Court File No. T-1559-20

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

- and -

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

Respondents

- and -

CONGRESS OF ABORIGINAL PEOPLES

Intervener

MEMORANDUM OF FACT AND LAW OF THE INTERVENER, CONGRESS OF ABORIGINAL PEOPLES

May 12, 2021

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OVERVIEW

1. In 2016, the Canadian Human Rights Tribunal ("Tribunal") issued a ground-breaking decision ("*Merit Decision*") arising from the federal government ("Canada")'s inadequate funding of child and family services to First Nations children. The Tribunal found that Canada had discriminated against these children in the provision of services. In a series of remedial decisions since, the Tribunal has determined the steps that Canada must take to address the discriminatory conduct and to prevent the same or similar practices from occurring in future. In these decisions, the Tribunal has determined that Canada must provide Jordan's Principle services to all First Nations children.

2. The Applicant has taken issue with the Tribunal's decision defining who is a "First Nations child" for purposes of receiving Jordan's Principle services ("*First Nations Child Decision*"). The Applicant argues that the *First Nations Child Decision*, which applies to some children living off-reserve who do not have status under the *Indian Act*, "takes an expansive approach to difficult issues of identity, which have not yet been decided by First Nations". With respect, no "difficult issues of identity" arise.

3. This is a straightforward case of a Tribunal exercising its remedial discretion, acting within its jurisdiction, in a manner that furthers its statutory mandate of giving effect to equality, and removing discriminatory practices.[1]

4. Indigenous people did not design and implement the status system. Canada did. Canada has created lines that divide Indigenous communities, and which leave Indigenous persons without status especially vulnerable to disadvantage and discrimination. The Tribunal took a small step towards rectifying that disadvantage and discrimination in the particular context of this complaint. The Tribunal's Order was firmly grounded in its governing statute and equality rights law. There is nothing unreasonable about the Tribunal's Decision. The Attorney General's application should be dismissed.

PART I. FACTS

A. The Congress of Aboriginal Peoples

5. The Congress of Aboriginal Peoples ("CAP") is one of five National Aboriginal Representative Organizations recognized by the Government of Canada. CAP represents the interests of hundreds of thousands of off-reserve status and non-status Indians, Métis and Southern Inuit Peoples, and serves as the national voice for its provincial and territorial affiliate organizations.

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[1] *Canadian Human Rights Act*, RSC 1985, c.H-6 ("CHRA"), s.2, provides as follows: "The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered."

6. CAP also holds consultative status with the United Nations Economic and Social Council, which facilitates its participation on international issues of importance to Indigenous Peoples. CAP was founded in 1971 as The Native Council of Canada, and subsequently changed its name to the Congress of Aboriginal Peoples to reflect better the constituency and mandate of the organization.

7. CAP's mandate is to represent the collective and individual interests of off-reserve status and non-status Indians, Métis and Southern Inuit Peoples. CAP works to advance the constitutional status of these constituencies, and to protect their Aboriginal, constitutional and treaty rights. CAP has a long record of working to protect and advance the rights of off-reserve status and non-status Indians, Métis and Southern Inuit Peoples in negotiations with governments. For example, CAP "negotiated the inclusion of Métis in section 35 of the *Constitution Act, 1982*"[2]

8. CAP also has a long record of working to protect and advance the rights of off-reserve status and non-status Indians, Métis and Southern Inuit Peoples in the courts. For example, CAP was lead plaintiff in *Daniels v. Canada (Minister of Indian and Northern Affairs)*,[3] which held that Métis and non-status Indians are "Indians" within the meaning of s.91(24) of the *Constitution Act, 1867*, and thereby fall under federal jurisdiction. CAP

[2] Report of the Royal Commission on Aboriginal Peoples, (Ottawa: 1996) volume 4, chapter 5, section1.3.
[3] 2016 SCC 12 ("*Daniels* SCC").

has also been a party or intervener in numerous other cases involving the rights and interests of off-reserve status and non-status Indigenous people.[4]

9. CAP intervened before the Tribunal below on issues of remedy, and made submissions in particular on the significance of *Daniels* to the Tribunal's exercise of remedial discretion.[5] CAP's intervention in this Court will be focused on the scope and eligibility and/or effectiveness of remedies under Jordan's Principle for non-status First Nations children living off reserve, including the facts and law giving rise to such remedies.

B. The Status/Non-Status Divide

10. Parliament and the federal government have regulated Indian affairs since Confederation. At Confederation and for many years thereafter, assimilation of "Indians" into settler society was the avowed policy of the government.[6] An early post-Confederation statute, the 1869 *Act for the gradual enfranchisement of Indians, the better management of Indian Affairs and to extend the provisions of the Act 31st Victoria Chapter*

