Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL and
NISHNAWBE ASKI NATION

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA WRITTEN SUBMISSIONS re DEFINITION OF "ALL FIRST NATIONS CHILDREN" UNDER JORDAN'S PRINCIPLE

February 4, 2019

David P. Taylor
Conway Baxter Wilson LLP/s.r.l.
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Tel: 613-288-0149
Email: dtaylor@conway.pro

Sarah Clarke ***Clarke Child & Family Law***
Barbara McIsaac, Q.C. ***Barbara McIsaac Law***

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A. Overview

1. The Caring Society is seeking a determination on Canada's definition of "all First Nations children" in the context the Tribunal's orders regarding Jordan's Principle and an order that Canada work with the Parties to generate a definition that meets the requirements of the order in 2017 CHRT 14 within 30 days. Indeed, the question before the Panel is whether the limitations that Canada has placed on the meaning of "all First Nations children," as referenced in paragraph 135(1)(B)(i) of 2017 CHRT 14 conforms to that order:

> **As of the date of this ruling,** Canada's definition and application of Jordan's Principle shall be based on the following key principles:
>
> i. Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living.[1]

2. It is the Caring Society's position that Canada has improperly "restricted or narrowed" the definition the Tribunal ordered, without seeking judicial review or clarification of the definition of a First Nations child from the Tribunal, contrary to paragraph 135(1)(C) of the same order:

> Canada shall not use or distribute a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(B).

3. In effect, Canada has developed and implemented a definition of First Nations child outside of the Tribunal process, thus denying the Parties to the complaint their right to procedural fairness. Moreover, Canada's failure to correct, in a timely manner, sworn testimony by one of its officials whose evidence was that the inclusion of *Indian Act* status was not considered in Canada's Jordan's Principle eligibility criteria, further compromised the Caring Society's due process rights. To be clear, Canada cannot seek a judicial review of the definition of "all First Nations children" now that the 30-day period set out in the *Federal Courts Act* has expired.

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[1] *First Nations Child and Family Caring Society et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs)*, 2017 CHRT 14, at para. 135(1)(B)(i) ("2017 CHRT 14"), Tab 13 of the Joint Record of Documents ("ROD").

4. As such, the only matter under review in this hearing is whether Canada's choice to implement a restricted and narrowed conception of Jordan's Principle is compliant with the Panel's orders or not. If the Panel finds that Canada's implementation of the definition ordered by the Tribunal in 2017 CHRT 14 is not compliant, then Canada should be ordered to work with the Parties to generate a definition that meets the requirements of the order in 2017 CHRT 14 within 30 days.

B. Factual summary

5. The Caring Society's concerns regarding Canada's definition of "all First Nations children" first arose in early 2018.[2] Prior to that time, the Caring Society understood, on the basis of the February 6, 2017 cross-examination of Robyn Buckland (a senior Health Canada official) that *Indian Act* status was not a mandatory criterion for the receipt of services under Jordan's Principle, but was instead a "point of information" on which Canada was collecting information.[3]

6. However, 15 months later, on May 9, 2018, Sony Perron, Associate Deputy Minister of Indigenous Services Canada testified that contrary to Ms. Buckland's testimony, Canada had unilaterally and without direction from the Tribunal or the parties, interpreted the Tribunal's order narrowly, to the exclusion of many First Nations children since the "beginning":

> Q. So […] Canada's interpretation of the words 'First Nations children' is children with status under the Indian Act or eligible thereto.
>
> A. This is the way we have [understood] the direction since the beginning and we have applied [it].[4]

7. By April 2018, discussions took place between the parties regarding this matter, with some expansion being made in July 2018, when Canada broadened its definition to include "non-status Indigenous children who are ordinarily resident on-reserve."[5] However, the Caring Society has

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[2] Affidavit of Dr. Valerie Gideon, sworn December 21, 2018, (the "December Gideon Affidavit") at Exhibit "A", Tab 39 of the ROD.
[3] Cross examination of Robyn Buckland, February 6, 2017, at Q. 142 (see Affidavit of Dr. Cindy Blackstock, affirmed December 5, 2018 at Exhibit "B"), Tab 2 of the January 9, 2019 Caring Society Motion Record ("Jan 9 CSMR").
[4] Cross examination of Sony Perron, May 9, 2018, (the "Perron Cross") p. 47 | line 9, Tab 40 of the ROD
[5] December Gideon Affidavit, at paras. 8, 10 17 and Exhibit "C", Tab 39 of the ROD.

continued to have concerns that the definition of "First Nations child" excludes First Nations children who reside off reserve[6].

C. The Caring Society's position regarding the process for achieving a compliant definition of "First Nations child"

8. Defining the meaning of "all First Nations children" in relation to the Tribunal's orders regarding Jordan's Principle is not meant to address the broader question of First Nations identity, either under subsection 91(24) of the *Constitution Act, 1867*, under section 35 of the *Constitution Act, 1982*, under any Treaty, at common law, or in general. Instead, the Caring Society's arguments address the operational definition for service delivery under Jordan's Principle. As such, the Caring Society is in agreement with paragraph three of Canada's submission, to the effect that the definition under consideration is specific to the implementation of Jordan's Principle as required by the Tribunal's orders. The Caring Society is not proposing a definition that would trench on the self-government rights of any rights-bearing collective. Such an outcome would be beyond the scope of this complaint.

9. What is within the scope of this complaint is the definition of a First Nations child who is eligible to receive services pursuant to Jordan's Principle or under the First Nations Child and Family Services Program.

10. Canada's definition fails to comply with the Tribunal's order in 2017 CHRT 14 as it excludes children, residing on- or off-reserve, whom a First Nations group, community or people recognizes as belonging to that group, community or people, in accordance with the customs or traditions of that First Nations group, community or people.

