Tribunal File No. T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Co-Complainants

- and –

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and –

ATTORNEY GENERAL OF CANADA
(representing the Minister of Aboriginal Affairs and Northern Development Canada)

Respondent

-and-

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

WRITTEN SUBMISSIONS OF THE ASSEMBLY OF FIRST NATIONS REGARDING THE DEFINITION OF "FIRST NATIONS CHILD" UNDER JORDAN'S PRINCIPLE

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Contents

I. OVERVIEW

1. In its Main Decision, 2016 CHRT 2, the Canadian Human Rights Tribunal (Tribunal) concluded that Canada's definition and inadequate implementation of Jordan's Principle amounted to a violation of s. 5 of the *Canadian Human Rights Act*, and ordered that Canada take the necessary steps to ensure Jordan's Principle is given its full meaning and scope. Recently, the scope of the application of Jordan's Principle has come into issue between Canada and the parties. The nature of the issue centers upon the definition of "First Nations child" under Jordan's Principle.

II. BACKGROUND

2. These submissions are filed pursuant to the Panel's direction in its letter dated March 11, 2019 requesting the Assembly of First Nations (AFN), Nishnawbe Aski Nation (NAN), Chiefs of Ontario (COO) and the Canadian Human Rights Commission (Commission) to file their submissions on the question of Jordan's Principle eligibility and the "First Nations child" definition.[1]

3. This issue is scheduled to be addressed at the upcoming March 27-28, 2019 hearing dates and it has been identified by the complainants and interested parties as one requiring Tribunal adjudication.[2] It is also a continuation from the First Nations Child & Family Caring Society's (Caring Society) motion for interim relief filed on December 5, 2018. That motion was for an order that Canada provide First Nations children living off-reserve who have urgent service needs, but do not have (and are not eligible for) *Indian Act* status, with the services required to meet those urgent service needs, pursuant to Jordan's Principle.[3]

4. The Panel heard this motion on January 9, 2019. On February 21, 2019, the Panel issued its decision, 2019 CHRT 7, granting the Caring Society's motion for interim relief.

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[1] Letter, JDubois to All Counsel re Parties Subs, Compensation, 2019 CHRT 7, dated March 11, 2019.
[2] Letter, DTaylor to JDubois re List of Outstanding Items, dated December 21, 2018. Among the issues identified for adjudication are: (1) the definition of "First Nations Child" under Jordan's Principle, (2) Major capital funding under the FNCFS Program, Jordan's Principle, and for First Nations child and family well-being, (3) Compensation for individuals under the FNCFS Program, (4) Compensation for individuals under Jordan's Principle, (5) Restitution for small First Nations Child and Family Services Agencies for downward scaling, and (6) Ongoing Tribunal supervision and accountability measures following the end of the Tribunal's supervision.
[3] Caring Society, Notice of Motion, para. 1, dated December 5, 2018.

In its decision, the Panel ordered Canada to provide, *inter alia*, First Nations children living off-reserve who have urgent service needs, but do not have (and are not eligible for) *Indian Act* status, with the services required to meet those urgent service needs, pursuant to Jordan's Principle.[4]

5. This interim relief order applies until a full hearing on the issue of the definition of a "First Nations Child" under Jordan's Principle is held and a final order is issued.[5] In its decision, 2019 CHRT 7, the Panel invited the parties to provide any suggested wording changes to the order to be submitted by March 7, 2019.[6] The Caring Society, COO and Canada have provided proposed amendments to the order. NAN submitted that it would not be seeking amendments to the order. [7] In response to the parties' proposed amendments, the Panel provided two options of amendments to its 2019 CHRT 7 order and requested the parties' comments and/or suggestions by March 22, 2019. The Panel's two options as presented remain to be addressed.[8]

6. The AFN previously submitted that it had no suggested wording changes to the order but that it would be participating in the March 27-28 hearings and making submissions toward a final order on the issue of the definition of a "First Nations child" under Jordan's Principle.[9] These submissions are below. However, the AFN is considering providing comment and suggestions on the two options of amendments to the Panel's 2019 CHRT 7 order, which will be provided within the March 22 deadline.

III. FACTS

7. The AFN relies on the facts as stated throughout the Panel's decision in 2019 CHRT 7 issued on February 21, 2019, and generally accepts facts as stated in the Caring Society's

[4] 2019 CHRT 7, paras. 87-93.
[5] 2019 CHRT 7, paras. 92.
[6] 2019 CHRT 7, paras. 93.
[7] For Canada, see letter, RFrater to JDubois re Changes to Order in 2019 CHRT 7, dated March 4, 2019, and letter, RFrater to JDubois re Amendments to 2019 CHRT 7, dated March 7, 2019, referring to Affidavit of Leila Gillis (Affirmed March 7, 2019). For COO, see letter, MWente to JDubois re Amendments to 2019 CHRT 7, dated March 7, 2019, also see letter, SDearman to JDubois Re Panels Feb 27 Letter & Band Rep Claims. For the Caring Society, letter, DTaylor to JDubois re Amendments to 2019 CHRT 7, dated March 8, 2019; For NAN, see letter, AMatthews to JDubois re Panels Feb 27 Letter & 2019 HCRT 7, dated March 8, 2019.
[8] Letter, JDubois to All Counsel Re Amendments to 2019 CHRT 7, dated March 15, 2019.
[9] Letter, TMilne to JDubois re Response to Para 93 in 2019 CHRT 7, dated March 7, 2019.

Notice of Motion at paragraphs 2 to 9, and paragraphs 11 through 18, with respect the Tribunal's decisions and orders in this matter.

IV. ISSUE

8. The AFN submits the issue to be determined is the definition of a "First Nations child" with respect to eligibility to receive services under Jordan's Principle.

9. At the centre of this issue is whether individuals who are non-registered Indians without status, and residing or ordinarily resident off reserve, should be eligible under Jordan's Principle.

10. The AFN seeks to assist the Tribunal by identifying how domestic law and principles of international human rights law establish citizenship as a core First Nation jurisdiction which must guide the definition of "First Nations child" under Jordan's Principle.

V. SUBMISSIONS

a. The Present Definition of "First Nations child" under Jordan's Principle

11. In the Panel's decision, 2019 CHRT 7, it was acknowledged that a definition of "First Nations child" has never been provided in this proceeding by the Tribunal, and no party has sought clarification on this definition until the Caring Society filed its motion in December 2018. And, there is currently no consensus among the parties, nor within the Consultation Committee on Child Welfare, on the definition of "First Nations child" for the purposes of implementing Jordan's Principle. The complexity of arriving at an acceptable definition which is non-discriminatory was determined by the Panel to be best addressed by way of a full hearing on the merits in consideration of several areas of applicable law and a multi-faceted analysis.[10]

12. Presently, the current definition of "First Nations child" used under Jordan's Principle is legislated and defined by the *Indian Act*.[11] In the past, this definition would

[10] 2019 CHRT 7, paras 20-22.
[11] Affidavit of Valerie Gideon (affirmed December 21, 2018), paras 8-25, 40-41.

typically require the applicant under Jordan's Principle to be a registered Status Indian pursuant to the *Indian Act* and residing on reserve.

