

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

-and-

JOANNE POWLESS

Respondent

-and-

**ASSEMBLY OF MANITOBA CHIEFS AND
THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA**

Interveners

APPELLANT'S MEMORANDUM OF FACT AND LAW

(In response to the Interveners' Memoranda of Fact and Law dated September 25, 2025)

October 2, 2025

ATTORNEY GENERAL OF CANADA

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OVERVIEW

1. Jordan's Principle has been described as a "transformational human rights remedy". The Canadian Human Rights Tribunal has recently noted that in establishing an entire operational sector within ISC to deliver, administer, and support Jordan's Principle, it has made fundamental, foundational changes towards the ending of systemic discrimination against First Nations children. At the same time, the Tribunal has also recognized that Jordan's Principle is not open-ended.

2. The narrow issue before this court is whether it was reasonable for the decision maker in this case to deny a request for remediation of housing, in the absence of an existing service or discriminatory gap. Canada maintains that the decision is wholly consistent with the purpose and scope of Jordan's Principle as articulated by the CHRT and informed by substantive equality jurisprudence, and makes the following points in response to the submissions made by the Interveners, Assembly of Manitoba Chiefs and the First Nations Child and Family Caring Society.

3. First, Canada agrees that reasonableness review must take into account the unique nature of the decision, which was made pursuant to the CHRT Framework established for Jordan's Principle requests. The CHRT has recently affirmed that the Framework allows Indigenous Services Canada to rebut the presumption of substantive equality in the application of Jordan's Principle in appropriate circumstances. In this context, reasonableness must be assessed against the applicable "constellation of legal and factual constraints." Addressing the factual and legal constraints in defending the decision is not a collateral attack on the CHRT's Framework, but a necessary step in assessing the reasonableness of the decision.

4. Second, the applicable factual and legal constraints include both historical and contextual factors and the applicable appellate jurisprudence. For the most part, the CHRT Framework already incorporates the historical context. The legal constraints include the appellate human rights and Charter jurisprudence on substantive equality, except where it was expressly distinguished. In this case, the CHRT considered and cited certain binding authorities at issue here but did not distinguish or depart from other applicable jurisprudence. Accordingly, a reasonable decision is one which is based on an interpretation of the Framework that incorporates and is consistent with the jurisprudence.

5. Third, a reasonable decision is one which is consistent with the purpose and scope of Jordan's Principle as informed by appellate jurisprudence. The requirement of an existing service is consistent with the purpose of Jordan's Principle. Moreover, neither the CHRT nor the courts have dispensed with this requirement. While the Framework provides that the Principle is to apply to situations where the service sought is not available to *all* children, the requirement that an existing benefit or service be available to at least *some* children has remained constant. This conclusion is consistent with the applicable human rights and *Charter* jurisprudence, and in particular, with the principle that human rights remedies must be related to the discriminatory practice or adverse differentiation. Without the element of an existing benefit or service that has been denied, there is no discrimination to be remedied.

6. Fourth, Canada agrees that subsection 16(1) *Canadian Human Rights Act* ("CHRA") does not preclude complainants from challenging an ameliorative program that is intended to assist them. However, that is not the issue here. Rather, Canada's position is that incremental ameliorative programs, such as the On-Reserve Residential Rehabilitation Assistance Program ("RRAP"), are not properly considered existing services with a discriminatory gap

for purpose of the analysis. A finding that the program is the source of discrimination in this case would ignore the deference afforded to the legislature and the executive to create such programs and turn them into positive obligations, contrary to the jurisprudence.

7. In this case, the decision maker reasonably interpreted the purpose and scope of Jordan's Principle to require an existing service that was available to at least some children. In reaching her decision, she was alert and alive to the health needs and best interests of the children; however, in the absence of a government service that provides housing remediation, the presumption of substantive equality was rebutted. Further, she reasonably concluded that the RRAP was not a service with a discriminatory gap. This conclusion is consistent with the Framework and jurisprudence. Accordingly, the Appeal should be allowed.

1. Reasonableness review of Jordan's Principle Funding Requests must take the unique nature of the decision into account

8. Canada agrees that Jordan's Principle is "to be interpreted broadly and liberally rather than narrowly so that it can effectively address the unique hardships confronting First Nations children".¹ However, the discretion afforded decision makers when determining whether to grant requests for funding under Jordan's Principle is not unlimited. As there is no underlying statutory framework that applies to guide the decision-making, reasonableness requires consideration of the elements of the legal context of the decision that operate as constraints.² Here the constraints are found in the CHRT's various Orders respecting Jordan's Principle in

¹ *Pictou Landing Band Council v Canada (Attorney General)*, [2013 FC 342](#), paras [85-86](#) and [95](#) ["Pictou Landing"], *Schofer v Canada (Attorney General)*, [2025 FC 50](#), para [17](#) ["Schofer"].

