

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

-and-

JOANNE POWLESS

Respondent

MEMORANDUM OF FACT AND LAW OF THE APPELLANT

ATTORNEY GENERAL OF CANADA

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OVERVIEW

1. Jordan's Principle is a human rights principle which ensures that First Nations children have substantively equal access to government services and benefits as compared to non-First Nations children. While Jordan's Principle must not be narrowly interpreted, appellate jurisprudence on substantive equality remains a relevant factual and legal constraint on decision makers. Since substantive equality is an inherently comparative concept, there must be a discriminatory gap in an existing service for Jordan's Principle to apply.

2. In this case, there is no dispute that the Respondent's situation is serious, and that their grandchildren would be best served in a mould-free home, as would be the case for any child in their circumstances. Canada employs many different means to meet these challenges, including through ameliorative programs such as the On-Reserve Residential Remediation Assistance Program ("RRAP").

3. However, in this specific matter, the Court below erred in finding that Jordan's Principle applied as the record demonstrates that there is no existing program anywhere in Canada that would fund the mould remediation and renovation work sought by the Respondent. The Court also erred in finding that Indigenous Services Canada ("ISC") took a narrow approach and failed to consider the request solely from the perspective of substantive equality and the health needs of the children. To the contrary, ISC was alert and alive to the children's needs, best interests of the children, and culturally appropriate services. However, in the absence of a discriminatory gap in an existing service, ISC reasonably refused the Respondent's funding request with due consideration of the facts and the proper scope of Jordan's Principle as framed by governing substantive equality jurisprudence.

4. The Court below further erred in its consideration of the RRAP. ISC properly considered whether this Program could be considered an existing service with a discriminatory gap to which Jordan's Principle would apply. ISC reasonably identified the RRAP as a special or ameliorative program for which the Respondent would be eligible but concluded that Jordan's Principle did not apply to expand the incremental scope of such programs so as to provide more funding beyond each First Nation's annual allocation and at the higher individual level requested by the Respondent. To reduce inequities, the government can create ameliorative programs provided for in subsection 16(1) of the *Canadian Human Rights Act* ("CHRA") and subsection 15(2) of the *Canadian Charter of Rights and Freedoms* ("Charter"). Supreme Court of Canada jurisprudence confirms that governments are entitled to deference in allocating resources to incremental ameliorative programs and in reducing inequities in an incremental way. Substantive equality cannot be invoked by a court as a basis for expanding the scope of an ameliorative program.

PART I – STATEMENT OF FACTS

A) Funding requests under Jordan's Principle

5. First Nations children, through their parent or legal guardian, may make a funding request to ISC under Jordan's Principle so that they do not face gaps, delays, or denial in accessing government services because of their identity as First Nations Children.

6. If a funding request is refused at first instance, a requester may seek to appeal the refusal through the Appeal Secretariat at ISC within one year of the refusal.

7. On appeal, the Appeal Secretariat will engage the External Expert Review Committee ("EERC"), which is comprised of health experts or social workers who provide a

recommendation to the final decision maker as to whether approving the funding request is necessary to ensure substantive equality in the provision of services taking in to account culturally appropriate services and the best interests of the child.

8. Once the EERC's recommendation is received, the final decision maker, the Senior Assistant Deputy Minister ("SADM") of the First Nations and Inuit Health Branch, renders a final decision on a *de novo* basis. The SADM may vary, depart, or adopt the EERC's reasons. If the refusal is upheld, a requester may seek judicial review in the Federal Court.

B) The funding request

9. The Respondent has been the primary caregiver of her two grandchildren since 2020.¹ She has made prior requests under Jordan's Principle and has previously received food and clothing support.²

10. In the funding request at issue before the Federal Court, the Respondent sought approximately \$200,000 for mould removal, replacement of drywall, flooring, doors, windows, eavestroughs, paint, kitchen and washroom renovations, among other items.³ The request also sought a further sum of \$110,000 for 6 months of housing security to vacate the home during renovations, \$3,000 for 6 months of "personal hygiene and care provision" while displaced, \$6,000 for food, and \$5,000 for new clothing.⁴

¹ Affidavit of Joanne Powless at para 4, affirmed on January 27, 2025, Appeal Book, Tab 7 at p 443.

² Email from ISC, Appeal Book, Tab 6 at p 111.

³ Letter from Toronto Council Fire to Jordan's Principle Regional Intake Office dated January 8, 2024, Appeal Book, Tab 6 at pp 106 to 107.