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[4] See for example *R. v. Desautel*, 2021 SCC 17 concerning the exercise of s.35 aboriginal rights by a U.S. resident descended from the cross-border Sinixt people; *R. v. Powley*, 2003 SCC 43, concerning the section 35 rights of Métis communities; *R. v. Blais*, 2003 SCC 44, concerning the interpretation of the term "Indians" in the Manitoba Natural Resources Transfer Agreement as excluding Métis; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) concerning voting restrictions against off-reserve band members; *Lovelace v. Ontario*, 2000 SCC 37, concerning the exclusion of certain Aboriginal communities from reserve-based commercial casino revenues; *McIvor v. Canada (Registrar of Indian an Northern Affairs)*, 2009 BCCA 153, concerning the discriminatory effects of the 2nd generation cut-off as originally enacted; *Canada (A.G.) v. Misquadis*, 2003 FCA 473, concerning the almost total exclusion of CAP's constituents from a federal human resources development program; and the long-running Sawridge Band litigation (see e.g. *Sawridge Band v. Canada*, 2006 FCA 228), concerning an attempt by an *Indian Act* band to prevent Indigenous women who had lost the right to status because they "married out", and whose right to registration had been restored in 1985 by Bill C-31, to (re)join the band.

[5] *First Nations Child Decision*, 2020 CHRT 20, paras. 54-57.

[6] *Daniels v. Canada (Min. Indian and Northern Affairs)*, 2013 FC 6 ("*Daniels* Trial"), paras. 278, 354.

42, 32-33 Vict., c.6, introduced the "marrying out" rule for the first time in legislation, reflecting this policy.[7]

11. The marrying out rule provided that Indigenous women who married non-Indigenous men, and their children, would lose their "status" as "Indians", though they could still be "Indians" for the limited purpose of entitlement to receive annuity payments. The marrying out rule was a feature of federal Indian legislation from 1869 until 1985. The 1869 *Act* also provided for "enfranchisement" of other Indigenous persons, including those who entered professions such as the clergy or law. Enfranchised Indians also lost their status, as did their wives and children.

12. Parliament enacted the first *Indian Act* in 1876. The *Indian Act* was repeatedly amended over the decades, for example to provide for compulsory enfranchisement of "Indians" at the order of the Department of Indian Affairs. The purpose of amendments to the *Indian Act* in 1920 providing for compulsory enfranchisement was described as follows by Deputy Superintendent-General Duncan Campbell Scott:

> Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian department, that is the object of this Bill.[8]

13. The assimilationist policy was also reflected in the terms on which Newfoundland entered into confederation in 1949. All Indigenous persons in Newfoundland entered Confederation "fully enfranchised" – that is, without any status as Indians.[9] The first

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[7] *Daniels* Trial, para. 365-67.

[8] J. Leslie, *The Indian Act: An Historical Perspective*, 2002 Canadian Parliamentary Review 23, at 25, 2002 CanLIIDocs 236.

[9] *Daniels* Trial, para. 466.

recognition of "status" Indians in Newfoundland did not occur until 1984, with the creation of the Conne River Band (Miawpukek First Nation) by federal Order-in-Council.[10]

14. The current registration system for "Indians" with status under the *Indian Act* was not introduced until 1951. The 1951 Act established a central Indian registry, under the control of the Department of Indian Affairs. Those who were registered effectively became a charter population. From that point on, eligibility for registration would depend upon demonstrating the required relationship to parents or other ancestors who were already registered. Band lists were created in and following 1951, but not all Indigenous persons were able to or chose to register. [11] The 1951 *Indian Act* also ended annuity payments for women who had married out, and introduced the "double mother" rule, whereby children whose mother and paternal grandmother both acquired status through marriage to a status Indian, would lose status at age 21.[12]

15. Under the registration system introduced in 1951, even if an Indigenous person was entitled to register in fact, they could face difficulty in establishing their rights to do so through lack of written records. In cases where parentage was unknown or unstated, an Indigenous person could be unable to register.[13] Many Indigenous persons lost their

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[10] *Daniels* Trial, para. 511.

[11] Band lists were based in many cases on Treaty Paylists, which have been described as being "the product of *ad hoc* record keeping, fluctuating interpretations of the *Indian Act*, and ongoing policy changes dating back to pre-Confederation" *Daniels* Trial, para. 168

[12] Crown-Indigenous Relations and Northern Affairs Canada, *Background on Indian registration* https://www.rcaanc-cirnac.gc.ca/eng/1540405608208/1568898474141.

[13] Crown-Indigenous Relations and Northern Affairs Canada, *Background on Indian registration* https://www.rcaanc-cirnac.gc.ca/eng/1540405608208/1568898474141.

links to their communities when they were sent to residential schools, or were subjected to the "Sixties Scoop".[14]

16. Some, but not all, of the restrictions on registration were addressed in 1985 with Bill C-31. Those who had married out or enfranchised, and their first-generation descendants, became entitled to register as "status" Indians. However, Parliament imposed a "second-generation cut-off" rule through ss.6(1) and 6(2) of the *Indian Act*. A first-generation descendant of an Indian who had married out or enfranchised was entitled to be registered, but only under s.6(2), which meant that they could not pass on status to their children, unless the other parent also had status under the *Indian Act*. A prior version of the legislation (Bill C-47) would have extended status to second-generation descendants, which would have included approximately 55,000 more Indigenous persons in the status Indian population.[15]

17. Further amendments following *McIvor v. Canada (Registrar of Indian an Northern Affairs)*[16] and *Descheneaux v. Canada (A.G.)*[17] removed some aspects of residual sex discrimination arising from the marrying out rule, and allowed some, but not all, second-generation descendants to become eligible for status, but the legacy of settler-society interference remains and continues. The very concept of status represents an ongoing form of federal government interference and control of Indigenous people and communities.