11. Canada's definition of "First Nations child" also fails to comply with the Tribunal's order in 2017 CHRT 14 as it excludes First Nations children whose families have lost contact with their communities through circumstances such as the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program. However, further work between the parties and Canada would be required to develop a process to include such individuals.

[6] Affidavit #3 of Doreen Navarro, affirmed on January 3, 2019 ("Navarro Affidavit #3), at Exhibit "A", Tab 3 of the Jan 9 CSMR.

12. The Caring Society intends to discuss the situation of children who have only one parent with subsection 6(2) *Indian Act* status with the AFN and would pursue those discussions with Canada once the Chiefs-in-Assembly have taken a position on that issue.

13. While the discussions noted above are ongoing, the Caring Society's position is that urgent requests from children falling within the categories "under discussion" ought to be dealt with pursuant to the Tribunal's ultimate order on the Caring Society's January 9, 2019 interim relief motion.

D. Inclusion of Jordan's Principle in the complaint

14. At the January 9, 2019 hearing on interim relief regarding the definition of "First Nations child" in urgent cases, submissions were made to the effect that the definition of Jordan's Principle was not within the scope of the complaint. Canada also makes similar submissions in its January 29, 2019 written submissions. However, Jordan's Principle has always been an integral part of the complaint.

15. Indeed, the 2007 Complaint filed by Regional Chief Lawrence Joseph (on behalf of the AFN) and by Dr. Blackstock (on behalf of the Caring Society) referenced Jordan's Principle.[7]

16. The Caring Society's June 5, 2009 Statement of Particulars made it clear that the Caring Society was seeking broad relief regarding Jordan's Principle in these proceedings:

> Pursuant to section 53(2)(a), and in order to redress the discriminatory practices:
>
> (a) The application of Jordan's Principle to federal government programs affecting children and which implementation shall be approved by the Canadian Human Rights Commission in accordance with section 17.[8]

[7] Affidavit #4 of Doreen Navarro, affirmed January 28, 2019 ("Navarro Affidavit #4"), Human Rights Complaint at Exhibit "A", at p. 3, Tab 1 of the February 4, 2019 Caring Society Motion Record ("Feb 4 CSMR").

[8] Caring Society Statement of Particulars, June 5, 2009 at para. 21(2), Exhibit "B" to the Navarro Affidavit #4, Tab 1 of the Feb 4 CSMR.

17. Contrary to paragraph 35 of Canada's submissions, and in keeping with paragraph 21(2) of the Caring Society's Statement of Particulars, the Caring Society has not limited its approach to Jordan's Principle to the territorial boundaries of reserves.

18. Canada's own July 22, 2009 Statement of Particulars also acknowledged its acceptance of Jordan's Principle's application off-reserve and outside the child and family services context:

> Jordan's Principle is a 'child first' approach, which engages various health and social services and not solely child and family services.[9]

19. In any event, the Tribunal ought to take the same "functional approach" to pleadings in this matter as was urged by the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44. In that case, the Court held that the function of pleadings is to provide the parties and the court with an outline of the material allegations and the relief sought, and that where pleadings achieve this aim, minor defects should be overlooked, in the absence of clear prejudice.[10]

20. Two of the considerations that underpinned the Court's approach in *Tsilhqot'in* apply with equal force in this case. First, the legal principles in a ground-breaking case such as this one were not clear at the outset, making it difficult to have framed the claim with exactitude.[11] Second, there are significant societal interests at stake. As McLachlin C.J. held in *Tsilhqot'in*:

> cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group […] and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal.[12]

21. As the Panel Chair recognized in her remarks at the conclusion of the Tribunal's February 1, 2018 ruling, children are at the heart of First Nations communities. Ensuring that the current and future generations of First Nations children are able to achieve outcomes equal to those of non-First Nations children, such that they might make for themselves the lives that they are able

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[9] Statement of Particulars of the Respondent, the Attorney General of Canada, dated July 22, 2009, Exhibit "C" of Navarro Affidavit #4, Tab 1 of the Feb 4 CSMR.
[10] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, at para. 20, Tab 12 of the February 4, 2019 Caring Society Book of Authorities ("Feb 4 CSBA").
[11] *Ibid*, at para. 21, Tab 12 of the Feb 4 CSBA.
[12] *Ibid*, at para. 23, Tab 12 of the Feb 4 CSBA.

and wish to have, is fundamental to the growth of the Nation-to-Nation relationship and to achieving the project of reconciliation. A narrow reading of the pleadings in this case with respect to Jordan's would defeat this important goal.

E. Canada is attempting to challenge the Tribunal's supervisory jurisdiction over its orders regarding Jordan's Principle without seeking judicial review

22. At paragraph 37 of its submissions, Canada alleges that the purview of the Tribunal's supervisory powers is limited to "Canada's funding of child welfare programs for First Nations children and families ordinarily resident on reserve." However, the Tribunal's supervisory jurisdiction over Jordan's Principle is confirmed by the fact that Canada did not judicially review the Tribunal's orders regarding Jordan's Principle in 2016 CHRT 2, 2016 CHRT 10, or 2016 CHRT 16, nor did it challenge that supervisory jurisdiction in its application for judicial review of 2017 CHRT 14 filed in June of 2017,[13] which was later discontinued following the Tribunal's amended order in 2017 CHRT 35.

F. Components of the definition on which the parties already agree

23. The parties are already in agreement with respect to three items in the definition of "First Nations child". Specifically, the parties agree that First Nations children with *Indian Act* status, First Nations children who are eligible for *Indian Act* status, and First Nations children who are citizens/members of First Nations with a self-government agreement are eligible to make Jordan's Principle requests.