⁴ *Ibid.*

11. In a decision dated September 10, 2024, Indigenous Services Canada (“ISC”) denied the Applicant’s request for funding on the grounds that:

- (a) Jordan’s Principle is intended to ensure that First Nations children can benefit from existing government services available to the general public. As ISC is unaware of any existing government service to the general public that funds mould remediation, the Respondent has not been denied a service under section 5 of the *CHRA* or subsection 15(1) of the *Charter*.
- (b) The Canada Mortgage and Housing Corporation’s (“CMHC”)’s On-Reserve Residential Rehabilitation Assistance Program (“RRAP”) is an ameliorative program designed to improve the health and safety of on-reserve housing. Jordan’s Principle is not intended to change the scope of special or ameliorative programs. As a special program under subsection 16(1) of the *CHRA* or an ameliorative program under subsection 15(2) of the *Charter*, the RRAP could not serve as a basis for granting Jordan’s Principle funding, even if the Respondent qualified for the program.⁵

12. On November 14, 2024, the Applicant appealed the refusal and added a request for \$5,559.60 to fund appeal advocacy costs.⁶

C) Decision under review before the Federal Court

13. On November 25, 2024, the External Expert Review Committee (“Committee”), whose role is to advise the SADM, assessed the Applicant’s appeal of the September 10, 2024 and recommended that the appeal be dismissed.⁷

⁵ First-Level Decision, Appeal Book, Tab 6 at pp 299 to 300.

⁶ Email from Applicant to ISC, Appeal Book, Tab 6 at p 301.

⁷ External Expert Review Committee Presentation Form, Appeal Book, Tab 6 at pp 422 to 429.

14. The Committee found that major structural changes and renovations to a house are outside the scope of Jordan’s Principle. The Committee evaluated the Applicant’s request *de novo* and reconsidered the needs of the minor grandchildren. The Committee explicitly assessed whether the requested funds should be provided in order to ensure substantive equality, culturally appropriate services, and the best interests of the grandchildren. The Committee’s rationale is detailed in their Designated Decision Maker (“DDM”) form and the “Presentation Form.” The Presentation Form provides the reason for recommendation to approve or deny from each panel member, and includes each member’s assessment of the evidence, including health and medical documents. These materials were placed before the SADM, for a final decision on the appeal.⁸

15. Having considered the Committee’s recommendation, the SADM denied the second-level appeal on grounds substantially similar to those set out in the first-level denial in a decision dated November 28, 2024.⁹

16. The SADM stated in the decision that Jordan’s Principle is grounded in the legal concept of substantive equality and serves to ensure that First Nations children can benefit equally from existing government services like other children across Canada. The SADM also noted that substantive equality recognizes that First Nations children may need resources or support not provided to others, within the context of an existing government service.

17. However, the SADM further stated in the decision that ISC was not aware of an existing government service available to the general public that provides funding for the purposes of

⁸ External Expert Review Committee Presentation Form, Appeal Book, Tab 6 at pp 422 to 429.

⁹ Final-Level Decision, Appeal Book, Tab 6 at pp 439 to 441.

mould remediation. With this in mind and having assessed the distinct needs of the children as set out in the Presentation Form and other documents, to determine if the requested service should be provided to ensure substantive equality in the provision of services to the children, to ensure culturally appropriate services to the children, and to safeguard the best interests of the children; the SADM concluded that the Applicant had not been denied access to an existing government service under the *CHRA* or a benefit under the *Charter*. Therefore, Jordan's Principle did not apply.

18. The SADM also explained that Jordan's Principle is not meant to provide access to or change the scope of special or ameliorative programs like the RRAP. Such programs are specially designed to combat discrimination by helping members of a disadvantaged group. In this case, the RRAP is aimed to address health and safety concerns related to housing for First Nations people on reserve, a specific group to which the Respondent belongs.¹⁰

19. Lastly, the SADM refused the Applicant's request, made at the appeal level, for funding for advocacy services on the grounds that ISC was not aware of an authority applicable to the Jordan's Principle appeals process that would allow appeal advocacy costs to be paid or reimbursed.

¹⁰ "On-Reserve Residential Rehabilitation Assistance Program", Canada Mortgage and Housing Corporation, online: < <https://www.cmhc-schl.gc.ca/professionals/project-funding-and-mortgage-financing/funding-programs/all-funding-programs/residential-rehabilitation-assistance-program>>.

