Court File No.: A-270-25

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

-and-

JOANNE POWLESS

Respondent

APPELLANT'S RESPONDING MOTION RECORD
(In response to First Nations Child and Family Caring Society of Canada Motion to Intervene)

September 15, 2025

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FEDERAL COURT
OF APPEAL
COUR D'APPEL
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DÉPOSÉ

August 11, 2025
11 août 2025

Robert McAndrew

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Court File No.: A-

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

JOANNE POWLESS

Respondent

NOTICE OF APPEAL

(pursuant to subsection 27(1) of the *Federal Courts Act*, RSC 1985, c F-7)

TO THE RESPONDENT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at 90 Sparks Street, Ottawa, ON K1A 0H9.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: August 11, 2025 Issued by: _____
(Registry Officer)

Address of Local Office: 90 Sparks Street, Main Floor
Ottawa, Ontario K1A 0H9

TO: **CONWAY BAXTER WILSON LLP/S.R.L.**
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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the decision and order of the Honourable Madam Justice McDonald dated July 10, 2025, in Federal Court file number T-3332-24, where the Federal Court granted the Respondent's application for judicial review of the decision of the Senior Assistant Deputy Minister (SADM) of Indigenous Services Canada (ISC) dated November 28, 2024 (Decision) that denied the Respondent's request for funding for mould remediation and related renovations for her house.

THE APPELLANT ASKS that this Court:

1. Set aside the judgment of the Federal Court and allow the Appellant's appeal; and,
2. Grant such other relief as counsel may request and this Court may deem appropriate and just.

THE GROUNDS OF APPEAL are as follows:

1. The Respondent resides in a house on-reserve with her grandchildren. They are members of Oneida First Nation of the Thames Settlement;
2. On September 10, 2024, ISC denied the Respondent's request for Jordan's Principle funding in the amount of approximately $200,000 toward mould remediation and related renovations for her house;
3. On November 14, 2024, the Respondent appealed the refusal and included a request for funding for appeal advocacy costs;
4. On November 25, 2024, the External Expert Review Committee (EERC) recommended that the first-level denial be upheld;

5. On November 28, 2024, the SADM agreed with the result of the Committee's recommendation, and upheld the first-level denial, but for the reasons outlined in the Decision. In the Decision, the SADM recognized that Jordan's Principle is grounded in the legal concept of substantive equality and is intended to ensure that First Nations children can benefit equally from existing government services available to the general public. In this case, she concluded that ISC was not aware of an existing government service available to the general public that provides funding for the purposes of mould remediation. The SADM held that the Canada Mortgage and Housing Corporation's On-Reserve Residential Rehabilitation Assistance Program (RRAP), which offers funding to address on-reserve housing issues, is not an existing government service for the purposes of Jordan's Principle but is a special program under subsection 16(1) of the *Canadian Human Rights Act* or an ameliorative program under subsection 15(2) of the *Charter*. The SADM held that Jordan's Principle is not intended to expand access to or alter the scope of special or ameliorative programs;

6. The SADM also refused the Respondent's request, made at the appeal level, for funding for advocacy services;

7. The Respondent challenged the Decision in Federal Court through judicial review. The Appellant consented to expediting the application for judicial review given the urgent nature of the issues;

8. On July 10, 2025, the Federal Court allowed the application for judicial review. The Federal Court concluded that ISC unduly focused on comparable services, noting that the issue is not whether the RRAP is an ameliorative program, but whether the children's health needs were adequately addressed. According to the Federal Court, ISC's focus on comparable services ignored the core principle of substantive equality, which requires consideration of historical disadvantage and the best interests of the children. The Court also held that ISC unreasonably concluded that other programs could meet the children's means, and that the amount of funding requested alone was not a reasonable basis for denying the request. The Court rejected the Respondent's arguments that there was any procedural unfairness from the change in decision-maker or the denial of the advocacy funding costs;

9. The Federal Court ordered the matter to be remitted for reconsideration and for cost submissions to be filed in the event the parties cannot agree on costs.