24. In her May 24, 2018 affidavit, Dr. Gideon confirmed that for the 11 self-governing First Nations who are subject to a Self-Government Agreement and the Yukon Self-Government Act, eligibility is determined based on whether the child is included in the self-governing First Nation's membership code.[14] This practice is confirmed in a January 9, 2019 email from the Acting Regional Director, Operations of ISC's Northern Region. As such, Canada has agreed that

[13] Affidavit of Dr. Cindy Blackstock, affirmed December 5, 2018 at Exhibit "A", Tab 2 of the Jan 9 CSMR.
[14] Affidavit of Dr. Valerie Gideon, affirmed May 24, 2018, (the "May Gideon Affidavit"), at para. 22, Tab 39 of the ROD. See also *Teslin Tlingit Council v Canada*, 2019 YKSC 3 at paras 9-13, per Veale C.J.S.C, Tab 11 of the Feb 4 CSBA.

membership in a self-governing First Nation has been confirmed as an eligibility definition that can be implemented.

G. Human rights/anti-discrimination rationale for finding that Canada's restricted definition does not comply with the Panel's orders

25. The Tribunal's orders have consistently referenced the application of Jordan's Principle to "all First Nations children." None of the Tribunal's orders referenced *Indian Act* status or on-reserve residency as limitations on Jordan's Principle. Canada, however, is narrowly defining eligible First Nations children, constraining the definition to children with *Indian Act* status, who are eligible for such status, or who are resident on reserve.

26. While Canada broadened its definition in July 2018 to include children without *Indian Act* status resident on reserve, Canada has provided conflicting and unclear explanations, assumptions and justifications for the limitations it has imposed on the definition of a "First Nations child" for the purpose of implementing the Tribunal's orders regarding Jordan's Principle, none of which accord with the Tribunal's orders or decisions:

- […] this is the way most federal programs have been working[15]
- […] the division of responsibility with provinces and territories is that, when we talk about serving First Nations, it's First Nations with status"[16]
- […] If a family is living in a non-reserve context or outside the community on a permanent basis and is not registered, they would have access to services within that broader urban context as a resident of that province or territory"[17]
- […] Jordan's Principle services are based on the decision that First Nations are subject to discrimination as a result of underfunding in their community, or as a result of deliberate exclusion from provincial services <u>because of their status, because of the fact that they're registered"</u>[18] [Emphasis added]

27. These rationales all address decisions between the federal and provincial/territorial governments with regard to provision of government services. They do not address the <u>needs</u> of First Nations children, which is the metric for determining whether discrimination is present. If

[15] Perron Cross, p. 24 | line 17, Tab 40 of the ROD.
[16] Perron Cross, p. 24 | line 20, Tab 40 of the ROD.
[17] 30 Gideon Cross, p. 161 | line 21, Tab 41 of the ROD.
[18] 30 Gideon Cross, p. 162 | line 5, Tab 41 of the ROD.

Canada's objective is the one cited at paragraph three of its submission, to seek "to remedy the discriminatory practices that were at the heart of this complaint, and on preventing other First Nations children from experiencing the discrimination faced by Jordan River Anderson", it is completely contradictory for Canada to focus on First Nations children's status or residence, as opposed to their needs.

28. Indeed, Canada's approach, which considers Jordan's Principle requests from First Nations children living on reserve who do not have *Indian Act* status but refuses to consider requests from "non-status, non-resident" children introduces discrimination on the basis of on reserve residency, contrary to section 15 of the *Charter*.[19] This is a factor that the Tribunal may take into account when determining whether Canada is making available to the victim of the discriminatory practice the rights, opportunities or privileges that are being or were denied, pursuant to subsection 53(2)(b) of the *CHRA*.

29. Moreover, Canada has not advised the public, including First Nations families, of its restrictive criteria. Indeed, Canada's website regarding Jordan's Principle, a key mechanism for informing the public about Jordan's Principle, does not mention any such limitations, specifying only that Jordan's Principle applies to all First Nations children.[20] The public simply does not know.[21] This is either contrary to the Tribunal's order at para 135(1)(C) of 2017 CHRT 14 (i.e. Canada has limited the definition of Jordan's Principle ordered by the Tribunal), or it is contrary to the Tribunal's orders at para 135(3) (re: publicizing the definition and approach to Jordan's Principle), given the obfuscation of an important element to Canada's operational definition.

30. Jordan's Principle is a human rights principle. It is not to be read narrowly.[22] It ensures substantive equality for First Nations children by preventing First Nations from being denied essential public services or experiencing delays or disruptions in receiving them.[23] As such, it is

[19] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. Tab 2 of the Feb 4 CSBA.
[20] Navarro Affidavit #4 at Exhibit "D", Tab 2 of the Feb 4 CSMR.
[21] Perron Cross, p. 90 | lines 9-16, Tab 40 of the ROD.
[22] *Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342 at paras 86 and 90, Tab 7 of the Feb 4 CSBA.
[23] 2016 CHRT 2 at para 351, Tab 3 of the ROD.

entirely consistent with the *CHRA* for all First Nations children to receive the benefit of Jordan's Principle.

31. Recognizing the Tribunal's acknowledgement of the key role of a Nation-to-Nation relationship[24] and acknowledging the scope of the complaint, the Caring Society supports short-term (within 30 days of the Tribunal's order) and medium-term (by September 1, 2019) discussions between the parties regarding the following expanded parameters (d-f) for Canada's implementation of the Tribunal's orders regarding Jordan's Principle, in addition to those already acceptable to Canada (a-c):

a. A child, whether resident on or off reserve, with *Indian Act* status;

b. A child, whether resident on or off reserve, who is eligible for *Indian Act* status;

c. A child, residing on or off reserve, covered under a First Nations self-government agreement or arrangement;

d. Children, residing on or off reserve whom a First Nations group, community or people recognizes as belonging to that group, community or people, in accordance with the customs or traditions of that First Nations group, community or people;

e. First Nations children, residing on or off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program; and

f. First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.