² *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65](#), para [105](#) ["Vavilov"].

the First Nations Child and Family Caring Society (“Caring Society”) and AFN Complaints (“CHRT Framework”), and in appellate caselaw.³

9. In approaching a funding request, a decision maker must apply its expertise to interpret the purpose and scope of the Principle as defined by the CHRT. As set out more fully below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker.⁴

a) Reasonableness review requires an assessment of the legal and factual constraints

10. In determining whether an administrative decision is reasonable, a reviewing court needs to consider whether the decision is justified, intelligible, and transparent in relation to the “constellation of law and facts that are relevant to the decision”.⁵ It is a robust and deferential standard that is concerned with the outcome and the reasoning that lead to a decision.⁶ It is not focused on whether the decision was correct, or whether the reviewing court would have come to a different conclusion.⁷ A reviewing court will only intervene if there are flaws or shortcomings that are sufficiently central and significant such that it does not exhibit the requisite degree of justification, intelligibility, and transparency.⁸

11. In this case, the identification and clarification on the constellation of law and facts – particularly the legal constraints - is not a collateral attack on the scope and content of the CHRT Framework, but a necessary element to be considered in assessing the reasonableness

³ *Schofer*, paras [17-21](#).

⁴ *Vavilov*, para [85](#).

⁵ *Ibid.*, para [105](#).

⁶ *Ibid.*, paras [83-85](#), [91](#).

⁷ *Ibid.*, paras [46-49](#).

⁸ *Ibid.*, para [100](#).

of the decision.⁹ Accordingly, when assessing the exercise of discretion, the Court will need to consider the legal constraints built into the CHRT Framework, as amplified and guided by binding appellate jurisprudence.

b) Reasonable review requires consideration of whether the presumption of substantive equality has been rebutted

12. The history and context of the CHRT proceedings and the remedial nature of Jordan's Principle form part of the constellation of law and facts that operate as constraints on the decision maker.¹⁰ Canada agrees with the Interveners that Jordan's Principle is a remedial provision that is intended to eliminate jurisdictional barriers to ensure that First Nations children are able to access services in a substantively equal manner.

13. In the absence of a statutory framework governing the exercise of discretion in this context, it is important to not lose sight of the fact that Jordan's Principle is a remedy ordered by the CHRT to address prior discrimination in the provision of federal government services to First Nations children. The Principle was intended as an interim measure aimed at preventing discrimination going forward while longer-term reforms were developed.¹¹

14. In 2025 CHRT 6, the CHRT elaborated on the process that decisions makers were to follow in reviewing requests, in part as a response to concerns with requests that sought benefits and services that were well beyond what the Tribunal intended.¹² The panel clarified

⁹ *Toronto (City) v C.U.P.E., Local 79*, [2003 SCC 63](#), para [34](#).

¹⁰ *Schofer*, paras [17-21](#).

¹¹ *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](#), para [351](#) [2016 CHRT 2]. Note that the CHRT held in [2022 CHRT 8](#), para [144](#), that the discrimination from the FNCFS program ceased in 2022.

¹² *First Nations Child & Family Caring Society of Canada and Assembly of First Nations v Canada (Attorney General)*, [2025 CHRT 6](#), para [66](#) [2025 CHRT 6].

that the presumption of substantive equality articulated in relation to the administration of Jordan's Principle is aimed generally at removing burdens and accessibility barriers on requesters when making an application. The presumption is not intended to eliminate the requirement of substantive equality:

[563] A presumption of substantive equality is a means to break down accessibility barriers and remove burdens on requestors of having to prove how their requests meet the substantive equality test. The Tribunal has no intention to deny ISC's right of rebuttal or say in assessing the requests.¹³ [emphasis added]

15. Finally, it is important to note that the CHRT Framework was made under paragraph 53(2)(a) of the *CHRA*, which authorizes the Tribunal to order a party to cease a discriminatory practice and take measures to redress the discriminatory practice and prevent it from reoccurring in the future.¹⁴ Jordan's Principle is currently being administered by Canada as a remedial measure flowing from the Merits Decision. All human rights remedies must "flow from" the original claim and discriminatory practice based on adverse differentiation.¹⁵ Any relief under Jordan's Principle must therefore be connected to the discriminatory denial of an existing service. The Framework's acknowledgment that the presumption may be rebutted is a recognition of this legal constraint.

¹³ 2025 CHRT 6, para [56](#).

¹⁴ *Canadian Human Rights Act*, [RSC 1985, c H-6](#), s [53\(2\)\(a\)](#) [*CHRA*].

¹⁵ *Moore v British Columbia (Education)*, [2012 SCC 61](#), para [64](#) ["Moore"].

