Mandell Pinder LLP

422 – 1080 Mainland Street
Reception Suite 300
Vancouver, BC V6B 2T4

Phone: 604.681.4146
Fax: 604.681.0959
www.mandellpinder.com

MEMORANDUM

DATE: September 19, 2024

TO: First Nations Leadership Council

FROM: Dawn Johnson and Crystal Reeves

RE: CHRT Non-Compliance Hearing on Jordan's Principle: Summary of Hearing and Suggested Next Steps

A. Purpose

The purpose of this memorandum is to provide the FNLC with a summary of the hearing before the Canadian Human Rights Tribunal ("**Tribunal**") , the arguments advanced and recommended next steps in relation to the FNLC's work around Jordan's Principle in BC.

B. Brief Summary of the hearing and arguments advanced at the hearing

On September 10, 11 and 12, 2024, the Tribunal) heard arguments related to the non-compliance motion on Jordan's Principle filed by the First Nations Child and Family Caring Society ("**Caring Society**"), and the cross-motion on the same issues filed by Canada. Parties to the hearing of the motions included the Caring Society, the Assembly of First Nations ("**AFN**"), the Chiefs of Ontario ("**COO**"), the Nishnawbe Aski Nation ("**NAN**"), the Canadian Human Rights Commission ("**CHRC**") and the FNLC.

The issues that became the focus of the oral hearing of the motions were: (1) defining "urgent" requests; (2) timelines related to the determination of Jordan's Principle requests and reimbursement for approved requests; and (3) the establishment of a complaints mechanism. For a more in-depth summary of the issues and arguments, please see **Appendix A** of the memo.

Canada and the AFN placed strong emphasis on the negotiation of long-term reform of Jordan's Principle and indicated that Canada has a mandate to negotiate a Final Settlement Agreement ("**FSA**") which runs until March 31, 2025. NAN and COO gave very brief submissions on the need for negotiations regarding long term reform and supported negotiations on the three issues that were the focus of oral submissions.

In our submissions on behalf of the FNLC, we supported the Caring Society's position on urgent requests, timely reimbursement of expenses to families and vendors, as well as the need for a complaints mechanism for families in process of requests to start being developed now, but unlike the caring society through a negotiated process rather than tribunal dictated process. We also

emphasized the importance of Rights and Title holders being involved in discussions that impact them, and the role and importance of inherent rights and UNDRIP.

Submissions were also made by the Parties regarding the possibility of Tribunal ordered negotiations on the issues raised in these specific motions, especially on the co-development of a definition of urgency. The Caring Society indicated that if the Tribunal were to order negotiations, they would support the involvement of the FNLC and the CHRC. No other party presented a view on the FNLC being involved.

C. Recommended Next Steps

(1) Present FNLC's position on the specific issues if the Tribunal orders negotiations

If the Tribunal does order negotiations, it will be restricted to the issues raised in the motions: the definition of urgency, timelines, and the establishment of a complaint mechanism. It is unknown whether the Tribunal will order the FNLC to be included in the negotiations, however, it is unlikely the Tribunal will do so unless all the Parties to the complaint agree. In the event the FNLC is not included, we suggest sharing the FNLC's position through the Caring Society.

(2) Put forward a resolution at the AFN seeking a different process for negotiation of the FSA on Jordan's Principle

Canada and the AFN have indicated they intend to negotiate an FSA, with the intention of meeting the deadline of **March 31, 2025**.

Given the process that has been used by Canada, the AFN, NAN and COO on the development of the draft FSA on long-term reform of the First Nations Child and Family Services program, it is our recommendation that the FNLC get involved now to push reform of the negotiation process for the FSA on Jordan's Principle. For example, you may want to bring forward resolutions at upcoming Chiefs Assemblies and at the AFN that drafts of the FSA be shared with the AFN Executive Committee regional representatives (and their technical and legal representatives) while it is being negotiated for review and feedback, using non-disclosure agreements to protect the negotiations and the drafts. This would be similar to the consultation processes that have been used with respect to the co-development of legislation between government and First Nations in British Columbia and Canada in certain circumstances. Such an approach would allow for review of FSA by First Nations representatives and leadership while it is being negotiated, so that issues within the draft FSA could be identified early and changes proposed.

We would also recommend that the resolution outline a process by which a finalized draft is shared with all First Nations (early disclosure to leadership and their technical and legal advisors) and how proposed changes will be addressed and incorporated by the parties.

(3) Begin engagement with First Nations and First Nations organizations administering Jordan's Principle in BC

We would also recommend that FNLC host some forums to receive information from First Nations in BC regarding the strengths and challenges with the implementation of Jordan's Principle as soon

as possible, so that FNLC has up to date information that can then be brought forward to formulate responses for negotiations and will assist in guiding engagement discussions when the FSA on Jordan's Principle is released and formulating concerns to be tabled with the Parties.