D) Decision of the Federal Court

20. The Federal Court granted the Respondent's application for judicial review and found that the SADM's decision denying the funding request was unreasonable.¹¹

21. 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 the decision to deny the request was unreasonable because:

- (a) ISC narrowly framed 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;¹²
- (b) ISC unduly focused on comparable services which ignores the core principle of substantive equality, which requires consideration of historical disadvantage and the best interests of the children;¹³ and
- (c) ISC's reliance on the RRAP was inconsequential as the issue was not whether the RRAP is an ameliorative program, but whether the children's health needs were adequately addressed. In this regard, the Court pointed to evidence that the RRAP was either inaccessible or inadequate to meet the children's health needs.¹⁴

¹¹ *Powless v Canada (Attorney General)*, [2025 FC 1227](#) at [para 24](#).

¹² *Ibid* at [para 43](#).

¹³ *Ibid* at [para 46](#).

¹⁴ *Ibid* at [paras 46-49](#).

PART II – POINTS IN ISSUE

22. This appeal raises three issues:

- (a) What is the appropriate standard of review on appeal?
- (b) Did the Federal Court err in concluding that ISC took an unreasonably narrow approach to characterizing the Funding Request as a housing remediation request and by failing to consider the request through the lens of substantive equality?
- (c) Did the Federal Court err in concluding that the RRAP, as an ameliorative program, was irrelevant to the analysis?

PART III – SUBMISSIONS

A) Standard of Review

23. In an appeal of a decision of the Federal Court on an application for judicial review, this Court should “step into the shoes of the lower court” and determine for itself whether the Court below “identified the appropriate standard of review and applied it correctly.”¹⁵ The reasons given by the lower court are relevant and the Appellant bears the tactical burden to show that the lower court’s reasoning is flawed.¹⁶

24. Here, the Federal Court correctly identified the standard of review as that of reasonableness in respect of a determination whether the underlying decision was transparent, intelligible, and justified, and that of correctness in respect of whether the *Charter* is engaged.

¹⁵ *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, [2013 SCC 36](#) at [paras 45 to 46](#). See also: *Northern Regional Health Authority v Horrocks*, [2021 SCC 42](#) at [para 10](#).

¹⁶ *Bank of Montreal v Canada (Attorney General)*, [2021 FCA 189](#) at [para 4](#).

B) ISC acted reasonably in assessing the funding request through the lens of substantive equality

25. ISC's approach and conclusions were grounded in appellate jurisprudence on substantive equality, and the Federal Court erred by concluding that ISC took an unreasonably narrow focus on comparable services instead of considering the Respondent's grandchildren's needs.¹⁷

26. In arriving at its decision, ISC applied the relevant legal standard to the facts before it, including in respect of the health of the children. ISC reasonably concluded that Jordan's Principle did not apply to the funding request because there was no discriminatory gap in an existing service. The Court below erred in finding that ISC took an unreasonably narrow view by focusing on whether there was a comparable service available to the 'general public' instead of solely focusing on the Respondent's grandchildren's needs.¹⁸ Contrary to the reasons of the Court below, ISC's conclusions were grounded in appellate jurisprudence on substantive equality as reasonably applied to the facts before it, and consistent with the proper scope and application of Jordan's Principle. On that basis, these conclusions were entitled to deference.

27. As a human rights principle, Jordan's Principle requires funding requests to be assessed through the lens of substantive equality.¹⁹ While Jordan's Principle must not be read narrowly, it is also not an open-ended principle.²⁰ A broad and liberal approach to Jordan's Principle

¹⁷ *Powless v Canada (Attorney General)*, [2025 FC 1227](#) at [paras 43 to 53](#).

¹⁸ *Powless v Canada (Attorney General)*, [2025 FC 1227](#) at [paras 43 to 53](#).

¹⁹ [2021 CHRT 41](#) at [para 194](#).

²⁰ *Pictou Landing Band Council v Canada (Attorney General)*, [2013 FC 342](#) at [paras 86](#) and [116](#).

cannot override basic requirements of appellate jurisprudence on substantive equality or else risk inconsistency with the principle's purpose.

i. Jordan's Principle

28. In December 2007, the House of Commons unanimously endorsed the principle that intergovernmental funding disputes should not delay the provision of necessary health supports and services to First Nations children. This principle was named "Jordan's Principle", after Jordan River Anderson.

