Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 20
Date: July 17, 2020
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and

-Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

Table of Contents

I. Context

[1] The Complainants, the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN) filed a human rights complaint alleging that the inequitable funding of child welfare services on First Nations reserves amounts to discrimination on the basis of race and national or ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, RCS 1985, c H-6 (the *CHRA*).

[2] In *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 (the *Merit Decision*), this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the *CHRA*.

[3] In the *Merit Decision*, this Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Delays were inherently built into the process for dealing with potential Jordan's Principle cases. Furthermore, Canada's approach to Jordan's Principle cases was aimed solely at inter-governmental disputes between the federal and provincial government in situations where a child had multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children (not just those with multiple disabilities). As a result, Aboriginal Affairs and Northern Development Canada (AANDC), now Indigenous Services Canada (ISC), was ordered to immediately implement the full meaning and scope of Jordan's Principle (see the *Merit Decision* at paras. 379-382, 458 and 481).

[4] Three months following the *Merit Decision*, INAC and Health Canada indicated that they began discussions on the process for expanding the definition of Jordan's Principle, improving its implementation and identifying other partners who should be involved in this process. They anticipated it would take 12 months to engage First Nations, the provinces and territories in these discussions and develop options for changes to Jordan's Principle.

[5] In a subsequent ruling (2016 CHRT 10), this Panel specified that its order was to immediately implement the full meaning and scope of Jordan's Principle, not immediately start discussions to review the definition in the long-term. The Panel noted there was already a workable definition of Jordan's Principle, which was adopted by the House of Commons, and saw no reason why that definition could not be implemented immediately. INAC was ordered to immediately consider Jordan's Principle as including all jurisdictional disputes (including disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). The Panel further indicated that the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided (see 2016 CHRT 10 at paras. 30-34).

[6] Thereafter, INAC indicated that it took the following steps to implement the Panel's order:

- It corrected its interpretation of Jordan's Principle by eliminating the requirement that the First Nations child on reserve must have multiple disabilities that require multiple service providers;
- It corrected its interpretation of Jordan's Principle to apply to all jurisdictional disputes and now includes those between federal government departments;
- Services for any Jordan's Principle case will not be delayed due to case conferencing or policy review; and
- Working level committees comprised of Health Canada and INAC officials, Director Generals and Assistant Deputy Ministers will provide oversight and will guide the implementation of the new application of Jordan's Principle and provide for an appeals function.

[7] It also stated it would engage in discussions with First Nations, the provinces and the Yukon on a long-term strategy. Furthermore, INAC indicated it would provide an annual report on Jordan's Principle, including the number of cases tracked and the amount of funding spent to address specific cases. INAC also updated its website to reflect the changes above, including posting contact information for individuals encountering a Jordan's Principle case.

[8] While the Panel was pleased with these changes and investments in working towards enacting the full meaning and scope of Jordan's Principle, it still had some outstanding questions with respect to consultation and full implementation. In the 2016 CHRT 16 ruling, the Panel requested further information from INAC with respect to its consultations on Jordan's Principle and the process for dealing with Jordan's Principle cases. Further, INAC was ordered to provide all First Nations and First Nations Child and Family Services Agencies (FNCFS Agencies) with the names and contact information of the Jordan's Principle focal points in all regions.

[9] Finally, the Panel noted that INAC's new formulation of Jordan's Principle once again appeared to be more restrictive than formulated by the House of Commons. That is, INAC was restricting the application of the principle to "First Nations children on reserve" (as opposed to all First Nations children) and to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports." The Panel ordered INAC to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve. In order for the Panel to assess the full impact of INAC's formulation of Jordan's Principle, it also ordered INAC to explain why it formulated its definition of the principle as only being applicable to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" (see 2016 CHRT 16 at paras. 107-120).

[10] In May 2017, the Panel made additional findings in light of the new evidence before it and has partially reproduced some of them below for ease of reference:

> Accordingly, the Panel finds the evidence presented on this motion establishes that Canada's definition of Jordan's Principle does not fully address the findings in the [Merit] Decision and is not sufficiently responsive to the previous orders of this Panel. While Canada has indeed broadened its application of Jordan's Principle since the [Merit] Decision and removed some of the previous restrictions it had on the use of the principle, it nevertheless continues to narrow the application of the principle to certain First Nations children.
>
> (see 2017 CHRT 14 at para. 67).
>
> Furthermore, the emphasis on the "normative standard of care" or "comparable" services in many of the iterations of Jordan's Principle above

does not answer the findings in the Decision with respect to substantive equality and the need for culturally appropriate services (see [Merit] Decision at para. 465). The normative standard of care should be used to establish the minimal level of service only. To ensure substantive equality and the provision of culturally appropriate services, the needs of each individual child must be considered and evaluated, including taking into account any needs that stem from historical disadvantage and the lack of on-reserve and/or surrounding services (see [Merit] Decision at paras. 399-427),

(see 2017 CHRT 14 at para. 69).

However, the normative standard may also fail to identify gaps in services to First Nations children, regardless of whether a particular service is offered to other Canadian children. As The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions document identifies above, under the "Considerations" for "Option One": "The focus on a dispute [over payment of services between or within governments] does not account for potential gaps in services where no jurisdiction is providing the required services."

(see 2017 CHRT 14 at para. 71, addition to quotation in original).

This potential gap in services was highlighted in the Pictou Landing [Band Council v. Canada (Attorney General), 2013 FC 342] case and in the [Merit] Decision. Where a provincial policy excluded a severely handicapped First Nations teenager from receiving home care services simply because he lived on reserve, the Federal Court determined that Jordan's Principle existed precisely to address the situation (see Pictou Landing at paras. 96-97).

Furthermore, First Nations children may need additional services that other Canadians do not, as the Panel explained in the [Merit] Decision at paragraphs 421-422:

> [421] In her own recent comprehensive research assessing the health and wellbeing of First Nations people living on reserve, Dr. Bombay found that children of Residential School survivors reported greater adverse childhood experiences and greater traumas in adulthood, all of which appeared to contribute to greater depressive symptoms in Residential School offspring (see Annex, ex. 53 at p. 373; see also Transcript Vol. 40 at pp. 69, 71).
>
> [422] Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves. By focusing on bringing children into care, the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past

> harms. 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.
>
> (see 2017 CHRT 14 at para. 72)

[11] Also, in the 2017 CHRT 14 ruling the Panel made additional findings that are relevant to the questions before us as part of this ruling:

> Therefore, the fact that it is considered an "exception" to go beyond the normative standard of care is concerning given the findings in the [*Merit*] *Decision*, which findings Canada accepted and did not challenge. The discrimination found in the [*Merit*] *Decision* is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families. There should be better coordination between federal government departments to ensure that they address those needs and do not result in adverse impacts or service delays and denials for First Nations. Over the past year, the Panel has given Canada much flexibility in terms of remedying the discrimination found in the [*Merit*] *Decision*. Reform was ordered. However, based on the evidence presented on this motion regarding Jordan's Principle, Canada seems to want to continue proffering similar policies and practices to those that were found to be discriminatory. Any new programs, policies, practices or funding implemented by Canada should be informed by previous shortfalls and should not simply be an expansion of previous practices that did not work and resulted in discrimination. They should be meaningful and effective in redressing and preventing discrimination.
>
> (see 2017 CHRT 14 at para. 73, emphasis added).
>
> Canada's narrow interpretation of Jordan's Principle, coupled with a lack of coordination amongst its programs to First Nations children and families […] along with an emphasis on existing policies and avoiding the potential high costs of services, is not the approach that is required to remedy discrimination. Rather, decisions must be made in the best interest of the children. While the Ministers of Health and Indigenous Affairs have expressed their support for the best interest of children, the information emanating from Health Canada and INAC, as highlighted in this ruling, does not follow through on what the Ministers have expressed.

(see 2017 CHRT 14 at para. 74).

Overall, the Panel finds that Canada is not in full compliance with the previous Jordan's Principle orders in this matter. It tailored its documentation, communications and resources to follow its broadened, but still overly narrow, definition and application of Jordan's Principle. Presenting a criterion-based definition, without mentioning that it is solely a focus, does not capture all First Nations children under Jordan's Principle. Furthermore, emphasizing the normative standard of care does not ensure substantive equality for First Nations children and families. This is especially problematic given the fact that Canada has admittedly encountered challenges in identifying children who meet the requirements of Jordan's Principle and in getting parents to come forward to identify children who have unmet needs (see *Transcript of Cross-Examination of Ms. Buckland* at p. 43, lines 1-8).

(see 2017 CHRT 14 at para. 75).

[12] Further in the ruling, the Panel wrote:

Despite Jordan's Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the [*Merit*] *Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the [*Merit*] *Decision*, especially with respect to allocating dedicated funds and resources to address some of these issues (see [*Merit*] *Decision* at para. 356)

(see 2017 CHRT 14, at para. 78).

Despite this, nearly one year since the April 2016 ruling and over a year since the [*Merit*] *Decision*, Canada continues to restrict the full meaning and intent of Jordan's Principle. The Panel finds Canada is not in full compliance with the previous Jordan's Principle orders in this matter. There is a need for further orders from this Panel, pursuant to section 53(2)(a) and (b) of the *Act*, to ensure the full meaning and scope of Jordan's Principle is implemented by Canada.

(see 2017 CHRT 14 at para. 80).

The orders made in this ruling are to be read in conjunction with the findings above, along with the findings and orders in the [*Merit*] *Decision* and previous rulings (2016 CHRT 2, 2016 CHRT 10 and 2016 CHRT 16). Separating the orders from the reasoning leading to them will not assist in implementing the orders in an effective and meaningful way that ensures the essential needs of First Nations children are met and discrimination is eliminated.

(see 2017 CHRT 14 at para. 133).

[13] Akin to what was said in 2019 CHRT 7 at para. 16, the above will also inform some of the reasons in this ruling.

[14] The Tribunal's May 26, 2017 order (2017 CHRT 14) required Canada to base its definition and application of Jordan's Principle on key principles, one of which was that Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve.

[15] Canada challenged some aspects of the 2017 CHRT 14 ruling by way of a judicial review which was subsequently discontinued following a consent order from this Tribunal essentially amending, on the consent of the parties, some aspects of the orders pertaining to timelines and clinical case conferencing. No part of this judicial review questioned or challenged the Tribunal's order that Canada's definition and application of Jordan's Principle must apply equally to all First Nations children, whether resident on or off reserve.

[16] In 2017 CHRT 35, the Tribunal amended its orders to reflect some wording changes suggested by the parties. The Jordan's Principle definition ordered by the Panel and accepted by the parties is reproduced in bold below:

> **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 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 professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is approved and funding is provided, the government department of first contact can seek reimbursement from another department/government;

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 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 for the purpose described in paragraph 135(1)(B)(iii). Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not

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

[17] The Panel found that while it is accurate to say the Tribunal did not provide a definition of a "First Nation child" in its orders, it is also true to say that none of the parties including Canada sought clarification on this point until this motion. To be fair, on this issue, the Panel believes that it should focus on ensuring its remedies are efficient and effective in light of the evidence before it and in the best interests of children more than on Canada's compliance (see 2019 CHRT 7 at para. 20).

[18] The parties have been discussing the issue outside the Tribunal process but have not yet reached a consensus on this issue. Therefore, the Caring Society requested adjudication of whether Canada's definition of "First Nations child" for the purposes of implementing Jordan's Principle complies with this Tribunal's orders.

[19] In an interim ruling, the Panel determined the issue of a "First Nations child" definition was best addressed by way of a full hearing. The Panel Chair requested the parties to make arguments on international law including the United Nations Declaration on the Rights of Indigenous Peoples (*UNDRIP*); the recent UN Human Rights Committee's *McIvor* [*McIvor UNHRC*] decision findings that sex discrimination continued in the *Indian Act*, RSC 1985, c I-5; Aboriginal law; human rights and substantive equality; constitutional law and other aspects, in order to allow the Panel to make an informed decision on the issue of the "First Nation child" definition following the upcoming hearing. Doing this analysis through a multi-faceted lens is paramount given the probable incompatibilities between the *UNDRIP* and the *Indian Act* (see 2019 CHRT 7 at para. 22).

[20] The Panel further wrote that:

> […] if the current version of the *Indian Act* discriminates and excludes segments of women and children, it is possible that but for the sex discrimination, the children excluded would be considered eligible to be registered under the *Indian Act*.
>
> (2019 CHRT 7 at para. 22).

[21] It further wrote that:

> In those circumstances the child would be considered by Canada under Canada's Jordan's Principle eligibility for registration criteria for First Nations children who are not ordinarily resident on-reserve and, who do not have *Indian Act* status. While this should not be read as a final determination on Canada's current policy under Jordan's Principle, the Panel also wants to ensure to craft effective remedies that eliminate discrimination and prevent it from reoccurring. Needless to say, it cannot condone a different form of discrimination while it makes its orders for remedies. Hence, the need for a full and complete hearing on this issue where the above would be addressed by all parties.
>
> (2019 CHRT 7 at para. 22).
>
> During the January 9, 2019 motion hearing, Panel Chair Marchildon expressed the Panel's desire to respect Indigenous Peoples' inherent rights of self-determination and self-governance including their right to determine citizenship in crafting all its remedies. Another important point is that the Panel not only recognizes these rights as inherent to Indigenous Peoples, <u>they are also human rights of paramount importance</u>. The Panel in its [*Merit*] *Decision* and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada's programs and systems (see for example 2016 CHRT 2 at para. 402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account. In fact, in 2018 CHRT 4, the Panel crafted a creative and innovative order to ensure it provided effective immediate relief remedies to First Nations children while respecting the principles in the *UNDRIP*, the Nation-to-Nation relationship, the Indigenous rights of self-governance and the rights of Indigenous rights holders. It requested comments from the parties and no suggestions or comments were made by the parties on those specific orders. The Panel has always stressed the need to ensure the best interests of children are respected in its remedies and the need to eliminate discrimination and prevent it from reoccurring.
>
> (see 2019 CHRT 7 at para. 23).

This Panel continues to supervise Indigenous and Northern Affairs Canada, now Indigenous Services Canada's, implementation and actions in response to findings that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or are differentiated adversely in the provision of child and family services, pursuant to section 5 of the *CHRA* (see the [*Merit*] *Decision*).

(see 2019 CHRT 7 at para. 24)

At the October 30-31, 2019 hearing (October hearing), Canada' witness, Dr. Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada, admitted in her testimony that the Tribunal's May 2017 CHRT 14 ruling and orders on Jordan's Principle definition and publicity measures caused a large jump in cases for First Nations children. In fact, from July 2016 to March 2017 there were approximately 5,000 Jordan's Principle approved services. After the Panel's ruling, this number jumped to just under 77,000 Jordan's Principle approved services in 2017/2018. This number continues to increase. At the time of the October hearing, **over 165 000 Jordan's Principle approved services** have now been approved under Jordan's Principle as ordered by this Tribunal. This is confirmed by Dr. Gideon's testimony and it is not disputed by the Caring Society. Furthermore, it is also part of the new documentary evidence presented during the October hearing and now forms part of the Tribunal's evidentiary record. Those services were gaps in services that First Nations children would not have received but for the Jordan's Principle broad definition as ordered by the Panel. In response to Panel Chair Sophie Marchildon's questions, Dr. Gideon also testified that Jordan's Principle is not a program, it is considered a legal rule by Canada. This is also confirmed in a document attached as an exhibit to Dr. Gideon's affidavit. Dr. Gideon testified that she wrote this document (see Affidavit of Dr. Valerie Gideon, dated, May 24, 2018 at exhibit 4, at page 2). This document named, Jordan's Principle Implementation-Ontario Region, under the title, Our Commitment states as follows:

No sun-setting of Jordan's Principle

Jordan's Principle is a legal requirement not a program and thus there will be no sun-setting of Jordan's Principle […] **There cannot be any break in Canada's response to the full implementation of Jordan's Principle.** [Emphasis added]

(see 2019 CHRT 7 at para. 25)

The Panel is delighted to hear that thousands of services have been approved since it issued its orders. It is now proven that this substantive equality remedy has generated significant change for First Nations children and is efficient and measurable. While there is still room for improvement, it also fosters hope.

> **We would like to honor Jordan River Anderson and his family for their legacy**. We also acknowledge the Caring Society, the AFN and the Canadian Human Rights Commission for bringing this issue before the Tribunal and the Caring Society, the AFN, the COO, the NAN, and the Canadian Human Rights Commission for their tireless efforts. We also honor the Truth and Reconciliation Commission for its findings and recommendations. Finally, the Panel recognizes that while there is more work to do to eliminate discrimination in the long term, Canada has made **substantial efforts** to provide services to First Nations children under Jordan's Principle especially since November 2017. Those efforts are made by people such as Dr. Gideon and the Jordan's Principle team and the Panel believes it is noteworthy. This is also recognized by the Caring Society in an April 17, 2018 letter filed in the evidence (see Dr. Valerie Gideon's affidavit, dated December 21st, 2018, at Exhibit A). This is not to convey the message that a colonial system which generated racial discrimination across the country is to be praised for starting to correct it. Rather, it is recognizing the decision-makers and the public servants' efforts to implement the Tribunal's rulings hence, truly impacting the lives of children.
>
> (see 2019 CHRT 7 at para. 26).

[22] On February 21, 2019, the Tribunal issued an interim ruling on Jordan's Principle (see 2019 CHRT 7) and found:

> [85] Furthermore, the Panel believes it would be in the best interests of non-status off-reserve children to make a temporary order with parameters that would apply until the "First Nation child" definition has been resolved, so as to avoid situations like the one that occurred in S.J.'s case. Especially that it may take a few months before the issue is resolved.
>
> [86] Finally, the Panel notes that Canada's Registration requirements as per the *Indian Act* have a direct correlation with whom receives services under Jordan's Principle and therefore support the importance of a full hearing on this issue:
>
> The recognition of Indigenous identity is a complex question. In August 2015, Bill S-3 amended the *Indian Act* by creating seven new registration categories, in response to the decision in *Descheneaux c. Canada* rendered by the Superior Court of Quebec in August 2015. These provisions came into force in December 2017 and appropriately, Canada **re-reviewed the requests submitted under Jordan's Principle for children who may have been impacted by the decision**. (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para.15).
>
> Additional amendments to the definition under the *Indian Act* will be developed subsequent to a period of consultation with First Nations. When part B of Bill

S-3 becomes law, Jordan's Principle requests will be processed in compliance with whatever definition affecting eligibility emerges from that process (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para. 16).

[87] The Panel, in light of its findings and reasons, its approach to remedies and its previous orders in this case, above mentioned and, pursuant section 53 (2) a and b of the *CHRA*, orders that, pending the adjudication of the compliance with this Tribunal's orders and of Canada's definition of "First Nations child" for the purposes of implementing Jordan's Principle, and in order to ensure that the Tribunal's orders are effective, Canada shall provide First Nations children living off-reserve who have urgent and/or life-threatening needs, but do not have (and are not eligible for) *Indian Act* status, with the services required to meet those urgent and/or life-threatening service needs, pursuant to Jordan's Principle.

[88] This order will be informed by the following principles:

[89] This interim relief order applies to: 1. First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and 2. who have urgent and/or life-threatening needs. In evaluating urgent and/or life-threatening needs due consideration must be given to the seriousness of the child's condition and the evaluation of the child made by a physician, a health professional or other professionals involved in the child's assessment. Canada should ensure that the need to address gaps in services, the need to eliminate all forms of discrimination, the principle of substantive equality and human rights including Indigenous rights, the best interests of the child, the *UNDRIP* and the Convention on the Rights of the Child guide all decisions concerning First Nations children.

[90] The Panel is not deciding the issue of Jordan's Principle eligibility based on status versus non-status. This issue will be further explored at a full hearing on the merits of this issue.

[91] The Panel stresses the importance of the First Nations' self-determination and citizenship issues, and **this interim relief order or any other orders is not intended to override or prejudice First Nations' rights.**

[92] This interim relief order only applies until a full hearing on the issue of the definition of a "First Nation child" under Jordan's Principle and a final order is issued.

[23] The present ruling deals with the issue on its merits.

II. Position of the Parties

A. The Caring Society's Position

[24] The Caring Society argues that Canada is impermissibly narrowing the scope of "all First Nations children" in the context of Jordan's Principle, as set out in the Panel's Order in paragraph 135(1)(B)(i) of 2017 CHRT 14. In particular, the Caring Society contends that Canada's interpretation does not comply with the Order in paragraph 135(1)(c) of the same ruling that "Canada shall not use […] a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(B)."