13. According to the Affidavit of Dr. Valerie Gideon, it would appear that since June 2018, Canada approved the expanded eligibility of Jordan's Principle to non-status Indigenous children ordinarily resident on reserve. Under this expansion, as long as the applicant under Jordan's Principle was ordinarily resident on reserve, it did not matter whether or not the applicant was a registered Status Indian. The applicant could be non-Status and still receive services under Jordan's Principle. It should be acknowledged that, as a Federal policy, Canada has authority to expand Jordan's Principle coverage to any other group without an order from the Tribunal. For example, Canada had unilaterally adjusted Jordan's Principle to also include Inuit and Métis peoples, without informing the AFN about this change in policy direction. Similarly, the AFN was not informed nor consulted about the change in policy regarding "ordinarily resident on reserve".

14. Most programs delivered by Canada are for Status Band members on reserve. Other funding criteria can generally be divided into a few programs with no provincial equivalent that are available to all Status Band members regardless of residence such as post-secondary education, health, education, and social assistance programs. Generally, no program is designated as available to members without status, where such members exist, despite the concession that Canada made in June of 2018 in agreeing to apply Jordan's Principle to Indigenous children without status who are ordinarily resident on reserve.[12]

15. Dr. Gideon stated this approach of allowing non-status Indigenous children to receive services provided they also were ordinarily resident on reserve aligned with other eligibility requirements under other Federal programming for First Nations which are typically residency-based.[13] This approach also resolved any uncertainty regarding the definition/eligibility of a "First Nations child" for the purposes of Jordan's Principle.[14] Dr.

[12] David Schulze, Discussion Paper on First Nation control over citizenship and amendments to the Indian Act, December 17, 2018; Attorney General of Canada's CHRT submissions, para 23.
[13] Affidavit of Valerie Gideon (affirmed December 21, 2018), paras 14. See also, Canada's submissions re Jordan's Principle, dated January 29 2019, paras 22-25.
[14] Affidavit of Valerie Gideon (affirmed December 21, 2018), paras 14. See also, Canada's submissions re Jordan's Principle, dated January 29 2019, para 3.

Gideon's affidavit also provided suggested eligibility requirements in determining whether or not an applicant is "ordinarily resident on a reserve".[15]

16. This *Indian Act* definition of "First Nations child" has been criticized by the Caring Society as being under-inclusive, narrow and non-compliant with the Tribunal's orders, particularly with its decisions in 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16 and 2017 CHRT 14.[16] For example, and as pointed out by the Caring Society in its Notice of Motion, in 2016 CHRT 16, the Tribunal ordered Canada to immediately apply Jordan's Principle to all First Nations children, not only to those residing on-reserve.[17] Further, in 2017 CHRT 14, Canada was ordered to apply Jordan's Principle equally to all First Nations children, whether resident on or off reserve.[18]

17. The Tribunal found in 2019 CHRT 7 that an application of Jordan's Principle that relies too heavily on the *Indian Act* in determining eligibility is a "bureaucratic approach" that does not properly consider the needs or best interests of the child, and does not properly consider substantive equality in the analysis, and it is a means that has been linked with discrimination.[19]

18. Canada submits that it is conscious of the fact that First Nations people do not want Canada imposing a definition of who is a "First Nations child", and that, accordingly, Canada's focus is not on defining the expression at large, but rather on implementing the Tribunal's orders and remedying the discrimination that was identified in the complaint.[20]

19. In sum, the residency requirement for eligibility under Jordan's Principle has been expanded to include applicants residing both on and off reserve. Potentially, and provided an applicant resides anywhere in Canada, then an applicant may be eligible to receive services under Jordan's Principle. The AFN submits that, as a consequence of the expanded scope of the residency requirement, the remaining key determinant for eligibility under

[15] Affidavit of Valerie Gideon (affirmed December 21, 2018), paras 19-22.
[16] Caring Society, Notice of Motion, December 5, 2018.
[17] 2016 CHRT 16, para 160.
[18] 2017 CHRT 14, para 135.
[19] 2019 CHRT 7, para 73.
[20] Canada's submissions re Jordan's Principle, dated January 29, 2019, para 21.

Jordan's Principle is that the applicant be a "First Nations child". However, it remains to be addressed and determined "Who is a "First Nations child" under Jordan's Principle?"

20. Presently, there would appear to be no available criteria to make this determination because the *Indian Act* definition has been found to be too narrow and potentially discriminatory. In other words, no alternative eligibility currently exists to replace the narrow set of criteria under the *Indian Act*. According to the Caring Society, there has been no progress with respect to expanding the definition of "First Nations child" to include First Nations children who are not ordinarily resident on-reserve and who do not have *Indian Act* status. The result is that groups of First Nations children are accordingly excluded from Canada's application of Jordan's Principle.

b. Recent Amendments to Indian Registration

21. Until 1985, status under the *Indian Act* was determined exclusively by the male line. In 1985, the federal government amended the *Indian Act* through *Bill C-31*. The stated goal of the amendments was to make the *Indian Act* consistent with the right to equality protected by s. 15 of the *Charter*. As of that date, the rules were to be neutral with respect to gender or marital status.

22. In 2010, the federal government enacted *Bill C-3* to correct discrimination found in the *McIvo*r case, namely, the discrimination suffered by the children and grandchildren of an Indian woman who lost her status by marrying out, if her children married or had their own children outside marriage after 1985.

23. In 2017, Bill S-3 was introduced after the Superior Court of Quebec rendered its decision in the *Descheneaux*[21] case. It was determined by the Court that Indian registration (status) under Section 6 of the *Indian Act* unjustifiably violated equality provisions under s. 15 of the *Charter*.[22]

[21] *Descheneaux c. Canada (Procureur Général)*, 2015 QCCS 3555, [2016] 2 CNLR 175.
[22] "The Government of Canada's Response to the Descheneaux Decision", Indigenous and Northern Affairs – Government of Canada, online <https://www.aadnc-aandc.gc.ca/eng/1467227680166/1467227697623>.

24. All recent amendments to the *Indian Act* have focused on addressing sex-based discrimination only. However, other forms of non sex-based discrimination remain in the *Indian Act*.

25. The current Collaborative Consultative process being conducted by Crown-Indigenous Relations may address some of these non sex-based inequities, However, the larger issue will remain: that the *Indian Act* continues to violate the Indigenous right to self-determination. Whether in 1985, or 2010 or 2017, these piecemeal amendments have simply been corrections to bring the *Indian Act* in compliance with the *Charter*. Canada's mandate has never been self-determination focussed.