2. The factual and legal constraints include historical and contextual factors and applicable appellate jurisprudence

a) The historical and contextual factors of past discrimination are already incorporated into the CHRT Framework

16. As a remedial measure, the CHRT Framework was shaped by the historical and contextual factors of Canada’s past discrimination towards First Nations children.¹⁶ Canada agrees with the Assembly of Manitoba Chiefs (“AMC”) that historical context, constitutional and treaty principles, and inherent rights and self-determination inform the decision-making process as they are already “baked-in” to the Framework.¹⁷ As such, supplementing the decision’s justifiability with additional contextual factors is, for the most part, not required.¹⁸

17. While having no independent role in the initial review of a request, historical and contextual factors may be relevant in evaluating the level of services required by a First Nations child to meet substantive equality. The CHRT has confirmed that these contextual factors may apply in circumstances where a First Nations child may require a service level above the normative standard of care provided by an existing service.¹⁹

18. In this case, the contextual factors raised by AMC such as treaty issues and “medicine chest” clauses have no application. The Respondent’s request was made in Ontario, beyond the Manitoba-specific treaty issues raised by the AMC. Moreover, none of these issues were raised during the funding application process or in the Court below.²⁰ The extent to which

¹⁶ See for example, 2016 CHRT 2, paras [87-110](#), [151](#), [405-455](#); *First Nations Child & Family Caring Society of Canada et al. v Canada (Attorney General)*, [2020 CHRT 20](#), para [89](#) [2020 CHRT 20].

¹⁷ AMC Factum, paras 13-30.

¹⁸ AMC Factum, para 12.

¹⁹ 2025 CHRT 6, paras [63-64](#).

²⁰ *Powless v Canada (Attorney General)*, [2025 FC 1227](#).

these factors may impact funding requests should be considered in a case where such issues arise on the facts.

b) Appellate Jurisprudence on substantive equality operates as a legal constraint on the exercise of discretion

19. In this case, binding appellate jurisprudence on substantive equality operates as a relevant legal constraint when considering a Jordan’s Principle funding request. As a starting position, this Court has recognized that *Charter* and statutory human rights equality jurisprudence are “mutually influential.”²¹ In rendering its decisions, the CHRT must “have regard to the *Charter*” as “the equality jurisprudence under the Charter informs the content of the equality jurisprudence under human rights legislation and *vice versa*.”²²

20. Administrative law permits decision makers and tribunals, such as the CHRT, to distinguish and depart from binding jurisprudence.²³ The CHRT did not however, distinguish the jurisprudence in its orders concerning Jordan’s Principle.²⁴ Rather, it actively relied on section 15 equality jurisprudence in defining the purpose and scope of its orders.²⁵

21. The Interveners suggest an incomplete interpretation of Jordan’s Principle by ignoring the appellate jurisprudence that is binding and relied on by the CHRT.²⁶ In its orders, the CHRT did not distinguish binding appellate authority such as *Auton*,²⁷ which requires the

²¹ *Canada (Attorney General) v Canadian Human Rights Commission*, [2013 FCA 75](#).

²² *Ibid.*, para [19](#).

²³ *Vavilov*, para [112](#).

²⁴ For example, 2016 CHRT 2, para [400-403](#).

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004 SCC 78](#) [“*Auton*”].

denial of a benefit provided to others to establish discrimination, and *Alliance*,²⁸ or *Sharma*,²⁹ which speak to the principle of incrementalism, ameliorative programs, and that equality remedies must be tied to a discriminatory practice.³⁰ Without an explicit departure from binding jurisprudence, the starting position of “mutual influence” between *Charter* and statutory human rights equality jurisprudence stands.

22. This Court’s decision in *Dominique* did not alter the applicability of equality jurisprudence under section 15 of the *Charter* in the statutory human rights context. In *Dominique*, the Court concluded that, because the test for discrimination is different under the *Charter*, the ameliorative effects of a service were not to be considered under the first step of the analysis – assessing *prima facie* discrimination – under the *CHRA*.³¹ This Court did not conclude that equality jurisprudence as it relates to ameliorative programs has no role in the analysis of human rights complaints.³²

23. Accordingly, it was relevant for Canada to consider that Jordan’s Principle requires an existing service that provides an underlying benefit to others in the first place, in order to apply. As set out by appellate jurisprudence, because equality is an inherently comparative concept, there must be *some* standard to compare against to remedy discrimination using Jordan’s Principle. As there was no discriminatory gap in an existing service in the Respondent’s funding request, Jordan’s Principle did not apply.

²⁸ *Québec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17](#), para [42](#) [“*Alliance*”].

²⁹ *R v Sharma*, [2022 SCC 39](#), para [65](#) [“*Sharma*”].

³⁰ *CHRA*, s [53\(2\)\(a\)](#).

³¹ *Canada (Attorney General) v Dominique*, [2025 FCA 24](#), paras [79-81](#) [“*Dominique FCA*”].

³² *Dominique FCA*, paras [68-69](#).

