonstrated statistically significant improvements in participants' mental, physical, and social well-being and reductions in healthcare demand and costs. Experts have pointed to the particularly powerful impact of social prescribing on children's mental health, suggesting that it may help to alleviate the strain on the overburdened mental health system. Social prescribing shows promise as a tool to move pediatric care upstream by addressing non-medical, health-related social needs, hence why there is an urgent need to direct more attention towards the pediatric population in social prescribing research, policy, and practice. This demands rapid action by researchers, policymakers, and child health professionals to support advancements in this area, (Commentary by Caitlin Muhl, Susan Bennett, Stephanie Fragman, and Nicole Racine, Exhibit 1 – 2024 to Ryan Rioux's M.D. affidavit dated March 27, 2024).

[348] With respect to social prescription, the AFN highlights the fact that evidence being uncontested does not necessarily make it good evidence, nor indicative of an approach that

the Tribunal should adopt when it comes to the identification of urgent matters, as put forward by the Caring Society and endorsed by the FNLC without the opportunity to negotiate its role amongst the Parties. Its acceptance in the context of weighing urgency will ultimately undermine the spirit and intent of the Tribunal's existing directions and the principle that "urgent means urgent". The AFN would instead recommend that the Parties consider the role of social prescription in the context of non-urgent Jordan's Principle requests and the negotiations of long-term reform of Jordan's Principle. The AFN would therefore caution the Tribunal in considering social prescription's applicability in the context of weighing the scope of misclassified requests under Back-to-Basics. The Tribunal agrees with the AFN on this point.

[349] Canada objects to this evidence given that it was filed in the Caring's Society's reply evidence and, therefore, it is prejudicial to Canada who was not able to test this evidence, nor provided an opportunity to respond. The Tribunal accepts this and believes that Canada is not prejudiced here given that no order is made based on this evidence.

[350] This information is interesting and could be used by the parties in their consultations. This being said, even if little weight is placed on the information found in the article and affirmed by Ryan Rioux M.D. in regards to requested orders and clarification of the Tribunal's orders, the Tribunal will make a few comments for the benefit of children that are not prejudicial to any party and may assist the parties in their consultations.

[351] Dr. Rioux affirms that, in his practice, he may recommend enrolment in a sports camp for a child as part of management for childhood obesity. Dr. Rioux may also recommend the removal of mold or carpet in a home in which a child who has poorly controlled asthma lives. Both of these examples would be within the treatment guidelines for these conditions and fall under the concept of social prescribing. Furthermore, in those two examples, pediatricians can look further upstream for the root causes of higher obesity rates and higher rates of asthma in, for example, First Nations communities – and we may find that poor access to healthy foods, poor access to centres that promote activity, and inadequate housing can be the root cause of the higher rates of obesity or asthma.

[352] However, in Dr. Rioux's opinion, a holistic understanding of a First Nations child's individual needs through social prescribing brings to the forefront that many of these needs may be urgent.

[353] For example, a child with Autism Spectrum Disorder may have sensory needs that include visual stimulation to self-regulate. For that child, a glowstick may be a tool used by their family to calm them. Additionally, a gaming console that provides a displaced teenager with the ability to reconnect with their online gaming community may provide stability and mental wellness in a time of crisis.

[354] The Tribunal generally agrees that social prescribing which takes into account the social determinants of health is an excellent principle to determine and analyze substantive equality in non-urgent Jordan's Principle cases. The Tribunal accepts that social supports (i.e. social prescribing) are a key tool for redressing those health and social inequities.

[355] However, in urgent cases, there is insufficient evidence and information to support orders given the only reply affidavit and the brief description of examples of urgent cases that are unconvincing. Furthermore, it was not previously considered by this Tribunal to arrive at its findings when the Tribunal made its urgent orders under Jordan's Principle. While the Tribunal is not against exploring such an important process, it is not prudent to include this concept in the current definition of urgent cases at this time. The examples provided by Ryan Rioux M.D. at paragraph 20 of his affidavit mentioned above have merit but do not fit the Tribunal's urgent definition requiring a resolution within 12 hours. In a time of backlogs that may include truly urgent requests that are left unaddressed, it would be unwise to expand the definition of urgent services to include services such as glowsticks to help a child in crisis regulate or a gaming console that provides a displaced teenager with the ability to reconnect with their online gaming community and that may provide stability and mental wellness in a time of crisis under the Tribunal's urgent orders. The Tribunal would need more details and information to decide otherwise for urgent cases.

Coordination of Federal Programs, gaps analysis, referrals, and elimination of gaps and barriers:

[356] The Tribunal will elaborate at length on this issue given its multiple previous orders, Canada's mischaracterization of the Tribunal's orders and Canada's slow progress on closing gaps in federal programs that are funding services to First Nations children. Canada uses the Tribunal's Jordan's Principle orders to support its position despite the fact that the Tribunal's orders and findings were to be read and implemented together as it will be further explained below.

[357] This issue was raised by Canada as part of the motion/cross-motion proceedings. As mentioned above, Canada asserts that there is a redirection of service requests to Jordan's Principle that may result in ISC duplicating funding in some instances, because ISC cannot service navigate requestors to existing programs such as Non-Insured Health Benefits, on-reserve income assistance, or education programming. Being unable to redirect requestors to existing accessible services contributes to the backlog for Jordan's Principle correspondence and requests.

[358] While Canada knows their federal programs and knows best how government systems operate, the evidence established over the years in this case is that Canada is not an expert in efficiently eliminating barriers, gaps, or denials of services to First Nations children and families.

[359] As part of the Tribunal's past rulings, the lack of coordination between social programs, the First Nations Indigenous Health Branch, and Health Canada was addressed, and eliminating the lack of coordination in federal social programs findings was part of the cease-and-desist order in 2016 CHRT 2. Moreover, the Tribunal's findings and orders address the need to close gaps in federal programs offering services to First Nations children. Some of those findings are reproduced below as a reminder and for ease of reference.

> [354] In response, AANDC and Health Canada entered into the *Memorandum of Understanding on the Federal Response to Jordan's Principle* (see Annex, ex. 46 [*2009 MOU on Jordan's Principle*]; see also testimony of C. Baggley, Transcript Vol. 57 at pp. 9-13, 23, 40-41, 84-85). In the 2009 MOU on Jordan's Principle, signed by an Assistant Deputy Minister for each department, both AANDC and Health Canada acknowledge that they have a role to play in

Jordan's Principle and a shared responsibility in working together to develop and implement a federal response (see at p. 1). The purpose of the memorandum is to act as a guide for the two departments in addressing/resolving funding disputes as they arise between the federal and provincial governments, as well as between the two departments, "…ensuring that services to children identified in a Jordan's Principle case are not interrupted as a result of disputes" (*2009 MOU on Jordan's Principle* at p. 1).

[355] The memorandum also serves as a guide for AANDC and Health Canada to collaborate on the federal implementation of Jordan's Principle. In this regard, the memorandum indicates that Health Canada's role in responding to Jordan's Principle is by virtue of the range of health-related services it provides to First Nations people, including: nursing services; home and community care; community programs; and, medically necessary non-insured health benefits. AANDC's role in responding to Jordan's Principle is by virtue of the range of social programs it provides to First Nations people, including: special education; assisted living; income assistance; and, the FNCFS Program (see *2009 MOU on Jordan's Principle* at pp. 1-2).

[356] Once a possible Jordan's Principle case is identified, the *2009 MOU on Jordan's Principle* provides for a review of existing federal authorities and program policies to determine whether the expenditures are eligible under an existing program and can be paid through existing departmental funds. If the dispute over funding arises between the federal and provincial governments, Health Canada and AANDC are to work together to engage and collaborate with the province and First Nations representatives to resolve the dispute through a case management approach. To ensure there is no disruption/delay in service, Health Canada was allocated $11 million to fund goods/services while the dispute is being resolved (see *2009 MOU on Jordan's Principle* at p. 2). The funds were provided annually, in $3 million increments, from 2009 to 2012. The funds were never accessed and have since been discontinued (see testimony of C. Baggley, *Transcript* Vol. 57 at pp. 123-125).

[357] According to the *2009 MOU on Jordan's Principle*, a governance structure has been developed to support communication and information-sharing between the two departments on matters related to Jordan's Principle. This governance structure includes "…supporting the resolution of departmental disputes where HC and AANDC are uncertain or do not agree on which department/jurisdiction is responsible for funding the goods/services based on their respective mandates, policies and authorities" (*2009 MOU on Jordan's Principle* at p. 2). The governance structure was also established to ensure that funding disputes are addressed and coordinated in a timely manner: timing to address case needs and make decisions being "…crucial to ensuring that funding disputes do not disrupt services provided to a child (*2009 MOU on Jordan's Principle* at p. 3).

[358] Health Canada and AANDC renewed their *Memorandum of Understanding on the Federal Response to Jordan's Principle* in January 2013 (see Annex, ex. 47 [*2013 MOU on Jordan's Principle*]). Again, signed by an Assistant Deputy Minister from each department, the 2013 MOU on Jordan's Principle acknowledges that Health Canada and AANDC "…have a role to play in supporting improved integration and linkages between federal and provincial health and social services" (*2013 MOU on Jordan's Principle* at p. 1). The *2013 MOU on Jordan's Principle* now provides that during the resolution of a Jordan's Principle case, the federal department within whose mandate the implicated programs or service falls will seek Assistant Deputy Minister approval to fund on an interim basis to ensure continuity of service.

[359] Ms. Corinne Baggley, Senior Policy Manager for the Children and Family Directorate of the Social Policy and Programs branch of AANDC indicated that the federal response to Jordan's Principle is focused on cases involving a jurisdictional dispute between a provincial government and the federal government and on children with multiple disabilities requiring services from multiple service providers. Furthermore, the service in question must be a service that would be available to a child residing off reserve in the same location (see *Transcript* Vol. 57 at pp. 9-13; see also Annex, ex. 48). While she estimated that approximately half of the cases tracked under the Jordan's Principle initiative involved disputes between federal departments, she indicated that the policy was built specifically around Jordan's case (see *Transcript* Vol. 58 pp. 24-25, 40-41).

[360] The Complainants claim AANDC and Health Canada's formulation of Jordan's Principle has narrowly restricted the principle. Whereas the motion was framed broadly in terms of services needed by children, AANDC and Health Canada's formulation applies only to inter-governmental disputes and to children with multiple disabilities.

[361] On the other hand, AANDC is of the view that Jordan's Principle is not a child welfare concept and is not a part of the FNCFS Program. Therefore, it is beyond the scope of this Complaint. AANDC also argues that the FNCFS Program does not aim to address all social needs on reserve as there are a number of other social programs that meet those needs and are available to First Nations on reserve. Moreover, the FNCFS Program authorities do not allow them to pay for an expense that would normally be reimbursed by another program (i.e. the stacking provisions in the *2012 National Social Programs Manual* at p. 10, section 11.0). In any event, AANDC argues there is no evidence to suggest that its approach to Jordan's Principle results in adverse impacts.

[362] In the Panel's view, while not strictly a child welfare concept, Jordan's Principle is relevant and often intertwined with the provision of child and family services to First Nations, including under the FNCFS Program. *Wen:De*

Report Three specifically recommended the implementation of Jordan Principle on the following basis, at page 16:

> Jurisdictional disputes between federal government departments and between federal government departments and provinces have a significant and negative effect on the safety and well-being of Status Indian children […] the number of disputes that agencies experience each year is significant. In Phase 2, where this issue was explored in more depth, the 12 FNCFSA in the sample experienced a total of 393 jurisdictional disputes in the past year alone. Each one took about 50.25 person hours to resolve resulting in a significant tax on the already limited human resources.
> (Emphasis added)

[363] *Wen:De Report Two* indicated that 36% of jurisdictional disputes are between federal government departments, 27% between provincial departments and only 14% were between federal and provincial governments (see at p. 38). Some of these disputes took up to 200 hours of staff time to sort out: "[t]he human resource costs related to resolving jurisdictional disputes make them an extraordinary cost for agencies which is not covered in the formula" (*Wen:De Report Two* at p. 26).

[364] Jordan's Principle also relates to the lack of coordination of social and health services on reserve. That is, like Jordan, due to a lack of social and health services on reserve, children are placed in care in order for them to access the services they need. As noted in the *2008 Report of the Auditor General of Canada*, at pages 12 and 17:

> 4.20 Child welfare may be complicated by social problems or health issues. We found that First Nations agencies cannot always rely on other social and health services to help keep a family together or provide the necessary services. Access to such services differs not only on and off reserves but among First Nations as well. INAC has not determined what other social and health services are available on reserves to support child welfare services. On-reserve child welfare services cannot be comparable if they have to deal with problems that, off reserves, would be addressed by other social and health services.
>
> […]
>
> 4.40 First Nations children with a high degree of medical need are in an ambiguous situation. Some children placed into care may not need protection but may need extensive medical

> services that are not available on reserves. By placing these children in care outside of their First Nations communities, they can have access to the medical services they need. INAC is working with Health Canada to collect more information about the extent of such cases and their costs.

[365] The *2008 Report of the Auditor General of Canada*, at page 16, also found that coordination amongst AANDC programs, and between AANDC and Health Canada programs, is poor:

> 4.38 As the protection and well-being of First Nations children may require support from other programs, we expected that INAC would facilitate coordination between the [FNCFS] Program and other relevant INAC programs, and facilitate access to other federal programs as appropriate.
>
> 4.39 We found fundamental differences between the views of INAC and Health Canada on responsibility for funding Non-Insured Health Benefits for First Nations children who are placed in care. According to INAC, the services available to these children before they are placed in care should continue to be available. According to Health Canada, however, an on-reserve child in care should have access to all programs and services available to any child in care in a province, and INAC should take full financial responsibility for these costs in accordance with federal policy. INAC says it does not have the authority to fund services that are covered by Health Canada. These differences in views can have an impact on the availability, timing, and level of services to First Nations children. <u>For example, it took nine months for a First Nations agency to receive confirmation that an $11,000 piece of equipment for a child in care would be paid for by INAC</u>. (<u>Emphasis added</u>)

[366] For example, a four-year-old First Nations child suffered cardiac arrest and an anoxic brain injury during a routine dental examination. She became totally dependent for all activities of daily living. Before being discharged from hospital, she required significant medical equipment, including a specialized stroller, bed and mattress, a portable lift and a ceiling track system. A request was made to Health Canada's Non-Insured Health Benefits Program requesting approval for the medical equipment. However, the equipment was not eligible under the program and required approval as a special exemption.

[367] An intake form disclosed during the hearing and prepared by provincial authorities in Manitoba, but which accords with AANDC's records of the incident, documents how the case proceeded thereafter (*see* Annex, ex. 49

[*Intake Form*]; see also Annex, ex. 50; and, testimony of C. Baggley, *Transcript* Vol. 58 at pp. 58-60). Initial contact was made with AANDC on November 29, 2012. A conference call was held on December 4, 2012, where Health Canada accepted to pay for the portable lift, but would "absolutely not" pay for the specialized bed and mattress. On December 19, 2012, the child was discharged from hospital. Over a month later, the specialized bed and mattress were provided, but only as a result of an anonymous donation. In the concluding remarks of the *Intake Form*, where it asks "[p]lease provide details on the barriers experienced to access the required services" it states at page 8:

> Health Canada does not have the authority to fund hospital or specialized beds and mattresses. NIHB said "absolutely not".
>
> AANDC ineligible through In Home Care (only provide for non medical supports) and family not in receipt of Income Assistance Program to access special needs funding.
>
> Southern Regional Health Authority (provincial) was approached but indicated they are unable to fund the hospital bed.
>
> Sandy Bay First Nation does not have the funding or has limited funding and is unable to purchase bed.
>
> Jurisdictions lacking funding authority to cover certain items which result in gaps and disparities.

[368] The lack of integration between federal government programs on reserve, in more areas than only with children with multiple disabilities, is highlighted in an AANDC document entitled *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region* (see Annex, ex. 51 [*Gaps in Service Delivery to First Nation Children and Families in BC Region*]). As indicated in the accompanying email message attaching the document, under the subject line "Jordan's Principle: Parallel work with HC", the document represents the views of AANDC's British Columbia regional office, including its Director of Intergovernmental Affairs, and is informed by other experienced officials within the regional office.

[369] The *Gaps in Service Delivery to First Nation Children and Families in BC Region* document indicates at page 1:

> <u>The work of the two departments on Jordan's Principle has highlighted what all of us knew from years of experience: that there are differences of opinion, authorities and resources</u>

> between the two departments that appear to cause gaps in service to children and families resident on reserve. The main programs at issue include INAC's Income Assistance program and the Child and Family Services program; for Health Canada, it is Non-Insured Health Benefits program, (emphasis added).

[370] The document goes on to identify gaps based on the first-hand experience of AANDC officials and FNCFS Agencies. For example, once a child is in care, the FNCFS Program cannot recover costs for Non-Insured Health Benefits from Health Canada. In that situation, Health Canada deems that there is another source of coverage (the FNCFS Program); however, AANDC does not have authority to pay for medical-related expenditures. Generally, there is confusion in how to access non-insured health benefits (i.e. where to get the forms; where to send the forms and who to call for questions given the official website does not give contact information) (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 1-2).

[371] Dental services are also identified as an area of contention for FNCFS Agencies and First Nations individuals. Even in emergency situations, basic dental care is denied by the Non-Insured Health Benefits program if pre-approval is not obtained. If pressed, Health Canada advises clients to appeal the decision which can create additional delays. When a child in care is involved however, the FNCFS Agency has no choice but to pay for the work (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at p. 2).