[25] The Caring Society identifies three categories of First Nations children it indicates Canada has agreed are within the scope of the order:

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

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

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

[26] The Caring Society presents three additional categories of First Nations children that it argues Canada is improperly excluding, and who are the focus of its submissions:

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

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

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

[27] The Caring Society does not seek to expand Jordan's Principle beyond the categories it identifies. In particular, it does not seek relief for individuals who self-identify as First Nations but lack one of the three objective markers, nor does it seek relief for Inuit and Métis children through this complaint.

[28] The Caring Society submits that the Tribunal's Orders have consistently referred to "all First Nations children" without any limitation based on *Indian Act* status or on-reserve residency. The Caring Society asserts that *Indian Act* status or residence on a reserve do not correspond with the discrimination in this case that is "on the basis of race and/or national or ethnic origin" (2016 CHRT 2 at paras 6, 23, 395-396, 459, and 473). The Caring Society contends that applying Jordan's Principle to all First Nations children is consistent with human rights principles that focus on the needs of the children. Failing to consider requests from First Nations children living off-reserve without *Indian Act* status introduces discrimination on the basis of reserve residency. The Caring Society suggests the focus should be on the best interests and individual needs of each First Nations child and that *Indian Act* status and on-reserve residency will not identify all First Nations children in need. The Caring Society notes that Jordan's Principle does not mean every child will be granted services. Rather, Jordan's Principle requires the individual needs of all First Nations children to be considered on the merits.

[29] The Caring Society asserts that Canada's definition of First Nations children does not acknowledge First Nations children recognized by a First Nation as belonging to the First Nation. The Caring Society highlighted the Panel Chair's remarks earlier in the case that children are at the heart of First Nations communities. The Caring Society claims that Canada's definition fails to recognize that "[c]ultural and ethnic labels do not lend themselves to neat boundaries" (*Daniels v. Canada (Indian and Northern Affairs Development),* 2016 SCC 12, at para 17 [*Daniels*]). In a Nation-to-Nation relationship, it is appropriate to recognize First Nations communities' views of First Nations identity. This is consistent with the position of the Chiefs-in-Assembly and self-determination principles underlying s. 35 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The Caring Society also invokes Canada's fiduciary duty to First Nations children as a reason Canada must provide Jordan's Principle services to First Nations children who are recognized by their community.

[30] The Caring Society suggests that Canada's criteria for Jordan's Principle eligibility exclude First Nations children who have lost their connection to their community due to the Indian Residential Schools System, the Sixties Scoop, or discrimination within the First

Nation Child and Family Services Program. The Caring Society refers to Panel's finding in 2018 CHRT 4, at para. 452, that "[g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence". The Caring Society argues that First Nations children face historical disadvantage regardless of *Indian Act* status or on-reserve residency. This broad disadvantage is recognized in other contexts such as the criminal justice system (see *R. v. Gladue*, [1999] 1 SCR 688; *R. v. Ipeelee*, 2012 SCC 13). Specifically, inter-generational trauma from cultural displacements creates particular disadvantages for First Nations children (see *Daniels*).

[31] The Caring Society submits that First Nations children with one parent with s. 6(2) *Indian Act* status and who are not eligible for *Indian Act* status themselves ought to benefit from Jordan's Principle.[1] Parents and guardians have significant responsibility for securing services for their children and their *Indian Act* status may cause obstacles in accessing services for their children. Treating two First Nations children differently based on whether their parent has s. 6(1) or s. 6(2) *Indian Act* status is discrimination on the basis of family status. The Caring Society advances that children who may gain status from the implementation of *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, S.C. 2017, c. 25 [*Bill S-3*] should not be required to wait until the implementation of the Act to receive services under Jordan's Principle.

[32] The Caring Society agrees with Amnesty International's submissions on Canada's international legal obligations.

[33] The Caring Society rejects Canada's argument that Jordan's Principle was not within the scope of the complaint. The Caring Society identifies references to Jordan's Principle in both its own Statement of Particulars and Canada's. Further, the Caring Society relies on *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 for the assertion that in a case such as this, the Tribunal ought to take a "functional approach" to pleadings. Similarly, the Caring

[1] A child who has one parent with s. 6(1) *Indian Act* status and one parent without *Indian Act* status is entitled to s. 6(2) *Indian Act* status. On the other hand, a child who has one parent with s. 6(2) *Indian Act* status and one parent without *Indian Act* status is not eligible for *Indian Act* status.

Society rejects Canada's argument that the Tribunal's supervisory powers are limited to First Nations children and families ordinarily resident on reserve, noting that Canada did not judicially review the Tribunal's orders relating to Jordan's Principle.

B. The Assembly of First Nations' Position

[34] The AFN submits that Canada's interpretation of "all First Nations children" fails to appropriately consider First Nations jurisdiction over citizenship and self-government rights of First Nations to determine who should be viewed as a "First Nations child". The AFN advances that "all First Nations children" includes children who are recognized by their First Nation as being a member. The AFN highlights that First Nations children who have lost *Indian Act* status and a connection to their First Nations community through discriminatory practices such as the Indian Residential School System and the Sixties Scoop require specific consideration from this Panel. The AFN contends that the scope of this complaint does not include other off reserve non-status, Métis, or Inuit children.

[35] The AFN specifically requests an order that Jordan's Principle applies to the following groups:

A. A registered Status Indian;

B. A person entitled to be registered as a Status Indian;

C. Individuals who are recognized by their First Nation as a member; and

D. Individuals covered under a self-government agreement.

[36] The AFN takes no position on whether First Nations children who are not eligible for status but have a parent with s. 6(2) *Indian Act* status should be included in the scope of the order.

[37] The AFN maintains that the *Indian Act* does not recognize First Nations right to self-determination or Canada's commitment to reconciliation and a Nation-to-Nation relationship with First Nations. The AFN represents that Canada's use of the *Indian Act* to determine First Nation membership and to identify First Nations children is a continuation of colonial, oppressive and racist policies. Canada should transition responsibility for determining First

Nations membership to First Nations. This is further supported by international and domestic law, including s. 35(1) of the *Constitution Act, 1982* and treaties with First Nations. In particular, many of the treaties grant all the descendants of the treaty signatories access to government services and restrictions based on *Indian Act* status breach those treaty provisions. The treaty relationships, especially the Numbered Treaties, are very important for many First Nations communities and individuals' identities. The treaties should be considered in the determination of a First Nations child.

[38] The AFN submits that both First Nations children who are recognized by their community and those entitled to *Indian Act* status should be included within a definition of First Nations child. Despite the *Indian Act's* flaws, including discrimination on the basis of sex such as found in *McIvor (UNHRC)*, it is the only legislation available to determine registered status. For non-registered First Nations children residing off reserve, the AFN argues that a connection to a First Nation's community is required. The AFN argues that defining a "First Nations child" affects First Nations jurisdiction over citizenship even though the definition is in the context of a specific program.

[39] The AFN contends that the Honour of the Crown requires Canada to ensure full participation of First Nations in recognizing who is a First Nations child. Recognizing First Nations rights to determine their citizenship in this manner is consistent with the honourable dealing required from the Crown.

[40] The AFN argues that while the focus of Jordan's Principle eligibility has been on rights of the child and the best interests of the child, the communally held First Nations rights to self-determination and self-government are also affected. Further, the AFN is concerned that First Nations might face legal challenges from individuals a First Nation refuses to recognize as belonging to the community. The AFN is also concerned that broadening eligibility criteria will drain financial resources and deprive already recognized First Nations children of services. The AFN notes that First Nations that have self-government agreements often do not receive funding for First Nations members who do not have *Indian Act* status. The AFN contends that a child who does not have *Indian Act* status and resides off reserve would ordinarily have access to provincial or territorial services that a child with status living on reserve does not have access to. The AFN acknowledges that the Tribunal

can order Canada to provide additional resources to maintain the availability of Jordan's Principle services for First Nations children already recognized as eligible.

[41] The AFN asserts that defining who is "First Nations" is difficult because the term describes over 63 organic political/cultural groups of people rather than a race from particular areas. First Nations are distinct peoples under customary international law, which creates unique questions of group identity in a human rights context. The definition of "First Nations" is also continuing to evolve as First Nations exercise their self-determination. Given this difficulty in defining a "First Nations child", any definition should not be imposed on First Nations using a top down approach but rather it should incorporate the viewpoints of First Nations communities.

[42] The AFN maintains that it would be inappropriate to adopt tests related to Indigenous identity developed in other circumstances. For example, it would not be appropriate to rely on the *R. v. Powley,* 2003 SCC 43 test for Métis identity or the *R. v. Ipeelee*, 2012 SCC 13 test for Aboriginal identity under the *Criminal Code*, RSC 1985 c. C-46.

[43] The AFN recognizes that Métis, Inuit or non-status Indigenous children may suffer discrimination on the basis of race, national or ethnic origin but argues that such discrimination should be addressed under a different complaint and evidentiary record. Most of the evidence in this complaint has been specific to First Nations with *Indian Act* status and First Nations children on reserve have been identified by the Panel as particularly vulnerable.

[44] The AFN proposes that a validation method similar to that in Part X of Ontario's *Child and Family Services Act*, R.S.O. 1990, c. C.11 for consulting with First Nations would be appropriate to determine whether an applicant under Jordan's Principle is a member of the First Nations community. The application ought to proceed under the presumption that there is a connection to the First Nations community. If the First Nations community responds denying the applicant's membership in the community, Canada ought to make a determination about whether the applicant is eligible. The AFN also identifies that entitlement to *Indian Act* status is currently changing and argues that this ongoing change should be considered by the Panel. Finally, the AFN submits that if First Nations are involved

in the validation process, this method may alleviate concerns raised by the Chiefs of Ontario (COO) and the Nishnawbe Aski Nation (NAN).

C. The Chiefs of Ontario's Position

[45] The COO submissions sought to provide practical considerations for an order that "all First Nations children" includes children recognized by their First Nation as being a member. In particular, the COO seeks to assist in crafting an order that can be implemented without causing delays to children receiving Jordan's Principle services and which respects First Nations' jurisdiction over citizenship. In particular, the COO requests that no duty of care or other legal duty be placed on First Nations to confirm citizenship, that First Nations in no way be required to recognize individuals in a way that is inconsistent with their traditions, laws or customs, that First Nations not be required to undertake new processes or systems, that recognition by a First Nation that a child is a member can be done through email, letter, or phone, and that Canada should provide First Nations and relevant organisations funding to educate First Nations about the Tribunal's order and to develop capacity to recognize citizenship when Jordan's Principle requests are made.

[46] The COO takes no position on the Caring Society's requested relief for children who have lost contact with their First Nations group, community or peoples.

[47] The COO supports First Nations right to determine their own citizenship through their own laws, traditions and customs. Any practical challenges do not mean the COO endorses or accepts the *Indian Act*, nor does it seek to perpetuate the *status quo* in Jordan's Principle cases.

[48] The COO identifies barriers to First Nations exercising jurisdiction over citizenship from the imposition of the *Indian Act*, Canada's failure to provide resources for First Nations individuals recognized through custom membership codes, disruptions to citizenship laws through the Indian Residential Schools System, forced disenfranchisement, the Sixties Scoop, and the First Nations Child and Family Services program. Most First Nations do not have a custom membership code and those that do not do not necessarily have codified or agreed upon citizenship laws, customs or traditions.

[49] The COO asserts that any order regarding recognition of a child by a First Nation should be directed only at the mechanism of evidencing that recognition and not direct First Nations when or how to exercise jurisdiction over citizenship.

[50] The COO highlights that while First Nations should be given an opportunity to voice their perspective on a child's citizenship, First Nations will not necessarily have the capacity to respond. This is particularly true given the 12-48 hour Jordan's Principle timelines. The COO argues First Nations require funding to have the capacity to respond to Jordan's Principle membership questions and that First Nations should ideally be given an opportunity and capacity to develop their own citizenship or membership codes.

D. The Nishnawbe Aski Nation's Position

[51] The NAN supports the Caring Society's position. The NAN submits that Jordan's Principle must be implemented in a non-discriminatory manner that respects First Nations inherent jurisdiction over citizenship and does not impose administrative burdens or legal liability on First Nations. The NAN supports the Caring Society and Amnesty International's submissions, subject to concerns about the best interest of the child. The NAN supports the submissions of the COO regarding First Nations jurisdiction and capacity. The NAN supports the Caring Society and Commission's submissions that Jordan's Principle has always been part of the complaint.

[52] The NAN advances that it is discriminatory and contrary to First Nations self-determination to exclude First Nations children recognized by a First Nation from Jordan's Principle. For Canada to continue to use *Indian Act* status and on-reserve residency as criteria for Jordan's Principle eligibility is inconsistent with the *UNDRIP,* Canada's commitment to reconciliation, and human rights principles that prohibit discrimination on the grounds of race, national or ethnic origin, and reserve residency.

[53] The NAN highlights that any discussion of the "best interest of the child" must consider how the principle has been used to support harmful practices such as the Indian Residential Schools System, the Sixties Scoop, and the child welfare system.

E. The Congress of Aboriginal Peoples' Position

[54] The Congress of Aboriginal Peoples (CAP) generally supports the Caring Society's position. The CAP submits that, in order to promote substantive equality, the definition of "First Nations child" should be based on the Honour of the Crown and, consistent with the principles in *Daniels v. Canada (Indian Affairs and Northern Development),* 2016 SCC 12, ought to adopt inclusion over exclusion. The CAP requests that consultations be part of the remedy ordered.

[55] The CAP represents off-reserve status and non-status Indians, Métis, and Southern Inuit Indigenous Peoples. The CAP identifies various socio-economic disadvantages suffered by its members in Canadian society. The CAP identifies Canada's policies as a key reason many of its members lack connections to their Indigenous families and communities. The CAP advances that its members are particularly disadvantaged and ought to be included in a remedial process seeking substantive equality.

[56] The CAP contends that the Honour of the Crown is a constitutional principle that affects how the Crown must fulfil its obligations to Indigenous Peoples. The Honour of the Crown requires negotiation in good faith and must be liberally and generously construed.

[57] The CAP advances that *Daniels* requires an inclusive definition of First Nations child in order to be constitutionally sound.

F. The Canadian Human Rights Commission's Position

[58] The Commission does not take a position on the definition of a "First Nations child" motion, instead providing submissions on the Tribunal's jurisdiction and identifying substantive evidence the Commission believes is relevant to the Panel's decision.

[59] The Commission represents that Jordan's Principle has always been within the scope of the complaint, noting that complaints should not be read as pleadings. The Statements of Particulars did not limit the Jordan's Principle relief requested to individuals with *Indian Act* status or living on reserve. The Panel has already addressed the scope of

Jordan's Principle, including that it applied both on and off reserve, which Canada should not now be entitled to challenge through a collateral attack.

[60] The Commission notes that there is uncertainty on whether Canada currently applies Jordan's Principle to First Nations children who do not have *Indian Act* status but are included in the membership code of a First Nation with a self-government agreement or self-government legislation. The Commission indicates that ISC staff have recently indicated these children are eligible while Canada's submissions on this motion appear to exclude this group.

[61] The Commission identifies concepts and sources of law that may relate to First Nations citizenship. *Indian Act* status is one recognition, although it has been found to be discriminatory. Custom membership codes, recognized under the *Indian Act*, may be more or less extensive than *Indian Act* status. First Nations with self-government agreements often have provisions to determine their membership. First Nations may have traditional laws with respect to citizenship. Section 35(1) of the *Constitution Act, 1982* and *UNDRIP* both recognize principles of self-determination.

[62] The Commission submits that there is a two-step framework, established in *Battlefords and District Co-operative Ltd. v. Gibbs,* [1996] 3 SCR 566, typically used to determine whether eligibility criteria for benefits are having a discriminatory impact. The first step is to determine the purpose of the benefit plan at issue. The second step is to determine whether the benefits criteria appropriately provide the benefit to individuals with the needs and circumstances the benefit program is intended to address.

[63] The Commission contends that previous decisions from the Panel have identified the purposes of Jordan's Principle as ensuring services to First Nations children are not delayed due to jurisdictional gaps and promoting substantive equality by providing services that may go beyond the normative standard of care and respond to the actual needs of First Nations children. The Commission argues the Panel ought to consider whether Canada's criteria are appropriate proxies for identifying the First Nations children with the sorts of needs identified by Jordan's Principle. The Commission is unable to identify evidence in the record that First Nations children living off reserve without *Indian Act* status face jurisdictional gaps in

accessing services but the Panel should consider any evidence that these First Nations children have actual needs that go beyond the normative standard of care and are rooted in historical and contemporary disadvantage that underlies a substantive equality analysis. The Commission identifies passages from the Supreme Court of Canada in *Daniels* and *Lovelace v. Ontario,* 2000 SCC 37 on the circumstances of off reserve First Nations individuals who do not have *Indian Act* status.

[64] The Commission opposes including a limitation of liability or indemnity in the final order for First Nations asked to confirm whether a child seeking Jordan's Principle services is a member of the First Nation. The Commission submits an order negating future duties of care or liabilities or ordering Canada to indemnify First Nations is outside the scope of the Tribunal's statutory powers. The Commission argues that such a case can be appropriately addressed if and when it arises.

G. Amnesty International's Position

[65] Amnesty International submits that Canada's interpretation of a "First Nations child" is too narrow to comply with Canada's obligations under international human rights law. The presumption of conformity, per *R. v. Hape*, 2007 SCC 26, indicates that courts should favour an interpretation of domestic law that conforms with international law. Amnesty International asserts that the *Convention on the Rights of the Child,* Can. T.S. 1992 No. 3 and the *UNDRIP* are particularly applicable.

[66] Amnesty International advances that international law protects the right to culture and cultural identity, which would be infringed if Canada's definition of a First Nations child were imposed on First Nations communities. Amnesty International notes that international human rights organisations have declined to adopt a formal definition of "Indigenous Peoples" in light of the harm caused by externally imposed definitions of membership. The *UNDRIP* specifically identifies an obligation to maintain cultural connections for children living outside their communities.

[67] Amnesty International highlights that Indigenous Peoples right to self-determination is protected in international law such as *UNDRIP*. The right to self-determination includes

Indigenous groups' right to determine their own membership in accordance with their customs and traditions.

[68] Amnesty International contends that the best interests of the child test applies here. The best interests of the child emphasizes eliminating barriers for children receiving services and obliges Canada not to create barriers limiting vulnerable children's ability to access services.

[69] Amnesty International argues that international law, including *UNDRIP*, requires states to take special measures to eradicate discrimination. That includes measures to redress actions that deprived Indigenous Peoples of their culture and identity. Special measures, aimed at ensuring substantive equality, must be applied in a non-discriminatory manner.

[70] Amnesty International asserts that budgetary considerations should not impact the scope of Canada's human rights obligations, as states must pursue rights fulfilment to the full extent of the nation's available resources.

H. Canada's Position

[71] Canada submits that the eligibility criteria it applies for Jordan's Principle are compliant with the Panel's orders and not only avoids jurisdictional disputes but provides substantive equality by funding services not provided to all other children. In particular, Canada argues that it complies with the orders by providing Jordan's Principle eligibility to:

A. Registered First Nations, living on or off reserve;

B. First Nations children who are entitled to be registered; and

C. Indigenous children, including non-status Indigenous children who are ordinarily resident on reserve.

[72] Canada advances that it is not appropriate to extend the scope of Jordan's Principle to cover the three categories of First Nations children requested by the Caring Society. Canada suggests that the lack of consensus between the parties reflects that the Caring Society seeks an order extending Jordan's Principle beyond the limits of the litigation as

reflected in the complaint, the particulars and the evidence and beyond the Tribunal's jurisdiction. While Canada notes some agreement among the other parties to include First Nations children recognized by a First Nation as belonging to that group, community or people, Canada identifies that there is little agreement on how that recognition might occur. Canada represents that the Tribunal lacks the jurisdiction to require First Nations who are not part of this proceeding to participate in any process for recognizing Jordan's Principle applicants.

[73] Canada contends that it has expanded its definition of Jordan's Principle eligibility to remedy the funding gap identified by the Panel and complies with the direction to apply Jordan's Principle "equally to all First Nations children on and off reserve" (2017 CHRT 14, para. 135 1.B.i). Canada submits that "all First Nations children on and off reserve" must be understood in the context of the complaint and the evidence heard, which focused on children subject to Canada's funding regime rather than every child in Canada who identifies as First Nation. Canada asserts that coverage for children with *Indian Act* status living off reserve recognizes potential service gaps for children perceived by provinces to fall under federal jurisdiction. Coverage for Indigenous children living on reserve who do not have *Indian Act* status recognizes that most federal programs are residency based and that failing to cover these individuals could cause a gap in coverage. Canada argues that its Jordan's Principle eligibility criteria satisfy the two step test proposed by the Commission for determining if a benefits program is under-inclusive.