26. In light of Canada's commitment to reconciliation and Nation-to-Nation relationship building, as well as implementing *UN Declaration* and the Truth and Reconciliation Commission's Calls to Action, a shift in the jurisdiction is required. Rather than continuing to apply band aid solutions to the *Indian Act*, Canada must engage in full consultation and develop an exit strategy from the business of determining who is and isn't entitled to be legally recognized as a member of an Indigenous community.

c. UN Human Rights Committee re *McIvor*

27. In an email dated January 21, 2019, the Panel requested submissions on a recent UN Human Rights Committee Ruling regarding Sharon McIvor and Jacob Grismer.[23] The Committee Ruling concerns the entitlement to Indian status as First Nations descendants on the maternal line. In effect, the Committee Ruling is a continuation of the BCCA's decision in *McIvor*[24] issued in April 2009 concerning the constitutionality of s. 6 of the *Indian Act*. In that case, Sharon McIvor and her son, Jacob Grismer, argued s. 6 of the *Indian Act* violated their equality rights under s. 15 of the *Charter*[25] because s. 6 was alleged to discriminate on the basis of sex and marital status.

[23] United Nations, Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2020/2010.
[24] *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153.
[25] *Charter of Rights and Freedoms*, s. 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

28. Their claim was that Mr. Grismer should be given status equivalent to those who come under s. 6(1) of the *Indian Act*, so that he is able to pass on Indian status to his children despite the fact his wife is non-Indian. The fact that Ms. McIvor (his mother) was an Indian with status granted under s. 6(1)(c) of the *Indian Act*, and consequently Mr. Grismer's status being s. 6(2), the legislative scheme precluded him from passing his Indian status to his children. The complaint in *McIvor* is that Mr. Grismer's children would have Indian status if his Indian status had been transmitted to him through his father rather than through his mother.

29. The BCCA ruled in favour of the Ms. McIvor and Mr. Grismer having found that they were victims of ongoing and historic discrimination created from the previous legislation that had carried over into the 1985 *Indian Act*. The discrimination was found to be based on Ms. McIvor's sex and the distinction the *Indian Act* drew on this basis in comparison to a male cohort in the same genealogical circumstances (referred to as the "hypothetical brother"). The distinction was found to be discriminatory due to the unequal treatment between matrilineal and paternal descent to determine Indian status. The Court said the 1985 *Indian Act* was a *prima facie* infringement of s. 15 of the *Charter*.[26]

30. The AFN submits it is the remedy that is germane to this matter concerning the definition of "First Nations child". With respect to the remedy, the BCCA was reluctant to read-in new entitlements into s. 6 of the *Indian Act*, and even more reluctant to read-down the entitlement of the comparator group because those rights-holders were not represented before the Court. The BCCA found that in situations dealing with under-inclusive legislation, based on the reasoning in *Schachter*, a temporary declaration of invalidity was found to be appropriate rather than granting Mr. Grismer or his children Indian status. It found that "[i]n the end, the decision as to how the inequality should be remedied is one for Parliament". Accordingly, the BCCA declared ss. 6(1)(a) and 6(1)(c) to be of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*, and suspended the declaration for a period of one year to allow Parliament time to amend the legislation to make it constitutional.

[26] *McIvor*, 2009 BCCA 153. para 154.

31. Ms. McIvor and Mr. Grismer appealed to the Supreme Court of Canada. The remedy issued by the BCCA was an important aspect of the appeal. The remedy they initially sought – i.e. that Mr. Grismer should be entitled to transmit Indian status to his children despite having a non-Indian father and wife – was not granted. Their appeal to the SCC was denied in November 2009 without reasons.[27]

32. Shortly afterward, Parliament introduced Bill C-3 (*The Gender Equity in Indian Registration Act*)[28] amending the 1985 *Indian Act* in compliance with the BCCA's decision, as mentioned above, and later Bill S-3 in response to the *Descheneaux* decision.[29] The following year, on November 24, 2010, Ms. McIvor and Mr. Grismer submitted a complaint to the Committee.

33. Briefly, in *Descheneaux,*[30] the Quebec Superior Court faced the situation of addressing the fallout from *McIvor* when Parliament chose to amend the *Indian Act* in a restricted fashion and solely based on the circumstances related to Ms. McIvor and her son, Mr. Grismer, and persons in situations identical to theirs. As a result of Parliament failing to remedy all potential discrimination in Bill C-3 (*The Gender Equity in Indian Registration Act*)[31] in its amendments of the 1985 *Indian Act*, the *Charter* infringement arising in *McIvor* remained not fully addressed. As a result, discrimination continued to persist in the *Indian Act*.

34. Like *McIvor*, the discrimination in *Descheneaux* is also based on sex. However, in *McIvor*, the discrimination Mr. Grismer's suffered was related to his mother's loss of status. In *Descheneaux*, the discrimination is related to the plaintiff's grandmother's loss of status. The nature of the discrimination is the same as in *McIvor* and flows from the historically lower value placed by Parliament on an Indian woman's identity.[32] The Court in *Descheneaux* essentially followed the same reasoning in *McIvor* and came to the same

[27] *Sharon Donna McIvor and Charles Jacob Grismer v. Registrar, Indian and Northern Affairs Canada and Attorney General of Canada*, 2009 CanLII 61383 (SCC).
[28] *Gender Equity in Indian Registration Act*, SC 2010, c 18, in force on January 31, 2011.
[29] An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur general), SC 2017, c. 25 (assented December 12, 2017).
[30] *Descheneaux c. Canada (Procureur General)*, 2015 QCCS 3555.
[31] *Gender Equity in Indian Registration Act*, SC 2010, c 18, in force on January 31, 2011.
[32] *Descheneaux*, para 92.

conclusions that there was discrimination on the basis of sex in violation of equality rights under s. 15 of the *Charter*.[33]

35. A declaration was requested from the Court that the plaintiffs are entitled to be registered with s. 6(1) Indian status. The Court found that such a remedy would not be appropriate due to contextual factors, and the reliance that people have placed on the existing state of the law, and may affect the options available to the Federal government in remedying the *Charter* violation. Thus, it ruled that it is more appropriate that Parliament have sufficient room to maneuver when drafting the details of the provisions to remedy the discrimination, given the highly technical and complex nature of the *Indian Act*. It also ruled that it is not a role of the Courts to impose certain language, but rather to frame the issue for Parliament towards their work of remedying the discrimination. Thus, the Court declared sections 6(1)(a), (c) and (f) and s. 6(2) of the *Indian Act* as unconstitutional and inoperative, and suspended its declaration of invalidity for a period of 18-months [34]

36. Ultimately, the issue advanced by Ms. McIvor and Mr. Grismer in the Committee's Ruling was that the BCCA's declaration did not provide them with an effective remedy, and in particular, the delay in being granted an effective remedy.[35]

37. Bill C-3 did not accord Ms. McIvor and Mr. Grismer full s. 6(1)(a) status, even though the comparator group in the BCCA decision had s. 6(1)(a) status. Rather, Bill C-3 entitled Mr. Grismer status under 6(1)(c.1), not s. 6(1)(a) as originally sought. Thus, in addition to the ability to transmit status, there was an issue for McIvor and Grismer with the labelling of the various legislative provisions regarding Indian status.