[372] Another medical related expenditure identified as a concern is mental health services. Health Canada's funding for mental health services is for short term mental health crises, whereas children in care often require ongoing mental health needs and those services are not always available on reserve. Therefore, children in care are not accessing mental health services due to service delays, limited funding and time limits on the service. To exacerbate the situation for some children, if they cannot get necessary mental health services, they are unable to access school-based programs for children with special needs that require an assessment/diagnosis from a psychologist (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3).

[373] In some cases, the FNCFS Program is paying for eligible Non-Insured Health Benefits expenditures even though they are not eligible expenses under the FNCFS Program (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3). This is problematic considering AANDC has to reallocate funds from some of its other programs - which address underlying risk factors for First Nations children - in order to

pay for maintenance costs. Again, as the *2008 Report of the Auditor General of Canada* pointed out at page 25:

> 4.72 Because the program's expenditures are growing faster than the Department's overall budget, INAC has had to reallocate funding from other programs. In a 2006 study, the Department acknowledged that over the past decade, budget reallocations—from programs such as community infrastructure and housing to other programs such as child welfare—have meant that spending on housing has not kept pace with growth in population and community infrastructure has deteriorated at a faster rate.
>
> 4.73 In our view, the budgeting approach INAC currently uses for this type of program is not sustainable. Program budgeting needs to meet government policy and allow all parties to fulfill their obligations under the program and provincial legislation, while minimizing the impact on other important departmental programs. The Department has taken steps in Alberta to deal with these issues and is committed to doing the same in other provinces by 2012.

[374] As mentioned above, AANDC's own evaluations of the FNCFS Program have also identified this issue. The *2007 Evaluation of the FNCFS Program* identified the FNCFS Program as one of five AANDC programs that have the potential to improve the well-being of children, families and communities. The other four are the Family Violence Prevention Program, the Assisted Living Program, the National Child Benefit Reinvestment Program and the Income Assistance Program. According to the evaluation, "[i]t is possible that, with better coordination, these programs could be used more strategically to support families and help them address the issues most often associated with child maltreatment" (*2007 Evaluation of the FNCFS Program* at p. 38). In addition, the evaluation identifies other federal programs for First Nations who live on reserve offered by Human Resources and Social Development Canada, Justice Canada and Public Safety and Emergency Preparedness Canada, along with Health Canada, that also directly contribute to healthy families and communities (see *2007 Evaluation of the FNCFS Program* at pp. 39-45). On this basis, the *2007 Evaluation of the FNCFS Program*, at pages 47-48, proposes three approaches to FNCFS Program improvement:

> **Approach A**: Resolve weaknesses in the current FNCFS funding formula, Program Directive 20-1, because in its current form, it discourages agencies from a differential response approach and encourages out-of-home child placements.

> **Approach B**: Besides resolving weaknesses in Program Directive 20-1, encourage First Nations communities to develop comprehensive community plans for involving other INAC social programs in child maltreatment prevention. The five INAC programs (the FNCFS Program, the Assisted Living Program, the National Child Benefit Reinvestment Program, the Family Violence Prevention Program, and the Income Assistance Program) all target the same First Nations communities, and they all have a role to play in improving outcomes for children and families, so their efforts should be coordinated and a performance indicator for all of them under INAC's new performance framework for social programs should be the rate of child maltreatment in on-reserve First Nation communities.
>
> **Approach C**: In addition to approaches A and B, improve coordination of INAC social programs with those of other federal departments that are directed to First Nations on reserve, for example health and early childhood development programs. With greater coordination and a stronger focus on the needs of individual communities, these programs could make a greater contribution to child maltreatment prevention, and could be part of a broader healthy community initiative.

[375] Similarly, the *2010 AANDC Evaluation of the Implementation of the EPFA in Alberta* found several jurisdictional issues as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In 2012, the *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* found that "[t]here is a need to better coordinate federal programming that affects children and parents requiring child and family services" (at p. 49). The *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia*, at page 49, goes on to state:

> It is clear that the FNCFS Program does not and cannot work in isolation from other programming. Too many factors affect the overall need for child and family services programming, and it would be unrealistic to assume that agencies can fully deliver services related to all of them. AANDC could improve its efficiency by having a better understanding of other AANDC or federal programming that affect children and parents requiring child and family services and facilitating the coordination of these programs. Economic development, health promotion, education and cultural integrity are key areas where an integration of programming and services has been noted as potentially addressing community well-being in a way that is

> both effective and necessary for positive long-term outcomes, and ultimately a sustained reduction in the number of children coming into care.

(…)

[379] Jordan's Principle is designed to address issues of jurisdiction which can result in delay, disruption and/or denial of a good or service for First Nations children on reserve. The 2009 and 2013 Memorandums of Understanding have delays inherently built into them by including a review of policy and programs, case conferencing and approvals from the Assistant Deputy Minister, before interim funding is even provided. It should be noted that the case conferencing approach was what was used in Jordan's case, sadly, without success (see testimony of Dr. Cindy Blackstock, *Transcript* Vol. 48 at p. 104).

[380] It also unclear why AANDC`s position focuses mainly on inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers. The evidence above indicates that a large number of jurisdictional disputes occur between federal departments, such as AANDC, Health Canada and others. Tellingly, the $11 million Health Canada fund to address Jordan's Principle cases was never accessed. According to Ms. Baggley, the reasons for this were that the cases coming forward did not meet the criteria for the application of Jordan's Principle; or, were resolved before having to access the fund (see *Transcript* Vol. 57 at pp. 123-125).

[381] In the Panel's view, it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need.

[382] More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made.

…

> [391] Furthermore, in areas where the FNCFS Program is complemented by other federal programs aimed at addressing the needs of children and families on reserve, there is also a lack of coordination between the different programs. The evidence indicates that federal government departments often work in silos. This practice results in service gaps, delays or denials and, overall, adverse impacts on First Nations children and families on reserves. Jordan's Principle was meant to address this issue; however, its narrow interpretation by AANDC and Health Canada ignores a large number of disputes that can arise and need to be addressed under this Principle.
>
> …
>
> [458] Non-exhaustively, the main adverse impacts found by the Panel are:
>
> > (…) The failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families.
> >
> > The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children.
>
> …
>
> [481] (…) AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle.

[360] Canada admitted at the motions' hearing that the Jordan's Principle operation, as ordered by this Tribunal, is a completely new path for them. In all fairness, after multiple orders over the years, they have done a great job approving millions of services to First Nations children and families. This is to be celebrated. The complete story is told when a review of all the findings and supporting evidence from this Tribunal in the multiple rulings is achieved. This is what the Tribunal is keeping in mind in assessing the effectiveness of its orders and the level of implementation achieved.

[361] Many years after the Jordan's Principle definition and consent orders in 2017 CHRT 14 and 35, Canada was still denying sufficient capital funding for buildings needed to support

Band Representatives and Jordan's Principle: 2021 CHRT 41. The Chiefs of Ontario brought the issue to the Tribunal because Canada was not in agreement with them. This required the Tribunal's intervention. All parties except Canada agreed that capital funds were often required for the purchase of buildings to offer Jordan's Principle but Canada refused.

[362] Canada needed to be ordered to fund those services to ensure that children would not be denied the services. Even when Canada was fully aware of the gaps and put on notice by numerous First Nations, Canada did not always act without orders.

> [63] Further, the Tribunal ordered a complete reform of the FNCFS Program to cease and desist from the discriminatory practice found in the decision including to move away from the lack of coordination of federal programs causing gaps, denials and delays in services to First Nations children and families.
>
> …
>
> [65] Canada's expressed its goal to move away from Canada's previous approach to programs that the Tribunal found to be working in silos. Canada stated it is focusing on a holistic, intersectional and First Nation community driven approach which if fully implemented would address the systemic racial discrimination found by the Tribunal and would align with the United Nations Declaration on the Rights of Indigenous Peoples in the long-term. The Panel entirely agrees with this goal if it materializes.
>
> …
>
> [67] This is the ideal approach as long as the systemic racial discrimination is satisfactorily addressed and communities and agencies are not denied when they express real measurable needs connected to service delivery including during transition (…), (2021 CHRT 41, at paras. 63, 65 and 67).

[363] The Tribunal is familiar with submissions from Canada such as the one in the motions stating that they have complied with orders and should be left alone to continue their work. The Tribunal is seeing similar arguments from Canada in the motions than the ones already argued in previous motions. Of note, Canada relied on the need to consult with First Nations while denying justified requests made by First Nations. This is something that the Tribunal considers in assessing the effectiveness of its orders.

[364] Furthermore, the Tribunal found in 2021 that Canada was falling short including on Jordan's Principle, and needed to improve. The Tribunal's previous findings inform the issues in the motions and Canada's argument that service requests that could be addressed by other federal programs are redirected into Jordan's Principle:

> [102] In sum, Canada submits that it has complied with the Tribunal's orders and there are no outstanding issues of compliance. There is no evidence of ongoing discrimination. The motion for non-compliance should be dismissed. Canada should be given time to follow the democratic structures in place to ensure the accountability of public funds. Further, Canada should be provided an opportunity to continue the current system that involves collaboration with Indigenous governing bodies.
>
> …
>
> [113] Canada contends that a long-term capital plan requires ongoing consultation and time. Consultation is ongoing on this issue and it is important that the consultation involves First Nation communities.
> (2021 CHRT 41)
>
> [179] This structure is a governmental choice in the way it functions and administers programs. Since the *Merit Decision*, INAC became ISC and a major merger and reorganization was made. While it may have addressed some issues identified in the *Merit Decision*, the Panel is still presented with arguments from Canada that show the silo mindset is still present. In Canada's submissions responding to the purchase or construction of capital assets that support the delivery of FNCFS services motion, a focus is made on the Community Infrastructure Program instead of the FNCFS Program and its Terms and Conditions or the findings made in the *Merit Decision*. The Panel was clear in the *Merit Decision* that reform needed to be informed by the findings in the *Merit Decision*. Major Capital was part of those findings.
>
> …
>
> [194] The history in this case and the evidence demonstrate that when Canada applies criteria and uses discretion, it is not necessarily using a substantive equality lens responsive to real needs of First Nations children and families.
>
> …
>
> [237] This ruling and orders are necessary given that the *Act respecting First Nations, Inuit and Métis children, youth and families* only refers to funding in the Preamble and does not guarantee adequate funding according to specific

needs of Nations. While the legislation refers to substantive equality, no link is made between funding according to need and substantive equality in the obligations. The Panel will possibly revisit this with the parties' assistance as part of the long-term phase and reform implementation. This being said, the Panel believes that if sustainable and adequate funding is provided to First Nations who decide to exercise jurisdiction over child and family services, it is the best possible outcome for those children, families and Nations. This option is included in 2018 CHRT 4 orders.

…

[261] …

> **Jurisdiction to issue orders for purchase and/or construction of capital assets that support the delivery of Jordan's Principle services**
>
> Jordan's Principle services are part of this claim and have been the subject of numerous orders by the Tribunal in these proceedings. Divorcing the services from provincial requirements for safe, confidential spaces to offer the services would amount to discrimination. It would also perpetuate gaps, denials and delays in hindering the delivery many services that can only be offered indoors. In other words, denying funding for safe, confidential and culturally appropriate spaces respecting provincial requirements would be the equivalent of refusing services otherwise allowed under Jordan's Principle.

…

[279] The argument of looking into other programs to delay or deny funding for building purchase or construction does not stand here. Canada ought to look at Nation specific building needs and requests at the time they are made not the time all First Nations have been consulted and have provided their views as this is unfair to First Nations that have pressing needs and are ready to proceed.

[280] For Jordan's Principle, Canada ought to provide a holistic view as to how it will respond to those needs and eliminate barriers, especially if those barriers arise from the administrative divide of federal programs. If building purchase or construction can accommodate social services under the FNCFS Program, Jordan's Principle services and early childhood intervention and others, this is ideal. This should only be done when it is possible. In the end, the FNCFS Agencies and First Nations communities decide on their plan.

> [281] Canada was ordered to cease and desist its discriminatory practices including this one. Multiple arguments pointing to other federal programs that are specialized in community infrastructure or ongoing discussions does not convince the Tribunal that real needs of First Nations children and families are met.
>
> …
>
> [298] With respect, the need for sufficient office space to offer services is so intertwined with the actual provision of services and so self-explanatory, the Panel did not envision the need for orders in that regard at the time. While there clearly was a timeframe to adapt to a large influx of new cases following the 2017 orders, we are now in the latter part of 2021. Canada continuously submits it should be given latitude to comply to remedy the systemic discrimination. This is a clear example where too much latitude risks perpetuating the unnecessary delays resulting in systemic discrimination. Moreover, the lack of sufficient funding for buildings to offer services on-reserve constitutes denials contravening the Tribunal's orders under Jordan's Principle.
>
> …
>
> [304] Given this concern, the Panel considers that one way that Canada can demonstrate that it is on track to comply with the Tribunal's orders would be for it to expeditiously engage in adequate consultations in regard to building needs for FNCFS Agencies and First Nation communities including with the parties in this case and prepare a plan with specific targets and deadlines to complete those consultations. In the Panel's view, Canada should be in a position to share this plan within three months of today's date or as otherwise agreed by the parties. An appropriate plan would be highly detailed with clear steps and goals. Through these details, the plan would demonstrate how Canada is being responsive to the Tribunal's orders including addressing the lack of coordination between federal programs affecting First Nations children, substantive equality, the challenges faced and solutions envisioned.

[365] On multiple occasions, the Panel Chair asked Canada's witnesses about their plan to eliminate the gaps and the lack of coordination in federal programs offered to First Nations children. A clear detailed plan with targets and deadlines was never provided. This is concerning when the Tribunal now hears from Canada that it believes federal programs may be responsive to several Jordan's Principle requests.

[366] Dr. Gideon, in response to the Panel chair's question on whether the department has done any systemic analysis on the other programs and how they would bridge gaps for

children, testified that ISC had started a systemic analysis of the gaps in federal programs around 2022 but she was unsure if it has been completed. Dr. Gideon deferred to Ms. St-Aubin for more information.

[367] In her revised affidavit, Candice St-Aubin affirmed that growth in the volume of requests and level of expenditures is forecasted to continue, as First Nations families increasingly turn to Jordan's Principle for essential products, services, and supports. However, responding only through growth in the federal implementation of Jordan's Principle could have unintended consequences, such as inadvertently shifting funds and services away from First Nations-led programs thereby creating a greater dependency on Jordan's Principle. Maintaining the current federal implementation approach also facilitates prioritizing federal decision-making over that of First Nations in the delivery of services to First Nations children. While the current approach is based on Tribunal orders, a response solely through operational growth does not address gaps in products, services, and supports through core programming or community-level service delivery.

[368] The Tribunal agrees with this statement; however, the Tribunal never directed a response based only on growth in the federal implementation of Jordan's Principle. On the contrary, the Tribunal directed an analysis of the gaps in an effort to close them and the need for proper coordination amongst the federal programs since the evidence demonstrated the lack of coordination and the existence of gaps. The Tribunal has always been in favour of First Nations community programs responding to First Nations children's needs as long as they had sufficient resources to do so. In other words, Canada cannot off-load its legal responsibilities on First Nations if they lack the resources to offer the services. This is in the best interest of First Nations children.

[369] Canada submits that the continued expansion of the public service for Jordan's Principle administration may shift funds and services away from existing First Nations programs, prioritize federal decision-making over First Nations decision-making, and fail to allow supports for First Nations children to be provided through core programming or community level service delivery. This is not in the best interests of First Nations children.

[370] As stated by Dr. Gideon during her cross-examination, some of the potential negative consequences of focusing on growth in the public service include:

> a. investing in the public service instead of investing in First Nations capacity;
> b. competing with First Nations to recruit staff; and
> c. competing with First Nations to recruit contractors and service providers, leading to bidding wars and increased fees for services needed by First Nations children.

[371] The Tribunal entirely agrees Dr. Gideon on this point.

[372] Ms. St-Aubin further affirms that looking forward, it is incumbent upon ISC to fulfill its legislative mandate to work collaboratively with partners to improve access to high-quality services and to support and empower Indigenous peoples to independently deliver services and address the socio-economic conditions in their communities. The ultimate goal is to transfer funds and control to First Nations communities and organizations for culturally appropriate and comprehensive service delivery to First Nations children.

[373] The Tribunal entirely agrees with this if First Nations communities and organizations have sufficient sustainable resources to thrive and to offer culturally appropriate and comprehensive service delivery to First Nations children.

[374] During Ms. St-Aubin's cross-examination, counsel David Taylor for the Caring Society read the following two paragraphs of the Tribunal's 2017 Jordan's Principle ruling:

> With regard to the AFN's submission that Canada has not yet developed an internal understanding of what the gaps in federal funding to First Nations children are, the Panel notes that the Jordan's Principle – Child First Initiative presentation, presented to the Innu Round Table on October 6, 2016 (Affidavit of Cassandra Lang, January 25, 2017, Exhibit 2, Annex I), under "Implementation Points" at page 12, states: "Conducting a province by province gap analysis of health and social services for on-reserve children with disabilities" (see also Health Canada, Jordan's Principle – Child First Initiative, presentation dated October 12, 2016 (Affidavit of Cassandra Lang, January 25, 2017, Exhibit 2, Annex I, at p. 12), (2017 CHRT 14, at para. 105).
>
> There are no timelines indicated for when this analysis will be completed and, based on the Panel's reasoning above regarding Canada's definition of Jordan's Principle, the analysis will need to be broadened beyond "on-reserve children with disabilities." The information that is collected must reflect the

> actual number of children in need of services and the actual gaps in those services in order to be reliable in informing future actions, (2017 CHRT 14, at para. 106).