Grounds for Appeal

10. The Federal Court erred in law by concluding that the SADM failed to assess the funding request through the lens of substantive equality. ISC's assessment, which accounted for both a need for an underlying comparable service to identify a discriminatory gap in government services as well as the best interests of the children, is consistent with leading jurisprudence on substantive equality. The Federal Court's finding that an assessment of the health and best interests of the children as well as historical disadvantage is required, regardless of whether a comparable service exists

to the general public, is not in line with Supreme Court of Canada jurisprudence on substantive equality. It also departs from the original intent of Jordan's Principle, which is to enable equal access to government services in the context of a race-based discrimination complaint. Jordan's Principle is a remedy to address discrimination in the provision of services.

11. The Federal Court erred in fact and law by concluding that ISC's focus on the RRAP as an ameliorative program was unreasonable. The RRAP is an on-reserve program that specifically addresses First Nation housing issues. It was identified by ISC as an ameliorative program which did not amount to an existing government service to which Jordan's Principle would apply to provide funding beyond its scope. The Court states that the issue is not whether the RRAP was ameliorative, and that it was unreasonable to conclude that other programs could meet the children's needs, notwithstanding that ISC did not raise the RRAP to come to this conclusion. In doing so, the Court effectively declares the substantive equality portion of ISC's analysis to be meaningless, contrary to Supreme Court of Canada jurisprudence.

12. The Federal Court erred in fact and law by concluding that ISC unreasonably handled the funding request as solely a housing remediation request. The record is clear that ISC was alive to the children's health issues at every stage of the process. Moreover, the Court's conclusion suggests without further guidance that there was some other process or analysis that should have taken place had ISC characterized the request

differently. Further, the Court's conclusion that that the decision was made based on the quantum of funding requested is simply not supported by the evidence.

Relief Requested

13. The Appellant seeks the setting aside of the Federal Court's July 10, 2025 Decision, and the upholding of the underlying November 28, 2024 decision.

Hearing

14. The Appellant proposes that this matter be heard before the Federal Court of Appeal in Ottawa.

Statutory Basis

15. The Appellant relies upon the following:

    a. *Federal Courts Act*, RSC 1985, c F-7, including sections 18.1, 18.1(2), 18.1(3), 18.1(4) and 27;

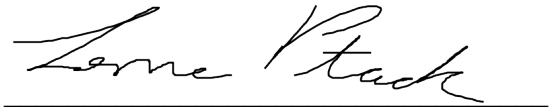
    b. *Federal Courts Rules*, SOR/98-106, including Rule 3 and Part 6;

    c. *Canadian Human Rights Act*, RSC 1985, c H-6;

    d. *Canadian Charter of Rights and Freedoms*; and

    e. Such further and other grounds as this Honourable Court may permit.

DATED AT Ottawa, Ontario, this 11th day of August 2025.



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Counsel for the Appellant

Federal Court of Appeal  Cour d'appel fédérale

Date: 20250818

Docket: A-270-25

Ottawa, Ontario, August 18, 2025

Present: ROUSSEL J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

JOANNE POWLESS

Respondent

ORDER

UPON informal motion by the appellant seeking to expedite the hearing of the present appeal;

AND UPON considering the respondent consents to the hearing being expedited;

AND UPON considering the direction and order of this Court issued on August 13, 2025;

AND UPON considering the requisition for hearing filed on August 15, 2025;

THIS COURT ORDERS that:

1. The present appeal shall be expedited according to the following schedule with the aim of having a hearing during the month of October 2025, subject to the order of the Chief Justice or Judicial Administrator specifying the date and duration of the hearing:
    a. The agreement as to the contents of the appeal book shall be served and file no later than August 22, 2025;
    b. The appeal book shall be served and filed no later than August 22, 2025;
    c. The appellant shall serve and file its memorandum of fact and law no later than September 12, 2025;
    d. The respondent shall serve and file their memorandum of fact and law no later than September 26, 2025;
    e. A joint book of authorities shall be filed no later than September 26, 2025.
2. The dates for service and filing of the parties' memoranda of fact and law may be modified upon informal motion to the Court on consent of the parties.
3. There shall be no order of costs on this motion.

"Sylvie E. Roussel"
J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20250908

Docket: A-270-25

Ottawa, Ontario, September 8, 2025

PRESENT: DE MONTIGNY C.J.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

JOANNE POWLESS

Respondent

ORDER

This appeal is set down to be heard at the Thomas D'Arcy McGee Building, 90 Sparks Street, 10th Floor, Ottawa, Ontario, beginning at 9:30 a.m. on Monday, October 6, 2025, for a duration that will be set by the presiding member of the panel hearing the appeal once the parties' memoranda have been filed, but which will not exceed four hours.