[74] Canada submits that the Caring Society's request to expand coverage to additional First Nations children is beyond the scope of the complaint and the evidence. The Jordan's Principle complaint was about how Canada's funding regime caused gaps in the provision of services to First Nations children and families on reserve. Canada advances that the Panel has identified that the complaint against Canada is in relation to funding child welfare programs on reserve, which constitute providing a service under section 5 of the *CHRA*. First Nations children without *Indian Act* status who reside off reserve do not receive a service from Canada as they fall exclusively under provincial jurisdiction. Canada argues that the initial complaint, the Statements of Particulars, and key sections of the Panel's reasons refer to First Nations children on reserve. Canada asserts that the Panel has not

heard any evidence that First Nations children without *Indian Act* status who reside off reserve face the sorts of jurisdictional barriers or gaps in services that Jordan's Principle addresses. Canada maintains that the Panel has not been presented with any evidence about the services that First Nations children living off reserve receive from provincial or territorial government, nor that children living off reserve face jurisdictional gaps in accessing services. Regardless of the needs of those children, their needs fall outside the scope of this complaint. Canada asserts that the broad and complex issues of First Nations identity and self-determination should engage broader consultation beyond the scope of this complaint.

[75] Canada advances that its interpretation of Jordan's Principle is consistent with *UNDRIP* and other international human rights obligations as Canada ensures First Nations children subject to federal funding do not face discrimination. Canada suggests that *McIvor (UNHRC)* does not support a broader approach to defining a First Nations child for Jordan's Principle eligibility as the changes to *Indian Act* status will not increase the number of First Nations eligible for *Indian Act* status nor will it impact any individual's ability to pass on entitlement to *Indian Act* status to their children. Canada disagrees with Amnesty International's argument that international law broadens the definition of a First Nations child beyond the children at the centre of the complaint.

[76] Canada rejects the argument that it has a fiduciary duty to extend Jordan's Principle. Canada maintains that the Panel's earlier analysis of the fiduciary duty in 2016 CHRT 2 was limited to First Nations children and families receiving services on reserve. Canada notes that none of the three branches of the *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 are met for First Nations children without *Indian Act* status living off reserve. Canada does not exercise the required degree of control, discretion or power required to trigger a fiduciary relationship.

[77] Canada submits that the Honour of the Crown is not capable of assisting in the interpretation of a "First Nations child". While Canada acknowledges that the Honour of the Crown requires it to act honourably, the specific obligations that arise in the implementation of a constitutional duty to Indigenous Peoples, fiduciary duties to Indigenous Peoples or treaty making do not apply in this case.

[78] Canada's position is that *Daniels* does not assist in defining Jordan's Principle eligibility. *Daniels* determined that constitutional division of powers enables Canada to enact legislation with respect to Métis and Indigenous Peoples without *Indian Act* status but it does not require Canada to do so. The *Daniels* complainants sought a declaration to address Canada's failure to accept responsibility for Métis and Indigenous Peoples without *Indian Act* status which they argued deprived those groups of programs, benefits and treaty opportunities available to individuals with *Indian Act* status.

[79] Canada asserts that there is no basis to extend Jordan's Principle eligibility beyond the age of majority in the given province or territory. There was no evidence presented during the hearing about services for adults and increasing the age of entitlement has significant implications for other federal, provincial and territorial government programs that have not been canvased.

I. Post-Hearing Developments

[80] Since the Panel held the hearing on this issue and issued an interim ruling, the Caring Society advised the Tribunal of a development in the factual background to the Caring Society's motion regarding the exclusion of First Nations children living off-reserve who do not have, and are not eligible for, registration under the *Indian Act* from Canada's definition of "First Nations children" under Jordan's Principle.

[81] As was canvassed during the May 9, 2018 cross-examination of Mr. Sony Perron, *Bill S-3* did not fully come into force on Royal Assent. The coming into force of sections 2.1, 3.1, 3.2, and 10.1 were delayed to a date to be fixed by the Governor in Council.

[82] The Caring Society advised the Tribunal that the remaining sections of *Bill S-3* came into force on August 15, 2019, pursuant to Order-in-Council P.C. 2019-116. The Order-in-Council was also filed with the Tribunal by the Caring Society. ISC has advised the Caring Society that it does not have projections for the number of individuals impacted by the coming into force of these provisions as the range of data and assumptions that would have to be made do not allow for accurate estimations.

[83] The Panel enquired with Canada and the other parties to determine if they desired to provide additional submissions on this specific question. Canada and the other parties indicated they had no further submissions to make on this question.

III. General Considerations in Jordan's Principle Eligibility

A. Considerations only apply for the purpose of Jordan's Principle

[84] The Panel has recognized in its interim ruling that there is a "significant difference" between determining who is a "First Nation child" as a citizen of a First Nation and determining who is a "First Nation child" entitled to receive services under Jordan's Principle and what is the appropriate eligibility criteria to use in the latter case (see 2019 CHRT 11 at para. 49). The present ruling puts the question of eligibility criteria to receive Jordan's Principle services before the Tribunal, but not citizenship, which is the prerogative of First Nations not the Tribunal or Canada. Nevertheless, some First Nations parties are concerned and strongly view the two questions as intertwined. Therefore, the Panel will address their concerns as part of this ruling as it will be further explained below.

[85] The Panel has already mentioned it recognizes the First Nations human rights and inherent rights to self-determination and to self-governance and the importance of upholding those rights. (see 2019 CHRT 7 at paras. 23, 89 and 91).

[86] Moreover,

> [d]uring the January 9, 2019 motion hearing, Panel Chair Marchildon, expressed the Panel's desire to respect Indigenous Peoples' inherent rights of self-determination and self-governance including their right to determine citizenship in crafting all its remedies. Another important point is that the Panel not only respects that these rights are inherent to Indigenous Peoples, the Panel also finds they are also human rights of paramount importance. The Panel in its [*Merit*] *Decision* and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada's programs and systems (see for example 2016 CHRT 2 at para. 402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account. In fact, in 2018 CHRT 4, the Panel crafted a creative and innovative order to ensure it provided effective immediate relief remedies to First Nations children while respecting the principles in the *UNDRIP*, the Nation-to-Nation relationship, the Indigenous

> rights of self-governance and the rights of Indigenous rights holders. It requested comments from the parties and no suggestions or comments were made by the parties on those specific orders. The Panel has always stressed the need to ensure the best interests of children is respected in its remedies and the need to eliminate discrimination and prevent it from reoccurring.
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> (see 2019 CHRT 7 at para. 23, emphasis omitted).

[87] Additionally, in the interim ruling, the Panel stressed "the importance of the First Nations' self-determination and citizenship issues", and added that "the interim relief order or any other orders is not intended to override or prejudice First Nations' rights" (see 2019 CHRT 7 at para. 91, emphasis omitted).

B. Jordan's Principle's objective and context for eligibility

[88] The purpose of this ruling is not to change in any way the Tribunal's definition ordered in 2017 CHRT 14 and 35 nor is it intended to revisit previous findings leading to those rulings. Rather this ruling, relying on previous orders, aims to further clarify who is eligible to receive services under Jordan's Principle as per the Tribunal's orders and to determine who should define, and how to define, who is a First Nations child for the purpose of Jordan's Principle.

[89] Jordan's Principle is a human rights principle grounded in substantive equality. The criterion included in the Tribunal's definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. The definition and orders account for First Nations' specific needs and unique circumstances. Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the *Charter*, the Convention on the Rights of the Child and the *UNDRIP* to name a few. Moreover, the Panel relying on the evidentiary record found that it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government

services affecting First Nations children and families. Substantive equality is both a right and a remedy in this case: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence. This falls well within the scope of this claim.

[90] The Panel's rulings referred to government services affecting First Nations children including: Federal-Provincial; Federal-Federal; and Federal-Territorial. While the Panel has no jurisdiction over Provinces and Territories, it does have jurisdiction over Canada's Jordan's Principle involvement in all Federal services offered to First Nations children.

[91] Additionally, Jordan's Principle is a broader aspect of the complaint in front of the Tribunal where the Panel found, in the *Merit Decision*, that while Jordan's Principle is not a strict child welfare concept, it is intertwined with child welfare (see *Merit Decision* at para. 362). Therefore, the Panel's general reasoning on child welfare is also relevant to Jordan's Principle cases. However, it does not provide the full answer. For Jordan's Principle, the Panel issued additional rulings and orders that form part of the analysis.

[92] Furthermore, as already found by this Panel, Jordan's Principle is a separate issue in this claim. It is 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 (see 2016 CHRT 2, 2017 CHRT 14 and 2018 CHRT 4).

[93] Moreover,

> [t]he discrimination found in the [*Merit*] *Decision* is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families,
>
> (2017 CHRT 14 at para. 73).

[94] There is a need to take a closer look at the differences between the FNCFS Program and Jordan's Principle which is not a Program rather it is a legal rule and mechanism meant to enable First Nations children to receive culturally appropriate and safe services and

overcome barriers that often arise out of jurisdictional disputes within Canada's own organization of Federal Programs and within Canada's constitutional framework including the division of powers.

[95] Additionally, while the existence of a jurisdictional dispute is not required to obtain Jordan's Principle services, the occurrence of a jurisdictional dispute was recognized and included since *Motion 296* (Canada, Parliament, House of Commons Debates, 43rd Parl, 1st Sess, Vol 149, No 5 (December 11, 2019) at 279) and in the Panel's previous rulings. This also includes disputes between the Federal government and Provinces/Territories.

[96] Moreover, the Panel agrees 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.

[97] Additionally, the Tribunal's Jordan's Principle findings also focus on the lack of surrounding services for First Nations children triggering their parents/caregivers or FNCFS agencies to seek services off-reserves. The Panel found a correlation between the Federal Programs' failure to address gaps in services to on-reserve children and the underfunding of the FNCFS Program driving First Nations children in care or to receive services often off-reserve. The on-reserves-off-reserves jurisdictional wrangling was considered by the Panel to arrive at its findings. For example, as part of the evidentiary record, mental health services gaps for First Nations children placed in care off-reserves was considered. Health Canada provided short-term funding for mental health crisis and the Province of British Columbia provided limited mental health funding for ongoing needs of First Nations children in care. This is a clear Jordan's Principle example where the Province should provide the service and then recover the funds from the Federal Government. This situation occurred off-reserve in the Provincial system.

[98] The same document also refers to first-hand provincial scenarios in the BC region and to different definitions of on-reserve/off-reserve residency in relation to gaps in service

delivery (see Gaps in Service Delivery to First Nation Children and Families in BC Region at pp. 2-3; see also *Merit Decision* at para. 372).

[99] Jordan's Principle is about ensuring First Nations children receive the services they need when they need them. Jordan's Principle is available to all First Nations children in Canada. Jordan's Principle, as previously ordered by the Panel, applies to all public services, including services that are beyond the normative standard of care to ensure substantive equality, culturally appropriate services, and to safeguard the best interests of the child. In other words, services above the normative provincial and territorial standards account for substantive equality for First Nations children as a result of the entire discrimination found in this case and further clarified in the Panel's rulings especially 2017 CHRT 14 and 35. Those orders bind Canada on or off-reserves. Moreover, Jordan's Principle provides payment for needed services by the government or department that first receives the request and recovers the funds later. A strict division of powers analysis perpetuates discrimination for First Nations children and is the harm Jordan's Principle aims to remedy.

[100] The focus is on the child and is personalized to the child's specific needs to receive adequate services in a timely fashion without being impacted by jurisdictional disputes or other considerations not in line with what the child requires. First Nations children experience those barriers because of race, national or ethnic origin. This is what causes governments and departments to dispute who pays for the service.

[101] This requires a case-by-case approach considering for example whether a Province or Territory considers a First Nations child a Federal responsibility solely based on *Indian Act* status or whether it considers broader criteria to avoid providing services or to claim repayment from the Federal government. A Jordan's Principle case analysis of this situation would likely reveal this so as to demonstrate if the criteria used by the Province/Territory and the Federal government generate gaps in services.

> In determining whether there has been discrimination in a substantive sense, the analysis must also be undertaken in a purposive manner "…taking into account the full social, political and legal context of the claim" (see *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 at para. 30). For Aboriginal peoples in Canada, this context includes a legacy of

> stereotyping and prejudice through colonialism, displacement and residential schools (see *R. v. Turpin*, [1989] 1 SCR 1296 at p. 1332; *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203 at para. 66; *Lovelace v. Ontario*, [2000] 1 SCR 950 at para. 69; *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 59; and, *R. v. Ipeelee*, [2012] 1 S.C.R. 433 at para. 60).
>
> (*Merit Decision* at para. 402, emphasis added).

C. Use of the term "All First Nations children" by the Panel

[102] The use of the expression "All First Nations children" used in the Tribunal's rulings and according to the evidence before the Tribunal was not based on a criterion rooted in the *Indian Act*. None of the Panel's rulings focus on the *Indian Act* or on status registration under the *Indian Act*. As demonstrated by the *Merit Decision* and subsequent rulings, the Panel understands and considered the historical context and its connection to the discrimination found in this case which also triggered orders to provide culturally appropriate services. This context transcends the *Indian Act* and its colonial perspective on First Nations governments.

[103] This being said, the Tribunal did not provide a definition of who is a "First Nations child" under Jordan's Principle. Instead it provided a definition of Jordan's Principle and its applicability, including how to eradicate the discrimination found in this case.

[104] The 2016 CHRT 16 ruling clarified that "all First Nations children" did not only mean on reserve First Nations children. This was especially true given the fact that Canada's own program was broader and given that the realities experienced by First Nations children as a result of Canada's racial discrimination drove many First Nations families to bring children in care off-reserve in order to access services. The expression "ordinarily on reserve" captures a portion of this aspect. Another reality in this case is that some First Nations children on reserve may not have *Indian Act* status, yet they live on reserve or ordinarily on reserve and experience the same hardships in accessing services, as all the other children with *Indian Act* status on reserve in their communities given the adverse impacts and the lack of surrounding services found in the *Merit Decision* and subsequent rulings. The rulings also clarified that the health condition of a child should not be driving the definition. In other words, a top-down analysis requiring a child to present specific health issues was not an appropriate objective criterion as it was too narrow.

[105] Furthermore, the Panel used the term “all First Nations children” as referred to in the House of Commons *Motion 296* adopting Jordan’s Principle. Therefore, the Panel did not define who is a “First Nations child” for eligibility purposes under Jordan’s Principle. The Panel relied on the same terminology employed in the House of Commons *Motion 296*. The Panel did not focus on the *Indian Act, Indian Act* status or on reserve residency given the application of Jordan’s Principle to federal government departments/programs affecting children (see 2016 CHRT 2 at para. 391-392; 2017 CHRT 14 at paras. 2, 73-74, 98 and 135). The Panel recognized in a past ruling, that was accepted by Canada, Indigenous Peoples’ right to self-government, Canada’s goal to rebuild the Nation-to-Nation relationship and the Truth and Reconciliation Commission’s (TRC) recommendation to use the *UNDRIP* as a framework for reconciliation (see 2018 CHRT 4 at para. 114).

[106] Moreover, the Panel in the same ruling expressed its goal to eliminate the discrimination found in this case and “fully supports Parliament’s intent to establish a Nation-to-Nation relationship and that reconciliation is Parliament’s goal (see *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12), and commends it for adopting this approach” (2018 CHRT 4 at para. 66).

[107] Furthermore, the Panel in its *Merit Decision* and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada’s programs and systems (see for example 2016 CHRT 2 at para. 402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account (see 2019 CHRT 7 at para. 23).

[108] The Panel did, however, provide some clarification in previous rulings that the term “all First Nations children” is not limited to on reserve children and that it applied to on and off reserve First Nations children. The Panel ordered INAC, now ISC, to immediately apply Jordan’s Principle to all First Nations children, not only to those residing on reserves (see 2016 CHRT 16 at paras. 107 and 117).

[109] Furthermore, the Panel found that

> On the issue of the breadth of INAC’s new formulation of Jordan’s Principle, the Panel notes that the motion unanimously passed by the House of

> Commons did not restrict the application of the principle solely to First Nations children on reserve, but to all First Nations children: "the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children" (see [*Merit*] *Decision* at para. 353, emphasis added). INAC's formulation of Jordan's Principle is also not in line with the eligibility requirements for its own FNCFS Program, which applies to First Nations "resident on reserve or Ordinarily Resident On Reserve" (see ss. 1.3.2 and 1.3.7 of the *2005 FNCFS National Program Manual* and s. 1.1 of the *2012 National Social Programs Manual* at paras. 52-53 of the [*Merit*] *Decision*). That is, the application of Jordan's Principle only to First Nations children living on reserve is more restrictive than the definition included in INAC's FNCFS Program. This type of restriction will likely create gaps for First Nations children and is not in line with the [*Merit*] *Decision* (see paras. 362, 364-382 and 391),
>
> (see 2016 CHRT 16 at para. 117).

[110] Furthermore, in the *Merit Decision*, 2016 CHRT 2 at para. 151:

> The *NPR* describes the context of First Nations child and family services as including several experiences of massive loss, resulting in identity problems and difficulties in functioning for many First Nations and their families. These experiences include the historical experience of residential schools and its inter-generational effects, and the migration of First Nations out of reserves causing disruption to the traditional concept of family (see *NPR* at pp. 32-33). As the *NPR* puts it at page 33:
>
> > First Nation families have been in the centre of a historical struggle between colonial government on one hand, who set out to eradicate their culture, language and world view, and that of the traditional family, who believed in maintaining a balance in the world for the children and those yet unborn. This struggle has caused dysfunction, high suicide rates, and violence, which have had vast inter-generational impacts.

[111] This is a serious issue that also needs non-pecuniary redress and is justified by the findings and the evidence in this case. The Tribunal ordered Canada in the *Merit Decision* to cease the discriminatory practice.

[112] This being said, in interpreting the Panel's findings and orders, Canada currently considers a First Nations child eligible for services under Jordan's Principle if the child falls in the categories below:

> a) First Nations children registered under the *Indian Act*, living on or off reserve;

> b) First Nations children eligible to be registered under the *Indian Act*, living on or off reserve; and
>
> c) non-status First Nations children without *Indian Act* status who are ordinarily resident on reserve (the AFN appears to dispute this however, this forms part of the Tribunal's findings in 2016 CHRT 16 at para. 117, quoted above).
>
> d) First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and who have urgent and/or life-threatening needs as per the Tribunal's interim order in (2019 CHRT 7 at paras. 88-89).

[113] The Panel confirms that all the above categories are eligible to receive services under Jordan's Principle.

[114] The question to be determined here is if Canada's current eligibility criteria under Jordan's Principle remedy the discriminatory practice and are sufficiently responsive to the Panel's reasons, findings and orders.

[115] As mentioned in the interim ruling, the Panel still believes it would be unfair to make a finding of non-compliance of the Tribunal's orders against Canada given that while the Tribunal did not use the *Indian* Act registration provisions as an eligibility criteria and did not limit Jordan's Principle to children on reserve, it did not provide a definition of who is a First Nations child eligible under its Jordan's Principle orders (see 2019 CHRT 7 at para. 20). While it is accurate to say the Tribunal did not provide a definition of a "First Nations child" in its orders, it is also true to say that none of the parties including Canada sought clarification on this point until this motion. To be fair, on this issue, the Panel believes that it should focus on ensuring remedies are responsive to the discriminatory practice in light of the evidence before it and in the best interests of children, rather than on Canada's compliance. On this point, the Panel agrees with the NAN and the AFN that the best interests of children should be interpreted through an Indigenous lens. The Panel considers First Nations perspectives of the best interests of their children in determining the matters in this case.

[116] The Panel believes that Canada has been responsive to the Tribunal's Jordan Principle's orders to a great degree and has worked to remedy the discrimination. Canada has now moved from zero Jordan's Principle cases at the time of the hearing to a few hundred a few months after the *Merit Decision* to thousands of approved requests as of July

2016 to, at the time of this ruling, over **607 000** approved requests for services for First Nations children who otherwise would not have received them since the Tribunal's ruling ordering its definition in 2017 CHRT 14. This is two years after the TRC's final report and one year and a half after the *Merit Decision*. Of note, this was made possible by the Panel's retention of jurisdiction allowing parties to bring evidence and make additional requests.