3. The CHRT Framework requires an existing service

24. Contrary to the Interveners’ submissions, the CHRT, the Federal Court, and this Court have never dispensed with the requirement of an existing service for Jordan’s Principle to apply. Canada agrees with the Interveners that substantive equality does not require a mirror comparator service. However, as equality as an inherently comparative concept, there must be *some* underlying service available to *some* children in order for Jordan’s Principle to apply.

a) Requiring an underlying service that is available to at least some others is consistent with the purpose and scope of Jordan’s Principle

25. Canada’s position is that the interpretation of the CHRT Framework adopted by the Senior Assistant Deputy Minister (“SADM”) is consistent with the purpose and scope of Jordan’s Principle. The purpose and scope of Jordan’s Principle has evolved through the dialogic approach taken by the CHRT.³³ It was first conceived through a unanimous motion by the House of Commons in 2007. Since then, it has evolved into a remedial measure flowing from the findings made by the CHRT in the Merits Decision and subsequent rulings have refined its scope.³⁴

26. In the Merits Decision, the CHRT defined the Principle in these terms:

[351] Jordan’s Principle is a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is

³³ *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, [2021 FC 969](#), para [135](#).

³⁴ 2016 CHRT 2, paras [351](#) and [475](#); *First Nations Child and Family Caring Society of Canada et al v Canada (Attorney General)*, [2016 CHRT 16](#), paras [31-33](#); *First Nations Child & Family Caring Society of Canada et al. v Canada (Attorney General)*, [2017 CHRT 35](#), para [10](#) amending para 135 of CHRT 14 [2017 CHRT 35]; 2025 CHRT 6, paras [57-67](#).

meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them.³⁵ [emphasis in original]

27. This definition was further clarified and refined in 2016 CHRT 10, where the CHRT confirmed that Jordan's Principle applied to all First Nations children, and not just First Nations children with multiple disabilities.³⁶ In 2016 CHRT 16, Jordan's Principle was further expanded to include off-reserve First Nations children as well.³⁷

28. In 2021, in *Malone*, the Federal Court described the purpose of Jordan's Principle in these terms:

[7] Jordan's Principle is designed to prevent First Nations children from being denied essential public services or experiencing delays in receiving them. **It ensures that where a government service is available to all other children, the government or department of first contact will pay for the service and then seek reimbursement as required from other governments or departments after the child has received the service.**

[8] Jordan's Principle requires the government or department of first contact to evaluate 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.³⁸ [emphasis added]

29. That definition was later found by the CHRT to be too narrow. In 2017 CHRT 14 and 2017 CHRT 35, the CHRT clarified that substantive equality may require the provision of services that exceed the normative standard of care. In the latter decision, the CHRT comprehensively redefined Jordan's Principle as follows:

[135] Pursuant to the above, the Panel's Orders are:

Definition of Jordan's Principle

³⁵ 2016 CHRT 2, para [351](#).

³⁶ 2016 CHRT 10, para [33](#).

³⁷ 2016 CHRT 16, para [117](#) [emphasis in original].

³⁸ *Malone v Canada (Attorney General)*, [2021 FC 127](#), paras [7-8](#) ["*Malone*"]

A. As of the date of this ruling, Canada shall cease relying upon and perpetuating definitions of Jordan's Principle that are not in compliance with the Panel's orders in 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16 and in this ruling.

B. 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.

ii. Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy.

iii. **When a government service, including a service assessment, is available to all other children,** the government department of first contact will pay for the service to a First Nations child, without engaging in administrative case conferring conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Canada may only engage in clinical case conferencing with ...;

iv. **When a government service, including a service assessment, is not necessarily available to all other children or is beyond the normative standard of care,** the government department of first contact will still evaluate 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. Where such services are to be provided, the government department of first contact will pay for the provision of the services to the First Nations child, without engaging in administrative case conferring conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Clinical case conferencing may be undertaken only ...

v. While Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle.³⁹

[emphasis added]

³⁹ *First Nations Child & Family Caring Society of Canada et al. v Canada (Attorney General)*, 2017 CHRT 14, para 135, [2017 CHRT 14].

30. Subsequently, in 2020 CHRT 20, the Tribunal reiterated that the purpose of Jordan’s Principle was grounded in substantive equality and “meant to remedy inequalities and gaps in the federal programs ... and to provide navigation to access these services”. The Tribunal highlighted that it was not limited to the child welfare program; it is meant to address all inequalities and gaps in the federal programs destined to First Nations children and families and to provide navigation to access these services, which were found in previous decisions to be uncoordinated and to cause adverse impacts on First Nations children and families.⁴⁰ The Panel agreed with Canada that “the evidentiary record and findings focus on Federally funded programs, the lack of coordination and gaps within Federal Programs offered to First Nations children and families and that this is also one important aspect of the service analysis under section 5 of the *CHRA* that Canada was ordered to remedy”.⁴¹

31. Most recently, in 2025 CHRT 6, the CHRT ruled that the scope of Jordan’s Principle is not boundless:

[66] **The Tribunal finds it is unreasonable to interpret substantive equality in a way that could include just about anything**, and at the same time, demand Canada to pay for it and to expedite the process for those requests. This places Jordan's Principle at risk and First Nations children with real pressing needs in jeopardy.⁴² [emphasis added]

32. Throughout these decisions, the purpose of Jordan’s Principle has remained constant – to ensure that First Nations children receive substantively equal services as compared with other children. This purpose is consistent with its role as a remedial measure made under

⁴⁰ 2020 CHRT 20, para [89](#).