29. The goal underlying Jordan's Principle was to require that the government or department of first contact to pay for the service sought and only seek repayment from the appropriate funder after the service has been provided to the First Nations child.²¹

30. Canada has invested significant resources and funds to meet the needs of First Nations children and has made many enhancements to its administration of Jordan's Principle. The scope of Jordan's Principle has also been further defined by the CHRT in the context of litigation against Canada brought by the Assembly of First Nations and the First Nations Child and Family Caring Society. Canada continues to implement the full scope and meaning of Jordan's Principle as it understands the CHRT's various rulings.²²

31. The CHRT's approach to Jordan's Principle is grounded in the legal concept of substantive equality, as defined by the Supreme Court of Canada in cases about equality rights

²¹ *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, [2016 CHRT 2](#) at [para 351](#).

²² See Annex 1.B in *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, [2017 CHRT 35](#) [2017 CHRT 35].

in section 15 of the *Charter*.²³ It was ordered as a remedy by the CHRT to address systemic discrimination in the provision of essential services to First Nations children and serves to ensure that First Nations children have substantively equal access to existing government services and programs as compared to non-First Nations children.²⁴

32. Jordan's Principle is meant to address discrimination in the provision of government services to First Nations children by preventing First Nations children from experiencing barriers such as gaps, delays, or denials in accessing existing government services available to other children, due to their identity as First Nations children.²⁵

33. When a government service exists, but is not necessarily available to all other children or is beyond the normative standard of care (i.e. beyond the existing level of service provided), the government or department of first contact is still required to evaluate and assess "the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child."²⁶

²³ [2016 CHRT 2](#) at [paras 400-402](#).

²⁴ [2020 CHRT 20](#) at [para 89](#).

²⁵ [2016 CHRT 2](#) at [paras 351, 379, 381, 391](#); Annex 1.B in [2017 CHRT 35](#).

²⁶ *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, [2017 CHRT 14](#) at [para 135](#) [2017 CHRT 14].

ii. The law on substantive equality

34. Substantive equality is a Canadian legal norm that is guaranteed by section 15 of the *Charter* and section 3 of the *CHRA*. The norm recognizes that governments must adapt laws and policies or provide additional resources to accommodate different needs related to race, disability, or other personal characteristics that are protected grounds of discrimination. It also accepts that identical treatment to all may result in discrimination against a particular group.²⁷

35. Substantive equality does not impose positive obligations on a government to remedy pre-existing inequalities in Canadian society.²⁸ Instead, it imposes obligations on the government not to act in a discriminatory manner when it chooses to adopt law or policy.²⁹

36. Where a government has adopted policies or legislation, the burden rests with the affected party to demonstrate unequal treatment in that they failed to receive a benefit provided to others or bear a burden not imposed on others.³⁰ In practice, this means the affected party must demonstrate that there is a discriminatory gap in access to a service for purposes of Jordan's Principle.³¹ This is because equality is an "inherently comparative

²⁷ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at p 164 to 165; *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at para 83; *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 47 ["Fraser"].

²⁸ *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras 60 to 61, 73 ["Eldridge"]; *Vriend v Alberta*, [1998] 1 SCR 493 at paras 76, 79, 82, 87 to 88; *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 at para 41 ["Auton"]; *R v Sharma*, 2022 SCC 39 at para 63 ["Sharma"].

²⁹ *Ibid.*

³⁰ *Auton* at para 27.

³¹ *Lepine v. Correctional Service Canada Amanda Lepine (on behalf of A.B.) v. Correctional Service Canada*, 2025 CHRT 74 at paras 39-42 ["Lepine"] ("[...] the duty to accommodate an individual is not a freestanding obligation owed by a service provider or employer to a complainant identified by one or more prohibited grounds of discrimination [...] It is the existence of a barrier or disadvantage in the provision of services created, at least in part, by their protected characteristics [that triggers a duty to accommodate them]."

concept” which “may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.”³²

37. In the government service provision context, governments must ensure that services can be accessed without discrimination. Any difference between the existing service level available to the general public and the level required to accommodate an individual based on their needs related to a protected ground is when the doctrine of substantive equality requires a remedy.³³

38. There is no requirement for an exact comparator group, but there must be *some* standard to compare against.³⁴ If there is no policy, legislation, or service to compare against, there is no benefit denied for the purposes of substantive equality.³⁵

