



The Assembly of First Nations May 21, 2024 Factum Information Sheet

On May 21, 2024, the Assembly of First Nations (the AFN) filed its revised factum with the Canadian Human Rights Tribunal (the Tribunal) as part of the proceedings relating to the Caring Society's non-compliance motion on Jordan's Principle. In its factum, the AFN opposes most of the Caring Society's requested orders.¹ The AFN acknowledges issues related to Indigenous Services Canada's (ISC) compliance with the Tribunal's mandated timelines for urgent requests, families having difficulties contacting ISC officials, backlogs in intakes and determinations, and delayed payments to service providers.² However, the AFN also says that "many of the issues identified are associated with Canada's adoption of the interim Back-to-Basics policy"³ and that "[m]any of the implementation concerns identified within this motion are properly the subject of ongoing negotiations relating to reforming the long-term implementation of Jordan's Principle."⁴

This information sheet provides a non-exhaustive summary of the AFN's arguments. You can read the [AFN's May 21, 2024 factum here](#) for a full sense of the issues it raises and its legal arguments.

This information sheet contains general information and is ***not legal advice***. Consult with your legal counsel to seek advice and guidance about your own needs and circumstances.

Orders sought by the AFN

In its May 21, 2024 submissions, the AFN requests that the Tribunal:

- Order interim relief in relation to the reimbursement of service providers and individual requestors, subject to such detail as provided in future submissions;
- Order interim relief clarifying the Tribunal's Orders on

the determination of urgent requests;

- Ensure that any relief ordered by the Tribunal in these proceedings be interim in nature, subject to a final settlement agreement or an expiry date of March 31, 2025; and
- Dismiss all final relief sought by the Caring Society.⁵

The AFN's arguments

The AFN makes arguments related to: i) the Tribunal's retained jurisdiction on Jordan's Principle; ii) its view there should be negotiations between the parties instead of orders; iii) its interpretation of Jordan's Principle under Back-to-Basics and Canada's adherence to the Tribunal's directed timelines; iv) immediate implementation concerns with Jordan's Principle; and v) the nation-to-nation relationship.

(i) The Tribunal's retained jurisdiction on Jordan's Principle

The AFN asserts that the Tribunal's role in retaining jurisdiction is to monitor Canada's progress in remedying the discrimination, and to avoid the need for duplicative proceedings to address implementation issues surrounding the Tribunal's orders.⁶ The AFN says that the Tribunal "must remain diligent in the exercise of" its retained jurisdiction and new remedies while negotiations between the First Nations parties (which the AFN defines as including **only** the AFN, Chiefs of Ontario (COO), and Nishnawbe Aski Nation (NAN)) on the long-term reform of Jordan's Principle continue.⁷

The Caring Society submits that its choice to file this non-compliance motion, after waiting 23 months while Canada made little progress in implementing the Agreement-in-Principle

¹ AFN May 21, 2024 factum at para 105.

² AFN May 21, 2024 factum at para 3.

³ AFN May 21, 2024 factum at para 6.

⁴ AFN May 21, 2024 factum at para 6.

⁵ AFN May 21, 2024 factum at para 105.

⁶ AFN May 21, 2024 factum at para 40.

⁷ AFN May 21, 2024 factum at para 43.

Workplan,⁸ is consistent with the dialogic approach, by “seeking direction from the Tribunal to address ongoing compliance issues that perpetuate past discriminatory conduct, rather than allowing those concerns to persist until long-term reforms are negotiated, which may or may not resolved underlying concerns.”⁹

Endorsed at the Federal Court, the Tribunal’s dialogic approach is one in which it retains its jurisdiction over its rulings to ensure that Canada remains responsible for fulfilling its human rights obligations.¹⁰ This approach affords the Parties space to provide input and discuss solutions to the issues raised while also seeking further direction from the Tribunal if necessary to ensure Canada’s compliance with the orders.¹¹

(ii) The need for ongoing negotiations

The AFN asserts that Jordan’s Principle reform will be best achieved through the continued negotiations between Canada and the First Nations parties “who have and continue to represent rights-holders in the context of the Tribunal Proceedings.”¹² The AFN’s arguments do not include the Caring Society as being involved in these negotiations.

The AFN also submits that the Tribunal has signaled its preference for resolving issues through negotiations as opposed to adjudication as a means of advancing reconciliation.¹³

(iii) Contextualizing Jordan’s Principle under Back-to-Basics and Canada’s adherence to the Tribunal’s directed timelines

The AFN describes Back-to-Basics as an interim policy adopted by Canada and the Caring Society that is “not necessarily in alignment with the Tribunal’s orders, nor what an eventual agreement on the long-term implementation of Jordan’s Principle will encompass.”¹⁴ This is a departure from the AFN’s previous evidence and ISC’s evidence on the motion which described the AFN’s involvement in negotiating Back-to-Basics.