38. The lack of an effective remedy was viewed as a continued failure on the part of Parliament to recognize their equality rights having not been granted status under s. 6(1)(a). As a result, they argued, *inter alia*, that they remained without full recognition of their inherent equality.[36]

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[33] *Descheneaux*, para 152 & 171.
[34] *Descheneaux*, para 224.
[35] Committee Ruling, para 2.12.
[36] Committee Ruling, para 3.5.

39. The BCCA showed in its decision a reluctance to provide an effective remedy to Ms. McIvor and Mr. Grismer. The hesitance of the Court would appear to be related to the complexities of entitlement to registration under the *Indian Act*, and the potential for overbreadth given the unknown impacts a potentially wide-sweeping order could create, among other things.[37]

40. In effect, the remedy that Canada was denied in the Trial Decision at the BCSC was granted to them in the BCCA's decision. At trial, Canada sought a suspension of any relief for a period of two (2) years to enable the registration process to continue and afford Parliament time to seek input from Aboriginal groups in its development and implementation of a scheme consistent with the Trial Judge's ruling. The Trial Judge disagreed with Canada's request for a remedy, stating that Canada's request must be measured against the backdrop of delays that Ms. McIvor and Mr. Grismer had already experienced, in addition to the period of time that successive governments recognized that the registration provisions discriminated on the basis of sex. The Trial Judge found that the Ms. McIvor and Mr. Grismer should not be told to wait any longer for their remedy.

41. The UN Human Rights Committee's Ruling reads as follows:

> "The 2009 decision of the British Columbia Court of Appeal and the subsequent denial of the Supreme Court of Canada of leave to appeal that decision have deprived the [McIvor and Grismer] of the remedy they obtained in the Trial Court. The only effective remedy will be one which eliminates the preference for male Indians and patrilineal descent and confirms the entitlement of matrilineal descendants, including of women who married out, to full section 6(1)(a) status."[38]

42. Canada and McIvor and Grismer disagreed over the effectiveness of the remedy granted by the BCCA. Canada argued that Bill C-3 answers their allegations. McIvor and Grismer asserted Bill C-3 and Bill S-3 still exclude from eligibility for registration status Aboriginal women and their descendants who would be entitled to register if sex discrimination were completely eradicated from the scheme.

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[37] *McIvor*, 2009 BCCA 153, paras 127-133 (emphasis added).
[38] Committee Ruling, para 3.11.

43. McIvor and Grismer seek to achieve full s. 6(1(a) status under the *Indian Act*. The underlying issue appears to be one of Canada's recognition of Aboriginal ancestry, or more specifically, the intangible benefits related to cultural identity, belonging, and the legitimacy and social standing of McIvor and Grismer with their peers. Their position is that s. 6(1)(a) status is superior and carries with it a certain social status, whereas individuals under s. 6(1)(c) are not "real" Indians.

44. The UN Human Rights Committee found that Bill S-3 provides answers to McIvor and Grismer's allegations through the proposed s. 2.1 referred to as "6(1)(a) all the way". However, there is no fixed dated when that amendment will come into force. McIvor and Grismer are concerned about there being no mechanism or provision stating when that provision will come into force, thus rendering it meaningless. As a result, they allege their situation of inequality is unchanged. Their fear is that legislative change will be bogged down by continued consultation by Parliament with Indigenous groups.

45. With respect to the merits, the UN Human Rights Committee found that that the *Indian Act* as amended in 1985, 2011 and 2017 still incorporates a distinction based on sex. As a consequence of Ms. McIvor being treated differently from her brother by not being able to transmit the same status in the same conditions, she has been stigmatized within her community and denied full opportunity to enjoy her culture in community with the other members of their Indigenous group. The Committee also found that the discriminatory distinction between members of the same community on the basis on sex can affect and compromise McIvor and Grismer's way of life. It wrote "…culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples, which may include such traditional activities as fishing and hunting."[39]

46. Despite the amendments to the *Indian Act*, the Committee found that the issue remained how recognizing equal status for McIvor and Grismer under s. 6(1)(a) would adversely affect the acquired rights of others. The Committee concluded that the continuing distinction based on sex in s. 6(1) of the *Indian Act* constitutes discrimination, which has

[39] Committee Ruling, para 7.10.

impacted the right of McIvor and Grismer to enjoy their own culture together with the other members of their group. It also concluded that Canada is under an obligation to provide them with an effective remedy, and that, accordingly, Canada is obligated, *inter alia*, (a) to ensure that section 6(1)(a) of the 1985 *Indian Act*, or of that Act as amended, is interpreted to allow registration by all persons including McIvor and Grismer who previously were not entitled to be registered under section 6(1)(a) solely as a result of preferential treatment accorded to Indian men over Indian women born prior to April 17, 1985; and (b) to take steps to address residual discrimination within First Nations communities arising from the legal discrimination based on sex in the *Indian Act*. Additionally, Canada is under the obligation to take steps to avoid similar violations in the future, and is to report to the Committee within 180-days with information about the measures taken to give effect to the Committee's views.[40]

d. Considerations for Establishing Criteria for "First Nations child"

47. It is helpful to unpack the term "First Nations". Essentially, two groups are captured under the term: (i) registered (or entitled to be registered) status Indians, and (ii) non-registered Indians without status. Section 6 of the *Indian Act* determines whether an individual is registered or entitled to be registered pursuant to listed criteria. The *Indian Act* is criticized for being discriminatory on the basis of sex, referring to the *McIvor* and *Descheneaux* decisions, amongst other criticisms, but it is currently the only legislation available to determine registration.

48. Registered and non-Registered Indians are separated by (i) those who reside on reserve and (ii) those who reside off reserve. Those who reside on reserve are governed by a First Nations government, its laws, and fall under federal jurisdiction. These individuals are typically a recognized "community member" and are included in the community's membership list, which may be maintained by either the community or Canada pursuant to the *Indian Act*, self-government agreement, or other legal means. As a member, these individuals may access programs and services offered by the First Nations government.

[40] Committee Ruling, paras 9-10.

49. Living in the community, contributing to the community, and immersion in the culture are examples of critical aspects for First Nations life on reserve, and those individuals who participate in community life are often included among the community membership.[41]

50. As mentioned above, at the centre of this issue is whether individuals who are non-registered Indians without status, and residing or ordinarily resident off reserve, should be eligible under Jordan's Principle. Currently, this group is not eligible pursuant to Canada's criteria because they do not reside on reserve. However, the interim relief order in 2019 CHRT 7 permits this group to access Jordan's Principle provided they have urgent and/or life-threatening needs.