39. Substantive equality also does not impose a positive obligation requiring government to enact remedial legislation or otherwise remedy pre-existing societal inequalities.³⁶ As part of a government’s commitment to equality, it may choose to enact legislation or adopt discretionary policies which further equality by way of special or ameliorative programs which are expressly permitted under subsection 16(1) of the *CHRA* and subsection 15(2) of the *Charter*.³⁷ These types of programs are specifically designed to combat the historic and societal disadvantage of members of particular groups of protected persons based on

³² *Andrews* at [p 164](#); *Withler v Canada (Attorney General)*, [2011 SCC 12](#) at [paras 47, 62, 65](#) [“*Withler*”]; *R v Kapp*, [2008 SCC 41](#) at [para 15](#) [“*Kapp*”]; *Fraser* at [para 55](#); *Sharma* at [para 41](#).

³³ *Lepine* at [paras 39-42](#).

³⁴ *Sharma* at [para 41](#); *Withler* at [para 62](#); *Fraser* at [para 48](#); and *Pictou Landing* at [para 116](#).

³⁵ *Auton* [para 41](#); *Sharma* [para 44](#).

³⁶ *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux* [2018 SCC 17](#) at [para 42](#) [“*Alliance*”]; *Sharma* at [paras 63 to 65](#).

³⁷ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, [1982, c 11](#) at [s 15\(2\)](#); *Canadian Human Rights Act*, [RSC 1985 c H-6](#) at [s 16\(1\)](#).

recognized grounds of discrimination. Both subsections 16(1) of the *CHRA* and 15(2) of the *Charter* expressly recognize that targeted special or ameliorative programs are not discriminatory.³⁸ They are aimed at enabling government action intended to combat societal inequalities proactively through affirmative measures.³⁹

40. Supreme Court of Canada jurisprudence has consistently recognized that deference is afforded to the legislative and executive branches of government to address inequality in an incremental manner. Government is entitled to deference in dealing with pre-existing societal inequities one step at a time, allowing government to set its own priorities.⁴⁰ These programs are based on policy discretion and allow the government to target the disadvantage of particular groups in specific ways.⁴¹

iii. Jordan’s Principle applies when there is both an existing service and a discriminatory service gap

41. A proper interpretation of the CHRT’s orders on Jordan’s Principle must be consistent with appellate jurisprudence on substantive equality. As a result, Jordan’s Principle applies where a First Nations child faces a discriminatory gap within an existing service.⁴² In its reasons, the CHRT, consistent with *Pictou Landing*, concluded that there must be an existing “complimentary social or health” service for Jordan’s Principle to apply.⁴³ As a result, the

³⁸ *Ibid.*

³⁹ *Kapp* [paras 25, 33, 37](#); *Cunningham* [paras 40-41](#).

⁴⁰ *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, [2011 SCC 37](#) at [para 41](#); *Alliance* at [para 42](#); *Sharma* at [para 65](#).

⁴¹ *Ibid.*

⁴² *Pictou Landing* at [para 116](#) (“Jordan’s Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and costs that meet the needs of the on reserve First Nation child.”)

⁴³ [2016 CHRT 2](#) at [para 378](#).

central legal inquiry ISC decision makers must address is whether the requested service is required to ensure substantively equal access to existing government services. Consideration of a child's needs, best interests, and culturally appropriate services are contextual factors to be considered by decision makers in deciding whether a Jordan's Principle funding request should be approved. However, consideration of the children's needs, their best interests and cultural appropriateness should not be done in a vacuum and must be done in a manner consistent with the core principles of substantive equality, as set out in governing jurisprudence.

42. This framing of what is required under Jordan's Principle is consistent with the CHRT's approach, which is clear that the purpose of Jordan's Principle is to ensure that First Nations children do not face gaps in essential public services or experience delays in receiving them as compared to non-First Nations children.⁴⁴

43. In interpreting Jordan's Principle, the CHRT did not distinguish any leading jurisprudence on substantive equality as required by administrative law when departing from binding jurisprudence.⁴⁵ Since the initial merits decision, the CHRT has consistently applied leading jurisprudence related to section 15 of the *Charter* in the interpretation of substantive equality in its orders concerning Jordan's Principle.⁴⁶

44. In the case of Jordan's Principle, if there is no existing service as a basis to compare against, there is no benefit or service denied to constitute a discriminatory gap which requires

⁴⁴ [2016 CHRT 2](#) at [paras 351](#), [381](#), [391](#); Annex 1.B in [2017 CHRT 35](#); [2020 CHRT 20](#) at [para 100](#).