As well, on cross examination, ISC’s affiant described how decision-making under Jordan’s Principle remained the same when asked if more services are being provided under Back-to-Basics than what the Tribunal initially ordered.¹⁵

The AFN acknowledges that the Tribunal has ordered Canada to determine requests within certain timeframes, but also asserts that there were relatively few Jordan’s Principle requests being advanced by First Nations families when the timeframes were established in 2017 CHRT 35.¹⁶ The AFN also submits that the Tribunal has provided general guidance on how urgent matters could be determined¹⁷ and guidance respecting urgent situations, including requests where the risk of irremediable harm is reasonably foreseeable, life-threatening cases, and requests related to “end-of-life or palliative care.”¹⁸

The AFN suggests that two key elements of Back-to-Basics are leading to implementation issues for Canada: i) the presumption of substantive equality, meaning that First Nations children need services going above those available to non-First Nations children,¹⁹ and ii) the self-identification of urgency by families placing requests.²⁰

The AFN’s submissions argue in Canada’s favour by saying that these two principles have created a situation in which “Canada’s non-compliance with aspects of the Tribunal’s orders are arguably based on it assuming too much, including an increased commitment to Jordan’s Principle and the expanded breadth of services and supports.”²¹

(iv) Immediate implementation concerns with Jordan’s Principle

Urgent requests: The AFN **does not agree with the Caring Society that families are well-placed to tell the government when they are in urgent situations.** The AFN says instead that “the self-identification of urgent Jordan’s Principle requests has not been effective” and is “ultimately resulting in a significant percentage of misclassified requests.”²² The AFN says that: “It is patently obvious that Back-to-Basics and the requirement on ISC

⁸ Caring Society’s June 7, 2024 factum at para 12.

⁹ Caring Society’s June 7, 2024 factum at para 52.

¹⁰ Caring Society’s June 7, 2024 factum at para 55.

¹¹ Caring Society’s June 7, 2024 factum at para 52.

¹² AFN May 21, 2024 factum at para 45.

¹³ AFN May 21, 2024 factum at para 49.

¹⁴ AFN May 21, 2024 factum at para 51.

¹⁵ Caring Society’s June 7, 2024 factum at Appendix A, pg. 41.

¹⁶ AFN May 21, 2024 factum at para 54.

¹⁷ AFN May 21, 2024 factum at para 55.

¹⁸ AFN May 21, 2024 factum at para 58.

¹⁹ AFN May 21, 2024 factum at para 61(a).

²⁰ AFN May 21, 2024 factum at para 61(b).

²¹ AFN May 21, 2024 factum at para 62.

²² AFN May 21, 2024 factum at para 68, citing to V. Gideon Affidavit at para. 23.

to accept the self-identification of urgent matters has ultimately had the effect of undermining ISC's ability to effectively address matters of a truly urgent nature."²³

The AFN also asserts that it "fundamentally disagrees" with the Caring Society's uncontested evidence on social prescription²⁴ as it pertains to the urgency of certain requested products, services, and supports. The AFN again takes the government's point of view, saying instead that such items must not interfere with Canada's ability to prioritize "truly urgent requests, consistent with the spirit and intent of the Tribunal's orders in relation to urgent matters."²⁵

To be clear, the AFN "**categorically disagrees with the Caring Society's specific attempts to expand the criteria of urgent circumstances beyond that ordered by the Tribunal**" through the non-compliance motion.²⁶ With respect to the Caring Society's relief sought to include in the definition of "urgent requests" requests for children who have recently experienced the death of a family member or caregiver,²⁷ the AFN says that the Caring Society's evidence has been taken out of context and is insufficient to support "a general blanket statement that support should be urgently provided to children, First Nations or otherwise, who lose their parents."²⁸ The AFN suggests that approving requests for the attendance of two children at a Potlatch ceremony following the deaths of their parent and sibling, though culturally important, was an "expansive interpretation of the Tribunal's existing orders, which are focused on addressing gaps in services."²⁹ The AFN submits the request went "beyond simply exceeding the normative standard based on substantive equality."³⁰

Backlogs and unanswered requests: Regarding the issue of children and families having to wait for much needed products, services, and supports, the AFN makes clear that while action must be taken by ISC to address the backlogs, it does not agree with the Caring Society's requested relief, including the request that families be able to self-identify their request as urgent while awaiting determination, which the AFN says would be "jump[ing] the queue."³¹ The AFN does not provide alternate solutions to

ensure that children and families are not faced with significant delays in obtaining needed products, services, or supports.