⁴¹ 2020 CHRT 20, paras [89](#), [92-94](#), [96](#).

⁴² 2025 CHRT 6, para [66](#).

paragraph 53(2)(a) of the *CHRA*, which requires a link to one or more discriminatory gaps in the provision of services to First Nations children.

b) Neither the CHRT nor the Federal Courts have dispensed with the requirement of an underlying service for Jordan’s Principle to apply

33. Throughout all of the decisions which refine and clarify the scope of Jordan’s Principle, the CHRT has never dispensed with the requirement that requests must relate to accessing an underlying service to be approved for funding pursuant to Jordan’s Principle. This requirement flows from the human rights principle that the remedy must be linked to and flow from the original claim and the discriminatory practice based on adverse treatment.⁴³

34. As stated above, this does not mean that there must be a mirror comparator service for Jordan’s Principle to apply.⁴⁴ Instead, as set out in the appellate jurisprudence, equality is an inherently comparative concept.⁴⁵ For there to be a discriminatory denial of a service or benefit, there must first be *some* underlying service available to *some* children in Canada in order for Jordan’s Principle to apply.⁴⁶ Contrary to the Intervener’s arguments, while the CHRT Framework was refined so as not to require that the service be available to all other children, this requirement was not eliminated but rather modified so that the service at issue need only be available to some children.

⁴³ *CHRA*, s [53\(2\)\(a\)](#); *Moore*, para [64](#); *Chopra*, para [37](#); *Disability Rights Coalition*, para [193](#).

⁴⁴ *Sharma*, para [41](#); *Withler v Canada (Attorney General)*, [2011 SCC 12](#), para [62](#) [“*Withler*”]; *Fraser v Canada (Attorney General)*, [2020 SCC 28 \(CanLII\)](#), [\[2020\] 3 SCR 113](#), para [48](#) [“*Fraser*”]; and *Pictou Landing*, para [116](#).

⁴⁵ *Ibid.*

⁴⁶ *Andrews v Law Society of British Columbia*, [\[1989\] 1 SCR 143](#), p 164; *Withler*, paras [47](#), [62](#), [65](#); *R v Kapp*, [2008 SCC 41](#), para [15](#); *Fraser*, para [55](#); *Sharma*, para [41](#).

35. In 2016 CHRT 2 (Merits Decision), the CHRT concluded that Canada had discriminated in the provision of government services relating to First Nations children. The CHRT ordered Canada to remedy the discrimination and eliminate jurisdictional barriers to ensure substantively equal access to government services.⁴⁷ In its reasons, the CHRT rejected Canada's arguments that the provincial child welfare services program would not be an appropriate comparator program (i.e. because it would require a cross-jurisdictional comparison between different levels of government operating in different contexts as service providers).⁴⁸ It did not, however, dispense with the requirement of comparison altogether, which would have been contrary to the appellate jurisprudence it was relying on. Instead, in its reasons, the CHRT relied on comparator evidence to ground its findings of adverse differentiation in respect of First Nations children.⁴⁹

36. Rather than dispensing with the need to identify an existing benefit or service, it required the consideration of comparative evidence, where available.⁵⁰ The CHRT noted:

[326] **Rather, the full context of the case and all relevant evidence, including any comparative evidence, must be considered** (see *Withler* at para. 2). As the Federal Court of Appeal noted in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154 at paragraph 27 (*Morris*), the legal definition of a *prima facie* case does not require a complainant to adduce any particular type of evidence to prove the existence of a discriminatory practice under the *CHRA*. It is a question of mixed fact and law whether the evidence adduced in any given case is sufficient to prove a discriminatory practice. The Federal Court of Appeal in *Morris*, at paragraph 28, concluded that:

A flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely, the elimination in the federal legislative sphere of discrimination from

⁴⁷ 2016 CHRT 2, paras 474-484.

⁴⁸ 2016 CHRT 2, para 328.

⁴⁹ 2016 CHRT 2, para 329-340.

⁵⁰ 2016 CHRT 2, para 326.

employment, and from the provision of goods, services, facilities, and accommodation. Discrimination takes new and subtle forms. [emphasis added]

37. In 2017 CHRT 14, the CHRT concluded that providing substantively equal access to services to First Nations child may require going above the normative standard of care when considering substantive equality, the best interests of the child, needs, and culturally appropriate services for the child.⁵¹ The Tribunal rejected Canada's arguments that Jordan's Principle only required providing equivalent services as compared to an existing service or normative standard of care.⁵² The CHRT clarified that "the normative standard should be used to establish the minimum level of service only".⁵³ By necessary implication, this means that a service must be available at least to *some* children. In pointing to the situation in *Pictou*, the CHRT was not suggesting there is a positive obligation to provide services solely based on need; rather it was to emphasize that a service gap exists when services available to others fall short.⁵⁴ When read in the context of the full passage, the CHRT did not dispense with the requirement for a discriminatory gap in an existing service for at least *some* children.