32. Short-term discussions would focus on expanding the definition to include children whom a First Nations group, community or people recognizes as belonging to that group, community or people in accordance with the customs or traditions of that group, community or people. If Canada

[24] 2018 CHRT 4, at paras. 436-437, Tab 15 of the ROD.

brings convincing evidence regarding concerns about a functional or procedural mechanism for identifying these children, this is something that can be discussed amongst the parties.

33. Medium-term discussions would focus on a process for including children who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program, with further deliberations by the Chiefs-in-Assembly being required regarding First Nations children who do not have, and are not eligible for, *Indian Act* status but who have a parent/guardian with, or who is eligible for, *Indian Act* status.

H. Canada's definition is discriminatory as it excludes First Nations children recognized by a First Nation as belonging to that First Nation

34. As the Supreme Court of Canada recognized in *Daniels v Canada (Indian Affairs and Northern Development)*, First Nations identity is not a subject that is amenable to clear definitions, as "[c]ultural and ethnic labels do not lend themselves to neat boundaries".[25]

35. In response to such a situation, Canada cannot rely on the "neat boundaries" of colonial concepts like *Indian Act* status or on-reserve residency. Indeed, the AFN and Caring Society's complaint did not address discrimination on the basis of *Indian Act* status or on-reserve residency; instead, it addressed discrimination "on the basis of race and/or national or ethnic origin".[26] *Indian Act* status and on-reserve residency is not synonymous with First Nations' views of their "race and/or national or ethnic origin" and fails to give life to the often-touted Nation-to-Nation relationship. Instead, as the Court of Appeal for British Columbia noted in *McIvor v Canada*, in a passage also adopted by the Superior Court of Quebec in *Descheneaux v Canada (Attorney General)*:

> [t]he traditions of First Nations in Canada varied greatly, and [*An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, c. 6 (32-33 Vict.)] did not

[25] *Daniels v. Canada (Indian and Northern Affairs Development,* 2016 SCC 12, at para 17, Tab 4 of the Feb 4 CSBA.
[26] 2016 CHRT 2 at paras 6, 23, 395-396, 459, and 473, Tab 3 of the ROD.

> reflect the aboriginal traditions of all First Nations. To some extent, it may be the product of the Victorian mores of Europe as transplanted to Canada.[27]

36. Significantly, in addition to not reflecting First Nations communities' own views of their "race and/or national or ethnic origin", *Indian Act* status, as it has been applied since 1985, will eventually lead to the extinguishment of *Indian Act* status everywhere. As Masse J. recognized in *Descheneaux*:

> […] it should also be noted that, according to expert Stewart Clatworthy, the logic of section 6 and its "second generation cut off" dictates that, given the current state of affairs, in about 100 years, no new child will be entitled to have his or her name added to the Register in the plaintiffs' Bands. If there are more people registered under 6(1), this evolution will be slightly slower, but because of the nature of the mechanism in subsection 6(1), there will eventually be no more children born with an entitlement to be entered in the Register. There is no evidence on other Indian Bands specifically, but it should be noted that the same mechanism is at work.[28] (Emphasis added).

37. As such, it cannot be the case that a legislative regime that will eventually result in a generation of First Nations children born without any "status Indians" can be the measure of the First Nations children who require the protection of Jordan's Principle.

38. The AFN Chiefs-in-Assembly's resolutions on First Nations citizenship also indicate the lack of a relationship between *Indian Act* status and on-reserve residence and "race and/or national or ethnic origin". For instance, Resolutions 30/2017, 71/2016, and 53/2015 provide[29]:

Resolution	**Provisions**
30/2017	WHEREAS: […] B. There is a long history of hardship and discrimination imposed on Indigenous peoples by the *Indian Act*'s Indian status provisions. C. Federal legislation enacted in the past and implemented still today was designed to assimilate and erode First Nations citizenship.

[27] *Descheneaux v Canada (Attorney General)*, 2015 QCCS 3555 at para 21, citing *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 at para. 17, Tab 5 of the Feb 4 CSBA.
[28] *Descheneaux* at para 230, Tab 5 of the Feb 4 CSBA.
[29] Affidavit of Dr. Cindy Blackstock, affirmed December 5, 2018 at Exhibit "E", Tab 2 of the Jan 9 CSMR.

	[…] E. Indian children lose Indian status after two generations of out-marriage, and with the current rate of out-marriage many First Nations communities will disappear within a few generations due to rapid decline in numbers of Status Indians with their citizenship. F. First Nations have always asserted their jurisdiction to determine and define their citizenship, regardless of Canada's unilateral imposition of the *Indian Act* that determines that status. THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly: 1. Affirm the authority of First Nations to determine their own citizenship and eligibility for registration.
71/2016	[…] THEREFORE BE IT RESOLVED THAT the Chiefs-in-Assembly: […] 3. Call on Canada to repeal the impugned provision in its entirety and to transfer the authority of citizenship and identity to the First Nations.
53/2015	WHEREAS […] B. First Nations peoples always governed themselves according to their customs, laws, and traditions, which included the determination of their individual and collective identities. The federal government has unilaterally interfered with Indigenous peoples and violated our inherent rights by determining who is a registered Indian under the registration provisions of the *Indian Act*. […] F. The federal government must stop interfering with the right of First Nations to determine their individual and collective identities and recognize the people accepted by First Nations as belonging to them on the basis of their own customs, laws, and traditions. THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly: […]

	3. Direct the federal government to immediately cease imposing *Indian Act* criteria for registration upon First Nations and recognize citizens as defined by First Nations. […] 6. Direct the federal government to provide resources to First Nations to support their exercise of jurisdiction over citizenship.