⁴⁵ *Canada (Citizenship and Immigration) v Vavilov*, [2019 SCC 65](#) at [para 112](#).

⁴⁶ For example, [2016 CHRT 2](#) at [para 400](#) refers explicitly to *Eldridge* at [para 78](#).

a remedy for the purposes of substantive equality.⁴⁷ While the CHRT has held that a requested government service need not necessarily be available to all other children or may be beyond the normative standard,⁴⁸ it must still be available at least to some children at a given normative standard for Jordan's Principle to apply, consistent with the principle of substantive equality.⁴⁹

45. To the extent that this Court in *Dominique* recognized that the jurisprudence under the *Charter* and the *CHRA* have evolved separate tests on establishing discrimination, this does not extend to their basic requirements based on the underlying principle of substantive equality that animates the guarantees in both the *Charter* and the *CHRA*.⁵⁰

46. In defining substantive equality under Jordan's Principle, the CHRT has relied on *Charter* jurisprudence from the Supreme Court of Canada such as *Eldridge* to inform its reasons on substantive equality. In *Eldridge*, the Supreme Court held that the failure of hospitals to provide sign language interpretation, where necessary for persons with hearing impairments to access medical services effectively, discriminatorily denied them an equal benefit of the law as compared with hearing persons. In addition, the *Eldridge* approach has been expanded to the statutory human rights context to ensure that disadvantaged groups benefit equally from services offered to the general public.⁵¹ Therefore, appellate jurisprudence on substantive equality developed within the context of the *Charter* remains

⁴⁷ *Auton* [para 41](#); *Sharma* [para 44](#); *Lepine* [paras 39-42](#).

⁴⁸ [2017 CHRT 14](#) at [para 135\(iv\)](#).

⁴⁹ *University of British Columbia v Berg*, [1993 CanLII 89 \(SCC\)](#), [\[1993\] 2 SCR 353](#) at [pp 382-383](#) [*Berg*].

⁵⁰ *Canada (Attorney General) v Dominique*, [2025 FCA 24](#) at [paras 62](#) and [64](#).

⁵¹ [2016 CHRT 2](#) at [para 400](#) refers explicitly to *Eldridge* at [para 78](#); *Moore v. British Columbia (Education)*, [2021 SCC 61 \(CanLII\)](#), [\[2012\] 3 SCR 360](#) at [para. 34](#).

applicable to the concept of substantive equality under the *CHRA* in the interpretation of the scope and application of Jordan's Principle.

47. ISC's determination that the Respondent was seeking funding for housing remediation was reasonable given how it was characterized in the funding request. The Respondent expressly sought funding for "Mould Remediation and Renovation." [sic]⁵² The Court below did not identify any error made by ISC, other than concluding that it was unreasonable to frame it in such a way.⁵³ Further, the Court erred in overlooking ISC's analysis of childrens' health and medical issues as addressed in the Presentation Form.

iv. ISC reasonably concluded that Jordan's Principle does not apply to the funding request

48. There is no evidence of any federal or provincial funding program available to the general public in Canada (including to families with children with asthma), which would fund the extensive mould remediation and home renovation work the Respondent seeks to fund through Jordan's Principle. If one existed, ISC would have been obliged to assess it as part of the funding request to determine whether there were any discriminatory gaps.

49. In denying the funding request, the decision maker duly acknowledged that the Respondent's grandchildren had extensive health-related needs.⁵⁴ However, in administering funding that is not unlimited and needs to be prioritized based on relevant legal and policy principles. In arriving at its decision, ISC was also required to consider the applicable

⁵² Funding Request from the Certified Tribunal Record, Appeal Book, Tab 6 at pp 295 to 296.

⁵³ *Powless v Canada (Attorney General)*, [2025 FC 1227](#) at [para 43](#).