[117] In light of the above, the Panel does not make a non-compliance finding against Canada here. Rather, it will examine the responsiveness of Canada's eligibility criteria to Jordan's Principle, including to Jordan's Principle's objective previously found by this Panel and already mentioned above and its responsiveness to the Panel's previous orders. The Panel, following its past approach, will also examine if there is a need for further orders to clarify its previous orders so as to ensure their effectiveness.

D. Objective of Panel's Retention of Jurisdiction

[118] In retaining jurisdiction, the Panel is monitoring if Canada is remedying discrimination in a responsive and efficient way without repeating the patterns of the past (see 2018 CHRT 4 at para. 50).

[119] If the past discriminatory practices are not addressed in a meaningful fashion, the Panel may deem it necessary to make further orders. It would be unfair for the Complainants, the Commission and the interested parties who were successful in this complaint, after many years and different levels of courts, to have to file another complaint for the implementation of the Tribunal's orders and reform of the First Nations' Child welfare system (see 2018 CHRT 4 at para. 53).

E. Structure

[120] Issue one will address children, residing on or off reserve whom a First Nations group, community or people recognizes as belonging to that group, community or people, in accordance with the customs or traditions of that First Nations group, community or people.

[121] Issue two will be dealing with the issue of First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.

[122] Issue three will be dealing with the issue of First Nations children, residing off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program.

IV. Issue I

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

A. Introduction

[123] The Panel views this first part of the ruling as an interpretation exercise of what the Panel meant to cover under Jordan's Principle under previous findings and rulings as opposed to the two other sections which raise new questions where the Panel will not only do an interpretation exercise but also will make findings in light of the evidence or lack thereof before it.

[124] In the *Merit Decision*, the Panel applied the test in *Moore v. British Columbia (Education),* 2012 SCC 61 at para. 33 [*Moore*] and *(Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center),* 2015 SCC 39 at paras. 44-52 [*Bombardier*] (see 2016 CHRT 2 at paras, 22-25).

> In the context of this Complaint, under section 5 of the *CHRA*, the Complainants must demonstrate (1) that First Nations have a characteristic or characteristics protected from discrimination; (2) that they are denied services, or adversely impacted by the provision of services, by AANDC; and, (3) that the protected characteristic or characteristics are a factor in the adverse impact or denial (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 [*Moore*]).

(see *Merit Decision* at para. 22).

[125] The Panel applied the *Moore* test as follows and found the complaint was substantiated:

> It is through this lens, and with these principles in mind, that the Panel examined the evidence and arguments advanced by the parties in this case. For the reasons that follow, the Panel finds AANDC is involved in the provision of child and family services to First Nations on reserves and in the Yukon; that First Nations are adversely impacted by the provision of those services by AANDC, and, in some cases, denied those services as a result of AANDC's involvement; and; that race and/or national or ethnic origin are a factor in those adverse impacts or denial.
>
> (see *Merit Decision* at para. 28).

[126] Additionally, the Panel used an international law framework to support its reasons on substantive equality in the *Merit Decision* and subsequent rulings.

[127] The Panel finds it is not necessary to redo the same analysis for this first section of this ruling given that the First Nations complainants have met their burden of proof and discrimination was established. Moreover, denials, delays and adverse impacts were all demonstrated and formed part of the Panel's analysis under Jordan's Principle. Jordan's Principle is a separate part of the complaint and is broader than the on-reserve FNCFS Program and applies to all Federal Programs concerning First Nations children. The Panel will be clarifying the use of the terms "all First Nations children" in the legal and evidentiary context that led to previous findings and orders in this case.

[128] The applicable human rights framework will be further discussed under issues two and three of this ruling. In light of the Panel's past findings, reasons, rulings and orders and, for the reasons outlined below, the Panel clarifies that "All First Nations children" also includes on and off-reserve First Nations children without *Indian Act* status who are recognized as citizens or members of their respective First Nations whether under agreements, treaties or First Nations' customs, traditions and laws who experience the same barriers as on-reserve First Nations children with *Indian Act* status or who are eligible for *Indian Act* status. These First Nations children are eligible to be considered on a case-by-

case basis using a substantive equality analysis under the Tribunal's Jordan's Principle orders.

B. First Nations identity versus First Nations categories of who is eligible under Jordan's Principle

[129] The Panel has recognized in its interim ruling that there is a "significant difference" between determining who is a "First Nation child" as a citizen of a First Nation and determining who is a "First Nation child" entitled to receive services under Jordan's Principle and what is the appropriate eligibility criteria to use in the latter (see 2019 CHRT 11 at para. 49). The present ruling puts the question of eligibility criteria to receive Jordan's Principle services before the Tribunal, but not citizenship which is the prerogative of First Nations not the Tribunal or Canada. Moreover, the AFN, the COO and the NAN all made arguments to this effect and those arguments need to be addressed. First Nations parties are concerned and strongly view the two questions as intertwined. Therefore, the Panel will consider their concerns as part of this ruling. In that regard, the Panel will use the terminology "eligibility criteria under Jordan's Principle" to distinguish it from the terms "definition of a First Nation child'' purposely to avoid any misunderstanding that the Panel is attempting to define who is a First Nations child for any purpose but the eligibility to access Jordan's Principle services.

C. First Nations Rights to Self-Determination

[130] The Panel already mentioned it recognizes First Nations' human rights and inherent rights to self-determination and to self-governance and the importance of upholding those rights. (see 2019 CHRT 7 at paras. 23, 89 and 91).

[131] Moreover,

> [d]uring the January 9, 2019 motion hearing, Panel Chair Marchildon, expressed the Panel's desire to respect Indigenous Peoples' inherent rights of self-determination and self-governance including their right to determine citizenship in crafting all its remedies to respect Indigenous Peoples' inherent rights of self-determination and of self-governance including their right to determine who their citizens are. Another important point is that the Panel not

> only respects that these rights are inherent to Indigenous Peoples, the Panel also finds they are also human rights of paramount importance. The Panel in its Decision and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada's programs and systems (see for example 2016 CHRT 2 at para. 402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account. In fact, in 2018 CHRT 4, the Panel crafted a creative and innovative order to ensure it provided effective immediate relief remedies to First Nations children while respecting the principles in the *UNDRIP*, the Nation-to Nation relationship, the Indigenous rights of self-governance and the rights of Indigenous rights holders. It requested comments from the parties and no suggestions or comments were made by the parties on those specific orders. The Panel has always stressed the need to ensure the best interests of children is respected in its remedies and the need to eliminate discrimination and prevent it from reoccurring.
>
> (see 2019 CHRT 7 at para 23, emphasis omitted).

[132] Additionally, in the interim ruling, the Panel stressed "the importance of the First Nations' self-determination and citizenship issues", and added that the "interim relief order or any other orders is not intended to override or prejudice First Nations' rights" (see 2019 CHRT 7 at para. 91, emphasis omitted).

[133] In 2018 CHRT 4, the Panel found that:

> national human rights legislation such as the *CHRA* must be interpreted so as to be harmonious with Canada's commitments expressed in international law including the *UNDRIP*.
>
> (see 2018 CHRT 4 at para. 81).

[134] The Panel also recognized "the Indigenous Peoples' right to self-government and Canada's goal to rebuild the Nation-to-Nation relationship and the TRC's recommendation to use the *UNDRIP* as a framework for reconciliation" (see 2018 CHRT 4 at para. 114).

[135] Finally, on this point, the Panel finds that the various domestic and international legal instruments discussed above all support the inherent self-determination right of First Nations to identify their citizens and members outside the narrow lens of the *Indian Act*. In particular, this approach is consistent with protecting First Nations individual and collective human rights as articulated in the *UNDRIP and* other relevant international instruments, section 35 of the *Constitution Act, 1982*, and the quasi-constitutional *CHRA*. It is consistent with

Canada's public commitment to implement the TRC recommendations, rebuild a Nation-to-Nation relation with First Nations, and advance reconciliation. And it is consistent with the Tribunal's previous approach, in particular as applied in the *Merit Decision* and in the 2018 CHRT 4 ruling.

D. International Law

[136] Canada has accepted the *UNDRIP* without reservation, but has not yet enacted it into domestic law. However, Canada has fully endorsed the *UNDRIP*, and committed to implementing it through the review of laws and policies, as well as other collaborative initiatives and actions. Further, and importantly, this Tribunal has already provided an analysis of the *UNDRIP* and its relevance to this proceeding.

[137] In 2018 CHRT 4, The Panel also reiterated its findings made in the *Merit Decision* that the *CHRA* is a result of the implementation of international human rights principles in domestic law (see the *Merit Decision* at paras. 437-439 and 2018 CHRT 4 at para. 69).

[138] Furthermore, the Panel made findings that

> […] Canada was found liable under the *CHRA* for having discriminated against First Nations children and their families. Canada has international and domestic obligations towards upholding the best interests of children. Canada has additional obligations towards Indigenous children under *UNDRIP*, the honor of the Crown, Section 35 of the Constitution and its fiduciary relationship, to name a few. All this was discussed in the [*Merit*] *Decision.*
>
> (see 2018 CHRT 4 at para. 131).

[139] As already mentioned in the *Merit Decision*,

> in *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 239 [Baker] an appeal against deportation based on the position of Baker's Canadian born children, the Supreme Court held procedural fairness required the decision-maker to consider international law and conventions, including the *United Nations' Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the UNCRC). The Court held the Minister's decision should follow the values found in international human rights law.
>
> (see 2018 CHRT 4 at para. 70).

As described by the Caring Society, the rights of the child are human rights that recognize childhood as an important period of development with special circumstances.

(see 2018 CHRT 4 at para. 71).

[140] The Panel also found that

the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*), GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007) (the *UNDRIP*) is of particular significance especially in this case. It outlines the individual and collective rights of Indigenous Peoples. In May 2016, Canada endorsed the *UNDRIP* stating that "Canada is now a full supporter of the Declaration, without qualification.

(see 2018 CHRT 4 at para. 72).

Moreover, the *UNDRIP* at Articles 3, 4, 5, 14, 15, 18, 21 support the rights of equal and just services and programs for Indigenous, with consultation on their social, economic and political institutions.

(2018 CHRT 4 at para. 73).

Additionally, the *UNDRIP* Articles 7, 21 (2), 22 (1) (2), state that Indigenous Peoples have the right to live in freedom and shall not be subject to violence including the forceful removal of their children; that Indigenous People have the right to the improvement of their economic and social conditions; and states will take measures to improve and pay special attention to the rights and special needs of children.

(see 2018 CHRT 4 at para. 74, emphasis omitted).

Furthermore, the *UNDRIP* Articles (Article 2, 7, 22) relate directly to the protection of Indigenous children and their right to be free from any kind of discrimination

(see 2018 CHRT 4 at para. 75).

Article 7

> 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
>
> 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

(see *UNDRIP*)

[141] Moreover,

> Article 8 of *UNDRIP* reminds governments of their responsibility to ensure that forced assimilation does not occur and that effective mechanisms are put into place to prevent depriving Indigenous Peoples of their cultural identities and distinctive traits, disposing them of their lands, territories or resources, population transfer which violates or undermines Indigenous rights, forced assimilation or integration, and discriminatory propaganda.
>
> (see 2018 CHRT 4 at para. 76).

[142] As such, self-determination is codified by article 3 of the *UNDRIP* which states:

> Article 3
>
> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

[143] Furthermore, self-government is codified under article 4, *UNDRIP*, which states,

> Article 4
>
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

[144] While the *UNDRIP* is to be read as a whole with the understanding that all the rights enunciated are interdependent, Articles 5, 9, 15, 18-19, 23, 33-34 and 37 of the *UNDRIP* are of particular significance:

> Article 5
>
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
>
> Article 9
>
> Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the

community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

> Article 34
>
> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.
>
> Article 37
>
> 1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
>
> 2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

[145] The rights and the Tribunal's approach mentioned above support a departure from the *Indian Act* criteria as a sole means to determine who is eligible to receive Jordan's Principle services.

[146] In addition, in 2015, Canada accepted to fully implement the 94 TRC calls for action. Child welfare and Jordan's Principle are first to fifth calls to action.

[147] Of significance, the TRC called for cooperation and coordination between all levels of government and civil society to implement its calls to action, and for government to fully adopt and implement the *UNDRIP* as the framework for reconciliation.

[148] In 2018, the Panel found that the TRC calls to action and the *UNDRIP* informed the Panel's reasons and orders in this ruling (see 2018 CHRT 4 at para. 83). Of note, this specific ruling led to a consultation protocol signed by all parties and included Canada's commitment to comply with all of the Panel's orders including those found in 2018 CHRT 4. This same ruling and orders acknowledged the Nation-to-Nation relationship and the recognition that this relationship meant that First Nations can choose to govern their own child welfare services. As such, Canada accepted this ruling in its entirety which was informed by the *UNDRIP*.

[149] Of note, the Panel Chair's final remarks in that same ruling mentioned that

> [g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence,
>
> The building of a Nation-to-Nation relationship cannot be more significant than by stopping the unnecessary removal of Indigenous children from their respective Nations. Reforming the practice of removing children to shift it to a practice of keeping children in their homes and Nations will create a channel of reconciliation […]
>
> (see 2018 CHRT 4 at paras. 452-453, emphasis omitted).

[150] Furthermore, when interpreting Canadian law, Parliament is presumed to act in compliance with its international obligations and to respect the values and principles enshrined in international law through the presumption of conformity. Moreover, the Supreme Court in interpreting the scope of the application of the *Charter*, stated in *R. v. Hape, 2007 SCC 26* that:

> …the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction.
>
> (see *R. v. Hape*, 2007 SCC 26 at para. 56).

[151] Therefore, international instruments such as *UNDRIP*, should inform the contextual approach to statutory interpretation.

[152] Consequently,

> International law remains relevant in interpreting the scope and content of human rights in Canadian law, as was underlined by the Supreme Court on numerous occasions since Chief Justice Dickson's dissent in *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88, [1987] 1 SCR 313.
>
> (see also 2016 CHRT 2 at para. 431).
>
> That is so because Parliament and the provincial legislatures are presumed to respect the principles of international law (see *Baker* at para. 81).
>
> (see also 2016 CHRT 2 at para. 432).
>
> This approach often leads the Supreme Court to look at decisions and recommendations of human right bodies to interpret the scope and content of

> domestic law provisions in the light of international law (see for example *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892 at p. 920; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at pp. 149-150; *Divito v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 47 at paras 26-27; and, *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at paras 154-160).
>
> (see 2016 CHRT 2 at para. 433).

[153] The Supreme Court of Canada in *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038, at p. 1056-7, discussed the importance of international law as an important interpretative tool in applying human rights law such as the *Charter*:

> As was said in *Oakes, supra*, at p. 136, among the underlying values essential to our free and democratic society are "the inherent dignity of the human person" and "commitment to social justice and equality". Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), and commitment therein to protect, *inter alia*, the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that the objective in this case is a very important one. In *Reference Re Public Service Employee Relations Act (Alta.), supra*, I had occasion to say at p. 349:
>
> > The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the *Charter* 's protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.
>
> Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, **the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective. This is consistent with the importance that this Court has placed on the protection of employees as a vulnerable group in society.**
>
> (emphasis ours).

> In recent years, the Supreme Court expanded the relevance of international law to give effect to Canada's role and actions in the development of norms of international law, particularly in the area of human rights (see *United States v. Burns*, 2001 SCC 7 at para. 81 [*Burns*]; and, *Canada (Justice) v. Khadr*, 2008 SCC 28 at paras. 2-3). In *Burns*, the Supreme Court found that Canada's advocacy for the abolition of the death penalty, and efforts to bring about change in extradition arrangements when a fugitive faces the death penalty, prevented it from extraditing someone to the United States facing the same sentence without obtaining assurance that it would not be carried out. The same reasoning applies to the case at hand as Canada has expressed its views internationally on the importance of human rights on numerous occasions.
>
> (see *Merit Decision* at para. 434).

[154] Moreover, in *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paragraph 175 citing R. Sullivan, Driedger on the Construction of Statutes (3rd Ed. 1994) at p. 330 the Court stated,

> ... the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

[155] Furthermore, the Panel wrote in the *Merit Decision* that:

> [t]he *ICESCR* [*International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3] is considered to be of progressive application. However, in General Comment No. 20, 2 July 2009 (E/C.12/GC/20), the CESCR [Committee on Economic, Social and Cultural Rights] stated that, given their importance, the principles of equality and non-discrimination are of immediate application, notwithstanding the provisions of article 2 of the *ICESR* (see paras. 5 and 7). The CESCR also affirmed that the **aim of the *ICESCR* is to achieve substantive equality by "…paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations" (at paras. 8; see also paras. 9 and 10). It added that the exercise of covenant rights should not be conditional on a person's place of residence** (see at para. 34).
>
> (2016 CHRT 2 at para. 442), (emphasis ours).
>
> In addition to the covenants that protect human rights in general, the Panel wrote that Canada is a party to legal instruments that focus on specific issues or aim to protect specific groups of persons. Canada is a party to the *International Convention for the Elimination of all Forms of Racial*

> *Discrimination*, 660 U.N.T.S. 195 (the *ICERD*), ratified in 1970. The *ICERD* clarifies the prohibition of discrimination found in the *Universal Declaration*, to which it refers to in its preamble. Articles 1 and 2 define racial discrimination and direct States to take all necessary measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them. The purpose is to guarantee them the full and equal enjoyment of human rights and fundamental freedoms, including special measures whenever warranted. Article 5 further highlights rights whose enjoyment must be free of discrimination, including the right to social services, which includes public health, medical care and social security.
>
> (2016 CHRT 2 at para. 444, emphasis ours).

[156] The Panel in the *Merit Decision* wrote that "Canada's statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric," (see 2016 CHRT 2 at para. 454).

[157] While the Panel is not making findings of violation of international law as Canada argued the Tribunal lacks jurisdiction to do so, the Panel does have jurisdiction to rely on international law in interpreting the *CHRA* and domestic human rights. Again, it did so in the unchallenged *Merit Decision* and previous unchallenged rulings especially in regards to substantive equality which is at the core of Jordan's Principle. The Panel in light of the above, finds that Canada's practice and eligibility criteria under Jordan's Principle is underinclusive and inconsistent with protected international human rights enshrined in the *UNDRIP*. More importantly, it fails to account for the inherent right to self-determination and to self-governance, both human rights of paramount importance that Canada publicly committed to uphold and also included in the *Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 which will be discussed below.

E. An Act respecting First Nations, Inuit and Métis children, youth and families

[158] While the AFN indicated that they advocated for the inclusion of a reference to the Tribunal's decision in *An Act respecting First Nations, Inuit and Métis children, youth and families,* S.C. 2019, c. 24 which was rejected by Canada, the Panel recognizes similar language used in its 2016 CHRT 2 decision in *An Act respecting First Nations, Inuit and Métis children, youth and families,* especially with regard to substantive equality.

[159] The *Act respecting First Nations, Inuit and Métis children, youth and families,* only came into force on January 1, 2020 after the present motion was argued. However, it was raised by the AFN and other parties were given an opportunity to respond as part of this motion and, at that time, it had undergone second reading. While the Panel recognizes that the legislation was not in force at the time of the hearing and that there is no provision giving the legislation retroactive effect, the Panel believes that it is appropriate to consider Parliament's goal and intentions and its purpose for enacting the legislation. Additionally, the Panel considers the rule of law that is applicable at the time it makes its orders. At the time it renders this ruling, the *Act respecting First Nations, Inuit and Métis children, youth and families* is now law in Canada. The same reasoning applies concerning *Bill S-3* which will be discussed further below. It is appropriate for the Tribunal to consider the current state of the law at the time of its ruling especially, as in this case, where the parties were able to anticipate the change and had an opportunity to make appropriate submissions. The Tribunal will not, however, consider secondary sources on such as public reports that were not addressed by the parties and not available at the time of the hearing.

[160] The Preamble is particularly instructive of Parliament's goal in enacting this important legislation.