51. Under Canada's criteria, Jordan's Principle is available to three distinct groups:

- Registered Status Indians residing on reserve;
- Registered Status Indians residing off reserve;
- Non-registered Indians without status residing on reserve (as of June 2018).[42]

52. The point here is that a connection to a First Nations community, such as to its membership, ought to be quintessential in determining the eligibility of individuals under Jordan's Principle who are non-registered Indians without status, and residing or ordinarily resident off reserve. The AFN submits this connection to a First Nations community's membership – in whatever manifestation it may exist – must be a key determinant in determining eligibility under Jordan's Principle.[43] The Panel has acknowledged this in the order however the question that arises is how should applicants who are non-registered Indians without status, and residing or ordinarily resident off reserve, be verified.

[41] Affidavit of Cindy Blackstock, affirmed December 5, 2018, Exhibit "E".
[42] Canada's Submissions re Jordan's Principle, dated January 29, 2019, para 1.
[43] See, Affidavit #3 of Doreen Navarro, sworn January 3, 2019, Exhibit "A" – Email dated August 29, 2018 from CBlackstock, "In addition, we believe that "All First Nations children" includes First Nations children resident off reserve who are not registered yet self-declare as First Nations (or parents/guardians do so on their behalf) AND are recognized by their First Nation."

53. There is some debate over how this should occur and it has been discussed at the CCCW.[44] The focus of this debate has been on the rights of the child, best interests of the child, addressing need, and the promotion of substantive equality. However, the AFN submits, there are also the rights of the First Nations community itself which must be weighed in this debate. First Nations communities have interests in this matter, which are communal in nature and constitutionally protected, and First Nations communities must be permitted to exercise without discrimination communally-held rights such as the right to self-determination and self-government, particularly in regard to matters that affect the community.

54. The AFN submits that eligibility under Jordan's Principle is one of those matters that affect First Nations communities. It is the AFN's position that the eligibility requirements of Jordan's Principle risks being too broad without a reasonable set of alternative eligibility criteria to replace the *Indian Act* and/or the residency-based criteria currently being used.

55. Dr. Gideon stated the following in her December 21, 2018 affidavit on the definition of "First Nations child":

> "The AFN has told me on numerous occasions that they are concerned with expanding the eligibility to include self-identified Indigenous children living off-reserve. I also agree with these concerns as it would be very difficult to verify Indigenous identity without some parameters of validation beyond an individual or parent claim. I will continue to work with First Nations leadership through the AFN to identify solutions to challenges we may identify concerning Jordan's Principle that relate specifically to the definition of who is a First Nations child. However, in the interim, Jordan's Principle is applying the definition as per the *Indian Act* and did expand eligibility to also include Indigenous children ordinary resident on reserve as a matter of policy and alignment with other ISC programs and in fulfillment of ISC's role and mandate."[45]

56. In its decision, 2019 CHRT 7, the Panel ordered Canada to provide, *inter alia*, Non-Status First Nations children (<u>who are not eligible for *Indian Act* status</u>) living off-reserve,

[44] Canada's Supplemental Record of Documents, dated January 29, 2019: Consultation Committee on Child Welfare – Meeting – Record of Decisions Final – October 23, 2018 – pg. 16 of 16.
[45] Affidavit of Valerie Gideon (affirmed December 21, 2018), para 41.

who are recognized as members by their Nation, and who have urgent service needs, with the services required to meet those urgent service needs, pursuant to Jordan's Principle.[46] With respect to the underlined portion, the AFN submits the potential exists that First Nations may face legal challenges by anyone who self-identifies as "First Nations" and assert that they should be recognized by their First Nation as a member. Secondly, the AFN is concerned that First Nations children who are registered Status Indians and reside on reserve, for example, may be denied services as a result of strained financial resources in Canada's budget, and consequently jeopardizing access to Jordan's Principle for this group of children. It should be acknowledged that the reality is budgets for programming directed at First Nations people are often capped and that they are not infinite in nature, and that an increase in the numbers of eligible individuals adds pressure to these budgets.[47]

57. As currently drafted, the interim relief order potentially opens up Jordan's principle to every Canadian that self-identifies as "First Nations", who have urgent or life-threatening needs, and recognized as a member of a First Nation, because residency in a reserve community is no longer a requirement for eligibility.

58. In the cross-examination of Mr. Sonny Perron on May 9, 2018, the AFN questioned Mr. Perron about the application of Jordan's Principle. Mr. Perron testified that prior to Jordan's Principle, non-Status and Métis individuals would be provided services funded by the provincial governments, and that there are no policies or legislation in the provinces and territories that exclude non-Status people from the application of provincial/territorial services.[48] Furthermore, with respect to the definition of "First Nations child", Mr. Perron added that Canada has operated under Jordan's Principle and the Child First Initiative with the understanding that a First Nations child is a child that is registered or entitled to be registered. He explained that most of the programs Canada operates are for registered Status Indians and Inuit populations, and to a lower degree, for urban Aboriginal people.[49]

59. The AFN submits that a child who does not have *Indian Act* status, and who does not reside on reserve, would normally have access to provincial or territorial health services

[46] 2019 CHRT 7, paras. 87.
[47] Cross-Examination of Mr. Sony Perron, May 9, 2018, pgs. 220-223.
[48] Cross-Examination of Mr. Sony Perron, May 9, 2018, pgs. 212-214.
[49] Cross-Examination of Mr. Sony Perron, May 9, 2018, pgs. 214-215.

and/or child and family services. By contrast, a child who is a registered Status Indian and resides on reserve, does not have the same or similar access to services. This dichotomy is based in jurisdiction under the *Constitution Act, 1867* and was explored in the main decision (2016 CHRT 2). Here, it ought to be a consideration in determining the definition of "First Nations child" under Jordan's Principle.[50]

60. The AFN would encourage the Panel to resist opening up Jordan's Principle to include all non-Status individuals as this will invite unintended consequences that may adversely impact First Nations children on reserve who are recognized by their First Nation as a member or citizen. It would appear that Jordan's Principle is enticing to non-Status individuals because it is based on an approach that includes addressing substantive equality, and thereby addresses the deficits in support and services that existed in the past, whereas the provinces and territories may not engage such an assessment. Mr. Perron touches upon this in his cross-examination, and adds that, as a practical option, allowing non-Status to be eligible under Jordan's Principle in the first instance, and then Canada seeking reimbursement from the provinces afterward in the event the applicant was indeed covered for services by the province or territory, is not necessarily a method that may work everywhere because the other government may see that Canada went way beyond what the province or territory would have covered otherwise.[51] Thus, opening up Jordan's Principle as a service of first instance has the potential to adversely impact First Nations children who regularly find themselves in a jurisdictional gap by straining financial resources that may or may not be recouped.