The AFN further takes issue with the Caring Society's request to expand the use and range of acquisition cards to help reduce financial barriers for families, as, in its view, this opens the doors to families being able to "make purchases or approvals up to \$500 with no questions asked."³² ISC uses acquisition cards to make direct payments to vendors, for online purchases, and for other urgent requests in which a family cannot pay up front and await reimbursement. The Caring Society has most typically seen acquisition cards used to purchase emergency gift-cards to grocery stores to ensure families have access to basic necessities while navigating urgent situations, like fleeing wildfires.

Request determination timelines: The AFN asserts that it is "cognizant of the difficulties that have been raised by Canada with respect to meeting the Tribunal's mandated timelines" given "the exponential increase in the number of both urgent and non-urgent requests" but indicates that in its view, "urgent continues to mean urgent" and that it will provide further information in its submissions on Canada's cross-motion.³³

Reimbursement timelines: The AFN asserts that it is "generally supportive of an interim order in relation to the reimbursement of service providers and individuals" but that it will provide further information about such an approach for its submissions on Canada's cross-motion.³⁴

Financial Administration Act: The AFN asserts that the Caring Society's requested order about the *Financial Administration Act* ("FAA") effectively recommends that "individuals be given a blank cheque" without any accountability when spending public funds.³⁵ The AFN submits that Canada's reliance on the FAA may be a "nuisance" but does not amount to discriminatory conduct.³⁶

Complaints Mechanism/Accountability Measures: Regarding the Caring Society's proposed order seeking the establishment of a complaints mechanism, the AFN submits that this has not been subject to negotiations with the AFN and would therefore

²³ AFN May 21, 2024 factum at para 65.

²⁴ AFN May 21, 2024 factum at para 68. See also Caring Society's March 27, 2024 reply affidavits.

²⁵ AFN May 21, 2024 factum at para 69 (underlining in original).

²⁶ AFN May 21, 2024 factum at para 74 (emphasis added).

²⁷ Caring Society [Notice of Motion](#) at para 1.

²⁸ AFN May 21, 2024 factum at para 78.

²⁹ AFN May 21, 2024 factum at para 77.

³⁰ AFN May 21, 2024 factum at para 77.

³¹ AFN May 21, 2024 factum at para 85.

³² AFN May 21, 2024 factum at para 87.

³³ AFN May 21, 2024 factum at para 88.

³⁴ AFN May 21, 2024 factum at para 91.

³⁵ AFN May 21, 2024 factum at para 92.

³⁶ AFN May 21, 2024 factum at para 94.

undermine efforts to negotiate a long-term approach in relation to disputes.³⁷

(v) Relief must include consideration for the nation-to-nation relationship

The AFN does not agree that the Caring Society's proposed orders are interim measures to address immediate concerns but "modifications to the Tribunal's orders" on Jordan's Principle.³⁸ The AFN says that any orders issued by the Tribunal ought to be interim in nature pending the completion of a final settlement agreement on the long-term reform of Jordan's Principle, on March 31, 2025.³⁹

Conclusion

The AFN does not agree with the Caring Society's decision to file this Jordan's Principle non-compliance motion against Canada. The AFN says that the Caring Society has chosen "to circumvent existing processes in favours of pathways that it views as more favourable to its ends."⁴⁰

Background

On December 12, 2023, the Caring Society filed a non-compliance motion with the Tribunal regarding Canada's chronic failure to adhere to the Tribunal's orders on Jordan's Principle.

To get a complete picture of the Caring Society's, the AFN's, Canada's, and the other parties' legal arguments, please review the key dates and submissions:

- December 12, 2023: [Caring Society's non-compliance motion](#)
- January 12, 2024: [Caring Society's affidavits](#)
- March 15, 2024: [Canada's cross-motion and affidavits](#)
- March 27, 2024: [Caring Society's reply affidavits](#)
- April 2-3, 2024: Cross-examination of two senior ISC officials
- April 12, 2024: [Canada's response to requests for information](#)

- April 19, 2024: [Caring Society's factum](#)
- May 10, 2024: [Commission's factum](#); NAN and [COO reply](#)
- May 17, 2024: [AFN's factum](#) (revised factum submitted May 21, 2024)
- May 24, 2024: [Canada's factum](#)
- June 7, 2024: [Caring Society's reply factum](#)
- June 28, 2024: Caring Society/AFN/Commission/COO/NAN response to Canada's cross-motion factum (paused pending FNLC interested party motion)
- July 19, 2024: Canada reply factum (paused pending FNLC interested party motion)

The Tribunal has indicated that a hearing will take place no later than August 2024, but the schedule has been put on hold pending the Tribunal's ruling on the FNLC's motion.

For the latest information, visit fnwitness.ca.

³⁷ AFN May 21, 2024 factum at para 95.

³⁸ AFN May 21, 2024 factum at para 97.

³⁹ AFN May 21, 2024 factum at para 101.

⁴⁰ AFN May 21, 2024 factum at para 103.