> Preamble
>
> Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;
>
> Whereas Canada ratified the United Nations Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination;
>
> Whereas Parliament recognizes the legacy of residential schools and the harm, including intergenerational trauma, caused to Indigenous peoples by colonial policies and practices;
>
> Whereas Parliament recognizes the disruption that Indigenous women and girls have experienced in their lives in relation to child and family services systems and the importance of supporting Indigenous women and girls in overcoming their historical disadvantage;

Whereas Parliament recognizes the importance of reuniting Indigenous children with their families and communities from whom they were separated in the context of the provision of child and family services;

Whereas the Truth and Reconciliation Commission of Canada's Calls to Action calls for the federal, provincial and Indigenous governments to work together with respect to the welfare of Indigenous children and calls for the enactment of federal legislation that establishes national standards for the welfare of Indigenous children;

Whereas Parliament affirms the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services;

Whereas Parliament affirms the need

> to respect the diversity of all Indigenous peoples, including the diversity of their laws, rights, treaties, histories, cultures, languages, customs and traditions,
>
> to take into account the unique circumstances and needs of Indigenous elders, parents, youth, children, persons with disabilities, women, men and gender-diverse persons and two-spirit persons,
>
> to address the needs of Indigenous children and to help ensure that there are no gaps in the services that are provided in relation to them, whether they reside on a reserve or not,
>
> […]

And whereas the Government of Canada acknowledges the ongoing call for funding for child and family services that is predictable, stable, sustainable, needs-based and consistent with the principle of substantive equality in order to secure long-term positive outcomes for Indigenous children, families and communities;

Moreover, according to the *Act respecting First Nations, Inuit and Métis children, youth and families*, an

Indigenous governing body means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Indigenous peoples has the meaning assigned by the definition of aboriginal peoples of Canada in subsection 35(2) of the *Constitution Act, 1982*.

[161] Similar to the language found in section 25 of the *Canadian Charter of Rights and Freedoms*:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> > (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> >
> > (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
>
> The *Act respecting First Nations, Inuit and Métis children, youth and families*, at section 2 stipulates:
>
> This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

[162] Section 7 of the *Act respecting First Nations, Inuit and Métis children, youth and families,* affirms that this "Act is binding on Her Majesty in right of Canada or of a province".

[163] Section 8 mentions that

> [t]he purpose of this Act is to
>
> > (a) affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services;
> >
> > (b) set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children; and
> >
> > (c) contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

[164] In light of the above, it is Parliament's clear intent to uphold the inherent rights of self-determination and of self-governance of First Nations, Inuit and Métis Nations in the areas of child welfare and to respect substantive equality, an area covered by Jordan's Principle and domestic and international human rights. This is consistent with the Panel's approach in this case and this clear intent from Parliament informs the eligibility criteria under Jordan's Principle and also further supports a departure from the *Indian Act* criteria as the sole means to determine who is eligible to receive Jordan's Principle services.

F. Indian Act

[165] The Panel will now turn to the subject of the *Indian Act*, followed by Section 35 of the *Constitutional Act, 1982* and treaties.

[166] The Supreme Court of Canada recently discussed the *Indian Act* in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2018 SCC 31 at paragraph 4:

> Since its enactment in 1876, the *Indian Act* has governed the recognition of an individual's status as an "Indian". In its current form, the *Indian Act* creates a registration system under which individuals qualify for status on the basis of an exhaustive list of eligibility criteria. The *Indian Act*'s registration entitlements do not necessarily correspond to the customs of Indigenous communities for determining their own membership or reflect an individual's Aboriginal identity or heritage. However, it is incontrovertible that status confers both tangible and intangible benefits.

[167] As Masse J. recognized in *Descheneaux v Canada (Attorney General)*, 2015 QCCS 3555 at paragraph 230:

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

[168] The recent amendments to section 6(1) of the *Indian Act* will be discussed below. However, the issue remains that Registered "Indians" under section 6(2) are unable to transmit status to their children which will inevitably result in the situation Masse J. identifies above.

[169] The AFN's Chiefs-in-Assembly passed significant resolutions pertaining to the *Indian Act* and its effects on First Nations. For instance, Resolutions 30/2017, 71/2016, and 53/2015 provide:

> Resolution Provisions 30/2017

WHEREAS:

[…]

B. There is a long history of hardship and discrimination imposed on Indigenous peoples by the *Indian Act's* Indian status provisions.

C. Federal legislation enacted in the past and implemented still today was designed to assimilate and erode First Nations citizenship.

[…]

E. Indian children lose Indian status after two generations of out-marriage, and with the current rate of out-marriage many First Nations communities will disappear within a few generations due to rapid decline in numbers of Status Indians with their citizenship.

F. First Nations have always asserted their jurisdiction to determine and define their citizenship, regardless of Canada's unilateral imposition of the *Indian Act* that determines that status.

THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:

1. Affirm the authority of First Nations to determine their own citizenship and eligibility for registration.

71/2016

[…]

THEREFORE BE IT RESOLVED THAT the Chiefs-in-Assembly:

[…]

3. Call on Canada to repeal the impugned provision in its entirety and to transfer the authority of citizenship and identity to the First Nations.

53/2015

WHEREAS

[…]

B. First Nations peoples always governed themselves according to their customs, laws, and traditions, which included the determination of their individual and collective identities. The federal government has unilaterally interfered with Indigenous peoples and violated our inherent rights by

> determining who is a registered Indian under the registration provisions of the *Indian Act*.
>
> […]
>
> F. The federal government must stop interfering with the right of First Nations to determine their individual and collective identities and recognize the people accepted by First Nations as belonging to them on the basis of their own customs, laws, and traditions.
>
> THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:
>
> 3. Direct the federal government to immediately cease imposing *Indian Act* criteria for registration upon First Nations and recognize citizens as defined by First Nations.
>
> […]
>
> 6. Direct the federal government to provide resources to First Nations to support their exercise of jurisdiction over citizenship.
>
> (see Affidavit of Dr. Cindy Blackstock, affirmed December 5, 2018 at Exhibit "E", Tab 2 of the Jan 9 CSMR).

[170] In the case of *Indian Act* band councils (which are not institutions of Indigenous design), extensive authority to review and intervene in the decisions of their institutions remains vested in the Minister of Indian Affairs (see for example *Indian Act,* sections 66, 67, 79 and 83).

[171] As demonstrated above, the *Indian Act* was designed to assimilate First Nations Peoples and does not reflect First Nations' definitions of themselves as Nations.

[172] In light of the above, the AFN and the Caring Society argue it cannot be the case that a legislative regime that will eventually result in a generation of First Nations children born without any *Indian Act* status can be the only measure for determining the First Nations children who require the protection of Jordan's Principle. The Panel agrees with this assertion.

G. Treaties and Section 35 of the of the *Constitution Act, 1982*

[173] Section 35 of the of the *Constitution Act, 1982* recognizes and affirms aboriginal and treaty rights of Aboriginal Peoples meaning, First Nations, Inuit and Métis peoples in Canada:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[174] The Panel agrees with the AFN that the issue of citizenship is an Aboriginal right and treaty right, constitutionally protected by virtue of s. 35(1) of the *Constitution Act, 1982*. Moreover, as demonstrated above, an even greater protection of Indigenous rights exists under the *UNDRIP* and other international instruments that Canada has ratified (see *Merit Decision* at paras.431-455).

[175] Finally, treaties are also of significance in protecting First Nations rights. A treaty is an agreement made between the Government of Canada (or made by the British Crown and inherited by Canada), Indigenous groups and often provinces and territories that defines ongoing rights and obligations on all sides. These agreements set out continuing treaty rights and benefits for each group. Treaty rights and Aboriginal rights (commonly referred to as Indigenous rights) are recognized and affirmed in section 35 of the *Constitution Act, 1982* and are also a key part of the *UNDRIP* which the Government of Canada has committed to adopt. Treaties with Indigenous Peoples include both historic treaties with First Nations and modern treaties (also called comprehensive land claim agreements) with Indigenous groups. The various treaties between First Nations and Canada, the Constitution, the *UNDRIP* and the *CHRA* all have primacy over the *Indian Act*.

[176] This important analysis above is employed by the Panel when it is asked by Canada to respect the fact that the *Indian Act* is law in Canada and that the Panel has to apply it. When asked to apply non-quasi-constitutional Federal legislation, the Panel must consider the legislation's effect on the quasi-constitutional human rights it is being asked to adjudicate. The Panel agrees with Canada that the Panel's role here is not to find sections of the *Indian Act* inoperative. While the *Charter* was referred to by some parties, a proper *Charter* challenge is not before the Tribunal as part of this motion.

[177] This being said, the Panel believes it is an interpretation exercise to determine if using the *Indian Act* to determine eligibility criteria for Jordan's Principle furthers or hinders the Panel's substantive equality goal in crafting Jordan's Principle orders and the Panel's goal to eliminate discrimination and prevent similar practices from reoccurring.

[178] This reasoning also supports the Panel's response to Canada's argument that the Panel cannot draft policy. The Panel's goal is to eliminate the discrimination found in this case which includes Jordan's Principle and did not focus on the *Indian Act* in the provision of services. The Panel's interpretation is through a human rights lens and a focus to ensure that its orders are effectively implemented in a non-discriminatory manner and not drafting policy. The Tribunal is not attempting to draft policy. It analyzes the responsiveness of the governmental approach taken to implement the Panel's orders to cease the discriminatory practice and, if warranted, provides guidance to eradicate residual discrimination.

[179] The Tribunal has jurisdiction to consider this motion and corresponding request for further orders given that the Tribunal remained seized of all its orders to monitor their implementation with a focus to ensure their effectiveness and to eliminate the discrimination found. This mechanism is broad enough to allow the Panel to consider this issue and make clarification orders if needed and supported by the evidence.

[180] The Panel rejects Canada's argument that this interpretation exercise is expanding the complaint. Firstly, the complaint is part of the claim but is not its entirety. Secondly, Jordan's Principle is a broader aspect of the claim as it encompasses all government services offered to First Nations children and has an interplay with the Provinces and Territories. The Complainants who were successful in this case and the evidence they

presented does not support a finding that Jordan's Principle eligibility criteria was limited to the *Indian Act.*

[181] Finally, on this point, the evidence and legal framework discussed as part of this motion support the Tribunal's jurisdiction and clarification orders that will be discussed below.

[182] Returning to the subject of treaties, the Royal Commission on Aboriginal Peoples identified citizenship as an Aboriginal Right protected by s. 35 of the *Constitution Act, 1982* in its recommendations, when it stated that:

> In our view, the right of an Aboriginal nation to determine its own citizenship is an existing Aboriginal and treaty right within the meaning of section 35(1) of the *Constitution Act, 1982*. At the same time, any rules and processes governing citizenship must satisfy certain basic constitutional standards flowing from the terms of section 35 itself. The purpose of these standards is to prevent an Aboriginal group from unfairly excluding anyone from participating in the enjoyment of collective Aboriginal and treaty rights guaranteed by section 35(1), including the right of self-government. In other words, the guarantee of Aboriginal and treaty rights in section 35 could be frustrated if a nation were free to deny citizenship to individuals on an arbitrary basis and thus prevent them from sharing in the benefit of the collective rights recognized in section 35.

[183] Furthermore, in *R. v. Sioui*, 1990 CanLII 103, [1990] 1 SCR 1025, Lamer J. noted that the Royal Proclamation recognized the authority of Indigenous nations to continue to exercise autonomy over their internal affairs (see p. 1052-3). Similarly, in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 [*Delgamuukw*] at paragraph 145, the Supreme Court of Canada affirmed that the assertion of British sovereignty over Indigenous lands did not displace the pre-existing Indigenous legal orders, but protected them.

[184] The AFN submits that attempts at limiting the scope of a "First Nations child" on the basis of colonially derived preconceptions of *Indian Act* status, instead of deferring to First Nations concepts of citizenship and membership, flies in the face of First Nations jurisdiction over this area. Section 91 of the *Constitution Act*, *1867* did not only delineate that individuals with *Indian Act* status or those resident on reserves were under the jurisdiction of Canada,

and therefore entitled to the benefit of federal services, but in fact more broadly confirmed "Indians, and Lands reserved for Indians" fell under federal jurisdiction.

[185] The AFN also submits the Supreme Court of Canada in *Daniels* explained that section 35's purpose is to protect First Nations communities' rights, while subsection 91(24)'s purpose is about the federal government's relationship with Aboriginal Peoples in Canada. (see *Daniels* at para. 49).

[186] Furthermore, the AFN adds that Dr. Gideon confirmed in her May 24, 2018 affidavit that for the 11 self-governing First Nations who are subject to a Self-Government Agreement, the eligibility for Jordan's Principle is determined based on whether the child is included in the self-governing First Nation's membership code. This practice is confirmed in a January 9, 2019 email from the Acting Regional Director, Operations of ISC's Northern Region. As such, Canada has agreed that membership in a self-governing First Nation has been confirmed as an eligibility criterion that can be implemented.

[187] In *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*], one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive [A]boriginal societies with the assertion of Crown sovereignty (see para. 49; see also para. 50 on the importance of taking account of the Aboriginal perspective to achieve reconciliation).

[188] Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty (see *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 [*Haida Nation*] at para. 20).

[189] The Supreme Court of Canada in decisions such as *Van der Peet* at paragraph 42 and *Delgamuukw* at paragraph 112 defined Aboriginal rights as "intersocietal" law, with their source in the interaction of pre-existing Indigenous legal systems with the common law system. The Court has also recognized Indigenous nations as holding pre-existing sovereignty, in particular in *Haida Nation* at paragraph 20. The Supreme Court of Canada has implied the existence of a right to self-government, for example by acknowledging in *Delgamuukw* that Aboriginal title is held communally, a state of affairs that would require some form of self-government to regulate the community's use of its lands. (see *Delgamuukw* at para. 115).

[190] Moreover, in *Reference re. Secession of Quebec,* [1998] 2 S.C.R. 217 [*Secession Reference*] at paragraph 114, the Supreme Court of Canada analyzed the right to self-determination of peoples in international law:

> The existence of the right of a people to self-determination is now so widely recognized in conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law. (see A. Cassese, *Self-determination of peoples: A legal reappraisal* (1995), at pp. 171-72; K. Doehring," Self-Determination" in B. Simma, ed., *The Charter of the United Nations: A Commentary* (1994), at p. 70.)

[191] If one understands the reconciliation of the pre-existing sovereignty of Indigenous Peoples and the de facto sovereignty of the Crown to be a fundamental principle of our constitutional order, the Constitution, both written and unwritten, must be interpreted in the context of the principle of reconciliation. This is so because, as the Supreme Court said in its *Secession Reference* judgment at paragraph 50, "[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole."

[192] It is important, in undertaking this task, that one keeps in mind that the Constitution is not simply the texts of the constitutional statutes listed in the Schedule to the *Constitution Act, 1982*. As the Supreme Court of Canada said in the *Secession Reference*,

> although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the *Provincial Judges Reference* [[1997] 3 S.C.R. 3]. Finally, as was said in the Patriation Reference, [[1981] 1 S.C.R. 753], at p. 874, the Constitution of Canada includes
>
> > the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.
>
> These supporting principles and rules…are a necessary part of our *Constitution* because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning

(see *Secession Reference* at para. 32).

[193] The British Columbia Supreme Court in *Campbell v. British Columbia (Attorney General),* 2001 BCSC 1400 found that Indigenous self-government is an existing right and that Indigenous jurisdiction existed outside the division of powers between the federal and provincial governments in the *Constitution Act, 1867*. See, for example, *R. v. Pamajewon*, [1996] 2 S.C.R. 821. Likely the strongest case law on the existence of an aboriginal right to self-government is the decision of the British Columbia Supreme Court in *Campbell*, though this case was never appealed to a higher court. These cases suggest that the courts may be returning to an earlier understanding of the relationship between the Crown and Indigenous peoples as being between self-governing co-creators of the Canadian constitutional order, rather than as sovereign and subject. The treaties provide evidence of the Crown's view of Indigenous nations as sufficiently independent and self-governing to warrant a treaty process, which implies a longstanding recognition of Indigenous authority to exercise self-government; these principles have never been entirely abrogated and they therefore continue to underpin Canada's legal structure. (see Patrick Macklem, "Normative Dimensions of an Aboriginal Right to Self-Government" (1995) 21 Queen's L.J. 173, at 197).

[194] In *Simon v. The Queen*, [1985] 2 SCR 387, the Supreme Court addressed the interaction between the Treaty of 1752 between the Mi'kmaq and the Crown and s. 88 of the *Indian Act*, RSC 1985, c I-5 that provides that the general applicability of provincial law to Indians is "[s]ubject to the terms of any treaty". The decision confirms that Treaty Rights should be given "a fair, large and liberal construction" (para. 27).

[195] The Panel finds that the law on treaties is aptly summarized in Ian Peach's "More than a Section 35 Right: Indigenous Self-Government as Inherent in Canada's Constitutional Structure"[2]. The Panel entirely agrees with Ian Peach and authors John Borrows, Patrick Macklem and James Tully's characterisation of treaties in Canada's historical context and finds they concisely summarize the applicable law and context. The references below translate the Panel's views on this question. This also supports the AFN's position on treaties between First Nations and Canada.

[2] *Canadian Political Science Association*, https://www.cpsa-acsp.ca/papers-2011/Peach.pdf.

Probably the strongest source for the authority of Indigenous peoples to exercise self-determination in the Canadian constitutional order, however, is in the confirmation and recognition by the Crown of the pre-existing and continuing sovereignty of the Indigenous peoples of Canada through the negotiation of treaties. As John Borrows comments, one of the best examples of the governance powers of Indigenous peoples is their power to make treaties with the Crown, over 350 of which were made prior to Confederation.[3] The legitimacy of Indigenous government in Canada is based not simply on the prior occupancy of the territory by Indigenous peoples, but on their prior sovereignty; as Patrick Macklem describes it, this sovereignty and Crown sovereignty were distributed, or shared, through a series of acts of mutual recognition, in the form of treaty-making.[4] The treaties manifestly considered Indigenous nations as distinct political communities with territorial boundaries within which their authority was exclusive, so that they and European settler nations were recognized one another as equal and co-existing nations, each with their own forms of government, traditions, and ways of living, and agreed to cooperate in various ways.[5] There are numerous examples of treaties between European nations and Indigenous peoples in North America that used Indigenous legal forms. These were part of a larger set of intersocietal encounters through with Indigenous and non-Indigenous participants generated norms of conduct and recognition that structured their ongoing relationships. Throughout, the Indigenous understandings of the treaties were relatively uniform, as a means by which Indigenous nations sought to retain their traditional authority over their territories and govern their communities in the face of colonial expansion.[6]

Once this form of mutual recognition was worked out, the only way the Crown could acquire land and establish sovereignty in North America was to gain the consent of the Indigenous nations, consistent with what Tully describes as the most fundamental constitutional convention, that of consent of the people.[7]

Unfortunately, as J.R. Miller notes, few non-Indigenous Canadians today appreciate that treaties, through which this mutual recognition and consent

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[3] John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38 U.B.C. L. Rev. 285, at 296.

[4] Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Standford L. Rev. 1311 ["Distributing Sovereignty"], at 1333.

[5] Ibid. at 124.

[6] John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19 Wash. U. J. L. & Pol'y 167, at 179 ["Indigenous Legal Traditions in Canada"] and Patrick Macklem, Indigenous Difference and the Constitution of Canada (Toronto: University of Toronto Press, 2001) [Indigenous Difference], at 137, 152-3 for a discussion of these matters.

[7] James Tully, Strange Multiplicity: Constitutionalism in an age of diversity (Cambridge: Cambridge University Press, 1995), at, 122.

were worked out, are an important part of the foundation of the Canadian state.[8]

Crown-Indigenous treaties were regarded by both sides as constitutive of normative arrangements, a conclusion confirmed by the customary practice of renewing past commitments and redefining acceptable political conduct, for example through the annual practice of "brightening" the covenant chain in nation-to-nation councils.[9] As Mark Walters comments, the British officials involved knew perfectly well how Indigenous peoples interpreted British conduct in brightening the covenant chain, so there can be no question about whether or not there was a shared understanding or "meeting of minds".[10]

Indeed, The Treaty of Niagara of 1764, which confirmed and extended a nation-to-nation relationship between the Crown and Indigenous peoples and affirmed the covenant chain relationship, is a prime example of the British understanding of the meaning of Indigenous forms.[11] This, the first legal act that the Crown undertook after the Royal Proclamation, expressed their mutual aspiration to live together, but also to respect one another's autonomy.[12] At this event, presents were exchanged and covenant chains and wampum belts were presented to the British to establish a treaty of alliance and peace.[13] One of the belts exchanged here, the two-row wampum belt, was used by Indigenous nations to reflect their understanding of the Royal Proclamation and the Treaty as one of peace, friendship, respect, and non-interference in one another's internal affairs.[14] A second belt exchanged represented an offer of mutual support and assistance, but also respected the independence of each party.[15]

As Barsh and Henderson describe it, the treaty process produced a consensual distribution of constitutional power and established a compact between the treaty parties, thus securing to the treaties the status of constitutional documents.[16] The acceptance of a shared normative meaning

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[8] J.R. Miller, Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada (Toronto: University of Toronto Press, 2009), at 3.
[9] Mark Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall" (2001) 24 Dalhousie L.J. 75, at 129.
[10] Ibid. at 130.
[11] John Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 ["Constitutional Law From a First Nation Perspective"], at 20.
[12] John Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill L.J. 153, at 163.
[13] John Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 ["Constitutional Law From a First Nation Perspective"], at, 23.
[14] John Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 ["Constitutional Law From a First Nation Perspective"], at 24.
[15] Borrows, Recovering Canada: The Resurgence of Indigenous Law (Toronto: University of Toronto Press, 2002) [Recovering Canada], at 127.
[16] Russel Lawrence Barsh and James Youngblood Henderson, The Road: Indian Tribes and Political Liberty (Berkeley and Los Angeles: University of California Press, 1980) at 270-1; see also Macklem, Indigenous Difference and the Constitution of Canada (Toronto: University of Toronto Press, 2001) [Indigenous Difference], at 154.