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[14] Final Report of the Truth and Reconciliation Commission, 2015, Vol. 2, *What We Have Learned: Principles of Truth and Reconciliation*, p.104-5, http://www.trc.ca/assets/pdf/Principles_English_Web.pdf.
[15] *Daniels* Trial, para. 549.
[16] 2009 BCCA 153.
[17] 2015 QCCS 3555.

18. The result of this history of massive government interference with Indigenous people and communities is that there is now a significant population of non-status Indians, [18] who may or may not have retained substantial links to *Indian Act* bands (now more frequently referred to as "First Nations"). These legislative developments have also taken place against the backdrop of migration of Indians from the reserves, and increasing urbanization of Indigenous people.

19. There is no doubt, however, that non-status Indians face similar socio-economic challenges as those with status, and are at least as vulnerable to discrimination (if not more so). As the trial judge noted in *Daniels*, quoting from an internal federal government document:

> The Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs and Northern Development, are far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens.[19]

C. The Tribunal's Decisions and Remedial Orders

20. The Tribunal made a number of key findings in its *Merit Decision*, which is not under review. The Tribunal specifically found that "Jordan's Principle is relevant and often intertwined with the provision of child and family services to First Nations, including under the FNCFS Program".[20] The Tribunal also found that:

> the history of Residential Schools and the intergenerational trauma it has caused is another reason – on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure – that exemplify the additional need of First Nations people to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.[21]

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[18] Estimated in *Daniels* Trial at between 300,000 and 450,000: paras. 117-118.
[19] *Daniels* Trial, para. 84.
[20] *Merit Decision,* 2016 CHRT 2, para. 362
[21] *Merit Decision*, 2016 CHRT 2, para. 422.

21. The Tribunal further accepted that substantive equality could require enhanced funding to meet the greater needs of First Nations children.

22. In an update to its remedial order dated September 14, 2016 ("*Update to Remedial Order*"), the Tribunal held that Jordan's Principle applied to all First Nations children, not only to those on reserve, in accordance with the motion that had been unanimously passed by the House of Commons when the principle was first articulated.[22] The Tribunal held that narrowing Jordan's Principle to children on reserve "will likely cause gaps for First Nations children and is not in line with the [Merit] *Decision*."[23] The Applicant does not challenge the *Update to Remedial Order*.

23. In a further Order on a motion for immediate relief dated May 26, 2017 ("*Immediate Relief Order*"), the Tribunal confirmed that Canada had accepted a revised definition of Jordan's Principle that "now applies to all First Nations children and is not limited to those residing on reserve or normally resident on reserve", and "also applies to all jurisdictional disputes, including those between federal government departments",[24] but found that Canada was applying the Principle too narrowly in practice. The Tribunal further defined Jordan's Principle as including the following:

> [135] Pursuant to the above, the Panel's orders are:…
>
> 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 serious issues creating critical needs for health and social supports or affecting their activities of daily living.

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[22] *Update to Remedial Order*, 2016 CHRT 16, para. 117-18.
[23] *Update to Remedial Order*, para. 117.
[24] *Immediate Relief Order*, 2017 CHRT 14, para. 12.

> 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 is available to all other children, the government department of first contact will pay for the service to a First Nations child… Once the service is provided, the government department of first contact can seek reimbursement from another department/government;
>
> iv. When a government service 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… Once the service is provided, the government department of first contact can seek reimbursement from another department/government.
>
> 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…[25]

24. Canada did seek judicial review of the *Immediate Relief Order*, but its application was resolved on consent on the basis of some changes made to the Order which are not material to this application.[26]

25. In an Interim Order dated February 21, 2019 ("*Interim Order*"),[27] the Tribunal considered the "illustrative" case of a non-status child of a person with status under s.6(2) of the *Indian Act*, residing off reserve, who was denied access to medically necessary services under Jordan's Principle because she lacked status. The Tribunal ordered on an interim basis that Jordan's Principle services be provided to off reserve non-status children who are recognized as members by their Nation, who have urgent and/or life-

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[25] *Immediate Relief Order*, 2017 CHRT 14, para. 135 [emphasis added]
[26] *Interim Order*, 2019 CHRT 7, paras. 18-19.
[27] *Interim Order*, 2019 CHRT 7.

threatening needs, pending the Tribunal final decision on the definition of "First Nations Child".[28] The Applicant did not seek judicial review of this Order.

26. The Applicant only challenges the Tribunal's *First Nations Child Decision*'s holding that Jordan's Principle services must be provided to non-status, off-reserve children who are either (a) recognized by a First Nation as being a member of their community, or (b) children of a parent or guardian who has or is eligible for *Indian Act* status.[29] The Applicant accepts the eligibility of non-status children who are ordinarily resident on reserve for Jordan's Principle services.

[28] *Interim Oder*, 2019 CHRT 7, para. 89.
[29] *First Nations Children Decision*, 2020 CHRT 20.