⁵⁴ DDM Presentation Form, Appeal Book, Tab 6, pp 435 to 436; Decision Letter, Appeal Book, Tab 6 at pp 439 to 440.

jurisprudence on substantive equality, which requires identifying a discriminatory gap in an existing service when considering whether Jordan's Principle applied, while taking into account the need to consider contextual factors relevant to the situation of First Nations children living on-reserve.⁵⁵ No discriminatory gap in an existing service was identified. As a result, ISC reasonably concluded that, for the purposes of Jordan's Principle, there was no discriminatory gap in an existing service that would provide the basis for approving the Respondent's request.⁵⁶

C) The relevance of the ameliorative RRAP to the Jordan's Principle analysis

50. The Court below erred by concluding that ISC's consideration of whether the RRAP was an ameliorative program was inconsequential to determining Jordan's Principle requests.⁵⁷ Having identified the RRAP as a program which might address the Respondent's needs, ISC reasonably considered whether the RRAP could be considered an existing service with a discriminatory gap to which Jordan's Principle would apply. ISC concluded that the RRAP was a special or ameliorative program that was already available to the Respondent to access through their First Nation and indeed was specifically aimed at addressing the type of situation they were facing.

51. However, the fact that the Respondent may not have been able to apply successfully to CMHC's ameliorative program for the amount of funding she was requesting is not an appropriate basis to apply Jordan's Principle. There is no legal basis to require ISC to expand

⁵⁵ DDM Presentation Form, Appeal Book, pp 435 to 436; Decision Letter, Appeal Book, pp 439 to 440.

⁵⁶ *Ibid.*

⁵⁷ *Powless v Canada (Attorney General)*, [2025 FC 1227](#) at [para 46](#).

access to or funding available through ameliorative programs through the application of Jordan's Principle. To do so would turn Jordan's Principle into a vehicle to challenge the incremental scope of ameliorative programs as underinclusive or inadequately funded. That outcome would risk creating significant issues, especially respecting provincial programs, and would be contrary to the legislative intent of s. 16(1) of the *CHRA*.

52. Section 16(1) of the *CHRA* expressly recognizes that such programs are not a discriminatory practice and should generally be protected from equality rights-based challenges. From a broader policy perspective, it could jeopardize the financial sustainability of these types of programs as a means to assist particularly vulnerable populations.

53. It would also be inconsistent with broader principles of substantive equality jurisprudence, holding that ameliorative programs are consistent with equality rights under section 15 of the *Charter*, subject only to potential challenge on section 15 grounds in limited circumstances of under inclusion involving the ineligibility of members of the very disadvantaged group that the program was intended to benefit.⁵⁸ Therefore, consistent with jurisprudence, ISC reasonably concluded that the RRAP was an ameliorative program, that Jordan's Principle is not available to expand the incremental scope of existing ameliorative programs, and accordingly, there was no basis under Jordan's Principle to grant the funding requested.

⁵⁸ *Cunningham* at [para 41](#); *Alliance* at [para 31](#).

i. The RRAP is an ameliorative program

54. According to the Supreme Court of Canada in *Kapp*, a program does not violate the equality guarantee if a government can demonstrate that: (1) the program has an ameliorative or remedial purpose, and (2) the program targets a disadvantaged group identified by enumerated or analogous grounds.⁵⁹

55. The RRAP is an ameliorative program - designed to improve the health and safety of on-reserve housing - within the framework set out by the Supreme Court of Canada in *Kapp* and within the meaning of subsection 16(1) of the *CHRA*. As noted by the Supreme Court of Canada, although statutory human rights provisions need not mirror *Charter* provisions, they should be interpreted in light of them.⁶⁰

ii. As an ameliorative program, the incremental scope of the RRAP is not a discriminatory gap

56. RRAP funding was not available to the Respondent as the RRAP had expended its funds for the relevant time.⁶¹ Limited and targeted funding reflects the incremental nature of the RRAP as an ameliorative program, and is not indicative of a discriminatory gap to be filled by Jordan's Principle.

57. Incremental steps of an ameliorative program are not a discriminatory gap because to characterise them so would effectively impose positive obligations on government to fully address pre-existing societal inequalities right away. The incremental scope of the RRAP is

⁵⁹ *R v Kapp*, [2008 SCC 41](#) at [para 41](#).

⁶⁰ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, [2015 SCC 39](#) at [para 31](#); see also *Canada (Attorney General) v. Canadian Human Rights Commission*, [2013 FCA 75 \(CanLII\)](#) at [para 19](#).

⁶¹ Respondent's submissions on Appeal, Appeal Book, Tab 6 at p 312.

not a discriminatory gap because it would be contrary to the legislative intent of section 16(1) of the *CHRA* and deference afforded to the Legislative and Executive branches to incrementally address societal inequalities through ameliorative programs.