> for the treaties from what both sides said and did results in the conclusion that Indigenous sovereignty and Crown sovereignty really were linked together in a genuine sense. Over time, the linkages were implicitly increased and strengthened with each present-giving ceremony until, on the eve of Confederation, it was understood that Indigenous nations enjoyed an inherent right of self-government, at least as a matter of internal sovereignty, under the protective umbrella of Crown sovereignty, in a manner consistent with Binnie J."s conception in *Mitchell*.[17]
>
> Tully refers to this as “treaty constitutionalism”, in which Indigenous peoples participate in the creation of constitutional norms to govern their relationship with the Crown, thereby taking an active role in the production of the basic legal norms governing the distribution of authority in North America.[18]

[196] While the Panel’s reasons and present ruling do not turn on the supporting doctrine referred to above, it does find it instructive and consistent with the Panel’s views on the law in regards to treaties and their important status in Canada’s constitutional framework. This supports the primacy of treaties over the *Indian Act*.

[197] Furthermore, in *An Act to amend the Canadian Human Rights Act*, SC 2008, c 30, Parliament recognized the importance of giving due regard to First Nations customary laws and legal traditions in applying the *CHRA* and when applying the *Indian Act*.:

> Aboriginal rights
>
> 1.1 For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.
>
> Regard to legal traditions and customary laws
>
> 1.2 In relation to a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and

[17] Ibid. at 137-8.
[18] James Tully, Strange Multiplicity: Constitutionalism in an age of diversity (Cambridge: Cambridge University Press, 1995), at, 117.

> interests, to the extent that they are consistent with the principle of gender equality.

[198] All the above justify a broader interpretation of Jordan's Principle eligibility criteria that goes beyond the narrow parameters of the *Indian Act*.

H. Scope of Complaint

[199] As summarized earlier in this decision, Canada argued that the relief requested in this motion was beyond the scope of the complaint currently before the Tribunal. Again, the Panel disagrees with this assertion.

[200] The Panel already addressed the scope of the claim (complaint, Statement of Particulars, evidence, arguments, etc.) as opposed to the scope of the complaint in previous rulings and what forms part of the claim (see 2019 CHRT 39 at paras. 99-102):

> [99] When the Tribunal analyzes the claim, it reviews the complaint and also the elements contained in the Statement of Particulars in accordance with rule 6(1)d) of the Tribunal's rules of procedure (see *Lindor c. Travaux publics et Services gouvernementaux Canada*, 2012 TCDP 14 at para. 4, translation).
>
> [100] In fact, when the Tribunal examines the complaint, it does so in light of the principles above mentioned and in a flexible and non-formalistic manner:
>
> > "Complaint forms are not to be perused in the same manner as criminal indictments''. (Translation, see *Canada (Procureur général) c. Robinson*, 1994 CanLII 3490 (FCA), [1994] 3 CF 228 (CA) cited in *Lindor* 2012 TCDP 14 at para. 22).
> >
> > « Les formules de plainte ne doivent pas être scrutées de la même façon qu'un acte d'accusation en matière criminelle. »
>
> [101] Furthermore, this Tribunal has determined that the complaint is but one element of the claim, a first step therefore, the Tribunal must look beyond the complaint form to determine the nature of the claim:
>
> > Pursuant to Rule 6(1) of the Tribunal's Rules of Procedure (03-05-04) (the "Rules"), each party is to serve and file a Statement of Particulars ("SOP") setting out, among other things,
> >
> > (a) the material facts that the party seeks to prove in support of its case; (b) its position on the legal issues raised by the case

> (...) (see Kanagasabapathy v. Air Canada 2013 CHRT 7 at para. 3).

[102] It is important to remember that the original complaint does not serve the purposes of a pleading (*Casler v. Canadian National Railway*, 2017 CHRT 6 at para. 9 [*Casler*]; see also *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para. 10 [*Gaucher*]). Moreover, as explained in *Casler*:

> …[I]t must be kept in mind that filing a complaint is the first step in the complaint resolution process under the Act. As the Tribunal stated in Gaucher, at paragraph 11, "[i]t is inevitable that new facts and circumstances will often come to light in the course of the investigation. It follows that complaints are open to refinement". As explained in Gaucher and Casler, cited above, the complaint filed with the Commission only provides a synopsis; it will essentially become clearer during the course of the process. The conditions for the hearing are defined in the Statement of Particulars. (see also Polhill v. Keeseekoowenin, see also, First Nation 2017 CHRT 34 at paras. 34 and 36).

[201] This question was already asked and answered. The only other question to be answered on the Tribunal's jurisdiction here is if this motion goes beyond the claim or not. The Panel's response is that for issues I and II of this ruling it does not.

[202] Furthermore, the case in front of the Tribunal focused on First Nations, not Métis peoples, Inuit or Self-identified First Nations. In fact, the Panel in a ruling adding the NAN as an interested party wrote the following:

> The Assembly of First Nations and the Chiefs of Ontario represent the various First Nations communities across Canada and Ontario. The interests of First Nations children, youth and families, along with the agencies that serve them, are represented by the First Nations Child and Family Caring Society of Canada. Furthermore, the Canadian Human Rights Commission (the Commission) represents the public interest and has led the majority of the evidence in this matter, including the evidence relied upon by the Panel to make the findings in the Decision identified above about remote Ontario communities.
>
> With the assistance of these parties and interested parties, along with the NAN and INAC, the Panel believes it will have more than enough submissions to craft a meaningful and effective order in response to the [Merit] Decision,
>
> (see 2016 CHRT 11 at paras. 16-17).

[203] This demonstrates that the focus of the claim revolved around First Nations representatives who had standing in this case and who were part of this complaint. Any clarification exercise on the terms “all First Nations children” is not unfair or outside this claim. Additionally, the Panel referred to the term communities over a hundred times in the Merit Decision and always believed First Nations communities should define themselves. This transpired in the Panel’s rulings especially in 2018 CHRT 4.

[204] Moreover, the Complainants’ Statement of Particulars alleged that underfunding of the FNCFS Program infringed Jordan’s Principle, and sought very broad relief to redress discriminatory practices in “…the application of Jordan’s Principle to federal government programs affecting children…”. The prayer for relief thus was not limited to the FNCFS program, or tied to *Indian Act* status or reserve residency.

[205] The issues pleaded are thus broad enough to encompass the clarification now being sought regarding eligibility under Jordan’s Principle.

[206] Furthermore, the Tribunal has already made rulings dealing with the scope and meaning of Jordan’s Principle, clarifying that it is not restricted to the resolution of jurisdictional disputes and that it applies to a broad range of services both on and off reserve. The Tribunal has retained jurisdiction over the implementation of its rulings and orders and the current motion simply seeks clarification of a matter that was not specifically addressed in those previous rulings – namely, who is eligible to receive the benefits that the Tribunal has already identified and described.

[207] The current motion asks the Tribunal for clarification intended to assist with such implementation and is squarely within the scope of the Tribunal’s retained jurisdiction.

[208] In the interim ruling, new evidence filed as part of the interim motion for further relief was considered by the Panel to arrive at its findings and order. The Caring Society had recently intervened to pay for medical transportation for a young First Nations child living off-reserve and without *Indian Act* status who required a medical diagnostic service, an essential scan, to address a life-threatening condition because Canada would not pay due to the child’s off reserve residence and lack of *Indian Act* status.

[209] The Panel found that the lack of *Indian Act* status was the primary reason for the refusal to cover the medical transportation costs:

> The fact that the child is not covered under Jordan's Principle for lack of status is the focus of the refusal,
>
> (see 2019 CHRT 7 at para. 69).

[210] The Panel found Canada's denial to be unreasonable:

> […] the outcome of S.J.'s case is unreasonable. The coverage under Jordan's Principle was denied because S.J.'s mother registered under 6(2) of the *Indian Act* and could not transmit status to her in light of the second-generation cut-off rule. This is the main reason why S.J.'s travel costs were refused. The second reason is that it was not deemed urgent by Canada when in fact the situation was not assessed appropriately. Finally, no one seems to have turned their minds to the needs of the child and her best interests. There is no indication that a substantive equality analysis has been employed here. Rather a bureaucratic approach was applied for denying coverage for a child of just over 18 months (Canada's team described the child has being 1 year and a half old, see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, email chain at Exhibit F), who has been waiting for this scan from birth. This type of bureaucratic approach in Programs was linked to discrimination in the [*Merit*] *Decision* (see at paras. 365-382 and 391).
>
> (see 2019 CHRT 7 at para. 73).

I. Conclusion

[211] The question is two-fold. The first part is the following:

> Should First Nations children without *Indian Act* status who are recognized as citizens or members of their respective First Nations be included under Jordan's Principle?

[212] The Panel, in light of the reasons outlined above, answers yes to this question. A mechanism ordered to eradicate discrimination must, in order to be effective in eradicating discrimination, be responsive to the entirety of the discrimination and apply a human rights framework. If services are offered, they must be offered in a manner respecting substantive equality and, in this case, inherent Indigenous human rights including self-determination. An eligibility criteria under Jordan's Principle ought to respect the protected rights discussed

above such as First Nations Self-government agreements, treaties, customs, laws, traditions, the *UNDRIP*.

[213] The second part is the following:

> If the previously noted First Nations children are included in the eligibility criteria, does it automatically grant them services or does it only trigger the second part of the process, namely 1) a case-by-case approach and 2) respecting the inherent right to self-determination of First Nations to determine their citizens and/or members before the child is considered to be a Jordan's Principle case?

[214] The Panel believes that it is the latter. Moreover, ensuring that First Nations children without *Indian Act* status who are recognized as citizens and/or members of their respective First Nations are not excluded automatically from Jordan's Principle does not necessarily mean that they receive services under Jordan's Principle because there is a need to achieve a case-by-case analysis. Nothing prevents the analysis to assess what services are required, if the province provides them, whether the child needs services above the normative standard, etc.

[215] Instead of excluding children based on assumptions, an effective approach in line with human rights and substantive equality and consistent with the Panel's previous rulings which did not focus on the *Indian Act* or on-reserve residency would be to include them in Jordan's Principle, get them "through the door" and do the verification of the particular case to see if the child is a citizen and/or a member of a First Nation according to a process proposed by First Nations that is also reasonably workable for Canada.

[216] Consequently, in light of the above and the Panel's Jordan's Principle definition, Canada's history of discrimination, the current rule of law, evolving case law and the need to craft effective remedies that do not condone other forms of discrimination, "all First Nations children" also includes First Nations children without *Indian Act* status who are recognized as citizens and/or members of their respective First Nations regardless of where they live, whether on or off-reserve.

[217] The Panel clarifies that in the spirit of its past findings, reasons, analysis, *Merit Decision* and previous rulings and orders and human rights laws namely the *CHRA* and the

UNDRIP, it is appropriate for Canada to consider First Nations children who do not have *Indian Act* status but are recognized as citizens and/or members of their respective Nations in accordance with their customs, laws, traditions, treaties and Self-government agreements to be considered eligible for services under Jordan's Principle.

[218] The Panel disagrees with Canada's position on this point and does not view this issue as outside its jurisdiction or outside the scope of the present claim given the historical and legal context forming part of this claim including Canada's acceptance of the *Merit Decision* and subsequent rulings especially 2018 CHRT 4 where Canada signed and confirmed its full acceptation of the Panel's reasons and orders. Again, this ruling also dealt with the importance of aligning human rights protected by the *CHRA* with the *UNDRIP* as explained above. Moreover, as already mentioned, the Panel did not narrow its view of Jordan's Principle services to First Nations children within the confinements of the *Indian Act*.

[219] Given the Panel's clarification above, the next step for this section is to address the meaning of "All First Nations children" for Jordan's Principle purposes. In considering the First Nations parties' requests in this case, the Panel opts to request the parties to discuss and generate potential eligibility criteria under Jordan's Principle only and in considering the Panel's clarification reasons outlined above.

[220] Additionally, contentious views arose from the interim order (2019 CHRT 7) and in discussions surrounding the process to allow First Nations to identify their citizens and/or members without placing a burden on First Nations who may not have capacity to address those requests in the short timeframe prescribed under Jordan's Principle. The Panel sought the parties' views to ensure that Canada has an effective way to verify if a First Nations child without *Indian Act* status is recognized by a First Nation. The COO brought many concerns and suggestions on the issue of potential liability for First Nations who, given they lack capacity, may not respond in time or may not respond at all to requests for identification of their citizens or members. The COO suggested that the Tribunal declare that this ruling does not impose any duty of care or responsibility on First Nations, and/or order Canada to indemnify First Nations for any liability they may incur.

[221] In sum, the Commission submits that with respect to negating future duties of care or liability, it must be remembered that the Tribunal is a creature of statute. Its mandate is to conduct hearings into alleged violations of the *CHRA*, and where infringements are found, to determine appropriate remedies under s. 53. The Tribunal does not have jurisdiction to make rulings that would purport to negate any private law duties of care that First Nations might owe as a matter of common or civil law. Further, even in the context of the *CHRA*, one panel of the Tribunal does not have the power to make a ruling that would compel the Commission (as gate-keeper) or future panels (as quasi-judicial decision-makers) to reach particular results, regardless of the facts and arguments that may be before them. This would unduly fetter future decision-making, and unfairly restrict the rights of any parties to those hypothetical future cases.

[222] The Commission also does not feel it would be appropriate at this point to order that Canada always indemnify First Nations for liabilities incurred in connection with requests for recognition. Such an order would likely be outside the Tribunal's jurisdiction, to the extent it sought to impose requirements to indemnify First Nations for liability incurred at common or civil law. Even within the *CHRA* scheme, one can imagine situations where discriminatory practices within a First Nation might make it more appropriate for the First Nation, rather than Canada, to bear responsibility for any infringements. Overall, the better approach would be to leave such matters to be determined in the context of future cases, using mechanisms and principles that already exist as a matter of human rights law.

[223] The Panel entirely agrees with the Commission's submissions above and believes it is the correct legal interpretation to apply in this case.

[224] The Panel finds the AFN's suggestion below to be helpful and a potential solution in identifying First Nations children under Jordan's Principle that addresses some of the concerns raised by the COO and Canada:

> With respect to verifying applicants under Jordan's Principle who are non-registered Indians without status, and residing or ordinarily resident off reserve, the AFN submits a solution exists in providing written notice and/or consulting the appropriate First Nations community. This is already an established practice regarding family and child matters under provincial child welfare legislation, such as Part X under Ontario's *Child and Family Services*

> *Act*.[19] It is also part of the Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, for example, under the current ss. 12, 13 and 20.[20]
>
> (see AFN submissions at para. 66).
>
> The AFN submits that by providing written notice and/or consultation, that could come in the form of a standardized letter which does not contain personal information, it offers the First Nations community *the opportunity* to confirm or deny, if it chooses, whether an applicant is indeed a member of the community. To be clear, the applicant ought to identify a connection with a particular First Nations community, and Canada ought to notify and/or consult that First Nations about the request to access services under Jordan's Principle.
>
> (see AFN submissions at para. 67).
>
> The application ought to proceed on the presumption that there is a connection to a First Nations community, so if the First Nations community does not respond, then the application is undisturbed. Under this presumption, Canada's logistical and operational concerns about "recognition as a member by their nation" are sufficiently addressed.[21] However, if the First Nations community responds, and denies there is a connection between the applicant and community, then Canada ought to make a determination whether the applicant is indeed eligible and whether the services ought to be offered.

[225] The Panel agrees with Canada that it cannot order First Nations who are not parties to do anything. The Panel does not impose the verification of the identity of the First Nations child on the First Nation but on Canada who is a party to these proceedings. The obligation is on Canada to provide all First Nations an opportunity to participate in identifying First Nations children for the purposes of Jordan's Principle eligibility. Additionally, the elaboration of the identification process as per the Panel's orders concerns First Nations who are parties to these proceedings and recognizes their expertise and valuable input in determining an identification process.

[226] Moreover, a process seeking the First Nations' viewpoints on the First Nations child's citizenship and/or membership is in line with their inherent right of self-determination and aims to recognize their right to determine who their citizens/members are. It also moves

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[19] *Child and Family Services Act*, R.S.O. 1990, c. C.11, Part X (Indian and Native Child and Family Services).
[20] Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, 1st Session, 42nd Parliament, Canada, December 3, 2015, ss. 12, 13, 20, House of Commons Second Reading.
[21] Affidavit of Leila Gillis, affirmed March 7, 2019, paras 5-9.

away from the issue of self-identification alone determining First Nations identity. The Panel finds that the AFN's suggestion for a recognition process potentially addresses Canada's concerns.

[227] Finally, on Canada's argument that the Tribunal must respect the division of powers between the Federal and Provincial governments and that off-reserve services are outside the purview of this claim preventing the Panel to make the orders requested, the Panel relies on the Supreme Court of Canada decision in *Daniels*:

> Moreover, this Court has been clear that federal authority under s. 91(24) does not bar valid provincial schemes that do not impair the core of the "Indian" power: NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union, [2010] 2 S.C.R. 696, at para. 3.
>
> (see Daniels at para. 51).

[228] The Panel finds the issue discussed in this section falls squarely within the core of the Indian power and forms part of this claim.

J. Order

[229] Pursuant to section 53 (2) of the *CHRA*, the AFN, the Caring Society, the Commission, the COO, the NAN and Canada are ordered

1. to consult in order to generate potential eligibility criteria for First Nations children under Jordan's Principle and in considering the Panel's previous orders and clarification explained above and

2. to establish a mechanism to identify citizens and/or members of First Nations that is timely, effective and considers the implementation concerns raised by all parties. In considering the identification mechanism, discussions should also include the need for First Nations to receive additional funds to respond and, in some cases build capacity, to answer Canada's identification requests for First Nations children. The mechanism should also include provision for additional and sustainable funding to account for the children who will now be included under Jordan's Principle.

[230] The parties will return to the Tribunal with their potential eligibility criteria and mechanism by **October 19, 2020**.

V. Issue II

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

A. Legal framework

[231] As mentioned above, the Panel in the *Merit Decision*, applied the tests found in *Moore* and *Bombardier*., (see 2016 CHRT 2 at paras. 22-25). The Panel finds it is still applicable and will apply the same tests again for issues two and three of this ruling.

[232] Furthermore, the majority in *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 SCR 566 [*Gibbs*] articulated a two-stage framework to determine claims for discrimination in an insurance benefits plan. The first step is to determine the true character of or underlying rationale of the benefits plan in this case, Jordan's Principle, which was already explained above. The second step is to consider whether benefits differ as a result of protected characteristics that are not relevant to the stated purpose. This analysis has subsequently been applied to other ameliorative programs (e.g. an employment policy in *Lavoie v. Treasury Board of Canada*, 2008 CHRT 27 at para. 136).

[233] *Gibbs* predates the establishment of the current three-part prima facie test for discrimination articulated in *Moore* at paragraph 33 and affirmed subsequently in *Bombardier* at paragraph. 35-54 and *Stewart v. Elk Valley Coal Corp*., 2017 SCC 30 at para. 24. The test requires that a complainant have a characteristic protected from discrimination under the *CHRA*; that they experienced a denial and/or an adverse impact with respect to the service; and that the protected characteristic was a factor in the denial and/or adverse impact.

[234] In *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31 [*Skinner*], the Nova Scotia Court of Appeal persuasively articulated how the *Gibbs* test could be applied within the *prima facie* test for discrimination articulated in *Moore*. In particular, the Court used *Gibbs* to analyze whether the protected characteristic was a factor in the adverse impact (*Skinner* at paras. 52-70). This approach is consistent with the approach

taken by Member Bélanger in *Hicks v. Human Resources and Skills Development Canada*, 2013 CHRT 20, aff'd *Canada (Attorney General) v. Hicks*, 2015 FC 599 where he first determined that the complainant had a protected characteristic and suffered an adverse treatment before applying *Gibbs*.