PART II. POINTS IN ISSUE

27. The issues on Application T-1559-20 are:

(a) What is the standard of review?

(b) Did the Tribunal breach procedural fairness in the *First Nations Child Decision*?

(c) Is the *First Nations Child Decision* unreasonable?

PART III. ARGUMENT

A. Standard of Review

28. CAP agrees that the standard of review on remedy is reasonableness, and that procedural fairness does not engage standard of review. However, in the context of remedies, reasonableness review must show deference to the Tribunal's exercise of discretion. This is particularly the case in the context of remedies for systemic discrimination.

29. In addressing a case of systemic discrimination, the Tribunal is given broad powers to fashion remedies that address the systemic issues that arise, in accordance with the purposes of the *CHRA*.[30] These include orders:

> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future…
>
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied 2019 CHRT 7the victim as a result of the practice…

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[30] *CHRA* ss.53(2), 2; *Action Travail des Femmes v. C.N.R. Co.*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, p.1141-42.

30. Discretionary remedies are entitled to a high degree of deference.[31] The Tribunal, after 72 days of hearing on the *Merit Decision*[32] and working with the parties through a multitude of decisions over several years, was very well placed to determine that the *First Nations Child Decision* was appropriate, in the exercise of the Tribunal's discretion, to redress past practices or to prevent the same or a similar practice from occurring in future.

31. In the *Interim Order*, the Tribunal summarized some of the considerations that it had taken into account in fashioning remedies. The Tribunal noted that it had "retained jurisdiction given the complexity of the remedies and the immediate, mid-term and long-term relief remedies and the necessity to assess if remedies are effective and implemented." The Tribunal also noted that this "necessarily requires some back and forth between the parties and the Tribunal unless, all parties agree and propose consent orders, to the Tribunal."[33] The Tribunal cited the Supreme Court of Canada's admonition that the case law of that court "stresses the need for flexibility and imagination in the crafting of remedies for infringements of fundamental human rights".[34] The Tribunal properly characterized these proceedings as a "nation-wide multi-faceted and complex case".[35] The Tribunal noted the role that ongoing data collection played in informing "the crafting of appropriate long-term remedies"; which it described as an "intricate task" that "may require ongoing supervision".[36]

32. These considerations militate in favour of a particularly high degree of deference.

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[31] *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, 1996 CanLII 220 (SCC), at paras. 52-55.
[32] *Merit Decision*, para. 14.
[33] *Interim Order*, para. 47
[34] *Interim Order*, para. 48, citing *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbain de Montréal*, 2004 SCC 30, para. 26.
[35] *Interim Order*, para. 50.
[36] *Interim Order*, para. 47, citing *Immediate Relief Order*, paras. 29-34.

B. Procedural Fairness

33. CAP takes no position on whether the *First Nations Child Decision* was arrived at in a manner that breached procedural fairness. CAP addresses the "open-ended proceeding" objection of the Applicant below.

C. Reasonableness of the First Nations Child Decision

1. Inclusion of Children Recognized as Part of a First Nations Community

34. The Applicant argues that the *First Nations Child Decision* is unreasonable in that it applies to non-status children living off reserve who are recognized by a First Nation as being part of their community, because that "imposes the burden of determining who is eligible for Jordan's Principle services on individual First Nations", and this was ordered without "direct consultation with communities".[37]

35. There are several problems with this argument. First, it rests on an unsound premise. The Assembly of First Nations ("AFN") was a co-complainant and has participated in the hearings throughout. The AFN represents more than 634 First Nations (*Indian Act* bands) across Canada. The Applicant does not explain why the participation of individual First Nations was required *prior to this order*, given the participation by the AFN (as well as Chiefs of Ontario ("COO") and Nishnawbe Aski Nation ("NAN")) in the litigation, and given the fact that individual First Nations or others could be consulted as appropriate with respect to the implementation of the Decision.

36. Second, the *First Nations Child Decision* included a term requiring Canada to consult with the Commission, the Caring Society, the AFN, COO and NAN "to generate

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[37] Applicant's Memorandum of Fact and Law, para. 145.

eligibility criteria for First Nations children under Jordan's Principle".[38] Canada did so, and entered into a consent order on the criteria.[39] Canada's consent is incompatible with its current complaint about the process. With respect, if Canada considered this consultation process to be inadequate, rather than entering into a consent order, it could have sought broader participation by any other "communities" it considered relevant. Nothing precluded Canada from consulting more broadly. There is no evidence that it did so. Nor is there any evidence of any First Nation community objecting to the purported "burden" of identifying children as members of their community for the purposes of eligibility for Jordan's Principle services.

37. Third, Canada's position runs counter to its declared position that Indigenous groups have the right to self-government and to self-determination, as recently reaffirmed by Canada in its acceptance of the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*").[40] Canada's submissions give the distinct impression that its true goal is not to avoid burdening First Nations, but rather to ensure that no non-status children residing off reserve are eligible for Jordan's Principle services.

38. The Applicant argues that there is no basis to find that failure to fund non-status children residing off reserve is discriminatory. With respect, that ignores the clear findings of the Tribunal that substantive equality requires that First Nations children be given access to services that address the special harms that they have suffered, and that services must be provided in a culturally appropriate manner. These findings were factual

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[38] *First Nations Child Decision*, 2020 CHRT 20, para. 321.