[375] Ms. St-Aubin was asked if she was aware that at the same time that the Tribunal was setting the timelines, the Tribunal was calling for this gaps analysis to happen and be done in a broader way. Ms. St-Aubin was also asked if she agreed that the gap analysis was called for by the Tribunal panel to be done on an expedited basis:

> Q. But there was, as early as 2017, calls from the panel to take on this kind of gap analysis approach on a on a more expedited basis. Would you agree with that?
> A. Yes.

[376] Ms. St-Aubin was also asked questions about the Tribunal's previous rulings:

> So again, would you agree this is another example of the panel kind of calling for that more comprehensive
> approach?
> A.
> Yes

[377] When asked if she agreed that the panel was not calling for a response solely through operational growth but also gap closing, Ms. St-Aubin agreed that this was the direction asked in the Tribunal's orders.

[378] Ms. St-Aubin admitted that ISC was supposed to be looking into gaps and doing an analysis.

[379] When asked about her affidavit where she affirms that: "ISC is leading a project to systematically identify the present overlaps, gaps, and/or opportunities for ISC funded community-based programs to provide similar access to the most frequent Jordan's Principle requests''. Ms. St-Aubin testified that this was underway, however, she could not confirm if it was completed or when it would be completed.

[380] Further, counsel for the Caring Society asked Ms. St-Aubin about the panel chair's question to Dr. Gideon in the context of socioeconomic supports and issues of poverty, about whether the department had undertaken a systemic analysis of other programs and

whether they could bridge gaps. Dr. Gideon noted that this is something that started in 2023 and that Ms. St-Aubin might be able to speak to this.

[381] Counsel for the Caring Society asked: Does this sound like the project you're referring to at paragraph 77 [in her affidavit]? Ms. St-Aubin replied that it seems to align with that.

[382] The Tribunal finds that while the gaps analysis is underway and a first phase of the IFSD has been completed, the gaps analysis has not been completed 8 years after the Tribunal's *Merit Decision* and 7 years after the Tribunal's Jordan's Principle specific rulings and orders in 2017 CHRT 14 and 35.

[383] Without sufficient evidence that Canada has in fact done or has completed a thorough evaluation of federal programs that are intended to respond to First Nations children's real needs and gaps in services, the same questions and findings from the *Merit Decision* remain. Only a proper and complete evaluation that analyzes all federal programs offered to First Nations children and clearly identifies gaps or overlaps will establish this. This evaluation would be in the best interest of First Nations children and families and would also be responsive in the assessment of Jordan's effectiveness and costs.

[384] Moreover, other federal programs may use an eligibility criterion that is different and less inclusive than that of the Tribunal's eligibility criteria ordered in 2020 CHRT 20. Federal programs may be more in line with the *Indian Act*, therefore excluding non-status First Nations children who are recognized by their First Nations. The latter is included in the eligibility criteria under Jordan's Principle as ordered by this Tribunal and challenged by Canada who strongly disagreed, but it was upheld by the Federal Court.

[385] Furthermore, when the AFN was asked by the Panel Chair who was referring to the evidence in this case, what their position on other federal programs was, they answered that there are inequities in all of them but that if another federal program can be responsive, it should be accessed. The Tribunal is not taking the AFN's position as evidence that there are in fact inequities in all federal programs - this is not the objective. In this case, a few programs were found to have unreasonably denied services to First Nations children and this forms part of the evidence supporting the Tribunal's orders. The Tribunal agrees there

may be other responsive federal programs for some of the Jordan's Principle requests. However, the Tribunal, considering the previous findings in this case, some referenced above, is not convinced that they are easily accessed and that there are no barriers in terms of eligibility. Further, the Tribunal had to order the publicity of Jordan's Principle to inform First Nations families on how to access Jordan's Principle services.

[386] Moreover, Craig Gideon, Interim Chief Executive Officer since March 21, 2024, and former Senior Director of the Social Branch, affirmed in his March 22, 2024, amended affidavit, that regarding the increase in requests to Jordan's Principle, the AFN is deeply concerned by the volume of Jordan's Principle requests. The AFN notes that the flood in applications highlights deep, systemic gaps and barriers to accessing federal supports elsewhere. The AFN remains concerned by reports of denials of urgent requests for life necessities, including housing, utilities, and transportation, for example. In the AFN's view, the volume of requests to Jordan's Principle to provide for such necessities is a symptom of Canada's discriminatory underfunding of other programs and services for housing, clean drinking water, infrastructure and transportation, accessibility, income assistance, etc. Jordan's Principle alone cannot solve the systemic discrimination and challenges in other programs and services, and reform of ISC and other federal departments is imperative to reduce the high volume of requests to Jordan's Principle.

[387] In 2022 CHRT 8, the Tribunal received evidence from the parties and made findings (see for example, paras. 74-93, 142 and 160). In terms of coordination and closing gaps in Federal Programs, the Tribunal made specific findings some are reproduced below:

> [90] As set out in Ms. Wellman's affidavit of March 7, 2022:
>
> > Moreover, the AFN Chiefs-in-Assembly unanimously supported the Spirit Bear Plan during the 2017 Special Chiefs Assembly through AFN Resolution 92/2017, Support the Spirit Bear Plan to End Inequities in all Federally Funded Public Services for First Nations Children, Youth and Families, attached to [Stephanie Wellman's affidavit dated March 7, 2022] as "Exhibit R".

[91] The Spirit Bear Plan is set out as Exhibit J to Dr. Blackstock's affidavit dated March 4, 2022 and as Exhibit Q to Stephanie Wellman's affidavit dated March 7, 2022:

> Spirit Bear calls on:
>
> 1 CANADA to immediately comply with all rulings by the Canadian Human Rights Tribunal ordering it to immediately cease its discriminatory funding of First Nations child and family services. The orders further require Canada to fully and properly implement Jordan's Principle (www.jordansprinciple.ca). all federally funded public services provided to First Nations children, youth and families
>
> 2 PARLIAMENT to ask the Parliamentary Budget Officer to publicly cost out the shortfalls in all federally funded public services provided to First Nations children, youth and families (education, health, water, child welfare, etc.) and propose solutions to fix it.
>
> 3 GOVERNMENT to consult with First Nations to co-create a holistic Spirit Bear Plan to end all of the inequalities (with dates and confirmed investments) in a short period of time sensitive to children's best interests, development and distinct community needs.
>
> 4 GOVERNMENT DEPARTMENTS providing services to First Nations children and families to undergo a thorough and independent 360° evaluation to identify any ongoing discriminatory ideologies, policies or practices and address them. These evaluations must be publicly available.
>
> 5 ALL PUBLIC SERVANTS, including those at a senior level, to receive mandatory training to identify and address government ideology, policies and practices that fetter the implementation of the Truth and Reconciliation Commission's Calls to Action.

[92] The Panel notes that included in the MMIWG report, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, filed in evidence in support of this motion, there is a specific call to justice concerning the Spirit Bear Plan:

> 12.13. We call upon all governments and child welfare agencies to fully implement the Spirit Bear Plan.

> [93] Furthermore, Canada publicly accepted the MMIWG report and findings. Consequently, the Panel believes this should inform long-term reform.
>
> …
>
> [103] Furthermore, in its *Merit Decision* and subsequent rulings, the Panel stressed the importance of ceasing the mass removal of First Nations children from their homes, families, communities and Nations now. The Panel made clear that the discriminatory underfunding, especially the lack of funding for prevention including least disruptive measures was a big part of the issue. However, it was never the sole issue that led to findings of systemic discrimination. Other structural and systemic changes ought to be made for the Panel to consider the systemic discrimination is eliminated in the long-term.

[388] The Tribunal agrees that the best programs are First Nations designed and delivered if the First Nations have all the resources they need. However, given Canada's own evidence that it will remain involved in Jordan's Principle, reforming its federal programs offered to First Nations children and properly coordinating them to ensure there are no gaps, denials, and delays is necessary to improve Jordan's Principle service delivery.

[389] During her cross-examination, Dr. Gideon explained her views on Canada's continued role in Jordan's Principle:

> I've always said that I think because of the off-reserve component and the rising number of off-reserve requests, which isn't captured in IFSD's report, but is captured in the deep dive 2021-22 administrative data with 52 per cent of individual requests came from off-reserve individuals. Although, I fully respect and support First Nations wanting to serve their members off reserve, I think realistically it will be a challenge to be able to make all of those service delivery connections. So, I believe, this is my opinion, that the federal government will need to continue, or someone that is designated, would need to continue to be able to receive individual requests, particularly because of individuals that are living (inaudible/off mic).

[390] The Tribunal, given the above, rejects Ms. St-Aubin's response to AFN counsel, Ms. Kassis's question concerning the Spirit Bear plan being outside or not of the four corners of the complaint before the Tribunal. Furthermore, as mentioned above, Ms. St-Aubin lacked the necessary knowledge of the Tribunal's rulings and of the evidence supporting previous orders to provide a reliable response to this question.

[391] During her cross-examination, Dr. Gideon provided a meaningful response on the Spirit Bear Plan, the AFN Chiefs-in-Assembly, and gap closing:

> Q.
> (…) in terms of the gap closing and finding other pathways to services.
> Would you agree that the Spirit Bear Plan that was passed by the Chiefs-in-Assembly in 2017 spoke to a lot of those themes and elements well?
> A.
> I would agree.

[392] In September 2022, the Institute of Fiscal Studies and Democracy at the University of Ottawa (IFSD) provided a report to Canada and the parties and forms part of the evidence before the Tribunal. The Tribunal finds this report relevant and reliable and that it provides a path forward that the Tribunal agrees with if it is accepted by First Nations as part of long-term reform of Jordan's Principle. If not, their inherent rights should be respected. However, for Canada, who will continue to have a role in Jordan's Principle, this report remains relevant.

[393] The IFSD's report, titled, Data Assessment and Framing of an Analysis of substantive equality through the application of Jordan's Principle, September 1, 2022, is attached as Exhibit J to the amended affidavit of Craig Gideon, dated March 22, 2024. The Tribunal agrees with the findings of the report and finds it is entirely in line with the Tribunal's vision of substantive equality and approach in this case and mentioned above. Canada cannot implement Jordan's Principle without assessing the gaps in other federal programs and then relying on the existence of those programs to limit access to Jordan's Principle. It might have been different if Canada had started its analysis of the federal programs when the Tribunal made its orders to eliminate gaps and the lack of coordination in federal programs that impact service delivery in 2016 or 2017 or even in 2021 when the Tribunal made its orders. The Tribunal made further findings on this point in 2021 CHRT 41:

> [56] Nevertheless, it may be less compelling for Cabinet and Treasury Board to approve authorities if there is a belief that other programs may be responsive to needs. However, to date while efforts are made to collect information, the information remains unclear on the elimination of the lack of coordination found that impacts service delivery. There is insufficient evidence about different programs offered to First Nations children and families on-

> reserve and how each really address the real needs of children and families. In other words, the Tribunal is unaware of the existence of a completed thorough analysis of all programs on-reserve, how they interrelate, intersect and ensure that there are no gaps in services to First Nations children. There is insufficient evidence to date to establish that the gaps in services to First Nations children and families on-reserve or ordinarily on reserve have all been addressed and accounted for by other programs when the FNCFS Program's authorities do not include items or place a funding cap. The Tribunal raises this point to illustrate that referring to other programs when a legitimate request is made for service delivery may not be sufficiently responsive to the Tribunal's orders (…).

[394] The Tribunal in 2022, made additional findings to that effect as explained above. This could have assisted in focusing on Jordan's Principle and closing gaps based on the real needs of First Nations children and families.

[395] The IFSD report concluded as follows:

> As with any major program change, implementation will take time. The gaps in programs are broad and would benefit from bottom-up cost analysis immediately. Addressing the gaps in programs could then be triaged based on areas of need. While it would be desirable to have programs change in tandem, the likelihood of broad-based programmatic change would be resource intensive and potentially, challenging for the department to manage. Identifying acute areas of need based on requests and gap analysis, the department and First Nations could work to develop an approach to remedying inequities in services.
>
> If gaps are closed in existing programs through the Spirit Bear Plan, it is expected that recourse to Jordan's Principle should decline. This is not to suggest that needs will be eliminated or change quickly, but that the nature of requests through Jordan's Principle should change, trending toward exceptional circumstances. Substantive equality through Jordan's Principle is achievable. It requires recognizing, quantifying, and addressing existing gaps in programs and services.
>
> This analysis of Jordan's Principle should serve as a warning sign. In its current form, Jordan's Principle's serves as evidence of the broader gaps in programs and services for First Nations children. A long-term sustainable approach for Jordan's Principle will require remedying existing gaps in adjacent program areas to ensure recourse to Jordan's Principle is a last resort and not a first (or only) source of products and services.

> ISC programs would benefit from renewal and restructuring to align to the provision of substantive equality. Programs to reduce gaps by equalizing points of departure will require new governance relationships with First Nations, linking actual needs and realities to program design.
>
> The cost of inaction on Jordan's Principle is high for First Nations children and Canada. A long-term sustainable approach should be premised on a clear understanding of root causes of need in First Nations.
>
> Governments typically do not design programs without ceilings, unless in an emergency situation or when there is an unknown or undefined end to the matter, e.g., war. When there is clarity around an outcome, funding and program parameters should frame the approach. Closing underlying gaps in services in First Nations would ensure Jordan's Principle can work as it was originally intended, by serving as recourse in exceptional circumstances (pp.76-77).

[396] With the above in mind, the Tribunal is cautious when told by Canada that other federal programs may address the needs of First Nations children instead of Jordan's Principle. The Tribunal is not saying this is not the case. Rather the Tribunal is saying that if this is the case, ISC should demonstrate how they arrived at this conclusion and that the systemic discrimination found has ceased and is not reoccurring. When answering this question, the high number of approved Jordan's Principle requests demonstrates the magnitude of the needs but not necessarily how those needs would be addressed by other programs, especially since many examples in the evidence over the years demonstrated the opposite.

[397] Canada was made aware of the above over the years and has not demonstrated that it has fully complied. Canada now raises this very issue in support of its cross-motion seeking further orders. This prompts the Tribunal to have further questions and make orders for a detailed report including a plan, specific targets, deadlines for implementation, and the dates when the implementation targets have to be met, to ensure that any orders made to refer requestors to other federal programs are in the best interest of First Nations children. Did Canada accept the IFSD's report referred to above? If so, did Canada act on the report's recommendations, and, if so, in what ways?

[398] The Tribunal agrees to allow Canada under Jordan's Principle to refer requestors to other federal services however, given the large evidentiary record that children experienced gaps, delays, denials, and interdepartmental disputes it is prudent, to ensure that safeguards are put in place to avoid what happened to First Nations children in the past which Canada was ordered to pay compensation for (see 2019 CHRT 39, 2022 CHRT 41 and 2023 CHRT 44).

[399] Such further and other relief that the circumstances may require and this honourable Tribunal may permit was included in the motion and cross-motions' order requests sections. This order falls in this category to ensure the Tribunal's orders are effectively implemented.

[400] Jordan's Principle was clearly defined by this Tribunal as having a substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government services affecting First Nations children and families. The Tribunal has the authority to make further orders to ensure that the orders are effective in eliminating the systemic discrimination found.

First Nations-led service coordination.

[401] Dr. Gideon's evidence describes First Nations-led service coordination under Jordan's Principle. She affirms that in addition to processing Jordan's Principle requests itself, ISC also works collaboratively with regional and First Nations partners to support First Nations-led service coordination.

[402] The Jordan's Principle service coordination function is delivered by one of several regional service delivery organizations (for example, First Nations communities, Tribal Councils, Health Authorities, and Indigenous Non-governmental Organizations).

[403] There are a variety of service delivery organization models across the regions to address individual community needs. Generally speaking, the service coordination function supports families as they navigate systems, linking them to existing resources, and informing regional focal points of identified service gaps to help facilitate access to support children.

[404] ISC currently has 599 contribution agreements in place with First Nations and other organizations across Canada.

[405] As just one example, and as noted above, ISC's Alberta region has a contribution agreement in place with FNHC, which is a partnership of 11 First Nations from each Treaty area in Alberta. ISC funds FNHC to support service coordination in Alberta.

[406] Regional service coordinators provide navigation support throughout the Jordan's Principle application process. Regional Service Coordinators also have in-depth knowledge of the other services that may be available at the community level and would benefit the child to ensure a continuation of supports and services are available.

[407] Currently, the Alberta Region also has Contribution Agreements in place with approximately 123 recipients, including First Nations Communities, School Districts/Schools, and other Indigenous and non-Indigenous Partners.

[408] Moreover, the Caring Society submits that 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. Referrals to existing services are also consistent with the Tribunal's order in 2017 CHRT 35.

ISC Programs process

[409] Dr. Gideon affirms that all ISC Programs (e.g. Non-Insured Health Benefits, Education, Mental Wellness, etc.) must put into place a process to expeditiously refer any requests for First Nations children received by the existing ISC program to a Jordan's Principle Focal Point where the request is not covered by the existing program. Focal Points receiving requests transferred from existing programs are to evaluate and determine requests according to CHRT timelines and the Standard Operations Procedures.

[410] Requests known to be covered by existing ISC programming (e.g. Non-Insured Health Benefits, Mental Wellness, Education, Maternal Child Health, etc.) are processed in the following manner, only if they can be processed within CHRT Timelines:

- Send request to the Regional or National Directorate of the existing program for review (Contact List to come), in order to: Seek coverage:
  - If approved under existing program:
  - Focal Point to communicate this to requester.
  - Existing program to process request through their systems.
  - An approval from an existing program indicates a closed case to the Focal Point and is to be tracked as a Jordan's Principle request funded under existing programs; or
  - If the request is denied, or if a denial has already taken place by existing program:
  - Focal Point will evaluate and determine the request under Jordan's Principle.
  - Document the denial in the case file by appending either the denial letter, an email from existing program confirming the denial, or written documentation that the program has verbally confirmed denial with Focal Point.