38. In 2020 CHRT 15, the CHRT reiterated this finding and again affirmed that as a remedial measure grounded in substantive equality, Jordan's Principle may require Canada to provide services that exceed the existing normative standard provided through existing services to at least *some* children. The Tribunal rejected Canada's arguments that for Jordan's Principle to apply, there must have been a request for service, a dispute between jurisdictions or departments, and that the existing service must have been normally publicly funded for *any*

⁵¹ 2017 CHRT 14, para [135\(iv\)](#).

⁵² 2017 CHRT 14, paras [69-73](#).

⁵³ 2017 CHRT 14, para [69](#).

⁵⁴ 2017 CHRT 14, paras [70-73](#).

child in Canada.⁵⁵ Again, it did not dispense with the requirement for a discriminatory gap in an existing service for *some* children. At paragraph 120, the Panel rejected “Canada’s requirement that the service must normally be publicly funded for *any* child in Canada given the Panel’s substantive equality findings and its orders accepted by Canada in 2017 CHRT 14 and 2017 CHRT 35 at paragraph 135 (cited above).⁵⁶ In support, the panel quoted the key term of the earlier order:

When a government service, including a service assessment, **is not necessarily available to all other children or is beyond the normative standard of care**, the government department of first contact will still evaluate 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 [...].⁵⁷

39. In 2025 CHRT 6, the CHRT expressed concern with the “apparent shift in some of Jordan’s Principle requests ... reported by Canada and some of the evidence [...]”.⁵⁸ After citing examples of requests which went well beyond what the Tribunal envisioned, the Panel reiterated its support for Justice Mandamin’s finding in *Pictou Landing Band Council* :

[57] The Federal Court in *Federal Court in Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342, stated that Jordan’s Principle was not open ended:

[116] Jordan’s Principle is not an open ended principle. It requires complimentary (*sic*) 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...(emphasis added)

[58] The Tribunal not only agrees with the Federal Court on this, it relied on its 2016 Merit Decision. The Tribunal determined that an assessment of programs

⁵⁵ *First Nations Child & Family Caring Society of Canada et al. v Canada (Attorney General)*, 2020 CHRT 15, paras 107, 120 [2020 CHRT 15].

⁵⁶ 2020 CHRT 15, para 120. See also *Canada (Attorney General), v FNCFCs*, 2021 FC 969, paras 208-209, 216.

⁵⁷ 2020 CHRT 15, para 120, citing para 135 of 2017 CHRT 14 [emphasis in original].

⁵⁸ 2025 CHRT 6, para 54.

and services based on the needs of First Nations children needed to be done by Canada. [emphasis added]

40. Far from distinguishing the requirement that there be an existing or complementary service in *Pictou Landing*, the CHRT has repeatedly and expressly adopted it.⁵⁹

41. In the same ruling, as discussed above, the CHRT recognized that there were limits to Jordan's Principle and that determining a Jordan's Principle request it is open to Canada to rebut the presumption of substantive equality in certain circumstances.⁶⁰ To be clear, at paragraphs 61-64 of the decision, the Tribunal explained that ISC should consider various social factors, including housing when assessing if the level of services should exceed the normative standard of care.⁶¹ The CHRT did not envision that Jordan's Principle requires ISC to provide funding to remedy the issues noted where there has been no denial of an existing service.

42. In these decisions and Orders, the CHRT did not depart from existing jurisprudence that required an existing service, or the substantive equality appellate jurisprudence that reinforces that requirement.⁶² The Tribunal only dispensed with the requirement that an existing service be available to *all* children, which is consistent with Canada's position and interpretation of the CHRT's Orders as a relevant legal constraint on the decision maker when considering a Jordan's Principle request. It did not dispense altogether with the requirement

⁵⁹ See for example 2016 CHRT 2, para [376](#); 2017 CHRT 14, paras [48](#) and [72](#); and 2025 CHRT 6, paras [57-58](#).

⁶⁰ 2025 CHRT 6, paras [169](#) and [563](#).

⁶¹ 2025 CHRT 6, paras [63-64](#).

⁶² See AGC factum, para 43.

of an existing service available to at least *some* children. To find otherwise, would expand the equality guarantee to require positive obligations to remedy all social inequalities.⁶³

43. For its part, this Court and the Federal Court relaxed the requirement of a mirror comparator, only in order to determine the presence of discrimination or adverse treatment when comparing services between two different levels of government.⁶⁴ Both of these cases dealt with the role of a provincial service acting as a comparator to a federal service.⁶⁵ These cases did not dispense with the requirement for an existing or complementary service altogether and Canada's position remains consistent with this jurisprudence.

44. Again, Canada agrees with the Interveners that there is no requirement for a mirror comparator or mirror comparator service.⁶⁶ However, where the parties differ is the requirement for an existing service available to at least *some* children. While subtle, there is a difference. As required by the Supreme Court of Canada and the Tribunal in other complaints, there must be an underlying benefit provided to others in the first place in order to make out a discriminatory denial warranting a substantive equality remedy.⁶⁷

⁶³ See AGC factum, paras 35, 39, 57 and 59.