[39] *First Nations Child and Family Services Caring Society v. Canada (A.G.)*, 2020 CHRT 36.

[40] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples:* resolution adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: https://www.refworld.org/docid/471355a82.html.

findings made on the evidence. The Applicant does not allege that the Tribunal committed any palpable or overriding error in reaching these conclusions.

39. The Applicant argues that "non-registered children living off reserve receive their health care supports and services from the provinces via the same channels as other Canadians". That may be true, but that does not mean that such provincial services ensure substantive equality. Non-status Indian children cannot be excluded from Jordan's Principle services, without experiencing discrimination. The Tribunal was entitled, and indeed required, to take a non-discriminatory approach to fashioning remedies. If the Applicant distinguishes between children with status and those without status, who both reside off reserve and are accepted as part of First Nations communities, then "race and national or ethnic origin is a factor in the denial of services".[41]

40. A remedy that addresses substantive inequality, seeks to avoid perpetuating division created by the status categories created by Canada, and takes a "child-first" approach to addressing the harms created by Canada's historical pattern of discrimination, cannot be said to be so unreasonable that judicial review is warranted.

2. Children residing off reserve of Parents/Guardians who have or are eligible for *Indian Act* status

41. The Applicant argues that the Tribunal's decision to include non-status children of parents/guardians with status or eligible to obtain status (i.e., extending Jordan's Principle services to the second generation, that is to say children with one parent or guardian with status under s.6(2) of the *Indian Act*) was unreasonable because it allegedly raises complex questions of identity on which there is no consensus among First Nations. With

[41] *First Nations Child Decision*, 2020 CHRT 20, para. 248.

respect, this is not a question of identity. Rather, it is a question of eligibility for much-needed services.

42. The intergenerational trauma of Residential Schools affects non-status children, just as it does those with status. Their grandparents and parents were subject to the Residential School system, whatever their status was at the time under the *Indian Act*.[42] They, too, have needs for services that may go beyond those of non-Indigenous children, and for services that are offered in a culturally appropriate manner.

43. The First Nations Child Decision does not "create conflict between children recognized as First Nations by the order but not recognized under the *Indian Act* or by the Nations themselves", as alleged by the Applicant. It is commonplace for Indigenous persons to be defined in one way for some purposes but differently for others. *Daniels* established that non-status Indians could be "Indians" for the purposes of s.91(24) of the *Constitution Act, 1867*, even if they were not "Indians" under the *Indian Act*.[43] Indeed, from the mid-19th century, the Canadian colonies, and later the federal government, have had a long history of defining "Indian" differently in a variety of contexts, depending on the purpose of the definition.[44]

44. Canada acknowledged that 2nd generation descendants of those who lost status prior to 1985 by marrying out or enfranchisement were Indians, for constitutional purposes, by initially including them in Bill C-47 among those who would be eligible for

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[42] *Daniels* SCC, para. 28.
[43] *Daniels* SCC, para. 18-20
[44] *Daniels* Trial, paras. 268-287

status.[45] Non-status children of parents or guardians with status under s.6(2) are in the same position as (and overlap with) this group.

45. The Applicant wrongly conflates band membership with eligibility for Jordan's Principle services. The majority of *Indian Act* bands do not have their own membership codes.[46] Those that do have little incentive to admit non-status Indians as members, since they have finite resources and federal funding is typically tied to the status population. As of 2009, 148 of the 230 *Indian Act* bands (64%) that had their own membership codes had rules that were more restrictive than or equivalent to the *Indian Act* registration rules. Another 380+ did not have membership codes, so band membership corresponded with registration under the *Indian Act*, pursuant to s.11 of the Act.[47] Thus, to a very large extent, a rule restricting eligibility for Jordan's Principle services to band members will exclude non-status Indians. Similarly, the one category of non-status children that Canada is prepared to include, those ordinarily residing on reserve, likely accounts for only a small number of such children.[48]

46. It is not known how many non-status children residing off reserve will be claimed as "being recognized by First Nations as part of their community". However, it is likely that

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[45] *Daniels* Trial, para. 549.

[46] The Government reports that as of June 2018, 229 bands had assumed control over their own membership under s.10 of the *Indian Act*, and a further 38 had done so under self-government legislation: Indigenous Services Canada, *About band membership and how to transfer to or create a band*, https://www.sac-isc.gc.ca/eng/1100100032469/1572461264701. This is out of a total of more than 630 bands.

[47] Indian and Northern Affairs Canada, *Discussion Paper: Changes to the* Indian Act *affecting Indian Registration and Band Membership* (2009), https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/mci_1100100032488_eng.pdf, p.3

[48] In the *Interim Order*, the Tribunal noted that in a 5 month period in 2018, only 17 requests were made for determination of eligibility for Jordan's Principle services respecting non-status children who were ordinarily resident on reserve: 2019 CHRT 7, para. 7. This was in a context where total Jordan's Principle approved services had reached 77,000 in 2017/2018: para. 25.

non-status children of a parent or guardian who has status or is eligible for status under the *Indian Act*, who reside off reserve, will comprise the most significant category of those that the Tribunal found to be eligible for Jordan's Principle services in the *First Nations Child Decision*.