[411] Dr. Gideon further affirms that the burden must not be placed on the requester to navigate through existing ISC programs. A referral to an existing program by a Focal Point is not permitted if doing so will breach the timeframes for determination in the CHRT Orders, as this is considered administrative case conferencing.

[412] The Tribunal finds this demonstrates improvements in service coordination and some level of accessibility to services in First Nations communities or via federal programs facilitated by service coordinators and focal points. The Tribunal believes that this is very positive. However, the Tribunal does not have sufficient evidence to determine their effectiveness to ensure that First Nations children do not fall into gaps or experience long delays in receiving services. Furthermore, at this time, there is insufficient evidence that the coordination of federal programs offered to First Nations children has been fully implemented.

[413] A combination of allowing referrals on an interim basis and receiving reports on implementation could ensure the effectiveness of the Tribunal's orders and be useful information for long-term reform of Jordan's Principle.

[414] The parties have indicated that the SOP was set aside and replaced with the Back-to-Basics policy. The SOP contains a process for navigators. The Tribunal finds that this could inform the parties' discussions and be a good basis for the elaboration of a comprehensive referral process. The Tribunal also is open to hearing the parties' views on

their definition of what is considered an administrative case conferencing. The Tribunal views administrative case conferencing as bureaucracy, unnecessary delays, etc.

[415] If there is a way for the parties to clarify this further and elaborate a process, there could be a way to improve expedient referrals to federal programs while at the same time ensuring that layers of bureaucracy are removed. This would be ideal. The Tribunal's interrogation here flows from past findings reviewed alongside the evidence in the motions. The Tribunal is not imposing its views on the details of the process since it focuses on the broader systemic picture but simply providing guidance and requesting information to ensure the Tribunal's orders are effective.

[416] Moreover, in follow-up with the implementation of previous orders, the Tribunal also requests a report on Canada's progress on the broader coordination of federal programs funding services for First Nations children. As explained above, this impacts Jordan's Principle service delivery.

[417] The Tribunal in light of the above makes the following order:

A. The Tribunal pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction orders Canada to report back to the Tribunal with a detailed report on its progress in coordinating its federal programs, especially since 2022 CHRT 8. The detailed report shall include a plan, specific targets, deadlines for implementation, and the dates when the implementation targets have been met. The information provided shall be sufficient to assist this Tribunal and allow the Tribunal to understand Canada's progress so far. Canada will file its report with the Tribunal and copy all the parties by January 9, 2025.

Contribution agreements and sufficient resources

Canada objects to the request made by the FNLC and supported by the Caring Society.

[418] Canada submits that the FNLC has gone beyond the limitations of their participation, as ordered by this Tribunal.

[419] The FNLC's request for an order requiring Canada "to provide sufficient and sustainable resources to First Nations and First Nations organizations for the administration of Jordan's Principle" goes well beyond the relief requested by the Caring Society, which was limited to a request that Canada provide a report on resourcing.

[420] Canada submits that this order request is outside the FNLC's role as a late-arriving interested party, which is "limited to the issues currently before the Tribunal by way of the motions at issue." The Caring Society's support for this order, indicated in their factum of August 8, 2024, is similarly beyond the scope of their motion.

[421] Canada further submits that as a new issue being raised for the first time by the late-arriving interested party, the Panel should show restraint and this issue ought not be considered.

[422] Canada also submits that it is prejudiced by this late request, as it had no opportunity to provide relevant evidence on the funding being provided through its 599 existing contribution agreements. Nor has any party provided evidence on how much funding might be sufficient in each particular circumstance.

[423] Canada submits that the Panel has no evidence on which to ground such an order, which was not requested in the Caring Society's notice of motion. As a result, this issue should not be considered and this requested order should be denied.

[424] The Commission submits that as the Caring Society and FNLC have pointed out that while the Panel cannot make orders that directly bind First Nations and affiliated organizations, it can make orders that impose obligations on Canada in its dealings with such third parties – and should do so, if satisfied on the evidence that such orders are needed to effectively eliminate and prevent the recurrence of discriminatory practices.

[425] The Commission further submits that in this regard, all parties aim to find long-term solutions that would allow the Panel to relinquish its retained jurisdiction. In the context of Jordan's Principle, the Commission believes this will require Canada to have funding and systems in place to ensure First Nations children can access the products, services, and

supports they need, when they need them – consistent with substantive equality, the best interests of the child, and the Panel's rulings identifying discriminatory practices.

[426] The Commission submits that as the Tribunal explained in a ruling released recently, its focus on eliminating systemic discrimination "…will be achieved in the long-term especially if programs and services are prevention-oriented and are designed and delivered by First Nations themselves in respecting their inherent right of self-governance and if the programs and services are sustainably and adequately funded and resourced by Canada who has a legal obligation to cease and desist the systemic discrimination found under the Tribunal's orders … Canada still has an important role to play and legal and positive obligations toward First Nations and First Nations peoples regardless of whether they decide to deliver services or not." 2024 CHRT 92 at para. 1.

[427] The Commission thus agrees with the Caring Society and FNLC that the Panel can properly require Canada to ensure any willing First Nations or affiliated organizations that agree to administer Jordan's Principle are properly resourced and supported to achieve that outcome.

[428] While the Caring Society and the FNLC request an order for Canada "to provide sufficient and sustainable resources to First Nations and First Nations organizations for the administration of Jordan's Principle", this is not what the Tribunal relies on to make an order. Canada requested that when ISC is the government department of first contact, Canada may refer requestors to an existing and applicable that has already been Jordan's Principle group request approved and that is being administered by a First Nation or First Nation community organization pursuant to a contribution agreement with Canada; or to an applicable First Nation or First Nation community organization engaged in the administration of Jordan's Principle pursuant to a contribution agreement with Canada. This is an order request from Canada that the Tribunal has to consider in terms of the evidence that Canada chose to bring forward in support of its request and the history, findings, and previous orders in this case. Canada filed two affidavits and raised the issue of contribution agreements in Dr. Gideon's March 28, 2024, Revised Affidavit and Candice St-Aubin's Revised Affidavit dated March 28, 2024.

[429] It would be unreasonable to expect the Tribunal to make a determination without the necessary evidence that in referring requestors to First Nations, the order will be effective not only on Canada's end but also on the Child, the family, and the First Nation delivering the service. This forms part of the Tribunal's authority to ensure the effectiveness of the Tribunal's orders. The Tribunal in granting Canada's request must be assured that the systemic discrimination is not perpetuated and that First Nations children are not harmed. On one hand, Canada submits that the Tribunal has no evidence to grant the FNLC's order, and on the other, Canada requests an order that could greatly impact children without bringing the supporting evidence about its contribution agreements to demonstrate to the Tribunal that Canada's order request is grounded in evidence and is perfectly safe for children. This must also be Canada's concern as the one who has legal obligations toward First Nations children and families. Any prudent person would want to ensure the referrals are effective and they may be so but the Tribunal does not know for the time being. What the Tribunal knows is that Canada has 599 contribution agreements.

[430] The Tribunal does not question the existence of Canada's contribution agreements. There is some evidence that contribution agreements are in place in Yukon and have positive impacts. The Tribunal does not have sufficient evidence and information to determine if the agreements are responsive to the Tribunal's orders. However, the example below is supportive of the position that a contribution agreement may be beneficial in reducing backlogs and improving service delivery.

[431] Exhibit 22, Attached to the affidavit of Cindy Blackstock dated March, 27th, 2024, and included in the AGC's compendium includes an email from Debra Bear, Director Jordan's Principle services, Council of Yukon First Nations, to Brittany Mathews, dated March 26, 2024, and providing comments on the backlog and positive impacts of their contribution agreements with ISC.

> In our region we have noted previous significant backlog on adjudication of applications.
> Some applications have been waiting in the queue for over a year and some we marked as urgent.

> (…) We now have contribution agreements which provides the opportunity to approve certain requests internally.
> This has been exceptionally helpful in providing support to the children when they need them without delay or disruption.
> Our office is also in a position to cash flow approved reimbursements without delay.
> Presently, new applications we are submitting can take a few months for a decision for non-urgent requests.
> For urgent or time-sensitive requests, we can often get a decision sooner but many times the decision comes at the last moment.
> This can impede the process of supporting our families and children with their urgent requests such as emergency medical travel or treatment.

[432] The Tribunal finds this is sufficient to justify an interim order accompanied with a request for additional evidence and information on Canada's contribution agreements. This allows the Tribunal to grant Canada's order request immediately to help reduce backlogs while allowing for a process to permit Canada to answer the Tribunal's questions on contribution agreements and how Canada ensures that First Nations have sufficient resources to adequately operate under a contribution agreement. The Tribunal finds it is more reasonable than not that allowing referrals with the appropriate safeguards described in this section would help reduce the backlog and may improve Jordan's Principle service delivery.

[433] The Tribunal agrees with Canada that when ISC is the government department of first contact if ISC cannot direct a family requesting respite service through Jordan's Principle individual request back to their community, even if respite care is already being delivered through community-based programming funded by Jordan's Principle or other programs. This may unintentionally create competition in the hiring of finite local human resources as well and perpetuate a 'one-off' approach to service delivery, rather than a 'system-based' approach. Further, the respite care provider employed by the community usually operates in a more supportive environment, as part of a team, receiving training and making sure performance standards are met, with the oversight of a First Nations health manager. It is not guaranteed that these factors would be present when families contract their respite care provider funded through Jordan's Principle individual request. The Tribunal

finds this argument compelling when reviewed alongside the available evidence to allow referrals with the appropriate effectiveness safeguards.

[434] A legalistic argument to prevent the Tribunal from making orders that would ensure the referrals are effective is not helpful. As mentioned above, Canada resisted paying for funding for buildings to offer Jordan's Principle even after repeated requests from First Nations and orders had to be made. This was recent.

[435] Moreover, the Tribunal finds that Canada is not prejudiced in ''not having the opportunity to provide relevant evidence on the funding being provided through its 599 existing contribution agreements'' for the following reasons: 1- Canada's affidavit evidence mentions the contribution agreements; 2- The Tribunal has crafted a way for Canada to bring additional evidence on its contribution agreements for the Tribunal's consideration; 3- The issue of First Nations having sufficient resources to do adequate and safe service delivery to First Nations children has been discussed multiple time by this Tribunal in previous rulings and more recently in a ruling related to the motions; 4- The Tribunal is granting Canada's order request to have the right to refer Jordan's Principle requests to First Nations who have a contribution agreement with Canada in the interim and will revisit it once more information is provided on the contribution agreements.

[436] Regardless of the FNLC's request, the Tribunal's focus is on the effectiveness of its Jordan's Principle orders past and present. This focus on the effectiveness of the Tribunal's orders is mentioned in the Caring Society's motion. Moreover, Canada in making this request ended it with the following: Such further and other relief that the circumstances may require and this honourable Tribunal may permit.

[437] This strikes at the heart of the systemic discrimination found in this case. This case is a case where the Tribunal found that services were underfunded and this led to harms to children and families. Jordan's Principle was also part of the findings as discussed above. If Canada negotiates agreements with First Nations to deliver Jordan's Principle themselves, Canada has to ensure that First Nations will have sufficient resources to do so. Otherwise, it would displace Canada's responsibilities under the Tribunal's orders to the First Nation

level. Furthermore, if the First Nation is without sufficient resources this could harm children. This would allow the systemic discrimination to continue in a similar way. This concern was discussed in the Wen: De reports with a focus on child welfare and is also relevant for Jordan's Principle services. The Wen: De reports form part of the Tribunal's previous findings.

[438] This is not a new rationale in these proceedings that is taking Canada by surprise. The Tribunal mentioned this multiple times in previous rulings in terms of child welfare/child and family services. The same applies for Jordan's Principle. First Nations having sufficient resources to offer services to First children is directly linked to substantive equality and the ability to respond to the real needs of First Nations children and is also directly linked to eliminating the systemic and racial discrimination in this case. In other words, regardless of how Canada offers the services, through First Nations themselves or other service providers, the focus is to ensure this is done in the best interest of the children receiving the services.

[439] In 2019 CHRT 7, in paragraph 25, the Tribunal made the following finding:

> Dr. Gideon also testified that Jordan's Principle is not a program, it is considered a legal rule by Canada. This is also confirmed in a document attached as an exhibit to Dr. Gideon's affidavit. Dr. Gideon testified that she wrote this document (see Affidavit of Dr. Valerie Gideon, dated, May 24, 2018, at exhibit 4, on page 2). This document named, Jordan's Principle Implementation-Ontario Region, under the title, Our Commitment states as follows:
> No sun-setting of Jordan's Principle. Jordan's Principle is a legal requirement, not a program and thus there will be no sun-setting of Jordan's Principle (…) There cannot be any break in Canada's response to the full implementation of Jordan's Principle.

[440] The reasoning from 2020 CHRT 20 is also relevant for Jordan's Principle services. There are ample findings in this Tribunal's previous rulings in this case that demonstrate that the issue of First Nations having sufficient resources to provide services to First Nations children forms part of the Tribunal's focus on ensuring the effectiveness of its orders.

[441] In 2022 CHRT 8 the Tribunal stated that:

[4] Consequently, the Tribunal determined all the above need to be adequately funded. This means in a meaningful and sustainable manner so as to eliminate the systemic discrimination and prevent it from reoccurring.

[5] Furthermore, recently, the Quebec Court of Appeal in Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis, 2022 QCCA 185, recognized the Tribunal's concern that funding only formed part of the Preamble and did not create an obligation for sustainable funding under An Act Respecting First Nations, Inuit and Metis children, youth and families, SC 2019, c 24 (see paras. 271-272, 274). The Court at para. 562 states: "Ainsi, une nouvelle approche s'impose, ayant pour piliers la collaboration fédérale-provinciale et la prise en compte des peuples autochtones en tant qu'acteurs politiques et producteurs de droit. Cette approche doit prévaloir tant pour ce qui est des initiatives législatives que de leur mise en œuvre, y compris leur financement" (emphasis ours).

[6] The Panel is pleased with this helpful finding that will guide governments in the future. Moreover, as part of this motion, in her affidavit dated March 4, 2022, Dr. Cindy Blackstock asserts that:

25. [she] is concerned that First Nations affirming their jurisdiction under An Act Respecting First Nations, Métis and Inuit children, youth and families may not benefit from the Tribunal orders, including this consent order. Canada has taken the position, and has repeatedly advised her, that it does not have obligations under the Tribunal's orders to First Nations affirming their jurisdiction under An Act Respecting First Nations, Métis and Inuit children, youth and families. Dr. Blackstock affirms the Agreement in Principle reached on December 31, 2021(AIP), also excludes such First Nations. However, the AIP does state that these First Nations will not receive less funding than they would have received under the Reformed CFS Funding Approach for the services in question.

[7] Dr. Blackstock adds that:

25. … Respecting the right of First Nations to be self-determining, I believe that First Nations ought to have the right to make a free, prior and informed choice about which funding approaches, policies and practices, including those arising from the Tribunal proceedings, ought to apply.

[8] The Tribunal agrees and is satisfied the AIP ensures First Nations affirming their jurisdiction under An Act Respecting First Nations, Métis and Inuit children, youth and families will not receive less funding than they would have received under the reformed First Nations Child and Family Services [FNCFS] Funding Approach for the services in question.

[9] This is significant to ensure that First Nations do not have to face the unacceptable choice between adequate and sustainable funding under the reformed FNCFS Program or the exercise of their inherent right to self-government to develop and offer their own child and family services with the uncertainty of adequate sustainable funding especially upon the date of renewal of the agreements between the First Nation and Canada.

[13] The Tribunal made findings in the Merit Decision where Canada had concluded a funding agreement with the Attawapiskat First Nation:

[122] This finding is similar to the one made by the Federal Court in *Attawapiskat First Nation v. Canada,* 2012 FC 948. In discussing the nature of funding agreements similar to the ones at issue in the present Complaint, the Federal Court stated at paragraph 59:

the [Attawapiskat First Nation] relies on funding from the government through the [Comprehensive Funding Agreement] to provide essential services to its members and as a result, the [Comprehensive Funding Agreement] is essentially an adhesion contract imposed on the [Attawapiskat First Nation] as a condition of receiving funding despite the fact that the [Attawapiskat First Nation] consents to the [Comprehensive Funding Agreement]. There is no evidence of real negotiation. The power imbalance between government and this band dependent for its sustenance on the [Comprehensive Funding Agreement] confirms the public nature and adhesion quality of the [Comprehensive Funding Agreement].
(emphasis added).

[14] When the Tribunal expressed its concerns about sustainable and adequate funding not being guaranteed under the Act Respecting First Nations, Métis and Inuit children, youth and families, it did so with the above in mind and not in any way to hinder First Nations' inherent rights that this Panel has recognized on multiple occasions.

[15] The Tribunal's focus is on Canada not repeating its past discriminatory practices or creating new ones that would harm First Nations children, families and Nations.