"Yves de Montigny"

C.J.

Court File No. A-270-25

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

-and-

JOANNE POWLESS

Respondent

APPELLANT'S WRITTEN REPRESENTATIONS
(In response to the First Nations Child and Family Caring Society of Canada Motion to Intervene)

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Counsel for the Respondent, Joanne Powless

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OVERVIEW

1. The First Nations Child and Family Caring Society of Canada ("Caring Society" or "Proposed Intervener") has not demonstrated that its intervention will assist the Court in determining the issues raised in this expedited appeal or that it is in the interests of justice. The Caring Society's proposed intervention would be duplicative of other submissions and would necessarily entail reliance on new evidence. Rather than assisting the Court, the proposed intervention would expand the record beyond what is currently before the Court. While the Proposed Interveners are experienced interveners with an interest in the outcome of the proceeding, their proposed submissions raise new issues that are not engaged in this appeal. In view of the above, and the expedited nature of the appeal, it is not in the interests of justice to grant leave to intervene.

PART I – STATEMENT OF FACTS

A) Nature of the Appeal

2. This appeal concerns a decision of the Federal Court which granted the Respondent's application for judicial review. The application related to the decision of a Senior Assistant Deputy Minister at Indigenous Services Canada ("ISC"), which denied the Applicant's request under Jordan's Principle. The Applicant had sought $200,000 to fund a housing remediation to remove mould, along with $110,000 in associated relocation and other costs.[1]

[1] *Powless v Canada (Attorney General)*, 2025 FC 1227 at para 24.

3. The Court below reviewed various orders of the Canadian Human Rights Tribunal ("CHRT") and previous Federal Court decisions that considered Jordan's Principle. The Court concluded that:

(a) It was unreasonable for ISC to deny the request by narrowly framing it as a housing remediation request, rather than assessing it through a substantive equality lens and considering the health and best interests of the children.[2]

(b) The issue is not whether the On-Reserve Residential Rehabilitation Assistance Program (" RRAP") is a special or ameliorative program, but whether the children's health needs were adequately addressed and ISC unduly focused on comparable services. There was evidence that the RRAP was insufficient and it was unreasonable for ISC to conclude that other programs could meet the children's needs.[3]

4. On August 11, 2025, the Attorney General of Canada appealed the decision of the Court below on three grounds:

(a) First, the Court below erred in concluding that it was unreasonable for ISC to frame the Jordan's Principle funding request as a housing remediation request;

(b) Second, the Court below erred in concluding that it was irrelevant to the substantive equality analysis whether the RRAP was an ameliorative program or not; and

(c) Third, the Court below erred in concluding that ISC failed to assess the funding request through the lens of substantive equality.[4]

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[2] *Ibid* at para 43.
[3] *Ibid* at para 46 and 49.
[4] Notice of Appeal dated August 11, 2025, Appellant's Responding Motion Record, Tab 1 at pp 3 to 7.

B) Proposed Intervention

5. On September 5, 2025, the Caring Society filed a motion to intervene in this appeal.

6. The Caring Society has not attached the submissions it proposes to make in its motion record but describes them in the affidavit of Cindy Blackstock ("Blackstock Affidavit"), and their written representations.[5] The Blackstock Affidavit contains Dr. Blackstock's CV, the Caring Society's public reports noting their concerns on compliance with CHRT orders, and an academic article. The Caring Society intends to rely on these public documents, that are not in the evidentiary record and have not been subject to cross-examination or response, to make their submissions as an intervener.[6]

7. Broadly, the Caring Society seeks to intervene to provide submissions on:

(a) The normative standard not applying and the lack of a comparable government service for non-First Nations children is not determinative of a Jordan's Principle request; and

(b) Disqualifying a Jordan's Principle request on the basis of the existence of an ameliorative program violates the fundamental requirements of Jordan's Principle and is not in keeping with substantive equality rights of First Nations children.[7]

[5] Affidavit of Cindy Blackstock at paras 37 to 48, Motion Record of the Proposed Intervener, Tab 2 at pp 16 to 19.
[6] See paras 22 to 36 of the Proposed Intervener's Written Representations dated September 5, 2025, Motion Record of the Intervener, Tab 3 at p 219 to 224.
[7] See para 22 of the Proposed Intervener's Written Representations dated September 5, 2025, Motion Record of the Intervener, Tab 3 at p 222.