[235] In summary, in alleging an ameliorative program is under inclusive, the burden remains with the complainant to establish a *prima facie* case of discrimination. The complainant must establish that they have a characteristic protected from discrimination under the *CHRA*, that they were denied and/or experienced an adverse impact with respect to the service, and that the protected characteristic was a factor in the denial and/or adverse impact. In order to demonstrate that the protected characteristic was a factor in the denial and/or adverse impact, it is open to the complainant to use the *Gibbs* framework in which the first step is to identify the true character or underlying rationale of the ameliorative program. The second step is to consider whether program benefits differ as a result of protected characteristics that are not relevant to the stated purpose.

[236] The Panel described Jordan's Principle as a substantive equality mechanism to ensure that First Nations children access governmental services, they need without experiencing gaps, delays or denials. For clarity, Jordan's Principle is not a program, it is considered a legal rule by Canada. This was already established in the past (see 2019 CHRT 7 at para. 25). However, the Panel finds the *Gibbs* test applicable and useful in analyzing eligibility for services under Jordan's Principle.

[237] Canada's position appears to be that it considers Indigenous children, including those without *Indian Act* status, who are ordinarily resident on reserve to be within the scope of Jordan's Principle. This includes the First Nations children in this issue ordinarily resident on reserve. Therefore, the central dispute here is with respect to First Nations children residing off-reserve who are not eligible for *Indian Act* status but have a parent who is.

[238] The Panel believes that is does have jurisdiction to examine this category of children as part of this claim without unduly expanding the scope of the complaint in any way. The Jordan's Principle distinction based on the *Indian Act* was made by Canada and raised after the *Merit Decision*. As already explained above, the Panel did not focus its *Merit Decision*

on considerations under the *Indian Act*. Additionally, Jordan's Principle applies on and off-reserve given its substantive equality nature and its goal to enable First Nations children to access services that are culturally appropriate and safe and account for intergenerational trauma and other relevant specific needs that may only be addressed in providing services that could be considered above normative standards. While Jordan's Principle can include FNCFS, it is broader than the part of the complaint addressing on-reserve FNCFS services. The Panel clearly made this distinction in its *Merit Decision* and subsequent rulings providing clarification based on the evidence in front of the Tribunal.

[239] In light of the Panel's past findings and rulings and its reasons on issue I, the Panel considered if any off-reserve First Nations children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status and have actual needs for services that (i) go beyond normative standards of care, and (ii) are rooted in the kinds of historical and contemporary disadvantages that breathes life into the substantive equality analysis – such as the legacies of stereotyping, prejudice, colonialism, displacement, and intergenerational trauma relating to Residential Schools or the Sixties Scoop – is eligible for Jordan's Principle services. For the reasons outlined below, the Panel finds there is an evidentiary and legal basis that off-reserve children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status share the same characteristics and have similar needs as the other First Nations children eligible for Jordan's Principle services but these children are denied the benefit of those services because of *Indian Act* status distinctions based in whole or in part on the prohibited ground of race and/or national or ethnic origin.

[240] The first element in the *prima facie* discrimination test is relatively simple in this case: race and national or ethnic origin are prohibited grounds of discrimination under section 3 of the *CHRA*. There was no dispute that First Nations possess these characteristics. The Supreme Court decision in *Daniels* determined that First Nations without *Indian Act* status, and regardless of their parents' *Indian Act* status, are "Indians" for the purposes of 91(24) of the *Constitution Act* of 1867. Therefore, a First Nations child who does not have *Indian Act* status and who is not eligible for *Indian Act* status, but has a parent/guardian with, or who is

eligible for, *Indian Act* status possesses the same characteristics as registered or eligible to be registered First Nations children namely race and national or ethnic origin protected under the *CHRA*. Moreover, the Panel never made this distinction in the *Merit Decision* since it viewed First Nations and the protected ground of race and national or ethnic origin in a broader sense given the reasons explained above.

[241] The second element in the *prima facie* discrimination test is that the First Nations child who does not have *Indian Act* status and who is not eligible for *Indian Act* status, but has a parent/guardian with, or who is eligible for, *Indian Act* must experience a denial and/or adverse impact in the services provided by Canada under Jordan's Principle.

[242] Based on the findings made in the interim ruling, it is clear that a First Nations child living off-reserve who does not have *Indian Act* status and who is not eligible for *Indian Act* status, but has a parent/guardian with, or who is eligible for, *Indian Act* status is denied services by not being considered eligible to receive Jordan's Principle services, with some exceptions, since Canada considers those children to be receiving provincial services. Under the Panel's substantive equality mandatory definition in 2017 CHRT 14 at paragraph 135, Canada must also provide culturally appropriate and safe services that may be considered above normative standards to all First Nations children on and off-reserve.

[243] However, 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.

[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

> 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).

[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 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).

[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).

> 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:
>
> > 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).

[249] The Panel found in the *Merit Decision* the narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children again, while it did include on-reserve First Nations children in Jordan's

Principle, it did not restrict it to only those on-reserve or on any reliance on the *Indian Act* criteria (see 2016 CHRT at paras. 351-355, 360-381 and 458).

[250] Furthermore, the Panel relied on General Comment No. 20 of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 (the *ICESCR*) that stated that

> [t]he *ICESCR* is considered to be of progressive application. However, in General Comment No. 20, 2 July 2009 (E/C.12/GC/20), the CESCR stated that, given their importance, the principles of equality and non-discrimination are of immediate application, notwithstanding the provisions of article 2 of the *ICESR* (see paras. 5 and 7). The CESCR also affirmed that the aim of the *ICESCR* is to achieve substantive equality by "…paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations" (at paras. 8; see also paras. 9 and 10). It added that the exercise of covenant rights should not be conditional on a person's place of residence (see at para. 34),
>
> (see 2016 CHRT 2 at para. 442, emphasis added).

[251] Moreover, the Panel already found that

> [c]oordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need
>
> (see 2016 CHRT 2 at para. 381, emphasis added).
>
> More importantly, Jordan's Principle is meant to apply to all First Nations children
>
> (see 2016 CHRT 2 at para. 382, emphasis added).

[252] Furthermore, Canada itself admitted that Federal Programs are more residency based than *Indian Act* based. Additionally, while Jordan's Principle is meant to address jurisdictional disputes amongst Federal Departments it also addresses jurisdictional disputes amongst the Federal government and Provincial and Territorial governments which clearly indicates that off-reserve considerations also form part of Jordan's Principle's process.

B. The discriminatory impact of section 6(2) of the *Indian Act* and its adverse effects on First Nations children

[253] On this point the parties have argued that the unanimous Supreme Court of Canada decision *Canadian Human Rights Commission v. Canada (Attorney General)*, 2018 SCC 31 to support their respective positions. This decision was a combined appeal from the judicial review of two decisions before the Tribunal: *Matson et al. v. Indian and Northern Affairs Canada,* 2013 CHRT 13 [*Matson*] and *Roger William Andrews and Roger William Andrews on behalf of Michelle Dominique Andrews v. Indian and Northern Affairs Canada,* 2013 CHRT 21 [*Andrews*].

[254] The two Tribunal decisions were first affirmed by the Federal Court and the Federal Court of Appeal and finally affirmed by a unanimous Supreme Court of Canada decision. The *Matson* and *Andrews* decisions are well known by the Panel given that each Panel Member rendered one of the two decisions.

[255] Section 6 of the *Indian Act* defines the various persons who are entitled to be registered as “Indian”. In *Matson*, the complainants claimed that, due to their matrilineal Indian heritage, they are treated differently in their registration under subsection 6(2) of the *Indian Act*, when compared to those whose lineage is paternal and are registered under subsection 6(1). Namely, registration under subsection 6(2) does not allow the complainants to pass on their status to their children. In *Andrews*, the issue was the previous enfranchisement provisions of the *Indian Act*. According to the complainant, had his father not enfranchised, he would have been entitled to registration under section 6(1), as opposed to his current status under 6(2). With subsection 6(1) status, the complainant would then be able to pass 6(2) status along to his daughter.

[256] Both complaints were argued under section 5 of the *CHRA* as discriminatory practices in the provision of a “service”. That is, Indian registration was argued to be a “service” within the meaning of section 5 of the *CHRA*. The Tribunal disagreed. While the processing of registration applications by the then INAC could be viewed as a service, the Tribunal found that the resulting status or lack thereof could not. INAC did not, and ISC now does not, have any involvement in determining the criteria for entitlement to be registered,

or not registered, as an Indian under section 6 of the *Indian Act*. Nor does it have any discretion in determining entitlement to be registered, or not registered, as an Indian pursuant to the criteria in section 6 of the *Indian Act*. Entitlement was determined by Parliament, not INAC, through section 6 of the *Indian Act*; and INAC was obliged to follow this section in processing applications for registration.

[257] Therefore, the Tribunal was of the view that the complaints were challenges to section 6 of the *Indian Act* and nothing else. Pursuant to the Federal Court of Appeal's decision in *Public Service Alliance of Canada v. Canada Revenue Agency,* 2012 FCA 7 [*Murphy*], the Tribunal determined that complaints aimed at legislation per se, and nothing else, fall outside the scope of the *CHRA*. An attempt to counter the application of legislation based solely on its alleged discriminatory impact would better be addressed by a constitutional challenge. The Tribunal also rejected additional arguments, i.e. (1) that *Murphy* was superseded by other Supreme Court of Canada authorities regarding the primacy of human rights legislation; (2) that provincial human rights bodies had accepted that human rights legislation could render legislation inoperable; and, (3) that current and former provisions of the *CHRA* (including the former s. 67) indicated Parliament's intent to allow challenges to legislation under the *Act*.

[258] With the repeal of section 67 of the *CHRA*, the Tribunal now has the jurisdiction to consider discrimination complaints emanating from the application of the *Indian Act.*

[259] In these two decisions, the Tribunal provides analysis and interpretation of the *CHRA*. Some examples of the Tribunal's analysis include the Tribunal's determination that the complaint could be dismissed as a challenge to legislation, interpretation of the term "service" as used in s. 5, and a determination regarding the primacy of human rights legislation.

[260] However, the case at hand can absolutely be distinguished from the *Matson* and *Andrews* cases given that the Panel found in the *Merit Decision* and subsequent rulings there are discriminatory practices that need to be eradicated. In *Andrews*, the Panel Chair Sophie Marchildon in this case chairing the *Andrews* case, wrote on the *Indian Act's* purpose. The following comments in particular are relevant for this ruling:

> Indian status is a legal construct created by the federal government. Through various provisions of the *Indian Act*, R.S.C., 1985, c. I-5 [the *Indian Act*] and its prior enactments, the federal government has defined the persons who are entitled to registration as "Indian". The statutory concept of "Indian" from early colonialism to the present day does not reflect the traditional or current customs of First Nations peoples for defining their social organization and its membership (see *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827 at paras. 8-12 [*McIvor*]),
>
> (see *Andrews* at para.1).

[261] Additionally, in *Andrews*, the issue of the need to establish the existence of a discriminatory practice was discussed and is particularly helpful in this case:

> I do not read these cases as foregoing the jurisdictional requirement for the Tribunal to find the existence of a "discriminatory practice" within the meaning of the *Act*
>
> (see *Andrews* at para. 78)
>
> This only further confirms the conclusion which I have already made, namely that while the Supreme Court has affirmed the primacy of human rights legislation, this principle applies to a "discriminatory practice" under the *Act*
>
> (see Andrews at para. 85, emphasis added).
>
> While my reasoning precludes challenges of decisions and/or actions which emanate directly from the *Indian Act*, decisions and/or actions which constitute a "discriminatory practice" pursuant to sections 5 to 25 of the *Act* and which would have previously been made "under the authority" of the *Indian Act* now fall within the Tribunal's jurisdiction. The fact that the Tribunal has already started to see cases of this kind is further evidence of this (See for example *Louie and Beattie v. Indian and Northern Affairs Canada*, 2011 CHRT 2),
>
> (see *Andrews* at para. 107, emphasis added).

[262] This case at hand is not a challenge to the *Indian Act* legislation. This case deals with discriminatory services and the use of a discretionary discriminatory criteria for eligibility purposes under Jordan's Principle. Furthermore, this ruling does not propose to strike down section 6(2) of the *Indian Act* as this was not properly brought before the Panel and this is not the appropriate way to do so. However, insofar as it conflicts with the *CHRA* and human rights protected under the *CHRA* in the presence of discrimination that the Tribunal is seeking to eliminate, the quasi-constitutional *CHRA* supersedes the *Indian Act*.

[263] Furthermore, the Panel finds that Canada uses its discretion to establish *Indian Act* registration or entitlement to registration eligibility criteria to restrict access and therefore deny Jordan's Principle services to First Nations children residing off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status. Relying on the discriminatory criteria of the *Indian Act* adversely differentiates between siblings or other family members because of a second-generation cut-off rule that is meant to assimilate and erode First Nations citizenship. This amounts to discrimination and runs counter to what the Panel is aiming to achieve in this case, namely to ensure Canada ceases the discriminatory practice and takes measures to redress the practice or to prevent the same or a similar practice from occurring in future (see section 53 (2) a of the *CHRA*). The Panel chair in her final remarks in a previous ruling wrote that "[g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence", (see 2018 CHRT 4 at para. 452).

[264] To arrive to its conclusion, the Panel follows a similar analysis and approach to that taken by Member Lustig in *Beattie v. Aboriginal Affairs and Northern Development Canada,* 2014 CHRT 1. In that case, the Tribunal addressed whether AANDC discriminated against Joyce Beattie in relation to her entitlement for *Indian Act* registration. Shortly after birth, Ms. Beattie was adopted through a custom adoption by parents who had *Indian Act* status in a different *Indian Act* Band than her birth mother. Once the *Gender Equity in Indian Registration Act*, S.C. 2010 c. 18 amended the *Indian Act*, Ms. Beattie's grandchildren became eligible for *Indian Act* status if Ms. Beattie had s. 6(1)(c) *Indian Act* status through her adopted parents but not if she had s. 6(1)(f) through her birth parents. AANDC refused, for a period of about two and a half years, to recognize Ms. Beattie's custom adoption and registered her under s. 6(1)(f). AANDC similarly refused to allow Ms. Beattie to have her name removed from her birth mother's Band list.

[265] The Tribunal found that the complaint was substantiated. The Tribunal found that processing an application for *Indian Act* registration constituted a service under s. 5 of the *CHRA*. *Indian Act* registration is work done by government employees on behalf of an applicant so that benefits may flow to that individual. The Tribunal found that AANDC's

decisions were discretionary decisions within the scope of the *CHRA*. The complaint was not a disguised attack on the *Indian Act* itself. AANDC's eventual recognition of Ms. Beattie's entitlement to registration through her adoptive parents and eventual removal from her birth mother's Band list confirmed that AANDC had discretion in how it interpreted the *Indian Act*. As such, AANDC had an obligation to choose a broad, liberal and purposive interpretation of the *Indian Act* that was consistent with human rights principles and did not discriminate on the basis of family status.

[266] Similarly, ISC has confirmed it uses its discretion in determining who is eligible to receive Jordan's Principle services:

> When a request is submitted on behalf of a non-status child, the Jordan's Principle Focal Point works with the requestor to understand if the child would be eligible for registration by learning about the parents' status, potential status under *Bill S-3*, as well as with the Office of the Indian Registrar. If there is uncertainty as to the eligibility of the child, the Focal Point can err on the side of caution and approve the request within the domain of "best interests of the child", particularly where there are concerns about meeting the ordered timeframes (see Dr. Valerie Gideon's affidavit, dated December 21st, 2018, at paras. 35-39)
>
> (see 2019 CHRT 7 at para. 42).

[267] Additionally, this Panel has already indicated its desire to ensure remedies do not condone another form of discrimination:

> The Panel also wants to ensure to craft effective remedies that eliminate discrimination and prevent it from reoccurring. Needless to say, it cannot condone a different form of discrimination while it makes its orders for remedies
>
> (2019 CHRT 7 at para. 22).

[268] The interim relief order informs the required analysis under Jordan's Principle:

> 1. First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and 2. who have urgent and/or life-threatening needs. In evaluating urgent and/or life-threatening needs due consideration must be given to the seriousness of the child's condition and the evaluation of the child made by a physician, a health professional or other professionals involved in the child's assessment. **Canada should ensure that the need to address gaps in services, the need to eliminate all forms**

> **of discrimination, the principle of substantive equality and human rights including Indigenous rights, the best interests of the child, the *UNDRIP* and the *Convention on the Rights of the Child* guide all decisions concerning First Nations children.**
>
> (2019 CHRT 7 at paras. 89, original emphasis omitted and new emphasis added).

C. S-3 and Enfranchisement provisions

[269] The Panel sees no reason why First Nations children who will inevitably become eligible to receive services under Jordan's Principle because of their eligibility for registration and obtaining status under the *Indian Act* following S-3 amendments should wait for Canada's process to implement the changes before they can obtain services such as above normative standards and culturally appropriate and safe services. Otherwise, those soon-to-have *Indian Act* status children will experience unnecessary delays and may, where applicable, ask for retroactive services once they obtain *Indian Act* status. Following substantive equality principles and given the history and discriminatory impacts found in the *Merit Decision* and subsequent rulings and of the *Indian Act*, Canada is ordered pursuant to section 53 (2) of the *CHRA* to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for *Indian Act* registration/status under S-3 implementation. The same reasoning applies to parents who will become eligible to obtain registration/status under S-3 implementation.

[270] Finally, on this point, the same reasoning should apply to those parents of First Nations children in need of Jordan's Principle services above normative standards and culturally appropriate and safe services who were enfranchised and are now eligible for registration under the *Indian Act*.

[271] It appears that Canada is raising a *bona fide* cost defence under section 15(1)(g) and 15(2) of the *CHRA* when Canada submits that an inclusive definition of a "First Nations child" would "risk leaving the needs of those children who are properly the subject of the complaint, unmet." While the argument that Canada's resources are not unlimited has merit, aside from this assertion no sufficient evidence was brought forward to support such a statement. Therefore, the Panel finds this argument unconvincing.

D. Order

[272] The Panel pursuant to section 53 (2) of the *CHRA* orders the AFN, the Caring Society, the Commission, the COO, the NAN and Canada to include as part of their consultations for the order in section I, First Nations children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.

[273] Further, Canada is ordered to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for *Indian Act* registration/status under S-3 implementation.

VI. Issue III

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

A. Structure

[274] This last section will deal with two additional categories:

- First Nations children without Indian Act status, residing off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program.
- First Nations children without Indian Act status, residing off reserve, who have lost their connection to their First Nations communities due to other reasons.

[275] As already discussed under the previous issue, the Panel understands Canada's position to be that it already considers Indigenous children living on reserve to be within the scope of Jordan's Principle and the Panel anticipates that would apply to the First Nations children under this heading who are living on reserve.

[276] The Panel made numerous findings, rulings and orders under Jordan's Principle all accepted by Canada. The Panel continues to retain jurisdiction concerning those orders to

monitor the implementation and in ensuring that the discrimination found in this case is eliminated. Therefore, the Panel has jurisdiction to deal with these requests in determining the effectiveness of its orders in light of the evidence it has before it and the discrimination found in this case.

B. Analysis

[277] There is no doubt that the Tribunal has jurisdiction to analyze this request given that Jordan's Principle is within this claim and the Panel has retained jurisdiction over its orders. The Panel therefore has jurisdiction to clarify its orders and make further orders when necessary when supported by the evidence before it.

[278] The Panel will address the two categories referred to above interchangeably given the fact that the legal framework discussed below applies to both categories.

[279] Despite the lack of evidence referred to and relied upon by the parties in support of this issue three request, the Panel extensively reviewed the evidence before it. In reviewing the record, the Panel reviewed the Parties' Statements of Particulars, the Parties' final arguments, the evidence the Parties relied on in their arguments, and the evidence as part of the interim motion.

[280] This being said, the Panel finds that First Nations children residing off reserve who have lost connection to their First Nations communities for other reasons than the discrimination found in this case fall outside of the claim before it. The claim was not focused on this at all until the 2019 motion and sufficient evidence has not been presented to support such a finding. As the Panel previously said, the Supreme Court of Canada stated in *Moore* that the remedy must flow from the claim.

[281] What the Panel found in the *Merit Decision* was that First Nation children of Residential School and of Sixties Scoop survivors have suffered, may have higher needs often as a result of intergenerational trauma, colonialism, systemic racism and other historical wrongs done by Canada. As already explained above, this forms part of the substantive equality analysis under Jordan's Principle. The Panel in making those findings did so without any focus on *Indian Act* status or on-reserve residency.