[16] Finally on this point, the Tribunal is pleased to hear that the AFN sought, and achieved, recognition within the AIP that such First Nations exercising their jurisdiction would receive no less than the funding provided under the eventual reformed FNCFS Program. In her March 4, 2022, affidavit Dr. Valerie Gideon, Associate Deputy Minister of ISC, asserts that:

15. [t]he Agreement-in-Principle notes that First Nations that have chosen to avail themselves of the framework offered by An Act respecting First Nations, Inuit and Métis children, youth and families … to facilitate the exercise of their

jurisdiction will "not receive less funding than they would have received under the reformed FNCFS Funding Approach for the services for which they have assumed jurisdiction." ISC [Indigenous Service Canada] will ensure that enhancements to the FNCFS Program, including those sought through this motion, are made available to those First Nations retroactive to April 1, 2022.

[17] Dr. Valerie Gideon further affirms that:

16. … ISC and the Assembly of First Nations will discuss how to adjust the [*Act respecting First Nations, Inuit and Métis children, youth and families*'] interim funding framework to reflect these enhancements. By April 1, ISC will also have reached out to the two Indigenous Governing Bodies who have signed or are on the cusp of signing coordination and fiscal relationship agreements. It will propose to discuss the enhancements available to those two entities. Regardless of the time required to have those discussions, ISC will make retroactive to April 1, 2022, any adjustments to the Indigenous Governing Bodies' agreements.

[18] This is extremely positive news and with the understanding that this commitment is reflective of what will also be included in the Final Settlement agreement for long-term reform addresses the Tribunal's concerns on this point.

[30] The AFN insisted that discussions on compensation also include a separate track on long-term reform. The Panel believes this was instrumental and necessary. Moreover, it is in line with the Panel's approach to remedies in this case and the Panel's goal to remain seized of this case until sustainable long-term reform orders on consent or otherwise have been made that will eliminate the systemic racial discrimination found and prevent it from reoccurring.

[75] Further:

42. IFSD has agreed to take on this Jordan's Principle research and, pursuant to this consent motion, Canada has agreed to fund it.

[76] The Panel agrees with the Caring Society and finds this is in line with the Panel's approach, findings and orders to eliminate systemic discrimination and prevent the same or similar discriminatory practices to emerge. Moreover, recently filed evidence in support of this motion substantiates Dr. Blackstock's assertions. The Panel finds this order is necessary to achieve evidence-based meaningful and sustainable long-term reform informed by the real needs of children, youth and families. This is consistent with the Panel's orders to provide services according to the First Nations children's real needs.

> [149] The above findings demonstrate the need for culturally appropriate and safe prevention services that address the key drivers resulting in First Nations children entering care and the need for adequately funded and sustainable prevention services that are tailored to the distinct needs of First Nations children, families and communities.

[442] Under the Tribunal's orders, Canada is already able to consult with First Nations and professionals if reasonably necessary. See 2017 CHRT 35 at paras 135(2)(A)(ii) and 135(2)(A)(ii.1).

> When a government service, including a service assessment, is available to all other children, the government department of first contact will pay for the service to a First Nations child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1), 2017 CHRT 35 where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is approved and funding is provided, the government department of first contact can seek reimbursement from another department/government.
>
> The initial evaluation and a determination of requests by individuals shall be made within 48 hours of the initial contact for a service request. In a situation where irremediable harm is reasonably foreseeable, Canada will make all reasonable efforts to provide immediate crisis intervention supports until an extended response can be developed and implemented. In all other urgent cases, the evaluation and determination of the request shall be made within 12 hours of the initial contact for a service request. Where more information is reasonably necessary to the determination of a request by an individual, clinical case conferencing may be undertaken for the purpose described in paragraph 135(1)(B)(iii), 2017 CHRT 35. For non-urgent cases in which this information cannot be obtained within the 48-hour time frame, representatives from the Government of Canada will work with the requestor in order to obtain

> the needed information so that the determination can be made as close to the 48-hour time frame as possible. In any event, once representatives from the Government of Canada have obtained the necessary information, a determination will be made within 12 hours for urgent cases, and 48 hours for non-urgent cases.
>
> Canada shall cease imposing service delays due to administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Canada will only engage in clinical case conferencing for the purpose described in paragraph 135(1)(B)(iii), 2017 CHRT 35.

[443] Moreover, prior to a historic agreement reached in June 2024 between Canada and the AMC, the AMC provided insight into Canada's delegation of Jordan's Principle responsibilities without adequate resources and the unintended negative impacts of the Back-to-Basics policy.

[444] The AMC wrote a letter on January 11, 2024, found at Exhibit 59 attached to the Affidavit of Cindy Blackstock dated January 12, 2024.

> This is a letter of support in response to your request on behalf of the First Nations Child & Family Caring Society for insights into the experiences, concerns, and challenges faced by First Nations in Manitoba accessing Jordan's Principle.
> Specifically, this letter 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.
> The information and perspectives shared herein are presented from the unique standpoint of AMC member First Nations, aligning with the AMC's ongoing commitment to creating a comprehensive understanding of the improvements necessary to address the challenges faced by First Nations in Manitoba when accessing
> Jordan's Principle. Our intent is to share information we have gathered on and off-reserve to contribute to the Caring Societies' efforts to enhance the accessibility and effectiveness of Jordan's Principle for AMC member First Nations.
> AMC member First Nations have raised concerns with the AMC Jordan's Principle Implementation Team

through Knowledge Translation Engagement sessions in First Nations in Manitoba throughout 2023.

Additional consultation was provided by AMC Jordan's Principle off-reserve service delivery within urban settings.

The following concerns have been identified by First Nations in Manitoba in relation to the non-compliance motion respecting Canada's approach to Jordan's Principle:

a. ISC's practice of having First Nations and First Nations service coordinators accept and fund Jordan's Principle cases without providing adequate resources at the local level;

b. ISC's non-compliance places serious pressure on First Nations and First Nations service coordinators as families are not having their child(ren)'s needs met regardless of where they live;

c. ISC's non-compliance has resulted in families losing confidence in their First Nation and First Nations service coordinators as they ultimately do not understand that it is Canada's non-compliance that is placing service coordinators in a position of not being able to meet the child(ren)'s needs in a timely manner;

d. ISC does not proactively fund liability coverage for all First Nations and First Nations coordinator organizations, placing individual employees, First Nations organizations and First Nations at serious risk;

e. Children experiencing significant delays or disruptions in professional recommended services and supports, or not receiving any services and supports due to limited access as a result of remoteness and/or human resources and;

f. Children not receiving services, supports or products due to Canada's failure to adhere to reasonable timeframes for approved services, which appears to be exacerbated by ISC's implementation of Back to Basics.

ISC implemented the Back to Basics (B2B) approach in early 2022. Some AMC member First Nations feel that B2B has been exclusively defined by ISC without local consultation and many feel ISC has overstepped, undermining local efforts. In Manitoba, Jordan's Principle has developed in each First Nation as a locally defined program, with funding directly provided to each Nation with a service coordinator guiding the development. As a result of B2B, there has been an observed decrease in the service coordinator's involvement at the local level,

> as many families are not connecting at the local level and are contacting ISC directly for requests. First Nations service coordinators feel the Manitoba approach to B2B is diminishing their role and impacting local autonomy in decision-making. It is felt that B2B is creating increased dependence on the government. B2B has impacted local Jordan's Principle programs in Manitoba by shifting the focus of the supports and services. B2B has created many more requests, altering the role and responsibilities of First Nations service coordinators and contributing to Canada's failure to adhere to reasonable timeframes for approved services.
>
> 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.

[445] The Tribunal reserved the right to ask questions to allow it to make a determination on the motions. The Tribunal has incorporated this aspect into its orders below.

[446] Therefore, the Tribunal pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction, allows Canada to refer Jordan's Principle requestors to First Nations or First Nations community organizations engaged in the administration of Jordan's Principle pursuant to a contribution agreement with Canada as per the Tribunal's orders below in i and ii. Canada can do so immediately and in the interim for ii (see details below for ii), and, until such time as either:

1. New criteria, guidelines, and a new process are developed by the parties and approved by the Tribunal;
2. If it is already in existence and in conformity with the Tribunal's requirements above (the Tribunal does not yet know and would like to find out), the existing criteria, guidelines, and process are provided to the Tribunal by way of an affidavit for the Tribunal's review and approval. This should be filed no later than December 10, 2024, and parties will have an opportunity to file responding affidavits, and cross-examine the affiant and Canada will have an opportunity to file a reply affidavit and to cross-

examine the other affiants. All parties will have an opportunity to file written submissions before the Tribunal makes a determination on this specific point; or

3. The parties may propose any other option to the Tribunal that may be more expeditious in addressing this specific point and that would allow the issue to be dealt with efficiently, adequately, fairly, and in the best interest of First Nations children viewed through an Indigenous lens.

[447] The parties will report back to the Tribunal on their views on the 3 options above by December 10, 2024.

[448] This is to ensure that children referred in this manner do not fall into gaps, long delays, and other unforeseen hardships.

[449] The Tribunal confirms that First Nations are not bound by the Tribunal's ordered timelines or other procedural terms of the Tribunal's Jordan's Principle orders. The Canadian Human Rights Act (*CHRA*) is clear that the orders are made against those who are engaging or have engaged in the discriminatory practice.

Section 53 (2) of the *CHRA* states that:

> If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate (…) (emphasis ours).

[450] However, an interim mechanism should be put in place to ensure that children and families referred to the services are not waiting in another long queue to receive services. Parties will discuss how to put in place an interim mechanism including a culturally appropriate streamlined risk management system to ensure that requestors referred to First Nations for Jordan's Principle services have their needs met in a timely manner and without barriers such as underfunding, a lack of coordination including of programs or program restrictions. This may be very helpful in gathering evidence to inform long-term reform. The Tribunal in clarifying its orders to allow Canada to refer Jordan's Principle requestors to First Nations wants to ensure that First Nations and First Nations organizations receiving, and/or

determining and/or funding Jordan's Principle requests have sufficient resources, including funding, to do so and sustainable resources, including funding, to do so. Furthermore, given that First Nations, as sovereign nations and rights holders, have an inherent right to govern their peoples, lands, and resources, it may be helpful to include these considerations in the parties' negotiations.

[451] The Tribunal pursuant to section 53 (2) (a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction, orders Canada to consult with the parties in the manner of their choice (mediation, conflict resolution, negotiations, etc.) with the goal of arriving at consent order requests if possible and if not, with options for orders on an interim mechanism as referred to above and supported by rationale and available evidence and to report back to the Tribunal by February 12, 2025.

[452] Pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous orders, the parameters on Canada's obligations under the *CHRA,* and the Tribunal' Jordan's Principle orders mentioned above, including the interdiction to underfund in a similar fashion than the one found in the *Merit Decision* and/or off-load its legal obligations to First Nations, the Tribunal orders that, when ISC is the government department of first contact, Canada may refer requestors:

i. to an existing and applicable Jordan's Principle group request that has already been approved and that is being administered by a First Nation or First Nation community organization pursuant to a contribution agreement with Canada; or
ii. to an applicable First Nation or First Nation community organization engaged in the administration of Jordan's Principle pursuant to a contribution agreement with Canada; (this ii. order is an interim order which will be revisited by the Tribunal, once the Tribunal has received more information from Canada on the contribution agreements and the criteria, guidelines, and process as explained above).

However, where a request is deemed urgent in accordance with the objective criteria to be developed by Canada, the AFN, the Caring Society, the COO, the NAN, and the

Commission, ISC will first take into account whether or not referring the requestor will enable faster access to the requested product, service or support.

For greater clarity, where Canada enters into a contribution agreement with any First Nation or First Nation community organization to administer Jordan's Principle, whether through a group request or otherwise, that First Nation or First Nation community organization is not bound by the Tribunal-ordered timelines or procedural terms of any of the Tribunal's Jordan's Principle orders that are directed at Canada.

The Financial Administration Act:

[453] In sum, the Caring Society submits that Dr. Blackstock's uncontested Affidavit evidence indicates that ISC has used its interpretation of the *Financial Administration Act* (FAA) as a basis to deny Jordan's Principle group requests in the Alberta Region and to deny a reimbursement request from an organization.

[454] The Caring Society submits that 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*.

[455] Moreover, the Caring Society adds that 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. This indicates that ISC has invoked the *FAA* as a basis to depart from the Tribunal's orders. ISC adopts a bureaucratic approach that runs contrary to the Tribunal's reasonings and orders.

[456] According to the Caring Society, ISC has already acknowledged that its requirement of itemized receipts creates an administrative burden on First Nations children and families. Families also report being questioned by ISC for making certain purchases.

[457] Furthermore, the Caring Society argues that ISC has stated that the itemized receipt is requested due to a reporting requirement imposed on ISC, not on the end user. 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. 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. The Caring Society submits that the evidence they have led shows that the receipt requirement is preventing the effective implementation of the Tribunal's orders. Service providers face difficulty in collecting itemized receipts from end users.

[458] Canada and the AFN submit 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.

[459] The Tribunal agrees with the Caring Society that the ultimate question on this motion is whether the Tribunal's orders are being implemented effectively to resolve discrimination at the level of the child and their family. The issues raised on the examples raised under the *FAA* are relevant to determining the reimbursement issue in this ruling. However, the Tribunal finds that the evidence including the examples provided do not clearly demonstrate that Canada used the *FAA* to limit the Tribunal's orders.

[460] The Tribunal discussed the *FAA* extensively in previous rulings and more recently in 2021 CHRT 41 and the Tribunal continues to rely on those findings. As mentioned, in 2021 CHRT 41 at paragraphs [376]: "The *Financial Administration Act* should be interpreted harmoniously with quasi-constitutional legislation such as the *CHRA* including orders made under the *CHRA*. [377] Further, the Tribunal's orders are to be read harmoniously with the *Financial Administration Act* and, in the event of conflict, the orders made under the *CHRA* have primacy over an interpretation of the *Financial Administration Act* that limits the Tribunal's remedial authority."

[461] Therefore, the Tribunal reiterates that a case-by-case approach must be applied to find that Canada has applied the *FAA* in a way that hinders the Tribunal's orders under the

CHRA. Furthermore, there is insufficient evidence in the motion/cross-motion to make a finding that Canada used the *FAA* to derogate from the Tribunal's orders.

[462] Disputes between the parties relating to the *FAA* have arisen from time to time in these proceedings. In order to prevent misunderstandings between the parties, the Tribunal will clarify its previous orders. As a general matter and for clarification purposes, the Tribunal's orders have primacy over any conflicting interpretation of the *Financial Administration Act* and related instruments such as "terms and conditions," agreements, policies and conduct that hinder the implementation of the Tribunal's orders.

[463] The Panel relied upon Kelso in determining the merits of this case (see *Merit Decision* at para. 42 and 2021 CHRT 41 at paras.155-156):

No one is challenging the general right of the Government to allocate resources and manpower as it sees fit. But this right is not unlimited. It must be exercised according to law. The government's right to allocate resources cannot override a statute such as the *Canadian Human Rights Act* (…).

[464] This principle still applies in this case.

Inherent rights of First Nations and the FNLC submissions

[465] The Tribunal appreciates the FNLC's thorough submissions and agrees the inherent rights of self-determination and self-governance of First Nations must be respected and an approach focused on their real needs, unique perspectives, and culture will ensure this. The FNLC's submissions on the requirements to respect the *UNDRIP* including the First Nations' free, prior, and informed consent are in line with the Tribunal's findings in previous rulings.

[466] However, the Tribunal has also discussed the impossibility of hearing from every First Nation in Canada before making its rulings. The Tribunal is not a commission of inquiry. Canada has the duty to consult. This duty was explained in the Tribunal's *Merit Decision*. The Tribunal takes great comfort that the AFN Chiefs-in-Assembly make resolutions of the majority of Chiefs and proxies present and those resolutions that have carried are filed and form part of the Tribunal's record.

The Tribunal from the beginning has rejected the one size fits all approach. Such an approach does not take into account the specific and distinct needs of a child, the child's family, community, and Nation. That is why a Potlach ceremony may be important to a family and another type of ceremony is preferred for another. Two children may have the same health condition but different needs. This is why remoteness and higher costs of living must be considered by Canada when a First Nation is isolated from surrounding services for example. The lack of hospitals nearby is a consideration. Calling 911 may mean something very different for a family living in a community near a hospital than a family living in a community with no surrounding hospital and the need to fly out to access it. The costs of capital buildings to offer Jordan's Principle services for remote communities are likely higher to ensure appropriate insulation and account for transportation of materials for example.

[467] In an approach based on needs, there is less of an issue of breaching the inherent rights of First Nations since the First Nations are to be consulted to understand their specific needs. Individual rights are also respected with this approach based on the real needs of First Nations children. The Tribunal understood that it would be challenging to achieve a complete consensus of all First Nations in the delivery of services to children and families. Resolutions from the majority of the Chiefs in Assembly provide direction in these proceedings but the inherent rights of each First Nation remain and can be respected by Canada in tailoring services based on their specific needs.

[468] Jordan's Principle is not to be viewed as a program. It is intended to be a means to achieve substantive equality.

[469] The services are intended to be child-centric and can differ from one child to another and one family to another. They are also intended to be First Nations-centric and can differ from one First Nation to another.

[470] If services are based on needs as repeatedly ordered by this Tribunal, the Tribunal need not hear from every First Nation in Canada to make orders that affect them. Their unique perspectives are accounted for in the orders. Inherent rights and unique perspectives of every First Nation should already be taken into account by Canada in the funding and

service delivery. The Tribunal relies on its numerous previous findings and orders that cannot all be repeated here.

[471] Canada has the duty to consult the First Nations involved in these proceedings and those who are not.

[472] The above is considered in all of the Tribunal's orders.

[473] Moreover, for those reasons, the Tribunal will leave it up to the parties to decide if the FNLC can participate in the consultations for the interim orders especially given their voiced preference for a Tribunal-assisted mediation which must be voluntary. Furthermore, the Tribunal included a process for parties to consult with other First Nations and other experts on the interim orders.