58. At its core, the Respondent's funding request did not allege ineligibility for RRAP but instead argued for a level of funding beyond the program allocation and individual allotment available under the RRAP. In other words, the funding request would use Jordan's Principle as an indirect vehicle to expand the incremental benefits available through an ameliorative program, which runs counter to appellate jurisprudence on substantive equality.

59. ISC reasonably concluded that there was no legal basis to apply Jordan's Principle so as to expand the incremental scope of the RRAP because there was no discriminatory gap in an existing program. To conclude otherwise would defeat the purpose of such discretionary programs and apply substantive equality, contrary to governing jurisprudence, as a positive obligation on government to remedy all pre-existing societal inequalities based on need once an ameliorative program is created.

60. This Court's decision in *Dominique* is inapplicable to this situation and does not require departure from Supreme Court of Canada jurisprudence on ameliorative programs for two reasons. First, there was no ameliorative program in *Dominique*.⁶² Second, the issue in *Dominique* was whether First Nation policing services were funded in a discriminatory way as compared to provincial police services, particularly in light of the terms of the First Nations and Inuit Policing Program.⁶³

⁶² *Canada (Attorney General) v Dominique*, [2025 FCA 24](#) at [para 76](#).

⁶³ *Canada (Attorney General) v Dominique*, [2025 FCA 24](#) at [para 30](#).

61. This Court rejected Canada's arguments that the ameliorative elements of the program would affect the *prima facie* discrimination test under *Moore*.⁶⁴ This Court did not, however, rule on issues related to ameliorative programs.

62. Therefore, *Charter* jurisprudence on ameliorative programs remains relevant in the statutory human rights context when it comes to basic principles of substantive equality. By extension, this appellate jurisprudence remains a relevant legal constraint for a decision maker when considering the application of Jordan's Principle to a set of circumstances. The Court below did not recognize this legal constraint and therefore incorrectly concluded that it did not matter whether the RRAP was an ameliorative program or not.

63. The Federal Court therefore erred in law in its a significant departure from the deference given to ameliorative programs by the Supreme Court of Canada.⁶⁵

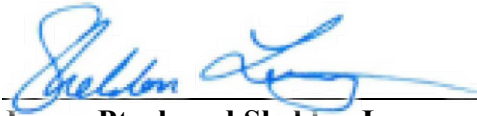
PART IV – ORDER SOUGHT

64. The Appellant respectfully requests that this appeal be allowed and the original decision of ISC dated November 28, 2024 which denied the Respondent's funding request be restored.

⁶⁴ *Canada (Attorney General) v Dominique*, [2025 FCA 24](#) at [paras 80 to 81](#).

⁶⁵ *Alliance* at [para 42](#); *Sharma* at [paras 63-65](#).

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF SEPTEMBER
2025



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PART V – LIST OF AUTHORITIES

Legislation

Canadian Human Rights Act, [RSC 1985 c H-6](#)

The Constitution Act, 1982, Schedule B to the *Canada Act 1982 (UK)*, [1982, c 11](#)

Jurisprudence

Agraira v Canada (Minister of Public Safety and Emergency Preparedness), [2013 SCC 36](#)

Alberta (Aboriginal Affairs and Northern Development) v Cunningham, [2011 SCC 37](#)

Andrews v Law Society of British Columbia, [\[1989\] 1 SCR 143](#)

Auton (Guardian ad litem of) v British Columbia (Attorney General), [2004 SCC 78](#)

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Canada (Attorney General) v. Canadian Human Rights Commission, [2013 FCA 75 \(CanLII\)](#)

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Eldridge v British Columbia (Attorney General), [\[1997\] 3 SCR 624](#)

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), [2021 CHRT 41](#)

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Moore v. British Columbia (Education), [2021 SCC 61 \(CanLII\)](#), [\[2012\] 3 SCR 360](#)

Pictou Landing Band Council v Canada (Attorney General), [2013 FC 342](#)

Powless v Canada (Attorney General), [2025 FC 1227](#)

Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux [2018 SCC 17](#)

Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center), [2015 SCC 39](#)

R v Kapp, [2008 SCC 41](#)

R v Sharma, [2022 SCC 39](#)

University of British Columbia v Berg, [1993 CanLII 89 \(SCC\)](#), [\[1993\] 2 SCR 353](#)

Vriend v Alberta, [\[1998\] 1 SCR 493](#)

Winko v British Columbia (Forensic Psychiatric Institute), [\[1999\] 2 SCR 625](#)

Withler v Canada (Attorney General), [2011 SCC 12](#)