We also suggest that the FNLC engage with the First Nations and First Nations organizations who are administering aspects of Jordan's Principle through contribution agreements with Canada, as they will have direct knowledge and experience around the implementation of Jordan's Principle in BC that will be able to inform discussions around any reformed funding approach.

By engaging and gathering information prior to any release of a draft FSA on Jordan's Principle, the FNLC will be better positioned identify issues and recommend changes. This information could also be used if, for some reasons, FNLC were to seek interested party status before the Tribunal when an FSA on Jordan's Principle is put before it for approval.

(4) Ensure FNLC technical representation at BC-Region Jordan's Principle tables

There is ongoing work on the implementation of Jordan's Principle occurring at BC regional tables. Participation at these tables will ensure that the FNLC is best positioned to provide timely and meaningful updates to First Nations in BC about Jordan's Principle implementation, as well as to ensure that the FNLC has the most recent information from Canada and other stakeholders. It also provides a forum for the FNLC to table concerns and issues that continue to arise and ensure these concerns are on the record.

APPENDIX A: SUMMARY OF HEARING

In advance of the hearing, on September 9, 2024, the Parties to complaint: AFN, COO, NAN, Canada and the Caring Society, participated in a one-day, Tribunal assisted mediation. The FNLC and the CHRC were not included in the mediation, and due to confidentiality, are not aware of the discussions that took place during the mediation. We are aware that the Parties were unable to come to agreement on any of the orders sought in the Motions.

The hearing started on September 10, 2024, and took place over three days, ending September 12, 2024, with the Tribunal reserving its decision to a later date. At the closing of the hearing, comments from the Tribunal suggested they preferred the Parties to attempt to negotiate an agreement on the issues. There was an indication that the Tribunal may order negotiation between the Parties on the issues, with some clarifications provided by the Tribunal on existing orders, including the definition and parameters around urgency, to guide such negotiations. It was the agreement of all parties that having some direction on the meaning of urgency would assist all parties as well as others who are applying for Jordan's Principle requests.

A. Urgent Requests

The significant increase in the number of urgent requests, particularly since the implementation of the Back-to-Basics policy approach, was central to the submissions of all parties. Canada and the AFN argued that the self-identification aspect of Back-to-Basics was one factor that played a large role in the increase. The Caring Society emphasized that the increase in Jordan's Principle requests represent ongoing disparity for First Nations children and that there has not been consideration as to how the increase in urgent requests is directly related to increasing gaps in services and that there was no evidence that it was Back to Basics or self-identification, in and of itself, that was leading to the increase in requests.

The AFN asked the Tribunal to limit the definition of urgent requests to those situations where there is a risk of immediate or irremediable harm to a child, where the child is palliative, and in cases of suicidal ideation. Their concern was that these type so urgent requests were being unmet because of other types of requests being identified as urgent when they were not. The AFN also argued that Canada and the Caring Society, in their submissions, appeared to take the position that Back to Basics was in alignment with the Tribunal's orders rather than an approach agreed to by Canada and the Caring Society.

The Caring Society made submissions suggesting a triaged approach to responding to requests and determining the level of urgency to address some of the issues around urgency. This approach would look at request by level of priority, which would determine the response time: (1) immediately in situations where it is reasonably foreseeable that there could be immediate or immediate harm to a child; (2) within 12 hours in urgent cases that involve harm to the child but an emergency response is not required; and (3) all other cases urgent cases. The Caring Society also asked the Tribunal to extend the definition of urgent requests to include times of bereavement for a child and where a local state of emergency has been declared. The FNLC supported the Caring Society on this issue and highlighted specific issues facing First Nations children in BC. However, Canada and the AFN argued that triage would not work and would not address the issues.

The CHRC suggested that it may be helpful for the Tribunal to order negotiations between the Parties on this issue and provided examples of where the Tribunal has done that in this case. The CHRC also suggested that if the Tribunal were to order the Parties negotiate a shared definition of urgency, it may be helpful to provide clarification on its previous orders and provide parameters around urgency to assist the Parties in negotiations.

All Parties indicated that it would be helpful for the Tribunal to provide clarification on its previous orders related to the definition of urgency.

The Tribunal made several comments emphasizing the preference for the Parties to come to a negotiated agreement on the issues. The Tribunal also asked various questions around the types of parameters that may be helpful if it were to order the Parties to negotiate on this issue.