39. *Indian Act* status is by no means a sufficient metric of an individual's First Nations identity, or of the jurisdictional obstacles they face in achieving access to services that are substantively equal to those available to non-First Nations Canadians. Indeed, contrary to paragraph 38 of Canada's submissions, barriers to receiving services and benefits due to *Indian Act* status or on-reserve residency are only one component of Jordan's Principle. The other key components include a focus on substantive equality and ensuring that the needs of First Nations children are met.

40. Canada takes too narrow of an approach when it says at paragraph 39 of its submission that "[n]on-status children living off-reserve are not subject to Canada's funding policies, but to those of the provinces/territories where they reside. They are presumably receiving the same level of publically funded [sic] services that all other children in their jurisdiction are receiving." Whether First Nations children living off-reserve receive the same services as non-First Nations children is not a relevant consideration. The necessary consideration is whether First Nations children living off-reserve also have greater <u>needs</u> than non-First Nations children. Indeed, this argument fails to heed the Tribunal's warning in 2017 CHRT 14 that "the normative standard may also fail to identify gaps in services to First Nations children, regardless of whether a particular service is offered to other Canadian children."[30]

41. Furthermore, an exclusive focus on <u>whether</u> a First Nations child without *Indian Act* status lives off-reserve, as opposed <u>why</u> that child lives off-reserve fails to recognize that the off-reserve residence of a First Nations child without *Indian Act* status may well be related to Canada's past discriminatory provision of services on-reserve. Indeed, the Tribunal has evidence before it of

[30] 2017 CHRT 14 at para 71, Tab 13 of the ROD.

families forced to place their children into child welfare care or to move off reserve to have service needs met that could not be met on-reserve due to Canada's discriminatory approach to Jordan's Principle and the FNCFS Program.[31]

42. Rather than focusing on a First Nations child's *Indian Act* status, or where a First Nations child lives, the analysis in determining eligibility for Jordan's Principle should turn on the greater needs of First Nations children as compared to non-First Nations children. This is the heart of a human rights analysis.

43. The evidence before the Tribunal that led to its January 26, 2016 decision did not make *Indian Act* status the measure of historic disadvantage and inter-generational trauma. Indeed, the Tribunal's analysis of this historical disadvantage in its January 2016 Decision did not draw any link between that historic disadvantage and *Indian Act* status.[32] As such, rather than categorically excluding non-status, non-resident First Nations children, Canada should consider their best interests, individual needs, and how historic disadvantage may heighten their needs, regardless of their province of residence's normative standards.

I. Canada's definition is discriminatory as it excludes First Nations children who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program

44. As the Joint National Policy Review (NPR) observed in 2000, in a passage cited by the Tribunal in its January 26, 2016 decision:

> First Nations families have been in the centre of a historical struggle between colonial government on one hand, who set out to eradicate their culture, language and world view, and that of the traditional family, who believed in maintaining a balance in the world for the children and those yet unborn.[33]

[31] CHRC Book of Documents, Tab 380, INAC Email with December 6, 2007 Briefing Note regarding Jordan's Principle at page 3, Tab 7 of the Feb 4 CSMR; Evidence-in-chief of Dr. Cindy Blackstock, February 11, 2013 (Vol 47) at p. 190 line 15 to p. 194 line 24, Tab 8 of the Feb 4 CSMR.
[32] 2016 CHRT 2 at paras 403-427, Tab 3 of the ROD.
[33] 2016 CHRT 2 at para 15, Tab 3 of the ROD.

45. This struggle has played out through the culturally disruptive forces of initiatives such as the Indian Residential Schools System and the Sixties Scoop, recognized by the Tribunal in its January 26, 2016 decision.[34] The Supreme Court of Canada has recognized that there are First Nations individuals "who may no longer be recognized by their communities because they were separated from them as a result, for example, of government policies such as Indian Residential Schools".[35] With regard to the Sixties Scoop, in *Brown v Canada*, Belobaba J. held that "[o]n the evidence before me, the harm done was profound and included lasting psychological and emotional damage".[36]

46. The chronic and perpetual discrimination within the FNCFS Program also raises the spectre of cultural displacement. Indeed, it is this reality that underlies the Panel Chair's observation at the conclusion of the Panel's February 1, 2018 decision, that "[g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence".[37]

47. Accordingly, First Nations children who have lost their connection to their communities, or who may not even know to which community they belong, due to the operation of colonial or discriminatory policies such as Indian Residential Schools, the Sixties Scoop, or the discrimination within the FNCFS Program should not be excluded from Jordan's Principle's reach. Indeed, given the inter-generational trauma of such experiences, these individuals risk facing disadvantage on the basis of their "race and/or national or ethnic origin" that non-First Nations Canadians do not face.

48. As noted above, the Tribunal placed no emphasis on *Indian Act* status in considering this historic disadvantage in 2016 CHRT 2.[38] The Supreme Court of Canada also considered this historic disadvantage in the context of First Nations adults without *Indian Act* status in the criminal justice system in *R v Gladue* and *R v Ipeelee*. The Supreme Court of Canada supported the

[34] 2016 CHRT 2, see in particular at paras 2, 151, 218, 227, 408, and 411, Tab 3 of the ROD.
[35] *Daniels* at para. 49, Tab 4 of the Feb 4 CSBA.
[36] *Brown v. Canada*, 2014 ONSC 6967 at para. 11, Tab 1 of the Feb 4 CSBA.
[37] 2018 CHRT 4 at para 452, Tab 15 of the ROD.
[38] 2016 CHRT 2, at paras. 403-427. Tab 3 of the ROD.