47. By definition, this category consists of children with a parent registered or entitled to be registered under s.6(2).[49] These parents are the "1st generation descendants" who became eligible for status as a result of Bill C-31 and the post-*McIvor* and *Descheneaux* amendments (Bill C-3 in 2010 and Bill S-3 in 2015). Overwhelmingly, they lived off reserve, and relatively few moved or were expected to move onto reserves after registration. By 2009, some 24 years after Bill C-31, only 18% of those who were reinstated as a result of Bill C-31 resided on reserve or Crown land. The registration of a significant number of off reserve Indians under Bill C-31, most of whom remained off reserve after registration, was an important factor in the decrease in the proportion of status Indians who live on reserve (from 71% to 56% between 1985 and 2007).[50]

48. Provision of Jordan's Principle services to off reserve children of parents or guardians with status under s.6(2) of the *Indian Act* is unlikely to have any real practical effect on *Indian Act* bands. These parents and guardians reside off reserve, may well have spent their entire lives off reserve; and may well have spent a significant part of their lives without status. They do not necessarily have a close connection to the band to which they are nominally assigned. This is a further reason why the provision of a particular

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[49] If a child's parent is registered or entitled to be registered under s.6(1), the parent can pass their status on to the child, so the child would not be non-status.

[50] Indian and Northern Affairs Canada, *Discussion Paper: Changes to the* Indian Act *affecting Indian Registration and Band Membership* (2009), https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/mci_1100100032488_eng.pdf, p.3.

category of services – Jordan's Principle services – has nothing to do with any issue of identity.

49. There is also an entire category of status Indians, referred to as the General List, who are not assigned to any band, despite having status under the *Indian Act*.[51] The non-status children of General List Indians can only be eligible under the Tribunal's "off reserve non-status children of Indians with status" category. Again, the eligibility of these children has nothing to do with identity issues for any registered *Indian Act* band.

50. Moreover, the provision or funding of services to Indigenous people by the federal government is already a checkerboard. Post-secondary education benefits are available to status Indians and to Métis (who may or may not have *Indian Act* status), but not to non-status Indians.[52] Non-insured health benefits are sometimes available to young non-status children whose parents have status (up to the age of 18 months), but not thereafter.[53] The Indigenous Community Support Fund, which provides funding for organizations to support pandemic preparation and relief, is available to status and non-status Indians, residing on or off reserve (though not in equal amounts).[54] Even prior to *Daniels*, there was some federal programming and funding available to Métis and non-status Indians, though there were great disparities between these groups and status

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[51] Library and Archives Canada, *Terminology Guide: Research on Aboriginal Heritage*, p.12 https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/Documents/Terminology%20Guide%20%20Aboriginal%20Heritage.pdf,

[52] Indigenous Services Canada: *Post-Secondary Student Support Program*, https://www.sac-isc.gc.ca/eng/1100100033682/1531933580211; *Métis Nation Post-Secondary Education Strategy*, https://www.sac-isc.gc.ca/eng/1578855031863/1578855057804.

[53] 2019 CHRT 7, para. 64; affidavit of Dr. Valerie Gideon, Dec 21, 2018, Ex. 144 to Mayo Affidavit, para. 26.

[54] Indigenous Services Canada: Indigenous Community Support Fund, https://www.sac-isc.gc.ca/eng/1585189335380/1585189357198.

Indians.[55] With respect, it is a bit late in the day for the federal government to start worrying about the purported effects on identity of its programming distinctions.

51. The Tribunal provided a cogent explanation of why it exercised its remedial discretion to order that Jordan's Principle services should be provided to non-status children residing off reserve, whose parent or guardian had status:

> [243] ….Canada's eligibility criteria exclude First Nations children without *Indian Act* status even if one of their parents has status or is eligible for status under 6(2) of the *Indian Act*. The reason behind this is because a parent that has 6(2) *Indian Act* status cannot transmit it to their children. This is what the AFN resolution above described as the erosion of First Nations. The issue here in the provision of services is that because Canada unilaterally imposes the *Indian Act* as the criteria for access to services under Jordan's Principle a situation may arise of two siblings sharing only one parent registered under 6(2) of the *Indian Act* being treated differently for Jordan's Principle eligibility. The child whose second parent is registered under 6(1) of the *Indian Act* may be considered eligible for Jordan's Principle services. On the other hand, the child whose second parent is not eligible for registration under the *Indian Act* may not be eligible for Jordan's Principle services. The Panel finds that benefits to First Nations children differ as a result of protected characteristics that are not relevant to Jordan's Principle's stated purpose of substantive equality for First Nations children. There is no doubt that this outcome is discriminatory and should not be the criteria used to remedy the discrimination found in this case.
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> [244] We are not discussing a self-identified First Nations person who had a First Nations ancestor twelve generations ago here. We are discussing First Nations children who, but for the discriminatory way in which the *Indian Act* categorizes them, are denied services under Jordan's Principle meant to address substantive equality. Jordan's Principle accounts for these children's specific needs as well as the legacies of stereotyping, prejudice, colonialism and displacement, and intergenerational trauma relating to Residential Schools or the Sixties Scoop. Moreover, the Panel already found that
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> > AANDC's role in responding to Jordan's Principle is by virtue of the range of social programs it provides to First Nations people, including: special education; assisted living; income assistance; and, the FNCFS Program (see 2009 MOU on Jordan's Principle at pp. 1-2),
> >
> > (see 2016 CHRT 2 at para. 355).
>
> [245] Additionally, Health Canada and Aboriginal Affairs and Northern Development Canada (AANDC), now ISC, has "a role to play in supporting improved integration and linkages between federal and provincial health and social services" (2013 MOU on Jordan's Principle at p. 1), (see 2016 CHRT 2 at para. 358).
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> [246] As already noted, the evidence before the Tribunal and findings indicated that a child who was living off reserve, was not recognized as being ordinarily resident on reserve, and was not eligible for *Indian Act* status registration was denied a service above normative standards. The child, who was an infant, was waiting for an essential scan prescribed by a