[282] Additionally, the same can be said for all First Nations children who were discriminated against by Canada in the provision of federally funded services which are covered by Jordan's Principle. Since the 2017 CHRT 14 and 35 orders that provided clarification on Jordan's Principle, a federal service also includes a service above normative standard which aims to remedy the discrimination found in this case and rightfully accounts for substantive equality and the specific and distinct needs of First Nations children.

[283] However, the Panel did not make findings in regards to the services First Nations children of Residential School and of Sixties Scoop survivors receive off-reserve who are not recognized as part of a First Nation community given that it was not advanced by the parties in their claim or arguments before this motion and insufficient evidence was presented.

[284] The Panel did not prevent the parties from bringing evidence as part of this motion. Of note, evidence was brought by the Caring Society and Canada to support the interim motion and was relied upon by the Panel in section two of this ruling.

[285] Given the lack of evidence in this motion, the Panel is not in a position to make findings let alone remedial orders for the two above categories at this time.

[286] Furthermore, the Panel agrees with the Commission and Canada that there is insufficient evidence in the record to make fact findings concerning off-reserves First Nations children without *Indian Act* status who have lost connections with their First Nations or who have parents that self-identify as First Nations. Again, the claim and arguments were not brought, argued or proven before this Panel, (see for example the Caring Society's 2014 final arguments for the hearing on the Merits at paras. 368-369; 374; 394-396; 398; 400-401; 403; 407; 424-425; 439; and 453-456).

[287] Additionally, the legal tests developed in *Moore* and *Gibbs* are not meant to simply stand-alone absent evidence; rather they find their meaning when applied to the facts and evidence presented. If there is insufficient evidence the onus is not met and no remedy is ordered.

[288] Furthermore,

> [a]s the Federal Court of Appeal stated in *Chopra v. Canada (Attorney General),* 2007 FCA 268, at paragraph 42 ("*Chopra*"), "[t]he question of onus only arises when it is necessary to decide who should bear the consequence of a gap in the evidentiary record such that the trier of fact cannot make a particular finding." While discrete issues regarding the burden of proof may arise in the context of determining motions like the ones presently before the Panel, where the evidentiary record allows the Panel to draw conclusions of fact which are supported by the evidence, the question of who had the onus of proving a given fact is immaterial. (see 2017 CHRT 14 at para. 30),
>
> (see also interim order 2019 CHRT 7 at, para.47).

[289] In this specific section, the Panel cannot make this finding of fact other than find those First Nations children are denied access to Jordan's Principle services. This denial is clear from Canada's submissions and the evidence in the record:

> the Panel notes that Canada's Registration requirements as per the *Indian Act* have a direct correlation with whom receives services under Jordan's Principle and therefore support the importance of a full hearing on this issue:
>
> > The recognition of Indigenous identity is a complex question. In August 2015, Bill S-3 amended the Indian Act by creating seven new registration categories, in response to the decision in Descheneaux c. Canada rendered by the Superior Court of Quebec in August 2015. These provisions came into force in December 2017 and appropriately, Canada re-reviewed the requests submitted under Jordan's Principle for children who may have been impacted by the decision. (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para.15).
> >
> > Additional amendments to the definition under the Indian Act will be developed subsequent to a period of consultation with First Nations. When part B of Bill S-3 becomes law, Jordan's Principle requests will be processed in compliance with whatever definition affecting eligibility emerges from that process (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para.16).
>
> (see 2019 CHRT 7 at para. 86, emphasis omitted).

[290] Nevertheless, the tests must be applied to the proven facts and are intimately linked to the evidence in front of the Tribunal. This is what justifies a remedy. As opposed to the first two issues, the Panel was not provided much to work with to make findings that will have considerable impacts involving rights holders outside this case.

[291] The CAP's intervention is an example of this. The CAP was not allowed to bring evidence before the Tribunal as parties raised expeditiousness concerns. The Panel after considering the matter has a better understanding of the bigger picture here. Essentially the CAP desires to be part of the consultations surrounding off-reserve First Nations children without *Indian Act* status, including those who have lost connection with their First Nations and who self-identify as First Nations.

[292] Additionally, the AFN is very concerned that this could include false claims by self-declared First Nations and take away resources meant for vulnerable First Nations children who need services. The Panel finds this to be a serious issue that needs important considerations that are beyond the evidence before it at this time. The AFN argued that the above normative standards services under Jordan's Principle are enticing to many. The AFN further submits that recognizing them and others who have First Nations identity but have lost connection with a First Nation would result in depleting resources that are meant to address the discrimination in federal services and programs found in this case for First Nations children.

[293] While the Panel agrees with the Caring Society and the NAN that absent a proven section 15 of the *CHRA* defence when the complainants onus has been met, there is no reason to limit access to services to some children, the Panel also understands the social impacts the AFN is bringing to our attention and the broader context requiring supporting evidence, as Canada advances, discussions outside the Tribunal. For Canada, at this time this type of order would be unworkable given the need to have much broader consultations with First Nations, Inuit and Metis Nations, Provinces and organizations to name a few. The Panel agrees and believes those broader consultations would be more beneficial in order to consider all circumstances affecting those children if the consultations are organized, planned and actually occur in a reasonable timeframe.

[294] This being said, for those who have First Nations identity without *Indian Act* status or eligibility to receive *Indian Act* status and who have no connection with their First Nation and who have experienced cultural displacements as a result of Residential Schools, Sixties Scoop and the FNFCS program, the Panel believes they should be considered for Jordan's

Principle services against the backdrop of Justice Phelan's findings and the Supreme Court of Canada's findings.

[295] The Supreme Court of Canada decision in *Daniels* determined that Métis and non-Status Indians fall under federal jurisdiction over "Indians and lands reserved for Indians" under s. 91(24) of the *Constitution Act, 1867*. The Court effectively described a situation whereby the term "Indians" was broadly defined when it served Canada's needs, but construed narrowly when doing otherwise would require something of the federal government. At the same time, provincial governments typically refused entreaties for help from Métis and non-status Indians as well, claiming that these were federal responsibilities.

[296] Moreover, the Court ruled that delineating and assigning constitutional authority between the federal and provincial governments, "will have enormous practical utility for these two groups who have, until now, found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution." (*Daniels* at para. 12).

[297] The Court described this as a "jurisdictional wasteland" that has left Métis and non-status Indians with "no one to hold accountable for an inadequate status quo." (*Daniels* at para. 15).

[298] Despite acknowledging that there is no consensus on who is considered Métis or non-status Indian, the Supreme Court wrote:

> These definitional ambiguities do not preclude a determination into whether the two groups, however they are defined, are within the scope of s. 91(24). I agree with the trial judge and Federal Court of Appeal that the historical, philosophical, and linguistic contexts establish that "Indians" in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis.
>
> (*Daniels* at para. 19).

[299] The Supreme Court went on to say:

> Moreover, while it does not define the scope of s. 91(24), it is worth noting that s. 35 of the *Constitution Act, 1982* states that Indian, Inuit, and Métis peoples are Aboriginal peoples for the purposes of the Constitution. This Court recently explained that the "grand purpose" of s. 35 is "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship": *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3

> S.C.R. 103, at para. 10. And in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, this Court noted that ss. 35 and 91(24) should be read together: para. 62, cited in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, at para. 69.
>
> (see *Daniels* at para. 34).
>
> The term “Indian” or “Indians” in the constitutional context, therefore, has two meanings: a broad meaning, as used in s. 91(24), that includes both Métis and Inuit and can be equated with the term “aboriginal peoples of Canada” used in s. 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples.
>
> (see *Daniels* at para. 35).

[300] The Supreme Court was explicit that the decision was meant to advance reconciliation in terms of the relationship between Canada and Indigenous Peoples. Justice Abella determined that reconciliation with all of Canada’s Aboriginal peoples is Parliament’s goal, drawing on

> [t]he constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the *Report of the Royal Commission on Aboriginal Peoples*, and the *Final report of the Truth and Reconciliation Commission of Canada*.
>
> (*Daniels* at para. 37).

[301] The preponderance of the reasons for the SCC’s findings deal with the Métis aspect of the question, as the Crown conceded in oral argument that non-status Indians were “Indians” under s. 91(24). Based on its analysis, the Court held that the declaration should be granted.

[302] The Court acknowledged that there is no consensus on who is considered Métis or non-status Indian, but did not believe this was a bar to issuing the declaration. The Court declined to establish definitional criteria for Métis and non-status Indians, stating broadly instead that “Determining whether particular individuals or communities are non-status Indians or Métis and therefore “Indians” under s. 91(24), is a fact-driven question to be decided on a case-by-case basis in the future...” (*Daniels* at para. 47).

[303] The Supreme Court distinguished the different purposes between Section 91(24): ““Indians” in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and

Métis" (see Daniels at para.19) and section 35: "The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights: para. 13. … Section 91(24) serves a very different constitutional purpose," (see *Daniels* at para. 49).

> The third criterion — community acceptance — raises particular concerns in the context of this case. The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights: para. 13. That is why acceptance by the community was found to be, for purposes of who is included as Métis under s. 35, a prerequisite to holding those rights. Section 91(24) serves a very different constitutional purpose. It is about the federal government's relationship with Canada's Aboriginal peoples. This includes people who may no longer be accepted by their communities because they were separated from them as a result, for example, of government policies such as Indian Residential Schools. There is no principled reason for presumptively and arbitrarily excluding them from Parliament's protective authority on the basis of a "community acceptance" test.
>
> (*Daniels* at para. 49).
>
> But federal jurisdiction over Métis and non-status Indians does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*. This Court has recognized that courts "should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government": *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 37 (emphasis in original). Moreover, this Court has been clear that federal authority under s. 91(24) does not bar valid provincial schemes that do not impair the core of the "Indian" power: *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] 2 S.C.R. 696, at para. 3.
>
> (see *Daniels* at para. 51).
>
> Both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. As the trial judge found, when Métis and non-status Indians have asked the federal government to assume legislative authority over them, it tended to respond that it was precluded from doing so by s. 91(24). And when Métis and non-status Indians turned to provincial governments, they were often refused on the basis that the issue was a federal one.
>
> (see *Daniels* at para. 13).

This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences, as was recognized by Phelan J.:

> One of the results of the positions taken by the federal and provincial governments and the "political football — buck passing" practices is that financially [Métis and non-status Indians] have been deprived of significant funding for their affairs. . . .
>
> . . . the political/policy wrangling between the federal and provincial governments has produced a large population of collaterally damaged [Métis and non-status Indians]. They are deprived of programs, services and intangible benefits recognized by all governments as needed. [paras. 107-8]
>
> See also *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, at para. 70.

(*Daniels* at para. 14).

With federal and provincial governments refusing to acknowledge jurisdiction over them, Métis and non-status Indians have no one to hold accountable for an inadequate status quo. The Crown's argument, however, was that since a finding of jurisdiction under s. 91(24) does not create a duty to legislate, it is inappropriate to answer a jurisdictional question in a legislative vacuum. It is true that finding Métis and non-status Indians to be "Indians" under s. 91(24) does not create a duty to legislate, but it has the undeniably salutary benefit of ending a jurisdictional tug-of-war in which these groups were left wondering about where to turn for policy redress. The existence of a legislative vacuum is self-evidently a reflection of the fact that neither level of government has acknowledged constitutional responsibility. A declaration would guarantee both certainty and accountability, thereby easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a longstanding jurisdictional dispute.

(see *Daniels* at para.15).

Should a person possess "sufficient" racial and social characteristics to be considered a "native person", that individual will be regarded as an "Indian" . . . within the legislative jurisdiction of the federal government, regardless of the fact that he or she may be excluded from the coverage of the *Indian Act*. [p.43]

(see *Daniels* para. 33).

[304] The following words from Justice Phelan's Federal Court decision are instructive in this context:

> [84] The circumstances which the Plaintiffs claim to have given rise to this litigation is well described in a memorandum to Cabinet from the Secretary of State dated July 6, 1972:
>
> > 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.
>
> (see *Daniels v. Canada*, 2013 FC 6 at para. 84).

[305] The Panel addressed section 91(24) of the Constitution, the double aspect rule, the living tree doctrine, federalism, fiduciary relationship and the Honor of the Crown in the *Merit Decision* and does not propose to repeat the findings here other than finding it is consistent with the Supreme Court Decision in *Daniels* and read together the reasoning is also applicable here. Additionally, *Daniels* confirms that Non-Status First Nations are in a similar situation of "jurisdictional tug-of-war" that can trigger a Jordan's Principle case and that the spirit of Jordan's Principle is meant to address.

[306] A case-by-case approach based on needs and the specific situation of the child still needs to occur. This is consistent with the approach taken by this Tribunal and the direction from the Supreme Court in *Daniels*.

[307] Furthermore, the Supreme Court in *Daniels* confirmed the Federal government's power to legislate on issues related to Métis and Non-Status Indians. Of note, section 2 of the CHRA stipulates:

> 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. (emphasis added).

[308] The Supreme Court of Canada decisions are binding and provide valuable information relevant to the case at hand. Additionally, section 50 (3) (c) of the CHRA allows the Tribunal to consider and accept any evidence and other information. However, the Panel finds this is insufficient to make such requested orders without supporting evidence. Additionally, as explained above, the case in front of the Tribunal focused on First Nations, not Métis peoples, Inuit or Self-identified First Nations persons. While the Panel believes that all children in Canada should receive the services they need, the case in front of the Panel is focused on First Nations. Consequently, the Panel does not make orders for this section, rather it provides some guidance relying on the case law and on Jordan's Principle's mechanism and purpose.

[309] This being said, in light of the above and international instruments that Canada has accepted, signed, signed and ratified, Canada has positive obligations towards all First Nations children whether they have *Indian Act* status or not and therefore, Canada must implement specific measures to protect children regardless of status. The Panel believes that the use of the term Indigenous Peoples is more reflective of the Principles protected by international law. Canada's domestic and international obligations are to ensure that all First Nations children have access to culturally appropriate and safe services and that the principle of substantive equality is upheld for all First Nations children regardless of status. Canada also has a domestic and international duty to its children wherever they live in Canada. The fact that other actors, including provincial actors, may be involved in the provision of the service is not a shield that Canada can use to avoid its own responsibilities to First Nations children under section 91(24) (see 2016 CHRT 2 at para.39). The Supreme Court of Canada also considered this historic disadvantage in the context of First Nations adults without *Indian Act* status in the criminal justice system in *R. v. Gladue* and *R. v. Ipeelee*. The Supreme Court of Canada supported the inference that, as compared to Canada's settler population, First Nations persons without *Indian Act* status also have greater needs.

[310] For the categories of children who lost *Indian Act* status or never received it due to Canada's discrimination, the Panel understands Canada's argument that they are presumably served by the provinces and territories and may not experience the same gaps,

delays and denials as those children on reserve if they are not considered to have *Indian Act* status.

[311] The difficulty here is that many First Nations have been deprived of eligibility for *Indian Act* status as a result of the discrimination found in this case. Some of them are parents who have lost connection with their First Nation, and have no *Indian Act* status. Their children are not eligible for *Indian Act* status. Those First Nations children possibly have the same higher needs, often above provincial normative standards, as on-reserve First Nations in terms of mental health, special needs education, Fetal Alcohol Syndrome, loss of connection, loss of culture, language etc. The intergenerational trauma was recognized by this Panel and forms part of the findings in this case. The Panel did find that intergenerational trauma experienced by First Nations children often causes those children to have higher needs.

[312] It is helpful to consider a hypothetical but plausible example given the evidence heard in this case and referred to above. This example involves a child without *Indian Act* status and who is not eligible for Indian Act status. However, this child is a First Nations child (for example, removed as a result of discrimination, third or fourth generation, etc.) who lost any connection to a First Nation. This child suffers mental health issues as a result of intergenerational trauma and racial discrimination. The province's normative standard is to offer children who suffer similar health issues 10 and exceptionally 12-15 sessions with a child psychologist. If the child requires 50 sessions instead of 15 because the trauma is linked to intergenerational trauma and being a First Nations child, an appropriate substantive equality analysis would result in the child receiving all 50 mental health sessions as recommended by professionals. Because the normative standard is 15 sessions, the province may require the parents of that child to seek the extra mental health through alternate means. The province may refer the child to the Federal Government for those extra services. The Federal Government under its current eligibility criteria may respond that the child does not have *Indian Act* status, there is no emergency and no life-threatening issue and, therefore, the child should obtain the services via the provincial system. This type of bouncing back and forth is precisely what Jordan's Principle aims to rectify. A lot of the service needs required by First Nations children regardless of *Indian Act* status are

connected to them being First Nations and requiring an Indigenous lens, culturally safe and appropriate services under a substantive equality analysis. If the service required is above normative standard because of intergenerational trauma for example, this service need cannot be disassociated from the nationality of the child regardless of how the government defines it.

[313] Moreover, Canada accepted the TRC report and committed to implement the 94 calls to action. The TRC report was filed in evidence as part of this claim and relied upon by the Panel on multiple occasions. Call to action number 20 is particularly instructive:

> In order to address the jurisdictional disputes concerning Aboriginal people who do not reside on reserves, we call upon the federal government to recognize, respect, and address the distinct health needs of the Métis, Inuit, and off-reserve Aboriginal peoples.

[314] Further, the Panel find the *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* to be relevant. Given that it was not released, and therefore not argued by the parties, at the time of the hearing, the Panel did not rely on it to make its findings. This being said, Canada publicly accepted the report therefore, the Panel simply highlights the report's call to justice 12.10:

> Adopt the Canadian Human Rights Tribunal 2017 CHRT 14 standards regarding the implementation of Jordan's Principle in relation to all First Nations (status and non-status), Métis, and Inuit children.

[315] Those standards include the definition and the substantive equality analysis that may require Canada to provide services above the normative standard when necessary to respond to the child's needs.

[316] The Panel agrees with the Caring Society that an exclusive focus on whether a First Nations child without *Indian Act* status lives off-reserve, as opposed to why that child lives off-reserve fails to recognize that the off-reserve residence of a First Nations child without *Indian Act* status may well be related to Canada's past discriminatory provision of services on-reserve. The Panel also agrees with the Caring Society that chronic and perpetual discrimination within the FNCFS Program also raises the spectre of cultural displacement and the Caring Society's appropriate characterization of the Panel Chair's observation at

the conclusion of the Panel's February 1, 2018 decision, that "[g]iven the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence," (see 2018 CHRT 4 at para. 452).

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

[318] The Panel finds that based on the above, Canada has a positive obligation towards "all First Nations children" regardless of *Indian Act* status or eligibility to *Indian Act* status.

[319] This may require additional funding and other resources to ensure the First Nations children protected by the Panel's orders, including those in this ruling which were based on the evidence in the record, continue to receive Jordan's Principle services in a sustainable manner for years to come.

[320] The Panel encourages Canada to implement specific measures and to be proactive and have those discussions in a timely manner to ensure all First Nations children in Canada have access to substantive equality.

VII. Orders

[321] Pursuant to section 53 (2) of the *CHRA*, the AFN, the Caring Society, the Commission, the COO, the NAN and Canada are ordered

1. to consult in order to generate potential eligibility criteria for First Nations children under Jordan's Principle and in considering the Panel's previous orders and clarification explained above in sections I and II and

2. to establish a mechanism to identify citizens and/or members of First Nations that is timely, effective and considers the implementation concerns raised by all parties. In considering the identification mechanism, discussions should also include the need

for First Nations to receive additional funds to respond and, in some cases build capacity, to answer Canada's identification requests for First Nations children. The mechanism should also include provision for additional and sustainable funding to account for the children who will now be included under Jordan's Principle.

[322] The parties will return to the Tribunal with their potential Jordan's Principle eligibility criteria and mechanism as ordered above by **October 19, 2020**. Until such time and until a final order (on consent or otherwise) is made by this Panel on this issue, the 2019 CHRT 7 interim ruling remains in effect.

[323] The Panel pursuant to section 53 (2) of the *CHRA* Canada is ordered

3. to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for Indian Act registration/status under S-3 implementation.

VIII. Retention of jurisdiction

[324] The Panel retains jurisdiction on all its Jordan's Principle orders including the orders above. Once the parties have drafted a potential Jordan's Principle eligibility criteria and mechanism as ordered above and returned to the Tribunal, the Panel will then revisit the need for further retention of jurisdiction on the issue of Jordan's Principle. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
July 17, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: July 17, 2020

Motion dealt with in writing without the appearances of the parties

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