inference that, as compared to Canada's settler population, First Nations individuals without Indian Act status also have greater needs. [39]

49. Without making specific reference to *Indian Act* status, the Court held in *Gladue* that "Aboriginal people are overrepresented in virtually all aspects of the system […] there is widespread bias against aboriginal people within Canada (Gladue at para 61).[40] Indeed, the Supreme Court of Canada held in *R v Ipeelee* that:

> [t]o be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how this history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.[41]

No part of this direction was linked to *Indian Act* status. To the contrary, the focus remains on systemic disadvantage. as the Court of Appeal for Ontario observed in *R v Kreko*, that disadvantage may stretch back many generations: "In the present case, the appellant's dislocation and loss of identity can be traced to systemic disadvantage and impoverishment extending back to his great-grandparents [emphasis added]."[42]

50. In a recent Justice Canada report titled "Spotlight on *Gladue*: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System" stipulates that the *Gladue* sentencing principles apply to First Nations people "regardless of whether they have status, live on- or off-reserve".[43] The Justice Canada report goes further and notes the insidious effects that *Indian Act* status has had in perpetuating disadvantage against First Nations women in particular:

> […] The *Indian Act* undermined and removed Indigenous legal orders, in which women held positions of power and had access to resources, and replaced them with structures that "uniformly devalued women and placed men in positions of power and control". The *Act* included provisions that took away "Indian" status from Indigenous women who married non-Indigenous men. Without status, women were no longer able to access resources, such

[39] *R. v. Gladue*, [1999] 1 SCR 688 at para. 60, Tab 8 of the Feb 4 CSBA.
[40] *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 60, Tab 8 of the Feb 4 CSBA.
[41] *R. v. Ipeelee*, 2012 SCC 13 at para. 60, Tab 9 of the Feb 4 CSBA.
[42] *R. v. Kreko*, 2016 ONCA 367 at para. 24, Tab 10 of the Feb 4 CSBA.
[43] Affidavit #5 of Doreen Navarro, affirmed February 4, 2019 at Exhibit "A" at p. 7, Tab 3 of the Feb 4 CSMR.

> as on-reserve housing, cultural resources, interaction with elders, subsidies for education, and land claim settlement resources.
>
> Although these provisions were changed in 1985, "Indian" status recovery still has a second generation cut-off. At the same time, *Indian Act* band council [sic] litigates against women's efforts to rejoin their community. The result is that Indigenous women, their children, and grandchildren are displaced to urban areas – as of 2006, 72% of Indigenous women live off-reserve. Not only does that mean that Indigenous women lack access to resources and a connection to their ancestral land – which for many Indigenous cultures, is intimately tied to a sense of belonging and cultural identity, but living in urban areas also means greater risk of poverty, systemic and direct racism, and sexual exploitation.[44]

51. Canada has offered no explanation for its willingness to acknowledge that systemic disadvantage persists for First Nations individuals regardless of their *Indian Act* status in the criminal justice context, but will not do so in the context of ensuring substantively equal access to services for First Nations children.

52. Indeed, The Supreme Court of Canada once again confirmed in *Daniels* that disadvantage persists as well for First Nations individuals who lack *Indian Act* status:

> [a]s the trial judge found, when […] non-status Indians have asked the federal government to assume legislative authority over them, it tended to respond that it was precluded from doing so by s. 91(24). And when […] non-status Indians turned to provincial governments, they were often refused on the basis that the issue was a federal one.
>
> This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences […][45]

53. However, the Caring Society agrees that the way in which the eligibility for Jordan's Principle Services of First Nations children who are not recognized by their communities due to Canada's colonial practices ought to be considered by ISC should be the subject of medium-term discussions by the parties (i.e. by September 1, 2019).

[44] Affidavit #5 of Doreen Navarro, affirmed February 4, 2019 at Exhibit "A" at p. 15, Tab 3 of the Feb 4 CSMR.
[45] *Daniels*, at paras. 13-14, Tab 4 of the Feb 4 CSBA.

J. Canada's definition is discriminatory as it excludes First Nations children who have one parent with subsection 6(2) Indian Act status

54. Parents/guardians play a major role in securing access to services for children. As such, it is reasonable to infer that families in which parents/guardians have *Indian Act* status may face similar service obstacles and may experience similar historical, cultural, and geographical circumstances that lead to greater service needs, irrespective of the *Indian Act* status of the children. This is partially acknowledged in the context of the Non-Insured Health Benefits Program, which provides for services to the children of a parent with s. 6(2) *Indian Act* status until the age of 18 months.[46]

55. Furthermore, differentiating between two children on the basis of the *Indian Act* status of their parent (s. 6(1) status as opposed to s. 6(2) status) perpetuates family status discrimination, which is equally contrary to the *CHRA*. In resolving one form of discrimination, Canada should not be permitted to perpetuate another. Children do not choose, nor do they have any agency to change, the parameters of the *Indian Act*.