[55] *Daniels* Trial, para. 107.

> physician in order to assist in determining the appropriate treatment and operation for a rare and serious medical condition (see 2019 CHRT 7 at paras. 64 and 72). The Panel found that the fact that the child was not covered under Jordan's Principle for lack of status was the focus of the refusal (see 2019 CHRT 7 at para. 69).
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> [247] Moreover, in the interim ruling the Panel found the outcome of the child's case unreasonable. The coverage under Jordan's Principle was denied because the child's mother is registered under 6(2) of the *Indian Act* and could not transmit status to her child in light of the second-generation cut-off rule. This is the main reason why the child's travel costs were refused (see 2019 CHRT 7 at para. 73).
>
> [248] Thirdly, as demonstrated above, race and national or ethnic origin is a factor in the denial of services namely above normative standard and culturally appropriate and safe under Jordan's Principle. A child with a parent who is registered under 6(2) of the *Indian Act* and with a parent with no status or eligibility to status will be treated differently than a child who has a parent registered under 6(1) of the *Indian Act*. No other children in Canada will be categorized in this manner, only First Nations children. Therefore, "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison" (see *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 59). Moreover, the same reasons and findings in the Merit Decision in terms of substantive equality and race and/or national or ethnic origin apply to this unilaterally created by Canada category of eligible First Nations children, (see for example 2016 CHRT 2 at paras. 395-467).
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> > In General Comment 18, thirty-seventh session, 10 November 1989 at paragraph 7, the UNHRC stated that the term "discrimination" as used in the ICCPR should be understood to imply:
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> > > any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.
> >
> > Moreover, the Panel relied on General Comment No. 18 of the UNHRC's stating "that the aim of the protection is substantive equality, and to achieve this aim States may be required to take specific measures" (see at paras. 5, 8, and 12-13).
>
> (see Merit Decision at para. 440, emphasis added).[56]

52. The Tribunal had both an evidentiary and a legal basis for making its decision. The Tribunal heard evidence of the intergenerational trauma caused by Residential Schools and the Sixties Scoop, the need for culturally appropriate services, and the concomitant need for "above normative" services for some Indigenous children. The Tribunal also

[56] *First Nations Child Decision*, 2020 CHRT 20, paras. 243-248 [emphasis added].

heard evidence of the circumstances of an "illustrative" non-status child who was denied Jordan's Principle services because she did not reside on reserve and was non-status.[57] The Tribunal was entitled to take this evidence into account in fashioning its remedies.

53. It was also reasonable for the Tribunal to consider the discriminatory nature of the status/non-status divide in crafting its remedies. A remedy that would have reflected that divide would not have been consistent with the purpose of the Act, which is to address and prevent discriminatory practices, not perpetuate them. The Tribunal explained that the exclusion of non-status children who lived off reserve could have resulted in a situation where two half-siblings with a common parent having status under s.6(2) would be treated differently under Jordan's Principle, based only on the status or eligibility for status of the other parent. This means that "race and national or ethnic origin" would be a factor in defining eligibility. More broadly, Indigenous people are the only group that are so classified and who are subjected to ancestry-based status rules.

54. The Tribunal was also entitled to take into account Canada's international human rights commitments in fashioning its remedies, and in interpreting its remedial powers.[58] Canada has committed to taking a child-first approach in the *Convention on the Rights of the Child*. Canada has also fully endorsed and accepted *UNDRIP*,[59] which sets out the rights of Indigenous Peoples to self-determination, to belong to an indigenous community or nation in accordance with the traditions and customs of the community or nation concerned, to improvement of their economic and social conditions, and to involvement

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[57] *Interim Order*, 2019 CHRT 7, paras. 57-73.
[58] See e.g. *Health Services and Support – Facilities Subsector Bargaining Assn v. British Columbia*, 2007 SCC 27, para. 69-70
[59] *First Nations Child Decision*, 2020 CHRT 20, para. 136.

in developing and determining health programs affecting them, among other things.[60] Restricting eligibility for Jordan's Principle services based on *Indian Act* status is not compatible with these commitments.