8. The Caring Society seeks to file a 20-page factum, to present oral argument not exceeding 30 minutes, and participate in future case conferences with respect to this Appeal.

PART II – POINTS IN ISSUE

9. The sole issue on this motion is whether the Caring Society has met the test for leave to intervene in this appeal.

PART III – SUBMISSIONS

A) The test for intervention

10. The parties agree that the test for intervention under Rule 109 requires three key elements to be met: (i) the usefulness of the intervener's participation to what the court has to decide, (ii) a genuine interest on the part of the intervener in the proceeding, and (iii) a consideration of the interests of justice.[8]

Interveners must restrict themselves to the central legal issues in the case and make relevant submissions to the proceedings.[9] It is not open to interveners to expand the scope of the proceeding by adding issues or evidence.[10]

B) The Proposed Intervener has not demonstrated that their participation will assist the court or that their intervention is in the interests of justice

11. While the Attorney General of Canada accepts that the Proposed Intervener has a genuine interest in the issue for the purposes of this motion, the Proposed Intervener has not

[8] *Le-Vel Brands v Canada (Attorney General)*, 2023 FCA 66 at para 7.
[9] *Talukder v Canada (Public Safety and Emergency Preparedness)*, 2025 FCA 132 at para 27.
[10] *Ibid*.

demonstrated that it meets the requirement that its participation would be useful to the Court or that its intervention would be in the interests of justice.

1) The Proposed Intervener's submissions do not meet the standard of usefulness

12. The Proposed Intervener does not meet the standard of usefulness as required under rule 109 of the *Federal Courts Rules*. The proposed arguments concerning the scope and purpose of Jordan's Principle are already being fully canvassed by the Parties and there is no purpose for the Caring Society to intervene to duplicate the Respondent's submissions. Furthermore, the proposed submissions concerning the "context vis-à-vis the historical disadvantage and contemporary realities of First Nations children accessing Jordan's Principle" necessitate the reliance on evidence that is not in the record.

13. The central issue in this appeal is whether the decision maker reasonably interpreted and applied Jordan's Principle to the funding request. As a reasonableness review exercise, the Court is reviewing whether the decision maker took into account the relevant factual and legal constraints in an intelligible, justified, and transparent way as applied to Jordan's Principle. Such contextual evidence is not relevant to the narrow issue on this appeal, that is, the reasonableness of a particular funding decision in a specific context.

While the Proposed Intervener states that they accept the evidentiary record as it currently stands, the proposed scope of intervention as described in their materials necessarily engages with additional evidence that was not before the decision-maker.[11] It appears that the Caring Society essentially seeks to introduce new evidence on Jordan's Principle that was not before

[11] See para 22 of the Proposed Intervener's Written Representations dated September 5, 2025, Motion Record of the Intervener, Tab 3 at p 222.

the decision maker to insist on a particular interpretation based on their institutional experience.[12] These are factual assertions that do not exist in the evidentiary record on appeal and would be included to support arguments broader than those relevant to the review of the funding decision at issue here. Permitting the admission of these arguments and evidence would go beyond an intervener's proper role.[13]

14. It is not permissible for an intervener to introduce such new evidence, and it is beyond the role of an intervener to provide submissions on matters "beyond the four corners" of the Notice of Appeal.[14] Permitting this evidence and arguments based on it, would shift and expand the scope of this appeal beyond the grounds set out in the Notice of Appeal. As this Court held in *Talukder*, interveners are "guests at a table that has already been set."[15]

15. Finally, legal novelty or uncertainty is, on its own, insufficient for an intervener to intervene in an appeal.[16] This appeal is not concerned with the correctness of the interpretation of Jordan's Principle.[17] Both parties will be providing their submissions on the scope and application of Jordan's Principle. Therefore, permitting the Proposed Intervener to make submissions on its preferred interpretation of Jordan's Principle would be of no assistance to this Court.[18] The Proposed Intervener has not articulated any other grounds to demonstrate