⁶⁴ *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, [2012 FC 445](#), paras [282-315](#); *Canada (Attorney General) v Canadian Human Rights Commission*, [2013 FCA 75](#), para [18](#).

⁶⁵ *Ibid.*

⁶⁶ Canada's Appeal Factum, para 38; *Sharma*, para [41](#), *Withler*, para [62](#), *Fraser*, para [48](#), *Pictou Landing*, para [116](#).

⁶⁷ *Auton*, para [27](#); *Lepine v Correctional Service Canada Amanda Lepine (on behalf of A.B.) v Correctional Service Canada*, [2025 CHRT 74](#), paras [39-42](#).

4. Ameliorative programs are relevant to Jordan's Principle but do not constitute a discriminatory gap

45. As a remedial measure grounded in substantive equality that is meant to ensure that First Nations children do not experience discriminatory gaps in services, Jordan's Principle recognizes that a First Nations child may need a level of service above the normative standard to ensure substantively equal access to an existing service. As a human rights remedy, there must be discriminatory adverse treatment in order for the remedy to apply. If there is no discriminatory gap, a remedial measure that is grounded in substantive equality like Jordan's Principle does not apply, as there is no discriminatory gap to remedy.

46. Nothing in the prior CHRT rulings suggests that Jordan's Principle was intended to be used to expand ameliorative programs. Ameliorative programs, as permitted under subsection 16(1) of the *CHRA* and subsection 15(1) of the *Charter*, are positive actions taken by the government to incrementally address inequalities through initiatives targeting particular groups in particular ways.⁶⁸ Its incremental scope is not a discriminatory gap because to characterize it as such would effectively impose positive obligations on government to fully address pre-existing societal inequalities right away.⁶⁹ To consider the incremental nature of an ameliorative program to be discriminatory would run counter to the deference afforded to the legislative and executive branches to incrementally address societal inequalities through ameliorative programs.⁷⁰ The RRAP is such an ameliorative program specifically designed to improve the housing conditions of First Nations residents on reserve.

⁶⁸ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, [1982, c 11](#), s [15\(2\)](#); *CHRA*, s [16\(1\)](#).

⁶⁹ *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, [2011 SCC 37](#), para [41](#); *Alliance*, para [42](#); *Sharma*, para [65](#).

⁷⁰ *Ibid.*

47. Contrary to the Caring Society’s submissions, this is not a situation where the Respondent was denied a service due to a jurisdictional dispute or challenges relating to referrals to other services. The Respondent was eligible for the RRAP, but the annual allocation for that ameliorative program for her First Nations had already been expended and would only have partially met their mold-remediation and renovation funding request.

48. Canada is not invoking subsection 16(1) of the *CHRA* to shield the RRAP from judicial scrutiny. Rather, Canada is saying that in the context of a Jordan’s Principle request, courts must be cautious about making findings that would effectively nullify the purpose of subsection 15(2) of the *Charter* and subsection 16(1) of the *CHRA*. The purpose being to protect governments’ willingness to create ameliorative programs to remedy inequalities incrementally without being subject to fiscally unsustainable obligations due to a broadening of such programs to ensure equality of outcomes for all, as opposed to supporting equality of opportunity for some.⁷¹

49. This is different from *Dominique* where the Canada did not consider the First Nations Inuit and Policing Program (“FNIPP”) as an ameliorative program as understood under subsection 16(1) of the *CHRA*.⁷² Instead, Canada argued that the ameliorative effects of the FNIPP should factor in to the *prima facie* discrimination test from *Moore*, which is what was rejected.⁷³ Further, this Court rejected the application of incrementalism solely because of the overarching commitments made in the FNIPP “to contribute to ensuring that First Nations are

⁷¹ *Sharma*, paras [63-65](#).

⁷² *Dominique FCA*, para [75](#).

⁷³ *Dominique FCA*, para [79](#).

able to have professional, effective, and culturally appropriate police services.”⁷⁴ It did not reject the application of incrementalism under the *CHRA* as a matter of principle altogether.⁷⁵

50. Further, Canada’s conclusion that incrementalism is not itself sufficient to prove a discriminatory gap is supported by the Supreme Court of Canada in *Sharma*. In *Sharma*, the majority of the Supreme Court of Canada held that the Government of Canada continues to possess an “ability to act incrementally in addressing systemic inequality.”⁷⁶ While the Court in *Sharma* recognized that where the Government does act, it must not act discriminatorily, there is no evidence of any other program or service that provides housing remediation in response to children’s health needs in Canada. ISC did however, consider the RRAP as a potential example of such a program, but reasonably concluded that it was an incremental ameliorative program available to the Respondent, and not a service with a discriminatory gap to which Jordan’s Principle would apply.