55. The *First Nations Child Decision* appropriately focused on substantive equality, not formal equality of treatment of individuals. The Applicant's arguments are based on form over substance. They should be disregarded.

3. The Applicant's Complaint of an "Open-ended Series of Proceedings"

56. The Applicant argues that the Tribunal has created an "open-ended series of proceedings". With respect, this demonstrates that the Applicant lacks perspective.

57. The *Merit Decision* was released as Canada approached its 150th birthday as a nation. It took almost 150 years for Canada to devise a system as illogical, dysfunctional, distinction-ridden and damaging as the child and family services system that the Tribunal found to be discriminatory in the *Merit Decision* and its subsequent remedial decisions. It should not be surprising if it takes some time, data collection, and supervision for the Tribunal to sort it out. All of this is well within the Tribunal's statutory mandate.

58. The Tribunal is not a court. Retaining jurisdiction and fashioning flexible remedies to address an underlying pattern of systemic discrimination are not unusual for the Tribunal. Further, fashioning systemic remedies "is an art, and not a science".[61] This Court

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[60] *UNDRIP*, articles 3, 9, 23, 33; *First Nations Child Decision*, 2020 CHRT 20, paras. 140-151.
[61] *Hughes v. Elections Canada*, 2010 CHRT 4, para. 70

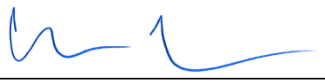
has specifically upheld the Tribunal's practice of providing guidelines to the parties to work out the details of orders themselves, under the Tribunal's ongoing supervision.[62]

59. The Applicant's complaint of an "open-ended proceeding" is not a valid complaint.

PART IV. ORDERS SOUGHT

60. CAP respectfully requests that application T-1559-20 be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



May 12, 2021

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[62] *Canada (Attorney General) v. Grover*, 1994 CanLII 18487 (FC), paras. 31-32.

PART V. LIST OF AUTHORITIES

LEGISLATION

Canadian Human Rights Act, RSC 1985, c.H-6. s.2, s.53(2)

JURISPRUDENCE

Daniels v. Canada (Minister of Indian and Northern Affairs), 2016 SCC 12

R. v. Desautel, 2021 SCC 17

R. v. Powley, 2003 SCC 43

R. v. Blais, 2003 SCC 44

Corbiere v. Canada (Minister of Indian and Northern Affairs), 1999 CanLII 687 (SCC)

Lovelace v. Ontario, 2000 SCC 37

McIvor v. Canada (Registrar of Indian an Northern Affairs), 2009 BCCA 153

Canada (A.G.) v. Misquadis, 2003 FCA 473

Sawridge Band v. Canada, 2006 FCA 228

Daniels v. Canada (Min. Indian and Northern Affairs), 2013 FC 6

Descheneaux v. Canada (A.G.), 2015 QCCS 3555

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs), 2016 CHRT 2

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs), 2016 CHRT 16

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

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

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2020 CHRT 20

First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs), 2020 CHRT 36

Action Travail des Femmes v. C.N.R. Co., 1987 CanLII 109 (SCC), [1987] 1 SCR 1114

Royal Oak Mines Inc. v. Canada (Labour Relations Board), 1996 CanLII 220 (SCC)

Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbain de Montréal, 2004 SCC 30

Health Services and Support – Facilities Subsector Bargaining Assn v. British Columbia, 2007 SCC 27

Hughes v. Elections Canada, 2010 CHRT 4

Canada (Attorney General) v. Grover, 1994 CanLII 18487 (FC)

SECONDARY SOURCES

Report of the Royal Commission on Aboriginal Peoples, (Ottawa: 1996) volume 4, chapter 5, section1.3

J. Leslie, *The Indian Act: An Historical Perspective*, 2002 Canadian Parliamentary Review 23, 2002 CanLIIDocs 236

Crown-Indigenous Relations and Northern Affairs Canada, *Background on Indian registration*, https://www.rcaanc-cirnac.gc.ca/eng/1540405608208/1568898474141

Final Report of the Truth and Reconciliation Commission, 2015, Vol. 2, *What We Have Learned: Principles of Truth and Reconciliation*, http://www.trc.ca/assets/pdf/Principles_English_Web.pdf .

UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: https://www.refworld.org/docid/471355a82.html

Indian and Northern Affairs Canada, *Discussion Paper: Changes to the* Indian Act *affecting Indian Registration and Band Membership* (2009), https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/mci_1100100032488_eng.pdf

Library and Archives Canada, *Terminology Guide: Research on Aboriginal Heritage*, https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/Documents/Terminology%20Guide%20%20Aboriginal%20Heritage.pdf

Indigenous Services Canada: *Post-Secondary Student Support Program*, https://www.sac-isc.gc.ca/eng/1100100033682/1531933580211

Indigenous Services Canada, *Métis Nation Post-Secondary Education Strategy*, https://www.sac-isc.gc.ca/eng/1578855031863/1578855057804

Indigenous Services Canada: *Indigenous Community Support Fund*, https://www.sac-isc.gc.ca/eng/1585189335380/1585189357198

Indigenous Services Canada, *About band membership and how to transfer to or create a band*, https://www.sac-isc.gc.ca/eng/1100100032469/1572461264701.