61. Dr. Gideon's affidavit states the following about coming to a determination on the definition of "First Nations child":

> "Defining "First Nations child" is a legal obligation that demands consultation with all First Nations across the country. It should be subject to a broader level of informed discussions as it will impact all programming, federally and provincially/territorially. As Jordan's Principle is about filling gaps in publicly funded services, the matter before us is one that will impact all programs. As such, it is my view that the Parties should continue working together through their own

[50] 2016 CHRT 2, paras 78-86, 87-110.
[51] Cross-Examination of Mr. Sony Perron, May 9, 2018, pgs. 224.

affiliations, including the AFN's Executive Committee, with the aim of reaching a consensus on this seminal issue outside the Tribunal process."[52]

62. Mr. Perron testified that there some First Nations have their own code (referring to Membership Codes) and determining who is First Nations might vary from one community to the other. Simply, there is diversity across the country, and that First Nations are a distinct group of with distinct priorities and rights. He also testified that he is not aware of any First Nation government asking or requesting that non-Status people be covered under Jordan's Principle. [53]

63. Indeed, there are First Nations children who are clearly within Federal jurisdiction pursuant to s. 91(24) by being registered Status Indians and residing or being ordinarily resident on reserve, and children who may choose their jurisdiction by, for example, self-identifying and residing off-reserve. The difference in access to services is substantial. Whereas the latter may choose to avoid the jurisdiction gaps in service delivery, the former rest firmly in the gap and historically have experienced discriminatory funding practices first-hand, which has resulted in adverse impacts on First Nations children and families on reserves. The AFN has submitted on the matter of "historic disadvantage", which is associated for example with Indian Residential Schools and Sixties Scoop, in previous submissions to the Panel.

64. To be clear, the AFN does take issue with individuals and their children who self-identify. In its motion, the Caring Society stated that "[e]xcluding First Nations who do not have *Indian Act* status and who are not ordinarily resident on-reserve discriminates against these children based on race, national or ethnic origin, contrary to section 5 of the *CHRA*."[54] The AFN generally agrees with this statement however it may not be appropriate to address the issue of non-Status Indians, Métis or Inuit individuals under this complaint, but instead such issue may require a new, separate complaint and separate evidentiary record.

65. A definition of "First Nations child" ought to consider as well the scope of the 2007 Complaint, which was issued for the benefit of First Nations children (citizens both on-

[52] Affidavit of Valerie Gideon (affirmed December 21, 2018), para 42.
[53] Cross-Examination of Mr. Sony Perron, May 9, 2018, pgs. 218-220.
[54] Caring Society Notice of Motion, para 21.

reserve and off-reserve) and in the Yukon, who were being discriminated against on the basis of race and/or national or ethnic origin, due to Canada's inequitable and insufficient funding and provision of child and family services. The Panel has identified First Nations children and families in need of child and family services on reserve as being a particularly vulnerable category of people.[55] Most, if not all, of the evidence provided to the Panel in this proceeding has been specific to registered Status Indians and their children. No evidence has been tendered to the Tribunal regarding discrimination against Inuit, Métis, non-Status, or individuals that self-identify.[56] First Nations citizens, including children on-reserve and those recognized under the Yukon Self-Government Agreements ought to remain the focus in determining the definition of "First Nations child".[57]

66. 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*. 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.

67. 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.

68. The application ought to proceed on the presumption that there is a connection to a First Nations community, so if the First Nations community doesn't respond, then the application is undisturbed. Under this presumption, the Canada's logistical and operational

[55] 2016 CHRT 2, para 105.
[56] See, Canada's Submissions re Jordan's Principle, para 37.
[57] See, Canada's submissions re Jordan's Principle, dated January 29, 2019, para 30.

concerns about "recognition as a member by their nation" are sufficiently addressed.[58] 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 services ought to be offered.

69. The AFN will be offering amendments to the options presented by the Panel in its March 15th letter.[59]

e. First Nations Jurisdiction on Citizenship as an Aboriginal Right

70. It is the AFN's position that First Nations' human rights and inherent rights to self-determination and self-governance demand that any attempt to define a "First Nation child" requires an analysis of First Nation citizenship as a core jurisdiction of First Nations, supported both by international and domestic law. Unless significant deference is made to this core jurisdiction, attempts to delineate what constitutes a First Nations child for a limited purpose such as that proposed by Canada, which continues to emphasize principles derived from the *Indian Act*, are arguably an extension of the racist, oppressive and colonial practices exerted by Canada and inherent in its programs and systems.

71. The AFN submits that the ability of First Nations to determine citizenship is a basic human right of paramount importance which predates colonialization which First Nations have exerted since time immemorial. Attempting to define a "First Nation child" goes to the heart of the issue of citizenship, no matter the programming at issue or representations that said definition is for a limited purpose. The AFN also submits the issue of citizenship is an aboriginal right, constitutionally protected by virtue of s. 35(1) of the *Constitution Act, 1982* and a part of First Nations inherent rights to self-determination and self-governance, as informed and supported by international law, more particularly the *United Nations Declaration on Rights of Indigenous Peoples* (the *"UN Declaration"*).[60] As a result, the

[58] Affidavit of Leila Gillis, affirmed March 7, 2019, paras 5-9.
[59] Letter, JDubois to All Counsel Re Amendments to 2019 CHRT 7, dated March 15, 2019.
[60] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15 ["***UN Declaration***"].

Tribunal's decision as to the definition of a "First Nation child" for the purpose of the applicability of Jordan's principle must be informed by and emphasize said jurisdiction.

72. In addition, the Tribunal must remain wary of an over-expansive definition of a "First Nation child" as suggested by the Caring Society. Without proper First Nation input and deference to First Nation jurisdiction over citizenship, it could undermine the purpose behind Jordan's Principle, being ensuring the delivery of services to First Nations who have faced discrimination by Canada in the delivery of health-related services and gaps in services derived from inter-governmental funding disputes.

73. First Nations across Canada have their own laws, languages, citizens, territories, and governance systems. First Nations are *Peoples* under international law and hold the right to self-determination under international conventions, customary international law and the *UN Declaration*. Their relationships with the Crown are founded on inherent rights, as well as historic treaties, the numbered treaties, self-government agreements, and other arrangements.

74. Although the Supreme Court of Canada has to date generally grounded the modern interpretation of Aboriginal rights in the context of "continuity", being rights that predate European contact, the AFN submits that reconciliation of First Nation interests requires that the construction of s. 35(1) must instead be grounded by the "living tree" doctrine. As per the Supreme Court, "our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."[61]

75. The AFN submits the issue of First Nation citizenship as a core First Nation jurisdiction is grounded in First Nation pre-colonial practices, being a right of First Nations people practiced since time immemorial. Further, in addressing the modern realities of Crown/First Nation relations, including the applicability of Jordan's Principle, the living tree doctrine requires that it give due deference to First Nation citizenship being a core First Nation jurisdiction entrenched as an Aboriginal right by virtue of s. 35(1) in the *Constitution Act, 1982*.

[61] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 22.