56. Finally, the status of many children who currently do not have *Indian Act* status due to their parent's s. 6(2) *Indian Act* status may change once all of the provisions of *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux v Canada (Procureur general),* S.C. 2017, c. 25 ("Bill S-3") come into force. The Government of Canada's website regarding its response to *Deschneaux* describes the impact of these yet-to-be-proclaimed amendments as follows:

> Once in force, all descendants born prior April 17, 1985 (or of a marriage prior to that date) of women who were removed from band lists or not considered Indians because of their marriage to a non-Indian man will be entitled to 6(1) status. This will include circumstances prior to 1951 and in fact, will remedy inequities back to the 1869 *Gradual Enfranchisement Act*.[47]

57. The Government of Canada's own demographic research forecasts a large increase in the number of individuals with *Indian Act* status following this change. Accordingly, a number of

[46] December Gideon Affidavit at para. 26, Tab 39 of the ROD.
[47] Government of Canada webpage tilted, 'Eliminating known sex-based inequities in Indian registration', last modified June 12, 2018, at Exhibit "F" of the Navarro Affidavit #4, Tab 1 of the Feb 4 CSMR.

children who do not have *Indian Act* status by virtue of their parents' s. 6(2) status will themselves gain s. 6(2) status, such that they would meet the requirements of Canada's current definition. Requiring these children to wait for the conclusion of government deliberations regarding *Descheneaux* and other relevant decisions has the practical effect of Canada denying or delaying the provision of public services due to the child's lack of *Indian Act* status or off-reserve residency. This amounts to discrimination on the basis of race and/or national ethnic origin and is exactly the problem that Jordan's Principle is intended to remedy

58. However, with the exception of urgent cases, which should be dealt with according to the Tribunal's ultimate order on the Caring Society's January 9, 2019 interim relief motion, the Caring Society agrees that the inclusion of other such children referred to in paragraphs 41(e) and 41(f) above should be subject to medium-term discussions (i.e. by September 1, 2019).

K. Implications based on section 35 of the Constitution Act, 1982

59. The Caring Society submits that the principles underlying section 35 of the *Constitution Act, 1982* support the relief sought, particularly with regard to First Nations children who do not have *Indian Act* status, do not reside on reserve, but are recognized by their First Nation. There can be no right more fundamental to a First Nation's self-determination than the right to determine its own members.

60. Affirming the control of First Nations over their membership is the purpose of the "second stage" consultation process launched by Canada when Bill S-3 was enacted. Indeed, as Minister Bennett recognized during second reading debate in the House of Commons, "eventually, we do not think it should be my department registering or determining who is a member or who has status. Eventually, [F]irst [N]ations, Inuit and Metis will determine that for themselves."[48]

61. With respect to First Nations children who have been separated from their communities as a result of Canada's past discriminatory practices, jurisdiction for federal government action lies under subsection 91(24) of the *Constitution Act, 1867*, which is a matter entirely distinct from the inherent and Treaty rights recognized in section 35 of the *Constitution Act, 1982*. While

[48] House of Commons Debates, June 13, 2017 at p. 12638 (Hon. Carolyn Bennett, P.C.), Tab 14 of the Feb 4 CSBA.

reconciliation underlies both provisions, the Supreme Court of Canada was clear in *Daniels* that section 35's purpose is to protect First Nations communities' rights, while subsection 91(24)'s purpose is about the federal government's relationship with Aboriginal peoples in Canada.[49]

62. Additionally, this is not a case like *Tabor v Millbrook First Nation*, 2015 CHRT 6, in which a specific First Nations community sought to exempt itself from the *CHRA* on the basis of self-government considerations. First Nations governments are not a party to this proceeding, and no specific evidence has been led regarding negative impacts on section 35 rights. The Panel's encouragement to Canada its February 1, 2018 should apply equally to any concerns related to section 35 rights:

> The Panel encourages Canada in the future to provide evidence to the Tribunal if a province, territory or First Nation resists or acts as a roadblock to Canada's implementation of the Panel's rulings. This will assist the Panel in understanding their views and Canada's efforts to comply with our orders and, will provide context and may refrain us to make orders against Canada. Absent this evidence, the Panel makes orders to eliminate the discrimination in the short term while understanding the importance of the Nation-to-Nation relationship.[50]

L. Implications of Canada's fiduciary obligations

63. The Caring Society submits that Canada's fiduciary obligation to First Nations children makes it essential that the definition of Jordan's Principle extend to include First Nations children who are recognized by their Nation, but who do not have *Indian Act* status and who reside off reserve. As Nordheimer J. (as he then was) held for the Ontario Divisional Court in *Brown v Canada*:

> [c]ases, such as *Guerin*, have imposed a fiduciary duty in respect of aboriginal lands because of the central role that land played in aboriginal economies and culture. Here, we are not dealing with just one aspect of that culture. Rather, we are dealing with a person's connection to that culture as a whole. It is difficult to see a specific interest that could be of more importance to aboriginal peoples than each person's essential connection to their aboriginal heritage.[51]

[49] *Daniels* at para. 49, Tab 4 of the Feb 4 CSBA.
[50] 2018 CHRT 4, at para. 443, Tab 15 of the ROD.
[51] *Brown*, at para. 30, Tab 1 of the Feb 4 CSBA.

64. This is in line with the Panel's conclusion in its January 26, 2016 decision that the criteria for a fiduciary relationship are arguably met in this case as well.[52] Furthermore, as the Panel held at para 109 "where the government exercises its discretion in a way that disregards indigenous cultures and languages and hampers their transmission, it can breach its fiduciary duty."[53] The exclusion of non-status, non-resident First Nations children who are recognized by their community is precisely the kind of exercise of discretion that Canada is prevented from making due to its fiduciary obligations to First Nations children.