5. The Decision of the Senior Assistant Deputy Minister was reasonable

51. In refusing the Respondent’s request, the SADM duly considered the “constellation” of factual and legal constraints discussed above. Ultimately, she concluded that because there was no discriminatory gap in an existing service, Jordan’s Principle did not apply. The decision is supported by the record, and the reasons, while brief, are justified, intelligible, and transparent.

52. Contrary to the reasons of the Court below, it was reasonable for the SADM to conclude that the Respondent’s request was intended to fund a significant housing remediation, without

⁷⁴ *Dominique FCA*, para [70](#).

⁷⁵ *Dominique FCA*, paras [68-73](#).

⁷⁶ *Sharma*, para [42](#).

denying or disregarding that the requested funding also had linkages to the children's health issues in the funding application. In her own materials, the Respondent identified the request as a housing remediation matter multiple times and no contrary evidence appears in the record.⁷⁷ The Court below therefore erred in finding this characterization was unreasonable.⁷⁸

53. Canada does not dispute that the children's health needs, best interests, and culturally appropriate services are factors in deciding whether a Jordan's Principle funding request should be approved. However, such factors must be considered in a manner consistent with the intended purpose of Jordan's Principle.

54. In this case, there was no existing service or program available to others that provided the home remediation funding requested. In the context of the facts and circumstances of this application, it was therefore reasonable for the SADM to conclude that the presumption of substantive equality was rebutted.

55. The record shows that the SADM was alert and alive to the children's needs, best interests, and the need for culturally appropriate services.⁷⁹ As in *Schofer*, the EERC report reflected an openness to considering the children's needs, but the SADM exercised her discretion reasonably and appropriately given that there was no existing benefit or service being denied.⁸⁰ Moreover, the argument that the SADM ignored the children's needs is not substantiated. Administrative decision makers are presumed to have considered all the

⁷⁷ For example, see Funding Request, **Appeal Book, Tab 6, pp 295-296**; Appeal Letter dated November 14, 2024, **Appeal Book, Tab 6, p 301**; Southwest Ontario Aboriginal Health Access Centre Support Letter, **Appeal Book, Tab 6, p 320**.

⁷⁸ *Vavilov*, para [99](#).

⁷⁹ DDM Presentation Form, **Appeal Book, Tab 6, pp 435-436**; Decision Letter, **Appeal Book, Tab 6, pp 439-440**; and Decision Letter, **Appeal Book, Tab 6, p 439**.

⁸⁰ *Schofer*, paras [34-35](#).

evidence unless demonstrated otherwise.⁸¹ The SADM considered the report of the EERC, and while she did not adopt all of their conclusions, absent evidence to the contrary, she must be taken to have considered them in coming to her own decision on the application.

56. As an ameliorative program, the SADM reasonably concluded that the RRAP was not a service with a discriminatory gap to which Jordan's Principle was meant to apply. It is designed to provide incremental relief to help improve First Nations housing on reserve.⁸²

57. The SADM's further conclusion that Jordan's Principle does not operate to expand the incremental scope of such programs is consistent with broader principles of substantive equality including the animating principles underlying section 15(2) of the *Charter* and section 16(1) of the *CHRA* set out by the Supreme Court of Canada in *Alliance* and *Sharma*.

58. In this case, the Respondent has never sought to challenge the program as underinclusive. Such a claim could not be made either as she belongs to the targeted group. Rather, she sought funding under a Jordan's Principle request which would effectively expand the scope of the RRAP, as her request exceeded the amounts available under that program.

59. As discussed above, the incremental nature of the RRAP should not be considered a discriminatory gap for these purposes. As a remedy grounded in substantive equality, it was reasonable for the SADM to rely on incrementalism and the uncontradicted principles set out in Supreme Court of Canada substantive equality jurisprudence to rebut the presumption of substantive equality in the Respondent's Jordan's Principle request. It follows that it was also

⁸¹ *Elson v Canada (Attorney General)*, [2019 FCA 27](#) at [para 42](#).

⁸² Emergency Repair Program ("ERP"), **Appeal Book, Tab 6, p 187**.

reasonable for the SADM to conclude that “Jordan’s Principle was not intended to provide access to or change the scope of special or ameliorative programs”⁸³

60. Jordan’s Principle has played an important role in remedying discriminatory gaps in services experienced by First Nations children.⁸⁴ Recent CHRT rulings have expressly recognized that Jordan’s Principle is not open-ended and that the applicable presumption of substantive equality may be rebutted. While the children’s needs in this case are not disputed, Jordan’s Principle is neither intended to, nor capable of, addressing the problem of inadequate housing on-reserve or all the needs of First Nations children when there is no other service provided. As with any policy, “it is sometimes necessary to draw a line in the sand, otherwise it will not be able to serve those who need it.”⁸⁵

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF
OCTOBER 2025**



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⁸³ Decision Letter, **Appeal Book, Tab 6, p 440.**

⁸⁴ *First Nations Child & Family Caring Society of Canada et al. v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, [2019 CHRT 7](#), paras [25-26](#).

⁸⁵ *Malone*, para [57](#).

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LIST OF AUTHORITIES

Legislation

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