Appeals mechanism and Complaints mechanism:

[471] Dr. Gideon described in detail the re-review and appeals process and the Tribunal finds this evidence reliable.

Re-reviews

[472] Re-reviews may be initiated by individual Jordan's Principle employees, requestors or First Nations partners or parties advocating for or acting on behalf of a child or family, or service coordinators/navigators. Re-reviews were introduced as part of the operationalization of the Back-to-Basics Approach as an informal mechanism to reconsider requests previously denied, prior to an appeal.

[473] A request may be re-reviewed when new information becomes available that has rendered the product, service, or support(s) eligible for approval, or if the Back-to-Basics Approach was not previously applied. If either of these criteria are identified and the request has not yet been appealed, it may be approved and considered a re-reviewed decision. Re-reviews may be conducted by any employee in the regional focal point or ISC Headquarters with authority to approve requests.

Appeals Process

[474] Previously, ISC formed an appeals committee composed of the Associate Deputy Minister and the Senior Assistant Deputy Minister, Regional Operations, both with ISC. In response to the Tribunal's order in 2017 CHRT 14 and Canada's commitment to the parties in 2018 to form an external arm's length Appeals Secretariat, the parties collaborated towards an improved appeals process based on the principles of transparency, accessibility, fairness, and independence. In agreement with the Assembly of First Nations and the Caring Society, ISC implemented the new Jordan's Principle appeals process in 2022.

[475] The new appeals process includes an arm's length secretariat function and an External Expert Review Committee (Appeals Committee). The Appeals Committee is an external nongovernmental panel of experts from regulated and certified disciplines in health, education, and social sectors. The objective of the Appeals Committee is to provide ISC with recommendations on appeals utilizing their professional knowledge and expertise.

[476] Currently, the Appeals Committee consists of nine consultants who have been contracted through a request for proposals process. All of these consultants are either Indigenous, have lived and worked with Indigenous communities, or have longstanding expertise in serving Indigenous communities across Canada. The inter-professional collaboration among these experts provides a fuller consideration of children's needs. ISC is working to expand the Appeals Committee membership, having launched an external Request for Proposals process in February 2024.

[477] From November 2021 until February 2022, the old appeals process overlapped with the new appeals process, such that appeals were heard by one of the two committees. As of February 2022, the new appeals process is fully in place, replacing the former internal ISC committee.

[478] Dr. Gideon affirms that the non-governmental Appeals Committee is supported by the Appeals Secretariat situated within ISC, but outside of the Jordan`s Principle Initiative. The Appeals Secretariat, agreed upon by the parties, serves as an advocacy office to support families in bringing appeals forward. To avoid a conflict of interest with the Jordan's

Principle implementation teams, the Appeals Secretariat reports directly to the Chief Medical Officer of Public Health within ISC, who is often referred to as the Chief Science Officer (CSO), who in turn reports directly to the Deputy Minister in exercising this authority.

[479] The Appeals Committee makes a recommendation to the CSO regarding whether ISC's determination should be upheld or overturned, based on their specialized knowledge, professional expertise, cultural awareness, and lived experiences. The CSO then renders an appeal determination based on that recommendation, which replaces ISC's earlier determination.

[480] The new appeals process, as agreed by the parties, is designed to be an easy-to-access, timely, and independently determined function, which provides support to those individuals and groups seeking an appeal. The Appeals Committee and CSO strive to make determinations on all appeals within 30 days.

[481] The Appeals Committee provides a clear avenue for complaint resolution. When a first instance of Jordan's Principle request is denied by ISC, ISC notifies the requestor of the reasons for the denial and of the right to appeal the decision to the Appeals Committee within one year of the denial.

[482] When an appealed determination is upheld by the Appeals Committee, ISC advises the requestor of the decision in writing, together with a written rationale. ISC also advises the requestor that they have the option of filing an application for judicial review to the Federal Court within 30 days.

[483] In the 2022-23 fiscal year, 1,258 appeals were determined under the new appeals process.

[484] Moreover, 59% of the determinations under appeal were overturned by the CSO, on the recommendation of the Appeals Committee. Between April 1 and December 31, 2023, 625 appeals were determined, with 46% of those determinations overturned by the CSO, on recommendation of the Appeals Committee.

[485] ISC's final Jordan's Principle determinations are subject to Federal Court oversight pursuant to the *Federal Courts Act,* RSC 1985, c F-7, s 18.1.

[486] The Caring Society submits that 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 mechanism were to be developed and that imposing one could have unintended consequences. The AGC also argues that it is not necessary given the appeals mechanism and the Federal Court oversight. The AGC also submits that over 50% of denied Jordan's Principle requests are reversed in appeal showing the appeals mechanism is working.

[487] The AGC submits that the Caring Society desires a complaints mechanism, not for appellate purposes, but for people to raise complaints about requests that have not yet been determined. The imposition of a new and untested complaints mechanism without broader First Nations collaboration could have serious negative and unintended consequences, such as further levels of bureaucracy, backlog, and delay in Jordan's Principle administration.

[488] Canada highlights that this issue should be tabled for discussion before Jordan's Principle Operating Committee (JPOC) and/or as part of the discussions to take place on long-term reform.

[489] Canada submits that the Caring Society's position that the Tribunal must impose a complaints mechanism, even where all parties excluding the Caring Society wish to negotiate the issue, does not reflect the collaborative approach needed to achieve effective outcomes. In fact, it deprives the parties of the opportunity to identify a jointly acceptable, flexible, and collaborative approach that takes all views into account.

[490] In the interim, Canada submits that requestors are not without recourse if a timely response has not been provided. It is open to all requestors to contact the National Call Centre to follow up on the status of any requests made under Jordan's Principle. ISC will also continue to work with its First Nations partners should they raise concerns about

delayed responses. Further, ISC has been actively exploring an interim complaints mechanism at JPOC, including the potential for an online complaints form, pending long-term reform negotiations. ISC is open to discussing this and any other proposed interim solutions with the parties, as part of the proposed mediation process.

[491] The main concern for Canada remains that the imposition of a new mechanism, without collaboration, could have unintended consequences that might otherwise contribute to the existing backlog and delay in Jordan's Principle administration while adding further levels of bureaucracy. Moreover, Canada prefers focusing its efforts on reducing the backlog rather than diverting its energy into creating a complaints mechanism.

[492] The AFN argues the specific requested relief has not been the subject of discussion or negotiations with the AFN and accordingly, the requested complaints mechanism/accountability measures would only serve to undermine efforts to negotiate a long-term approach in relation to disputes. As noted, a final settlement agreement would be endorsed by the First Nations Parties, who represent rights-holders, and further to the mandates of the AFN, be subject to approval by the First Nations-in-Assembly.

[493] Therefore, the AFN submits that the Tribunal must be wary of endorsing a complaints approach that has not been subject to the dialogic approach or reconciliatory negotiations with the First Nations parties.

[494] In reply to ISC, the Caring Society submits that 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" or whether a complaints mechanism is to be developed. There is broad agreement that this is required.

[495] In reply to the AFN, the Caring Society submits that their request for a complaints mechanism is an example of the dialogic approach in action. The AIP Parties agreed to the need for a complaints mechanism in the AIP Work Plan on December 31, 2021, 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. 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.

[496] The Commission submits that Tribunal rulings in 2017 required Canada to establish an independent appeals mechanism for Jordan's Principle determinations. There is currently a committee of independent professionals who can decide appeals of ISC decisions denying requests. However, ISC has no formal national complaints mechanism for dealing with other types of concerns that might be raised, for example with respect to the conduct of staff in processing requests, or delays in making determinations or payments. The record shows the Caring Society and others have stepped in by (i) receiving complaints and inquiries from families, service providers, and communities, (ii) tracking and reporting on trends, and (iii) raising concerns with Canada in efforts to find solutions. However, the Caring Society has also said it was never intended to fill this role on a long-term basis and does not have the capacity to keep up with demand.

[497] In 2020, the Caring Society and ISC jointly commissioned a report from three experts that recommended the creation of independent accountability mechanisms. However, the Commission submits it does not appear any of the resulting recommendations have been implemented to date.

[498] Moreover, the Commission agrees that establishing a credible, transparent, and effective Jordan's Principle complaints mechanism within a reasonable time period would assist in the effective implementation of the Tribunal's rulings.

[499] The Commission submits that the Tribunal has repeatedly held that Jordan's Principle is a necessary component of achieving substantive equality in the delivery of critical services to First Nations children and youth. If Jordan's Principle is not implemented

properly in a given case, the potential result is a denial of substantive equality. In such circumstances, it is a best practice to have a responsive complaints mechanism in place that would allow potential issues to be raised and addressed quickly and efficiently. The Tribunal agrees with the Commission on this point.

[500] The Commission agrees with the Caring Society that analogies can appropriately be drawn to the workplace context, where it is common for the Tribunal to order the creation of policies that include formal procedures for receiving, investigating, and resolving complaints.

[501] The Commission submits that the Caring Society has asked that the complaints mechanism be independent. Human rights decision-makers have made such orders on occasion. For example, the Human Rights Tribunal of Ontario has ordered the appointment of third-party monitors and/or the use of external investigators where compelling evidence showed a respondent was unwilling or unable to respond appropriately to internal complaints over time.

[502] The Commission provided relevant case law examples to support their position. For example: *Ontario Human Rights Commission v. Ontario (Correctional Services),* 2002 CanLII 46519 at "Orders – B.8" (directing external investigation of workplace complaints); *McKinnon v. Ontario (Correctional Services),* 2005 HRTO 23 (generally clarifying the order for external investigation); and *McKinnon v. Ontario (Correctional Services),* 2007 HRTO 4 at paras 7(B)(8) and 207-208 (describing non-compliance issues with respect to the external investigation orders, and stating the orders were based on "…the well-founded mistrust in both the ability and the integrity of managers regarding WDHP matters"). See also *Lepofsky v. Toronto Transit Commission*, 2005 HRTO 21 at paras 1-2, and Lepofsky v. TTC, 2007 HRTO 23 (appointing a third-party monitor based on evidence "…the TTC has failed to provide a reliable accommodation for in excess of 10 years, notwithstanding numerous complaints and internal documents showing that the accommodation was not being properly provided").

[503] If the Tribunal is satisfied such circumstances exist in this case, the Commission contends that the Tribunal could consider making a comparable order.

[504] The FNLC does not entirely agree with the AFN that the establishment of a complaints and accountability mechanism is outside of the mandate provided by the Chiefs-in-Assembly, at least from the BC context. For example, the BCAFN passed a resolution asking the AFN to support and adopt the submissions of the Caring Society in respect of the Motion, which included submissions related to a complaints mechanism.

[505] The FNLC's position is that a balanced approach is necessary to ensure Canada meets its obligations to First Nations children, including upholding their inherent rights, while also ensuring that First Nations rights to self-government and self-determination are respected and upheld. Such an approach is necessary and supported in the Doing Better Report, which recommends a complaints mechanism for Jordan's Principle be established and the complaints mechanism draws on Indigenous laws and dispute resolution processes to resolve complaints wherever possible.

[506] For these reasons, the FNLC respectfully submits that it is within the Tribunal's jurisdiction to grant relief relating to the development of a complaints mechanism and that the Tribunal should make an order requiring the parties to move toward the development of a complaints mechanism, with specific timelines for that work. However, the Parties must consult with First Nations rights and title holders, including those who are not parties to this proceeding, regarding the development of a complaints mechanism and the timelines should be reflective of that requirement.

[507] The Tribunal finds that the Jordan's Principle Appeals mechanism is very important and is necessary. However, to access the Appeals mechanism, requestors must have received a denial of their request.

[508] The Tribunal agrees with the Commission's position explained above including that while there is an Appeals mechanism that can be triggered where a request has been denied, ISC, does not have a formal complaints mechanism that can be used in other situations for example, if there are concerns about processing timelines, staff conduct, or delays in paying service providers or reimbursing families who have paid out of pocket.

Furthermore, as discussed above, the Tribunal found that the evidence established that some families experienced delays in reimbursements.

[509] The AFN argued that it is their honor to assist families to access Jordan's principle and the Tribunal finds this commendable, and the same comment can be made to the Caring Society, the COO, the NAN, the FNLC and every First Nation and First Nation organizations in Canada that helps families access Jordan's Principle services. However, these ad hoc interventions may not be sufficient and do not provide formal recourses.

[510] The Tribunal understands Canada's point about the administrative recourses that families have however, those recourses are administrative and not formal independent recourses. Moreover, there is evidence in the motions record brought by the AFN's affiant Craig Gideon who held an important role as Senior Director of the Social Branch at the Assembly of First Nations (AFN) from March 28, 2022, to March 2024, that some requestors have experienced some difficulties in bringing their complaints forward at ISC's level. Craig Gideon affirms in his amended March 22, 2024, affidavit that a family had not received a response for over 5 months, despite following up at the regional level on at least one occasion following the initial submission. The requestor only received a response and a decision was rendered after the AFN intervened by contacting ISC Headquarters requesting an urgent follow-up. Furthermore, Craig Gideon affirms that the AFN was contacted by a parent who experienced extreme difficulty contacting ISC at the regional and national levels.

[511] Moreover, Craig Gideon, affirmed in his March 22, 2024, amended affidavit, that he has heard concerns from multiple callers about the challenges contacting Indigenous Services Canada at the national and regional levels, particularly in the context of making an urgent request or updating the urgency of a request. The Social Development Sector was contacted by a parent in September 2023 regarding a request submitted in June 2023. The parent had not received any follow-up from ISC and was unable to reach anyone at the Jordan's Principle Call Centre as they had already requested a call-back and couldn't leave a second request for a call-back until the first had been returned. The parent had waited over 1 week for a call-back when they contacted the AFN.

[512] The Tribunal finds that this is precisely why an independent complaints mechanism would be helpful.

[513] Again, the Tribunal accepts the AFN's uncontested evidence above. The Tribunal finds it relevant and reliable especially that, while it is hearsay and must be given the appropriate weight, these affirmations originate from the Social Development Sector which has extensive experience in assisting First Nations families' requestors and Jordan's Principle on a regular basis. Nothing in the affiant's affirmations gives this Tribunal reasons to find it unreliable or to give it little to no weight. Moreover, in reviewing the evidence as a whole, Canada did not challenge this specific evidence from the AFN. Furthermore, Canada even refers to the Amended Affidavit of Craig Gideon, affirmed March 22, 2024, at paras 8–9 in their factum submissions.

[514] The Tribunal finds that the ISC Appeals process does not have a focus on identifying systemic issues aside from some aspects that are evaluated in the random audits. Moreover, the ISC Appeals process is not intended to act as a complaints mechanism. The Appeals Committee deals only with requests that have already been determined and may be re-examined by the Appeals Committee.

[515] Ms. St-Aubin affirmed in her revised affidavit that a complaints mechanism is duplicative and conflicts with the appeals process already established by way of agreement with the parties. However, Ms. St-Aubin agreed on cross-examination that complaints regarding issues that arose either (a) prior to a determination, or (b) following an approval, would not go through the appeals committee and that a complaints mechanism receiving those complaints would not be duplicating the appeals process. Ms. St-Aubin admitted on cross-examination that such a complaint mechanism, and an independent office for ensuring compliance, would be important.

[516] Furthermore, Canada admits that 1 out of 2 denied requests is reversed in appeal, in other words, every two denied requests ought to have been approved. This speaks volumes in terms of the importance of the arms-length Appeals mechanism to allow corrections of unfounded denials of services for First Nations children.

[517] In Canada's Executive Summary of Agreement-in-Principle on Long-Term Reform posted online, updated July 2023, and filed as part of the Caring Society's motion materials, Canada mentions that it will take urgent steps to implement the measures set out in a work plan to improve outcomes under Jordan's Principle, based on ISC's compliance with the Tribunal's orders. The work plan specifically includes commitments to: Identify, respond to, and report on urgent requests; 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 (…).

[518] Dr. Gideon also had the following exchange with the Caring Society counsel at her cross-examination:

> Q. "Develop and implement Indigenous Services Canada internal quality assurance measures, including training on various topics, complaint mechanism, and an independent office to ensure compliance;"
>
> Do you see that?
>
> A.
>
> I do.
>
> Q.
>
> And would you agree that the Complaint mechanism in the independent office to ensure compliance that was discussed there, would be something that was separate from the Appeals Committee?
>
> A. Yes.

[519] ISC committed to the development and implementation of a complaints mechanism, alongside an independent office to ensure compliance, in the AIP Workplan in 2021. Dr. Gideon testified that this complaints mechanism and independent office would be separate from the Appeals Committee. As Dr. Gideon describes in her affidavit, the Appeals Committee's role is to assess denied Jordan's Principle requests. On cross-examination, Dr. Gideon agreed that the Appeals Committee could only be an avenue for complaints regarding requests that had been determined and denied, in whole or in part. Dr. Gideon could not even see how the Appeals Committee would receive complaints regarding issues

that arose (a) prior to a determination or (b) following an approval, such as failure to make a timely reimbursement.

[520] The Tribunal finds that contrary to what Dr. Gideon affirmed, the role of the Appeals Secretariat, is not one of advocacy supporting families in bringing appeals forward, rather it is a role of administrative support and it prepares summary-style documents for the External Expert Review Committee's review in its determinations of appeals. Moreover, the quality assurance team performs random audits at ISC's Call Centre and while it may assist in improving the quality of services, it does not supplant the need for an effective complaints mechanism.