76. This is supported by the Royal Commission on Aboriginal Peoples which 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.[62]

77. Attempts at limiting the scope of a "First Nation child" on the basis of colonially derived preconceptions of status Indian pursuant to the *Indian Act*, instead of deferring to First Nation concepts of citizenship and membership, flies in the face of First Nations domain over this area. Section 91 of the *Constitution Act, 1867* did not delineate that status Indians or those resident on reserves were under the domain of Canada, and therefore entitled to the benefits of its services but in fact entailed "Indians, and Lands reserved for Indians" fell under federal jurisdiction.

f. Honour of the Crown

78. The AFN submits the Constitutional Principle of the Honour of the Crown supports First Nation jurisdiction over citizenship be accorded significant deference by Canada and the Tribunal in defining what a "First Nation child" means under Jordan's Principle.

[62] *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship*, text preceding Recommendation 2.3.8.

79. Per the Supreme Court in *Mikisew*, the Honour of the Crown is a foundational principle of Aboriginal law governing the relationship between the Crown and Indigenous peoples. Its underlying purpose is the reconciliation of Crown and Indigenous interests.[63]

80. The Honour of the Crown is acknowledged as a principle governing Crown conduct since at least the *Royal Proclamation of 1763*, through which the British asserted sovereignty over what is now Canada and assumed *de facto* control over land and resources previously in the control of Indigenous peoples.[64] Facilitating the reconciliation of these divergent interests remains the fundamental objective of the Honour of the Crown and is a first principle of Aboriginal law.[65]

81. The Supreme Court in *Haida*[66] in discussing this principle reiterated that in all dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims, the Crown must act honourably and that nothing less is required if the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown is to be achieved.[67]

82. The Supreme Court in *Mikisew* confirmed that determining what constitutes honourable dealing, and what specific obligations are imposed by the Honour of the Crown depends heavily on the circumstances faced by the court in effect acknowledging that the Honour of the Crown is not static, but an evolving principle which at its root is meant for the reconciliation of the divergent interests of First Nations and the Crown. [68]

83. Honourable dealing with First Nations in the context of this case suggest the Crown must do more than rely on its past funding models tied to registration and status derived under the terms of the *Indian Act* for the purpose of applying Jordan's Principle, and instead ensure First Nation participation in identifying their children's eligibility based on their inherent rights to establish citizenship on a community-by-community basis.

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[63] *Mikisew Cree First Nation v. Canada (Governor General in Council*), [2018] S.C.J. No. 40 at para. 21.
[64] *Mikisew Cree First Nation v. Canada (Governor General in Council*), [2018] S.C.J. No. 40. at para. 21.
[65] *Mikisew Cree First Nation v. Canada (Governor General in Council*), [2018] S.C.J. No. 40. at para. 22.
[66] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70.
[67] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70. at para 17.
[68] *Mikisew Cree First Nation v. Canada (Governor General in Council*), [2018] S.C.J. No. 40 at para 24.

g. The United Nations Declaration on the Rights of Indigenous Peoples

84. The AFN submits Canada must defer to First Nations and their jurisdiction over citizenship in its application of Jordan's Principle by virtue of Canada's commitments to adhere to the terms of the *UN Declaration* as part of the reconciliation process and other international obligations.

85. Canada has publicly represented that it is committed to implementing the *UN Declaration* "without qualification"[69] and undertaken formal plans to implement the *UN Declaration* in accordance with the Canadian Constitution with the aim of imbedding these international standards into Canada's domestic sphere.[70]

86. The Truth and Reconciliation Commission of Canada has called implementation of the *UN Declaration* "the framework for reconciliation at all levels and across all sectors of Canadian society." As previously noted, as the Supreme Court of Canada has identified that reconciliation is the "fundamental objective of the modern law of aboriginal and treaty rights," it is incumbent on Canada to take into consideration these fundamental principles.[71]

87. The recognition of these international principles in terms of domestic law and concurrent jurisdiction of the Tribunal to consider the same is further supported by the Supreme Court of Canada who noted in *Hape* that "it is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law principle".[72] The Supreme Court in interpreting the scope of the application of the *Charter of Rights and Freedoms,* stated in said case 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[73]

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[69] Minister of Indigenous and Northern Affairs Carolyn Bennett, "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, May 10, 2016.
[70] Bill C-262. https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=8160636&Language=E
[71] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para 1.
[72] *R. v. Hape,* [2007] 2 S.C.R. at para. 53.
[73] *R. v. Hape,* [2007] 2 S.C.R. at para. 56.

88. The *UN Declaration* recognizes First Nations inherent right to self-determination and that by virtue of this right "they freely determine their political status and freely pursue their economic, social and cultural development" Further, the *UN Declaration* states that First Nations in exercising this right of self-determination, have the right to self-government in matters relating to their local affairs, as well as ways and means of financing these autonomous functions.[74]

89. The AFN submits the Panel ought to consider that First Nations are autonomous, distinct, independent and self-governed communities, and as such, there is an element of self-determination with respect to the definition of "First Nations Child" to include in the analysis of determining this definition.

90. Self-determination is an expression of self-government which is an inherent right protected by s. 35 of the *Constitution Act, 1982*.[75] Self-determination is about protecting the freedom of Indigenous peoples in Canada to choose the pathways that best express their identity, their sense of themselves, and the character of their relations with others. Self-determination is the power of choice in action, and it is largely considered a fundamental right grounded in the identities of Indigenous peoples as distinct, independent and sovereign nations, and premised upon their recognition *as a people* in determining citizenship and entitlement.

91. Articles 2 and 3 under the *UN Declaration* protect self-determination. Article 2 states "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity." And, Article 3 states "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

92. Defining who is "First Nations" is a difficult task. Firstly, the term is not about capturing a race of people from particular areas of Canada, but rather organic

[74] *UN Declaration*, Articles 3 and 4.
[75] See, *Mitchell v. Minister of National Revenue* (2001), 2001 SCC 33, para 164.

political/cultural groups of people. Secondly, "First Nations" are not one homogenous group, but rather is a term to describe over sixty-three Indigenous Nations who have distinct cultures, languages, traditional territories and histories. Thirdly, the definition of First Nations is continually evolving as a result of First Nations exercising, applying and implementing their inherent and respective jurisdictions. In sum, "First Nations" is a politically and culturally loaded term that escapes pure definition.

93. The AFN submits that an approach to defining "First Nations child" should incorporate the viewpoints of the First Nations communities. In other words, a "top-down" approach where a definition is imposed on First Nations people ought to be avoided. Unfortunately, this is an approach typically advanced by Canada in its dealings with First Nations communities in delivering programs and services. Instead, the communities who administer the Federal funding and provide child and family services ought to be empowered and operate under their own specifically tailored definition of "First Nations child". In this way, the inherent right to self-determination is protected.

94. Defining who is a "First Nations child" should be deferred to the First Nations communities who deal with child and family services. It should involve some level of consultation and deference to these bodies, and the task may be properly delegated to these bodies to deal with at the grassroots level. It should be acknowledged that this is an area currently evolving pursuant to the fairly recent *Descheneaux*[76] decision which was issued on August 3, 2015 by the Quebec Superior Court. The whole system of entitlement to registration under the *Indian Act* is presently changing, and this should be considered by the Panel in this particular matter.