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[12] See para 22 of the Proposed Intervener's Written Representations dated August 25, 2025, Motion Record of the Intervener, Tab 3 at p 222.
[13] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 174 at paras 55 to 56; *Talukder v Canada (Public Safety and Emergency Preparedness)*, 2025 FCA 132 at para 29.
[14] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 174 at paras 55 to 56; *Talukder v Canada (Public Safety and Emergency Preparedness)*, 2025 FCA 132 at para 29.
[15] *Talukder v Canada (Public Safety and Emergency Preparedness)*, 2025 FCA 132 at para 27.
[16] *Canada v DAC Investment Holdings*, 2025 FCA 37 at para 16; See para 23 of the Proposed Intervener's Written Representations dated September 5, 2025, Motion Record of the Intervener, Tab 3 at p 219.
[17] *Le-Vel Brands v Canada (Attorney General)*, 2023 FCA 66 at para 17.
[18] *Ibid*.

that they will make a useful contribution that will assist the court in determining the issues raised in this appeal.

2) The Proposed Intervener's intervention is not in the interests of justice

16. As an expedited appeal, it is not in the interests of justice to grant leave to the Proposed Intervener as it would prolong the determination and hearing of this appeal. This is a flexible and discretionary part of the tri-partite test that requires consideration of rule 3 of the *Rules*.[19] The reasons articulated by the Proposed Intervener with respect to the interpretation of Jordan's Principle, potential precedential value, genuine interest, "experience in litigation" is more properly considered the first and second branch of the test.[20]

17. The hearing of the Appeal is set down for October 6, 2025.[21] Permitting the Caring Society to intervene would result in the exchange of additional submissions from all parties in advance of the hearing date which is three weeks away. The Attorney General of Canada has already submitted its Memorandum of Fact and Law, and the Respondent is due to file her Memorandum of Fact and Law on September 26, 2025.[22]

[19] *Le-Vel Brands v Canada (Attorney General)*, 2023 FCA 66 at para 19.
[20] See para 42 of the Proposed Intervener's Written Representations dated September 5, 2025, Motion Record of the Intervener, Tab 3 at pp 225 to 226.
[21] Scheduling Order for A-270-25, Appellant's Responding Motion Record, Tab 3 at p 11.
[22] Order for Timetable by Roussel JA dated August 18, 2025, Appellant's Responding Motion Record, Tab 2 at p 10.

C) In the alternative, the Proposed Intervener should be limited to written representations only

18. In the alternative, should this Court determine that Caring Society should be permitted to intervene, the Attorney General of Canada asks that the terms of any order granting leave include the following:

(a) That the Proposed Intervener's written and oral submissions shall be limited to the interpretive methodology of a decision maker concerning Jordan's Principle funding requests and shall not take a position on the ultimate disposition of the appeal;

(b) That the Proposed Intervener may submit a Memorandum of Fact and Law not exceeding ten (10) pages;

(c) That the Proposed Intervener shall accept the record as filed by the parties and shall not seek to file any additional evidence, nor refer to any evidence in its submissions that are not in the record already before this Court;

(d) That the Proposed Intervener shall provide its Memorandum of Fact and Law no later than September 22, 2025;

(e) That the Appellant shall be permitted to file a responding Memorandum not exceeding ten (10) pages in length no later than October 3, 2025;

(f) That the Proposed Intervener shall not seek costs and shall not have costs awarded against it regardless of the outcome of this Appeal; and

(g) Such further and other relief as this Honourable Court may deem appropriate

PART IV – ORDER SOUGHT

19. The Appellant respectfully requests that the First Nations Child and Family Caring Society of Canada's motion for intervention be dismissed without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th DAY OF SEPTEMBER 2025

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PART V – LIST OF AUTHORITIES

Jurisprudence

Canada v DAC Investment Holdings, 2025 FCA 37

Le-Vel Brands v Canada (Attorney General), 2023 FCA 66

Powless v Canada (Attorney General), 2025 FC 1227

Talukder v Canada (Public Safety and Emergency Preparedness), 2025 FCA 132

Tsleil-Waututh Nation v Canada (Attorney General), 2017 FCA 174