[521] The Tribunal finds that in applying a systemic lens supported by the available evidence and the evolution of Jordan's Principle, establishing a credible, transparent, and effective Independent Jordan's Principle complaints mechanism within a reasonable period through consultations among the parties would assist the effective implementation of the Tribunal's orders. The arms-length Appeals mechanism is now implemented and is effective. This was done successfully in these proceedings with the assistance of all the parties. However, the process does not account for multiple other issues such as processing timelines, delays in paying service providers, or reimbursing families who have paid out of pocket that may arise in the process of seeking services under Jordan's Principle.

[522] The Tribunal finds that the evidence supports the clear need for a credible and independent national and effective Jordan's Principle complaints mechanism and there is no doubt that the Tribunal has the authority to order it under section 53 (2) of the *CHRA*.

[523] Section 53(2)(a) of the *CHRA* gives this Tribunal the jurisdiction to make a cease and desist order. In addition, if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the *CHRA* (see *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare*) T.D.3/97, pp. 30-31). The scope of this jurisdiction was considered by the Supreme Court of Canada in *CN v. Canada (Canadian Human Rights Commission*),

1987 CanLII 109 (SCC), [1987] 1 SCR 1114, [*Action Travail des Femmes*]). In adopting the dissenting opinion of MacGuigan, J. in the Federal Court of Appeal, the Court stated that:

> ...s. 41(2)(a), [now 53(2)(a)], was designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups, but he held that "prevention" is a broad term and that it is often necessary to refer to historical patterns of discrimination, in order to design appropriate strategies for the future..... (at page 1141).
>
> (…)The Court pointed out that:
>
> Unlike the remedies in s. 41(2)(b)-(d), [now Section 53], the remedy under s. 41(2)(a), is directed towards a group and is therefore not merely compensatory but is itself prospective. The benefit is always designed to improve the situation for the group in the future (…), (at page 1142),
>
> (The Tribunal applied the above in these proceedings in 2018 CHRT 4).

[524] The Tribunal has made numerous findings on section 53 (2) of the *CHRA* in previous rulings in these proceedings including in the above and continues to rely on those findings. In sum, the Tribunal finds that it has sufficient evidence to support an order for an interim Independent complaints mechanism under section 53 (2) of the *CHRA* especially under subsection a as explained above*,* and that the *CHRA* is structured so as to encourage this innovation and flexibility in fashioning effective remedies, (see Grover). Moreover, the Jordan's Principle's Independent Appeals mechanism was already called for by this Tribunal. The Tribunal found that while Canada already had an internal appeals process, the evidence supported the need for an independent appeals process for Jordan's Principle where some of the decision-makers are composed of health professionals who act in concert with other professionals and are independent from the government.

[525] In 2017 CHRT 14 at paragraph 103, this Tribunal ordered Canada:

> Pursuant to section 53(2)(a) of the *Act*, the Panel orders Canada to ensure its processes surrounding Jordan's Principle implement the standards detailed in the "Orders" section below, under "Processing and tracking of Jordan's Principle cases." In addition, Canada should turn its mind to the establishment of an independent appeals process with decision-makers who are Indigenous health professionals and social workers.

> (…)
>
> [133] The orders made in this ruling are to be read in conjunction with the findings above, along with the findings and orders in the Decision and previous rulings (2016 CHRT 2, 2016 CHRT 10 and 2016 CHRT 16). Separating the orders from the reasoning leading to them will not assist in implementing the orders in an effective and meaningful way that ensures the essential needs of First Nations children are met and discrimination is eliminated.
>
> (…)
>
> v. If the request is denied, the government department of first contact shall inform the applicant, in writing, of his or her right to appeal the decision, the process for doing so, the information to be provided by the applicant, the timeline within which Canada will determine the appeal, and that a rationale will be provided in writing if the appeal is denied.

[526] In 2019, the Tribunal reiterated the importance of a timely and independent appeals mechanism involving health professionals and other professionals, to address such requests under Jordan's Principle, (see 2019 CHRT 7 at paras. 55 and 75).

[527] Canada in response to the Tribunal's orders has now implemented an arms-length Jordan's Principle appeals mechanism that is impactful.

[528] More recently, in *Andre v. Matimekush-Lac John Nation Innu*, 2021 CHRT 8, the Tribunal ordered the creation and implementation of a mechanism to allow for the lodging of official complaints:

> [236] In addition, the Tribunal orders the Respondent to draft, create and implement, in consultation with the Commission, one or more policies concerning harassment and discrimination in the workplace and the duty to accommodate, including procedures or a mechanism for officially lodging complaints regarding workplace harassment and discrimination or reporting it, and another mechanism for its administration to respond to and process such reports and complaints.

[529] Ms. St-Aubin identified in her cross-examination that one of the reasons the Caring Society can be helpful in assisting families and children, and in identifying systemic issues, is that there is a level of comfort that requestors may have with the Caring Society, their community, or their service coordinator. The Tribunal finds that the same could be said about

First Nations requestors having a level of comfort with the AFN, the COO, the NAN, or the FNLC since they are First Nations organizations.

[530] The Tribunal agrees with the Caring Society that this creates a vehicle for additional information to flow in problematic cases. Comfort and trust help ISC do its job and benefit First Nations children.

[531] The Tribunal finds the complaints mechanism should aim to fill a similar role. This would ensure that requestors feel comfortable relying on the accountability mechanism.

[532] Moreover, according to the evidence found at Exhibit 7 attached to Ms. Brittany Mathews' affidavit dated January 12, 2024, the JPOC identified on May 9, 2023, that the complaints mechanism must be established in a way that "ensures requestors and their families will not fear reprisal for submitting a complaint, and instills trust, recognizing the power dynamic individuals face when interacting with the federal government. (…) Tracks trends in complaints to address systemic issues families may be facing when accessing Jordan's Principle Multiple streams may need to be established for different types of complaints, for instance, complaints from Individuals/Requestors Service Coordinators, and Service Providers ''.

[533] The Tribunal finds that given the above, a complaints mechanism ought to be independent.

[534] Moreover, it has now been over 7 years since the Tribunal has crafted its detailed Jordan's Principle and substantive equality orders and the Tribunal must ensure the effectiveness of its orders. The Tribunal finds that it is paramount that Jordan's Principle requestors do not fall into gaps within a process that is intended to remove gaps and accessibility barriers in services for First Nations children. An Independent complaints mechanism would be responsive to those gaps and would improve Jordan's Principle's effectiveness. There comes a time when discussions need to lead to action.

[535] The Tribunal in keeping with the dialogic approach orders consultations amongst the parties rather than dictating all the details concerning the interim complaints mechanism.

The parties will return to the Tribunal to seek further guidance or with their consent order requests, if possible, or with their views on possible options supported by available evidence. The Tribunal made findings in previous rulings about the reasons justifying the need for an independent appeals mechanism those findings can inform consultations on the interim complaints mechanism.

[536] The Tribunal agrees that broad consultations with rights holders First Nations are important for the implementation of a permanent complaints mechanism and that the First Nations should not only have a voice in all aspects of its creation but also in the composition of the complaints mechanism.

[537] The BCAFN have already adopted a resolution and the AFN Chiefs-in-Assembly may do the same. If the First Nations reject such a recourse and prefer another one, the AFN can advise the Tribunal. However, no such thing was done prior to the creation of the arms-length Appeals mechanism that has now been implemented. Further, Canada admitted that it will remain involved in Jordan's Principle even if many First Nations assume service delivery. Therefore, a complaints mechanism for ISC's involvement has merit.

[538] The Tribunal agrees with Canada that the Jordan's Principle Operations Committee (JPOC) is an excellent forum to bring discussions on the complaints mechanism however, according to the parties, the last meeting was in the spring of 2024. Furthermore, the evidence shows that JPOC had a discussion on the complaints mechanism in May 2023. Therefore, it may be more expeditious to have the parties consult on an interim complaints mechanism in the near future and then submit their ideas to the JPOC. Without making a determination on this aspect, the JPOC may be of assistance to the creation of an interim independent complaints mechanism.

[539] The Tribunal also agrees with the AFN and Canada that the backlogs need to be addressed, and objective criteria for urgent cases must be developed as a priority and parties should focus their efforts on this until at least January 9, 2025.

[540] Again, the Tribunal agrees it would be best to have broad consultations with First Nations for the creation of a permanent independent Indigenous-led complaints mechanism.

This may take a long time to achieve to ensure First Nations are involved in its design, creation, and composition.

[541] In the interim, especially given that Canada will remain involved in Jordan's Principle even if First Nations assume greater Jordan's Principle roles, the Tribunal believes that a non-complex but effective independent complaints mechanism can be implemented until a permanent independent Indigenous-led complaints mechanism is developed and established or a long-term alternative is included in Jordan's Principle long-term reform settlement agreement and accepted by this Tribunal or, another long-term alternative is put forward as a result of the parties' meaningful consultations and involvement with First Nations, First Nations experts and organizations in Canada and proposed by the parties and accepted by this Tribunal. The long-term aspect of the independent complaints mechanism will be revisited at a later date by this Tribunal. The parties may choose to develop different mechanisms as part of their long-term reform negotiations and the Tribunal remains open and flexible in that regard.

[542] The AFN and Canada have indicated that they are determined to enter negotiations for a long-term reform agreement on Jordan's Principle by March 2025 and until then, they would prefer to use their energies and focus to address the backlogs. The Tribunal agrees on the need to focus on the backlogs. However, the Tribunal is not convinced that an agreement on long-term reform of Jordan's Principle will be completed by March 2025. These proceedings contain multiple examples of deadlines that needed to be extended for different reasons. Moreover, even if a long-term agreement was reached in March 2025, it would need to be approved by the AFN Chiefs-in-Assembly and then by this Tribunal. This may take several months. Refraining from interim orders that ensure the effectiveness of the Tribunal's orders in the hopes of a potential future agreement does not assist the First Nations children and families in need of essential services.

[543] Therefore, the Tribunal pursuant to section 53 (2) (a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction, orders Canada to consult with the parties in the manner of their choice (mediation, conflict resolution, negotiations, etc.) with the goal of arriving at consent order requests if possible

and, if not, with options for orders supported by rationale and available evidence to establish an interim independent, non-complex but effective, credible, national Jordan's Principle complaints mechanism and to report back to the Tribunal by February 24, 2025.

V. Order

[544] The Tribunal in accordance with the dialogic approach in this case and recognized by the Federal Court and pursuant to section 53 (2) (a) of the *CHRA* and the Tribunal's previous Jordan's Principle orders and retained jurisdiction, orders Canada to consult with the parties in the manner of their choice (mediation, conflict resolution, negotiations, etc.) to arrive at consent order requests if possible and if not, with options for orders supported by rationale and available evidence and to report back to the Tribunal by January 9, 2025. The FNLC may only participate on the consent of all the parties. The parties' consultations will include but are not limited to the following aspects:

- Parties will seek to co-develop objective criteria to be used to identify urgent Jordan's Principle requests by January 9, 2025.

[545] Furthermore, the parties will also include in their consultations, all the Tribunal's consultation orders found below.

[546] The Tribunal, on the consent of the parties, has determined two levels of urgent services in a 2020 CHRT 36, referred to above:

1. urgent cases involving reasonably foreseeable irremediable harm (requiring immediate response); and
2. the other urgent ones requiring action within 12 hours (see 2020 CHRT 36 Annex A).

[547] The Tribunal confirms that "life-threatening cases", and cases involving end-of-life/palliative care, the risk of suicide, the risk to physical safety, and no access to basic necessities (the Tribunal orders that this must be defined by the parties as part of their consultations on objective criteria to be used to identify urgent Jordan's Principle requests), or risk of entering the child welfare system are urgent. The Tribunal has also been clear that

the “time-sensitive nature” of a case could also make it urgent. Some life-threatening situations may require immediate response while others may require a timely response.

[548] The Tribunal agrees to include caregivers and children fleeing from domestic violence in the definition of other urgent cases requiring action within 12 hours. The Tribunal orders Canada to consult with the parties and seek to co-develop objective criteria and guidelines for these cases as part of their consultations on objective criteria to be used to identify urgent Jordan’s Principle requests.

[549] The Tribunal agrees that a child with no access to food or other basic necessities is considered an urgent case requiring action within 12 hours. The Tribunal also agrees that once food or other basic necessities have been provided it is appropriate to refer the family to other non-discriminatory services and, if the services include barriers, to eliminate those barriers. The Tribunal orders Canada to consult with the parties and seek to co-develop objective criteria and guidelines for these cases as part of their consultations on objective criteria to be used to identify urgent Jordan’s Principle requests and report back to the Tribunal by January 9, 2025.

[550] The Tribunal accepts Canada’s evidence that there are other services meant to support fire evacuations but Jordan’s Principle may still be engaged. However, a clear coordination between Jordan’s Principle and the other services ought to be established. In other words, referrals to other services are acceptable if the services are culturally appropriate, timely, effective, and address needs in a meaningful way. The Tribunal accepts that a request could be multifaceted involving some aspects under Jordan’s Principle and other aspects under other emergency response services. Therefore, the Tribunal orders Canada to consult with the parties and to seek to co-develop guidelines on this coordination aspect and on how to triage and respond to the multifaceted requests that also involve Jordan’s Principle aspects as part of their consultations on objective criteria to be used to identify urgent Jordan’s Principle requests and report back to the Tribunal by January 9, 2025.

[551] The Tribunal agrees that bereavement is a sacred time for First Nations children and that the passing of a parent, sibling, or close relative can be particularly traumatic. The Tribunal agrees that in some cases urgent services may be required and in other cases, it may be time-sensitive (more than 12 hours) but not urgent. The Tribunal also recognizes that cultural ceremonies of many forms are important services in line with substantive equality and also agrees with the AFN that all types of ceremonies should be considered not only potlaches. The Tribunal agrees that First Nations children who lose a parent face numerous life-altering risks and may need Jordan's Principle services even in the absence of a child welfare removal. The Tribunal will review the objective criteria to be used to identify urgent Jordan's Principle requests developed by the parties and will revisit this request at that time.

[552] The Tribunal confirms that Canada is not bound by the Back-to-basics policy under the Tribunal's orders and clarifies that some of the main aspects are in line with the Tribunal's orders and some are not. For clarity, the Tribunal does not discuss every aspect of the Back-to-basics policy, only some that stand out.

[553] Aspects that are in line with the Tribunal's orders: presumption of substantive equality, supporting documentation kept minimal, professionals identifying urgent cases. (However, the Tribunal orders Canada to consult with the parties and seek to co-develop objective criteria to determine who is a qualified professional with relevant competence and training as part of their consultations to develop objective criteria to be used to identify urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025).

[554] The Tribunal clarifies the above should be maintained.

[555] * A presumption of substantive equality is a means to break down accessibility barriers and remove burdens on requestors of having to prove how their requests meet the substantive equality test. The Tribunal has no intention to deny ISC's right of rebuttal or say in assessing the requests.

[556] ** While documentation should be kept minimal, this does not mean that it is unreasonable to request some supporting documentation. The higher the complexities or costs the more reasonable it is to require supporting documentation.

[557] Aspects that are not in line with the Tribunal's orders:

- Self-declaration of urgent cases when no health or other qualified professional is involved (the Tribunal will revisit this once the parties have defined the terms "qualified professional" as they co-develop objective criteria to be used to identify urgent Jordan's Principle requests).
- Canada's interpretation that there is no possibility of re-classifying an urgent case as a non-urgent case.
- The requirement that once identified, every request must be dealt with in the same way with zero flexibility for escalating matters whose facts, on their face, could justify increased attention.
- The inability of ISC to prioritize matters.

The Tribunal clarifies the above should be eliminated.

[558] Pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, the Tribunal orders Canada to:

1. Immediately deal with the backlog with the assistance of the Tribunal's clarifications mentioned above and return to the Tribunal with its detailed plan with targets and deadlines by December 10, 2024.
2. Report back to the Tribunal and the parties by December 10, 2024, to identify the total number of currently backlogged cases both nationally and in each region, including the intake backlog, the in-progress backlog, and the reimbursement backlog, including with information regarding the cumulative number of backlogged cases at month's end, dating back 12 months.

3. Triage all backlogged requests for urgency with the assistance of the Tribunal's clarifications mentioned above. ISC shall review all self-declared urgent requests and evaluate if the requests are in fact urgent as per the tribunal clarifications and if not, reclassify them as non-urgent by December 10, 2024. If a qualified professional with relevant competence and training has deemed them urgent and until such time as the parties develop a definition for a qualified professional with relevant competence and training, ISC shall deem the requests urgent.
4. Communicate with all requestors with undetermined deemed urgent cases as per the Tribunal's clarifications to take interim measures to address any reasonably foreseeable irremediable harms within fourteen days of the Tribunal's order and report back to the Tribunal by December 10, 2024.
5. Consult and work with all parties to co-develop solutions, to reduce and eventually eliminate the backlog that are efficient and effective and that can work within a government context (this does not mean that red tape should be excused or permitted in this system) and report back to the Tribunal by January 9, 2025.

[559] The Tribunal pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to confirm by December 10, 2024, that staff have authority to review and determine urgent requests and are available in sufficient numbers during and outside business hours and that requestors can immediately and easily indicate that their request is urgent.

[560] The Tribunal pursuant to section 53 (2) (of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to ensure that by December 10, 2024, requestors who have made an existing non-urgent request that has become urgent have an effective and expeditious way to indicate that the status of their non-urgent request has now changed to urgent.

[561] The Tribunal pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to confirm if its website and social media pages clearly indicate the relevant contact phone numbers, email addresses, and hours of operation for the ISC office in each

province/territory and for headquarters, for requests and payment inquiries. Canada will provide this information to the Tribunal by December 10, 2024.