M. Implications of International Law

65. The Caring Society supports Amnesty International Canada's ("AIC") submissions regarding Canada's international legal obligations and their impact on Canada's implementation of the Tribunal's orders. In particular, the Caring Society supports AIC's submission that Canada's unilateral imposition of a narrow and arbitrary definition of First Nations children in its implementation of Jordan's Principle is contrary to Canada's international obligations.[54] Moreover, the Caring Society agrees that measures enacted to implement the Tribunal's orders must eradicate discrimination versus reinforcing discriminatory practices.[55]

66. In this regard, the UN Human Rights Committee's ("UNHRC") November 1, 2018 Views, concerning communication No. 2020/2010 (Sharon McIvor and Jacob Grismer's complaint against Canada) highlights the suspect nature of *Indian Act* status as a metric for access to services under Jordan's Principle. The UNHRC concluded that the *Indian Act* status regime is discriminatory based on sex, and that it prevents Ms. McIvor and Mr. Grismer from enjoying their own culture together with other members of their groups.[56] The UNHRC also found that the stakes for individuals who are discriminated against by Canada's *Indian Act* status regime are significant,

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[52] 2016 CHRT 2, at para. 104, Tab 3 of the ROD.
[53] 2016 CHRT 2, at para. 109, Tab 3 of the ROD.
[54] Written submissions of the Interested Party Amnesty International Canada, dated January 30, 2019, at para. 5.
[55] Written submissions of the Interested Party Amnesty International Canada, dated January 30, 2019, at para. 42.
[56] United Nations, Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2020/2010* at para. 7.11 ("*McIvor Views*"), Tab 13 of the Feb 4 CSBA.

as "such a discriminatory distinction between members of the same community can affect and compromise their way of life."[57]

67. The UNHRC's observations, made in the context of the *Covenant on Civil and Political Rights*, echo those that the Canadian Human Rights Commission made in its submission to the United Nations Committee on the Rights of the Child ("UNCRC") in 2011 on the occasion of Canada's third and fourth periodic review pursuant to the *Convention on the Rights of the Child*. In those submissions, the Commission cited both domestic and international challenges to sex-based discrimination in the *Indian Act* and noted that it was "concerned about the systemic impact of *Indian Act* provisions that determine eligibility for "Indian" registration and, in particular, how denying 'Indian status' impacts Aboriginal children, their cultural identity, and their entitlement to programs and services."[58] Canada's reliance on *Indian Act* status to limit access to services under Jordan's Principle is a further example of the systemic impact with to which the Commission drew the Committee on the Rights of the Child's attention in 2011.

68. The UNCRC's 2012 Concluding Observations on Canada's third and fourth periodic reports noted that "[t]he Committee is also concerned that under federal legislation, Aboriginal men are legally entitled to pass their Aboriginal status to two generations while Aboriginal women do not have the right to pass their Aboriginal status to their grandchildren."[59] In light of this concern, the Committee urged Canada to:

> ensure full respect for the preservation of identity for all children, and to take effective measures so as to ensure that Aboriginal children in the child welfare system are able to preserve their identity. To this end, the Committee urges the State party to adopt legislative and administrative measures to account for the rights, such as name, culture and language, of children belonging to minority and indigenous populations and ensure that the large number of children in the child welfare system receive an education on their cultural background and do not lose their identity. The Committee also

[57] *McIvor Views* at para. 7.9, Tab 13 of the Feb 4 CSBA.
[58] Affidavit #5 of Doreen Navarro, affirmed February 4, 2019 at Exhibit "B" at page 7, Tab 3 of the Feb 4 CSMR.
[59] Canadian Human Rights Commission Book of Documents, Tab 57, United Nations Committee on the Rights of the Child, *Consideration of reports submitted by State parties under article 44 of the Convention, Concluding observations: Canada* at para. 42 ("UNCRC 2012 Observations"), Tab 6 of the Feb 4 CSMR.

> recommends that the State party revise its legislation to ensure that women and men are equally legally entitled to pass their Aboriginal status to their grandchildren.[60]

69. Significantly, the UNHRC found that forthcoming amendments to *Indian Act* status under Bill S-3 do not relieve current discrimination on the basis of *Indian Act* status.[61] As such, Canada's approach to eligibility under Jordan's Principle relies on a metric that has been found to discriminate against First Nations women and their descendants, and such discrimination will continue until Bill S-3 is fully in force (assuming all provisions required to eliminate sex-based discrimination in the *Indian Act* are enacted). Canada's failure to take positive measures to eliminated sex-based discrimination pending Bill S-3's fully coming into force, coupled with Canada's reliance on the *Indian Act* to determine eligibility under Jordan's Principle, perpetuates discrimination against First Nations women and their descendants, contrary both to Canada's legal obligations, the *CHRA*, and the *Charter*.

70. The UNHRC's recent *McIvor Decision* also found an obligation on Canada's part "to take steps to address residual discrimination within First Nations communities arising from the legal discrimination based on sex in the Indian Act. Additionally, the state party is under the obligation to take steps to avoid similar violations in the future."[62] By relying on a definition of a "First Nations child" to implement the Tribunal's orders regarding Jordan's Principle, Canada is not taking "steps to address residual discrimination" arising from *Indian Act* status and is in fact taking steps that will cause similar violations in the future, by leading to different outcomes for similarly situated First Nations children, solely on the basis of *Indian Act* status. This is contrary to Canada's international obligations, and to the specific direction of the UNHRC.

71. The Tribunal's orders under section 53 of the *CHRA* should be read in a way that promotes compliance with the UNHRC's findings, and not in a way that aggravates existing discrimination.

N. Order Sought

72. Based on the submissions above, it is the Caring Society's position that the Tribunal ought to make the following Orders:

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[60] UNCRC 2012 Observations at para. 43, Tab 6 of the Feb 4 CSMR.
[61] *McIvor Views* at paras. 7.4 and 7.6, Tab 13 of the Feb 4 CSBA.
[62] *McIvor Views* at para. 9, Tab 13 of the Feb 4 CSMR.

Canada shall consult not only the Commission, but also directly with the AFN, the Caring Society, the COO and the NAN to generate a definition of "all First Nations children" that meets the requirements of the order in 2017 CHRT 14 and of this order within 30 days of this order.

Canada shall serve and file a report and affidavit materials detailing its compliance with the order above within 30 days of this order.

All of which is respectfully submitted this 4th day of February, 2019.

David P. Taylor
Sarah Clarke
Barbara McIsaac, Q.C.

Counsel for the Caring Society