B. Timelines

(1) Processing Requests

Canada argued that there has been a significant increase in the number of Jordan's Principle requests being received since the Tribunal made its orders in 2017, and that the increased demand has made it impossible for it to comply with the Tribunal ordered timelines. Canada sought orders extending the timeframe for it to respond to Jordan's Principle requests based on this increase. The AFN agreed with Canada that the increase in urgent requests has made it impossible for Canada to comply with the Tribunal ordered timeframes, however, it opposed any orders which would extend the timelines for responding to urgent requests. Instead, AFN suggested that a limited definition to urgency would allow Canada to become compliant with the current timeframes. AFN indicated it would be open to negotiating extended timelines for non-urgent requests. NAN and COO opposed any orders extending the timelines for processing requests. FNLC also opposed the extending of timelines for processing requests.

The Caring Society emphasized that the current backlogs and processing delays have had the effect creating more urgency as requests become more time sensitive. It made recommendations around how Canada could address the backlogs to become compliant with the Tribunal orders, including increased staffing and triaging of requests. Canada argued that the solutions proposed by the Caring Society would take resources away from First Nations, rather than resolve the issues of backlog.

On this issue the Tribunal chair questioned whether amending its orders related to timelines would be premature, and whether the issue may be addressed through a clarified definition of urgency.

(2) Reimbursement for Approved Requests

The Caring Society asked the Tribunal to make orders related to reimbursement for approved Jordan's Principle requests that families have paid for out of pocket, and where service providers have provided the service but are awaiting payment. The Caring Society emphasized that the vulnerability of First Nations children and families receiving products and services requires this issue

to be addressed if discrimination is to be eliminated. The FNLC and the CHRC generally supported the Caring Society on this issue.

Canada made submissions regarding steps they have taken to speed up reimbursements and shared about contribution agreements they have entered into with First Nations and First Nations organizations to assist in processing reimbursements and vendor payments on a faster timeline. Canada opposed the Tribunal making any orders related to timelines for reimbursement. FNLC highlighted to the need to ensure the timely reimbursement of requests and that Canada's obligations to do so should not be offloaded to First Nations or First Nations organizations.

C. Complaint Mechanism

AFN and Canada argued that the establishment of a complaint mechanism should be left to negotiations about long-term reform of Jordan's Principle and indicated that the existing appeals process through and the availability of judicial review before the Federal Court already address this issue. The Caring Society argued that there is not currently any complaints mechanism in place for those who are awaiting a decision on Jordan's Principle and provided evidence of several cases where the Caring Society has had to intervene to assist requestors in receiving a response from Canada on their existing request. The FNLC supported the submissions of the Caring Society on this issue.

The CHRC made submissions that it is within the jurisdiction of the Tribunal to order Canada to implement a complaint process and indicated that where it had done so in the past, it had ordered a process that was internal to the government department. In its closing submissions, Canada asked that if the Tribunal were to order it establish a complaints mechanism at this stage, it be internal to Indigenous Services Canada, and that the establishment of any external complaints mechanism be left to long-term reform negotiations.

D. Long-Term Reform of Jordan's Principle

Canada and the AFN made extensive submissions around the ongoing negotiations related to long-term reform of Jordan's Principle, noting that Canada's mandate to negotiate an FSA on Jordan's Principle is only until March 31, 2025. Both Canada and the AFN indicated that the issues raised in the Motions would be more appropriately dealt with at the negotiating table, rather than through additional orders from the Tribunal. In this, they emphasized the importance of Canada's nation-to-nation relationship with First Nations, and supporting First Nations in being able to administer Jordan's Principle, including through new and existing contribution agreements. It was suggested that any additional orders from the Tribunal could have unintended consequences on long-term reform negotiations, and on the willingness of First Nations to administer Jordan's Principle.

The Caring Society emphasized in its submissions that the issues raised in its non-compliance motion require action now and cannot be left to long-term reform negotiations while First Nations children are currently left waiting for access to needed products and services. The Caring Society stated its support for First Nations self-determination and the Nation-to-Nation relationship between First Nations and Canada but argued that First Nations must be adequately resourced to do this work. The FNLC supported this position from the Caring Society and made submissions

around the inherent rights of First Nations, and that First Nations must be involved in any discussions about reforms that may impact their rights.

AFN, COO, NAN, and Canada asked that any new orders made by the Tribunal be interim in nature to allow the Parties to negotiate creative solutions on long-term reform. The Caring Society, FNLC and CHRC agreed that any new orders should be interim in nature but did not support an end-date being imposed (as suggested by the AFN). The Caring Society and the FNLC took the position that the Tribunal should retain jurisdiction over any orders until long-term reform is completed and the issues related to discrimination have been addressed.