[562] the Tribunal confirms that where Canada has agreements with First Nations for service delivery under Jordan's Principle or under other programs that can address the child's needs in a timely manner, Canada may refer the Jordan's Principle requestors to the First Nations as long as Canada does not transfer its legal obligations to them or set them up to fail. For example, as a principle, insufficient resources including insufficient funding, and unsustainable resources including funding under the agreements would be similar to the systemic discrimination found and would likely be considered a transfer of Canada's obligations setting First Nations up to fail the children they serve. The Tribunal in clarifying its orders to allow Canada to refer Jordan's Principle requestors to First Nations wants to ensure that First Nations and First Nations organizations receiving, and/or determining and/or funding Jordan's Principle requests have sufficient resources, including funding, to do so and sustainable resources, including funding, to do so. The Tribunal does not have this information and would like to be better informed by Canada on this important aspect by January 9, 2025.

[563] Therefore, the Tribunal pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, allows Canada to refer Jordan's Principle requestors to First Nations or First Nations community organizations engaged in the administration of Jordan's Principle pursuant to a contribution agreement with Canada as per the Tribunal's orders below in i and ii. Canada can do so immediately and in the interim for ii (see details below for ii), and, until such time as either:

1. New criteria, guidelines, and a new process are developed by the parties and approved by the Tribunal;
2. If it is already in existence and in conformity with the Tribunal's requirements above (the Tribunal does not yet know and would like to find out), the existing criteria, guidelines, and process are provided to the Tribunal by way of an affidavit for the Tribunal's review and approval. This should be filed no later than December 10, 2024,

and parties will have an opportunity to file responding affidavits, and cross-examine the affiant and Canada will have an opportunity to file a reply affidavit and to cross-examine the other affiants. All parties will have an opportunity to file written submissions before the Tribunal makes a determination on this specific point; or

3. The parties may propose any other option to the Tribunal that may be more expeditious in addressing this specific point and that would allow the issue to be dealt with efficiently, adequately, fairly, and in the best interest of First Nations children viewed through an Indigenous lens.

The parties will report back to the Tribunal on their views on the 3 options above by December 10, 2024.

[564] The Tribunal pursuant to section 53 (2) (a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction, orders Canada to consult with the parties in the manner of their choice (mediation, conflict resolution, negotiations, etc.) with the goal of arriving at consent order requests if possible and if not, with options for orders on an interim mechanism as referred to above and supported by rationale and available evidence and to report back to the Tribunal by February 12, 2025.

[565] Pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous orders, the parameters of Canada's obligations under the *CHRA,* and the Tribunal' Jordan's Principle orders mentioned above, including the interdiction to underfund in a similar fashion than the one found in the Merit Decision and/or off-load its legal obligations to First Nations, the Tribunal orders that, when ISC is the government department of first contact, Canada may refer requestors:

i. to an existing and applicable Jordan's Principle group request that has already been approved and that is being administered by a First Nation or First Nation community organization pursuant to a contribution agreement with Canada; or
ii. to an applicable First Nation or First Nation community organization engaged in the administration of Jordan's Principle pursuant to a contribution agreement with Canada; (this ii. order is an interim order which will be revisited by the Tribunal, once

the Tribunal has received more information from Canada on the contribution agreements and the criteria, guidelines, and process as explained above).

However, where a request is deemed urgent in accordance with the objective criteria to be developed by Canada, the AFN, the Caring Society, the COO, the NAN, and the Commission, ISC will first take into account whether or not referring the requestor will enable faster access to the requested product, service or support.

For greater clarity, where Canada enters into a contribution agreement with any First Nation or First Nation community organization to administer Jordan's Principle, whether through a group request or otherwise, that First Nation or First Nation community organization is not bound by the Tribunal-ordered timelines or procedural terms of any of the Tribunal's Jordan's Principle orders that are directed at Canada.

[566] The Tribunal does not agree to change timelines for urgent services at this time. The Tribunal believes that adjusting Jordan's Principle operations, with the Tribunal's clarifications above, would reduce and reclassify some of the allegedly urgent cases that are not truly urgent and allow Canada to manage the truly urgent cases in the Tribunal-ordered timelines. Canada shall monitor cases after implementing the Tribunal's clarifications of urgent requests and report back to the Tribunal by January 9, 2025.

[567] Without ordering a change in timelines at this time, the Tribunal agrees to receive options from the parties that would arise from their discussions in the format that they so choose (mediation, negotiations, conflict resolution, etc.) and in light of the Tribunal's clarifications. The Tribunal pursuant to section 53 (2) (a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to consult with the parties to seek to co-develop potential options supported by rationale and available evidence to present to this Tribunal in regards to timelines for non-urgent Jordan's Principle requests and report back to the Tribunal by January 9, 2025.

[568] However, the Tribunal rejects the proposed terms "Without unreasonable delay". This concept is vague and does not align with the best interest of the child or any reasonable practice standard. As even immediately and urgent were not understood the same way by

everyone, the term “without unreasonable delay” would likely cause other misunderstandings.

[569] The Tribunal’s orders in 2017 CHRT 14 and 2017 CHRT 35 were meant to start the determination clock at the reception of a request except when clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor’s clinical needs information was required. Given the current backlog and the Tribunal’s clarifications on the term urgent and the Tribunal’s other consultation orders, the Tribunal pursuant to section 53 (2) (a) of the *CHRA*, the dialogic approach, the Tribunal’s previous Jordan’s Principle orders and its retained jurisdiction, orders Canada to consult with the parties and seek to co-develop guidelines on this aspect and return to the Tribunal with their options by January 9, 2025.

[570] The Tribunal pursuant to section 53 (2) (a) of the *CHRA*, the dialogic approach, the Tribunal’s previous Jordan’s Principle orders, and its retained jurisdiction, orders Canada to consult with the parties to seek to co-develop interim practical and operational solutions supported by rationale and available evidence to redress the hardship imposed on individuals and families (requestors) by reimbursement and payment delays and report back to the Tribunal by January 9, 2025.

[571] The Tribunal pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal’s previous Jordan’s Principle orders, and its retained jurisdiction, clarifies that consistent with its orders in 2017 CHRT 14 and 2017 CHRT 35, Canada cannot delay paying for approved services in a manner that creates hardship by imposing a burden on families that risks a disruption, delay or inability to meet the child’s needs.

[572] The Tribunal finds the current standard deadlines for service providers to be reasonable if there are no delays. As a matter of good practice, guidelines should be in place to avoid unnecessary delays in reimbursements. Canada will report back to the Tribunal to inform the Tribunal if they have such guidelines and if so, provide a copy of the guidelines

by December 10, 2024. The Tribunal will revisit this once it has received Canada's information and/or guidelines.

[573] The Tribunal pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders and its retained jurisdiction orders Canada to report back to the Tribunal with a detailed report on its progress in coordinating its federal programs, especially since 2022 CHRT 8. The detailed report shall include a plan, specific targets, deadlines for implementation, and the dates when the implementation targets have been met. The information provided shall be sufficient to assist this Tribunal and allow the Tribunal to understand Canada's progress so far. Canada will file its report with the Tribunal and copy all the parties by January 9, 2025.

[574] As a general matter and for clarification purposes, the Tribunal's orders impacts have primacy over any conflicting interpretation of the Financial Administration Act and related instruments such as "terms and conditions," agreements, policies and conduct that hinder the implementation of the Tribunal's orders. The Tribunal pursuant to section 53 (2) of the *CHRA*, the dialogic approach, the Tribunal's previous orders, and its retained jurisdiction, clarifies that Canada shall not rely on the *Financial Administration Act*, and related instruments such as "terms and conditions," agreements, policies and conduct that hinder the implementation of the Tribunal's orders to justify departures from this Tribunal's orders.

[575] The Tribunal pursuant to section 53 (2) (a) of the *CHRA*, the dialogic approach, the Tribunal's previous Jordan's Principle orders, and its retained jurisdiction, orders Canada to consult with the parties in the manner of their choice (mediation, conflict resolution, negotiations, etc.) with the goal of arriving at consent order requests if possible and, if not, with options for orders supported by rationale and available evidence to establish an interim independent, non-complex but effective, credible, national Jordan's Principle complaints mechanism and to report back to the Tribunal by February 24, 2025.

Dialogic approach and reconciliation

[576] The Tribunal emphasizes the importance and its commitment to the dialogic approach to resolving matters. The Tribunal strongly feels that the parties are better

positioned to resolve the operational issues amongst themselves or with the assistance of mediators than by way of litigation. However, the Tribunal as demonstrated in the past, remains committed to being flexible and to clarify orders when the parties need it. This may avoid costly, divisive litigation and lengthy delays that are not in the best interest of First Nations children and in respecting the parties' rights, obligations, and expertise. In the spirit of reconciliation, the Tribunal remains committed and hopeful in the parties' true commitment to the dialogic approach to solving issues that arise.

Updates since the summary ruling was released:

[577] On December 4, 2024, the AGC wrote that ISC has determined that there are approximately 25,000 self-identified urgent cases in the backlog. ISC is reviewing these on a priority basis, taking into account the Tribunal's recent clarifications regarding urgency, the aspects of the Back-to-Basics policy that should be eliminated, and referrals. In support of this review, each region has developed internal triaging processes to identify and address cases where a failure to act immediately could result in irremediable harm to the child.

[578] Canada submitted that it remains committed to fully implementing Jordan's Principle. The Panel's clarifications in the Summary Ruling are operationally beneficial in this regard. However, ISC's Jordan's Principle team has advised that meeting the Panel's expedited backlog-related timelines is not feasible, accounting for the significant size and complexity of the existing backlog. The backlog currently stands at approximately 131,000 requests, reflecting a continually rapid increase in demand for products, services, and supports through the Jordan's Principle initiative.

[579] In accordance with the Summary Ruling, ISC will report to the Panel on December 10, 2024, providing an update on its progress respecting self-identified urgent requests and further details on its plan to address the backlog of Jordan's Principle requests, including which backlog-related orders can be implemented and feasible timelines for doing so.

[580] Given that backlog issues are already part of the co-development orders, Canada would be pleased to discuss reasonable adjustments to the Panel's backlog-related timelines as part of any Tribunal-assisted mediation.

[581] The Tribunal requested the parties' submissions by December 13, 2024, on the AGC's proposal to adjust the timelines to deal with the backlogs and to discuss this at a mediation.

[582] On December 9, 2024, the AFN wrote to the Tribunal to request the suspension of all deadlines until March 31, 2025. The AFN wrote as follows: As the Panel may be aware, the AFN had been extensively engaged with respect to the negotiation of a Final Settlement Agreement ("FSA") on the long-term reform of the First Nations Child and Family Services Program. The FSA was presented to the First Nations-in-Assembly at a Special Chiefs Assembly called for the purposes of its consideration. The FSA was ultimately rejected.

[583] The Chiefs took issue with the negotiation process and its settlement privileged nature, as well as a desire to seek a revised mandate from Canada to address issues including, but not limited to, funding for off-reserve children not covered by the FNCFS Program, the indefinite continuation of the actuals process, allocation of prevention funding to FNCFS agencies, as well as the indeterminate oversight of the CHRT over the implementation of any Final Agreement. The AFN attached resolution 60-2024 Addressing Long-Term Reform of the First Nations Child and Family Services Program and Jordan's Principle and resolution 61-2024 Meaningful Consultation on Long-Term Reform of First Nations Child and Family Services hereto for your information, which we would note were strongly supported by the Caring Society further to their presentations at the October Special Chiefs Assembly in Calgary, and as recently as this past week during the AFN's December Special Chiefs Assembly in Ottawa. At the December 2024 Special Chiefs Assembly, the Chiefs adopted Resolution 38, affirming their desire to move forward further to the mandates of resolutions 60 and 61-2024. Resolution 38, and an accompanying Resolution 41, speaking to the implementation of Resolutions 60 and 61-2024, will not be officially available until formally ratified and signed by the National Chief, however we have included draft copies of same for the Panel's consideration, along with emergency resolution 02-2024 which also has bearing on the AFN's mandate on these proceedings moving forward. The said resolutions also call for the establishment of a Children's Chiefs Commission who would have oversight of the negotiations of all long-term reform agreements, extending both to long-term reform of the FNCFS Program and Jordan's Principle. The Resolutions also call for a new legal team to support said Commission's efforts. We understand that the Caring Society has been instrumental in crafting associated terms of reference relating to such efforts and should certainly be aware of the complexities with advancing same. Canada and the other parties have also been apprised of these revised AFN mandates and the state of negotiations generally at this time are in need of clarity, given the AFN has not received confirmation from Canada that they have a new negotiation mandate, along with the lack of clear source of funding to implement some aspects of these new resolutions. As the AFN's December Special Chiefs Assembly has just concluded this past week, the AFN must now take stock of the new mandates adopted therein and the interplay with resolutions 60/2024

and 61-2024. As said resolutions call for the creation of an entirely new entity, with a new negotiation and new legal team, the AFN is currently not in a position to move forward on this matter as set out in the Panel's letter decision. The AFN must consider how the resolutions can ultimately be given effect. The resolutions are complex and will require significant consideration by the AFN with respect to their implementation, which includes issues relating to resourcing and staffing, which are further complicated by the AFN's focus on this past week's Special Chiefs Assembly and upcoming two week shut down for the holidays. The AFN is therefore requesting that the Tribunal extend all timelines provided for in its summary ruling on the Jordan's Principle non-compliance motion and cross-motion to commence on March 31, 2025 to give the AFN sufficient time to take the necessary action(s) to fully consider and work towards implementation of the aforementioned resolutions, further to the will of the Chiefs. We would stress that this request is not being undertaken lightly, however, in light of the scope of the resolutions and their potential impacts on AFN governance, resourcing and staffing, including the potential for the appointment of new legal counsel, it is essential that the AFN be provided with sufficient time to clarify its role and mandate in these proceedings moving forward.

[584] On December 9, 2024, the Caring Society responded to the AGC's December 4, 2024 letter objecting to the extensions.

[585] On December 10, the AGC filed Canada's report as ordered by this Tribunal and detailed Canada's specific concerns with the ordered deadlines.

[586] On December 17, 2024, the Tribunal held a case management conference call to discuss Canada and the AFN's challenges with the Panel's November 21, 2024, ordered timelines. The Panel indicated that the summary ruling provided for this option and that the Panel welcomed it.

[587] The AFN indicated that regardless of their challenges they could start consultations as early as January 6, 2025.

[588] On December 17, 2024, Canada submitted the backlog would not be resolved within a month given that it is simply too large and that a specific date for completion is not possible at this time, however, the Tribunal's clarified orders are very helpful and the work continues to quickly identify requests that have the possibility of irremediable harm.

[589] The AGC proposed a one-month extension to allow Canada to apply the Tribunal's clarified orders and suggested revisiting the issue in a month to assess the effectiveness of

the orders in reducing urgent requests. The AGC suggested that they could provide a written report, or a subsequent case management, or both in a month.

[590] On December 18, 2024, the Tribunal directed Canada to provide an updated written report to this Tribunal by January 17, 2025. The Tribunal will revisit its deadlines to eliminate the backlog following the review of the updated report.

VI. Conclusion and Retention of Jurisdiction

[591] The Tribunal remains seized of the issue until long-term reform of Jordan's Principle is achieved or until the Tribunal's approval of the parties' agreement supported by adequate rationale and available evidence to clearly demonstrate how the agreement will effectively eliminate the systemic discrimination found and prevent it from recurring. Sustainability is crucial to eliminate the systemic discrimination and prevent its recurrence. This also means sufficient and sustainable resources including funding allocated to First Nations who choose to take on a greater role in Jordan's Principle and for Canada's responsible department (at this time, ISC), which will remain involved as admitted by Canada in its evidence. The requirement for sufficient and sustainable resources including funding is in line with all of the Tribunal's previous rulings and has been repeated numerous times by this Tribunal in this case.

[592] Aside from the clarifications above, nothing in this ruling affects the Tribunal's previous rulings and orders. Furthermore, the Tribunal retains jurisdiction on all its previous rulings and orders except the compensation orders. The Tribunal will revisit this retention of jurisdiction once long-term reform has been addressed with long-term Tribunal orders or the parties' agreement that clearly demonstrates the systemic racial discrimination will be eliminated in implementing the agreed measures and the same or similar systemic racial discriminatory practices will not reoccur. This necessarily includes sufficient and sustainable resources for all First Nations in the long-term. The Tribunal's cease and desist the discriminatory practice order in the *Merit decision* is an injunction-like permanent order against Canada. The purpose of this order is to eliminate the mass removal of children from their respective Nations and to protect First Nations children, families, and Nations for

generations to come. Finally, the Tribunal encourages the parties to negotiate as part of both long-term reform processes, creative, innovative, needs-based culturally appropriate solutions that reflect the different contexts and needs of the many diverse First Nations.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
January 29, 2025

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: January 29, 2025

Date and Place of Hearing: April 2-3, 2024 and September 10-12, 2024

Ottawa, Ontario

Appearances:

David Taylor, Sarah Clarke and Kiana Saint-Macary, for counsel for First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke, Adam Williamson and Lacey Kassis, for counsel for Assembly of First Nations the Complainant

Brian Smith, for the Canadian Human Rights Commission

Dayna Anderson, Kevin Staska and Samantha Gergely, counsel for the Respondent

Darian Baskatawang, counsel for the Chiefs of Ontario, Interested Party

Meaghan Daniel, counsel for the Nishnawbe Aski Nation, Interested Party

Crystal Reeves and Dawn Johnson, counsel for First Nations Leadership Council, Interested Party