95. In regards to First Nations core jurisdiction over citizenship, the *UN Declaration* specifically recognizes the right of indigenous peoples to belong to indigenous communities and to determine their own membership. Article 9 provides that:

> Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the

[76] *Descheneaux c. Canada (Procureur General)*, 2015 QCCS 3555 (CanLII).

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

96. Article 33 further elaborates on this core jurisdiction at subsections 1 and 2:

> [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.[77]

h. Self-government Agreements

97. A number of First Nations exercise jurisdiction over citizenship and membership through self-government agreements. In 1993, the Council of Yukon First Nations (CYFN) signed an Umbrella Final Agreement (UFA) with Canada and the Yukon territorial government pursuant to which each of the 14 Yukon First Nations may conclude a land claim agreement and self-government agreement. Since the UFA came into effect in 1995, 11 of the First Nations have signed Final Agreements and Self-Government Agreements, which means they have settled their land claims and are no longer under the *Indian Act*.

98. The Yukon First Nation Final Agreements allow for enrollment as a beneficiary if an individual who can meet one of the following criteria:

i. is "of 25 percent or more Indian ancestry" and was "Ordinarily Resident" in the Yukon no later than January 1, 1940, where "Ordinarily Resident" means a has lived the majority of his or her life in the Yukon Territory;
ii. a direct descendant or an adopted child of a such a person, whether that person is living or deceased; or
iii. "is determined by the Enrollment Commission in its discretion, and upon consideration of all relevant circumstances, to have a sufficient affiliation with that Yukon First Nation so as to justify enrollment," but only if he or she is a Canadian citizen and only upon application within two years of the applicable Yukon First Nation Final Agreement coming in force.[78]

[77] *UN Declaration*, Article 33.
[78] Umbrella Final Agreement, ss. 3.2.2 and 3.2.3.

99. The UFA explicitly states that membership in a Yukon Indian Band under the *Indian Act* did "not necessarily result in eligibility" for enrollment as a beneficiary.[79] As a result, the Yukon Final Agreements specified that enrollment as a beneficiary did not entail the right to registration under the *Indian Act*.[80]

100. The UFA also provided that Yukon self-government agreements could recognize the power to adopt Yukon First Nation Constitutions that would define "membership."[81] Yukon First Nations actually refer to membership as "citizenship," which is determined under codes they adopt but the self-government agreements require that all beneficiaries must be included as citizens.[82]

101. The result the operation of the UFA is there are three different lists of members: one under the *Indian Act*, another for beneficiaries and the third for citizens. These three lists do not necessarily align with each other.

102. Participating Yukon First Nations must negotiate Programs and Services Transfer Agreements with the federal government. These are based on *Indian Act* registration, not beneficiary status or citizenship in the First Nation, with result. The result, as one scholar pointed out, is responsibility for citizens without funding for them:

> [Yukon First Nations] observe that under the Indian Act the money that Canada spent on First Nations programs and services only funded their provision to "registered Indians." However, as noted above, First Nations count among their citizens many people who are not registered Indians in terms of the particular criteria that Canada requires individuals to satisfy in order for them to be recognized as belonging to this category. The First Nations view these non-registered people as citizens by virtue of family relationship or cultural affinity. The problem that arises from the First Nations' new control over defining their membership is that Canada has not given them additional funds to cover the extra cost they bear in delivering programs and services to a larger number of people than before. Canada has not increased its funding levels in the face of these arguments. It simply will not accept an open-ended approach to First Nations citizenship, or increase funding until

[79] JBNQA, sub-para. 3.5.4 c); Umbrella Final Agreement, ss. 3.2.4.
[80] Umbrella Final Agreement, ss. 3.2.4 and 3.2.7.
[81] Umbrella Final Agreement, s. 24.5.1.2.
[82] Yukon First Nations Statistics Agency, Final Report, July 2015, Appendix C: Enrollment Reference Manual, pp. 4-5, 18. https://sgsyukon.ca/wp-content/uploads/2014/01/Appdx-C_Enrollment.manual.25May15.pdf

> Yukon First Nations have attained particular targets in terms of social well-being. To commit to these approaches would be to sign a blank cheque whose ultimate cost would be unpredictable and possibly unsustainable. However, INAC's regional staff do acknowledge the First Nations' critique of Canada's funding policies as a substantial and ongoing issue.[83]

103. The First Nations Summit has pointed out that First Nations with modern treaties in British Columbia face the same problem "…of Citizens for whom they are responsible, but receive little or no funding" which "will be particularly problematic for First Nations that are heavily reliant on federal funding.[84]

i. Other International Considerations

104. Other international treaties to which Canada is a party further emphasize that First Nations should be provided with sufficient authority to preserve cultural autonomy and self-government, including the *International Covenant on Civil and Political Rights*,[85] in articles 25 (participation in public life) and 27 (a minority's right to enjoy its language and culture). Further, Canada is a party to the *Convention on Rights of the Child*, which recognizes Indigenous children's right to preserve their identity without interference and with an onus on member States to provide appropriate assistance and protection to those deprived of said identity.[86] It further provides First Nations with protection against being deprived of the right to enjoy their culture, language and religion.

j. Treaty Concepts

105. The AFN submits that Indigenous people comprise sovereign nations that possess the inherent jurisdiction to exercise exclusive control over membership. The right to determine citizenship is an integral component of "pre-existing sovereignty" which was historically exercised by Indigenous nations and continues to be done through traditional Indigenous legal systems. In exercising their self-determination, many Frist Nations entered into the Numbered Treaties with the Crown.

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[83] Dacks, "Implementing First Nations Self-Government in Yukon: Lessons for Canada," p. 680.
[84] First Nations Summit, *We Know Who We Are and We Lift Up Our People*, p. 10.
[85] *International Covenant on Civil and Political Rights* Can. T.S. 1976 No. 47.
[86] *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 article 8.

106. Treaties were negotiated with the intent that any benefit arising from the Treaty would be enjoyed by their descendants, "so long as the sun shines, the grass grows and the rivers flow." These benefits would include education, health/medicine, the right to continue their self-determination and sovereignty, and remain connected with their traditional territories. At no point were treaty entitlements were to be tied to "Indian Status", the double mother rule, or the second-generation cut off rule.

107. Rather the right to belong to one's nation, people, family and culture were enshrined in the numbered treaties. This treaty relationship continues to this day as many First Nation in the Number Treaty Areas still refer to themselves as "Treaty Indians".

108. The AFN submits that this Treaty aspect must also inform discussion on the definition of a "First Nation child".

k. AFN Reply to Congress of Aboriginal Peoples Factum

109. On March 19, 2019, the AFN responded to the Congress of Aboriginal Peoples (CAP) submissions to the Panel regarding the scope of the eligibility and/or effectiveness of remedies under Jordan's Principle for non-status First Nations children living off-reserve. Briefly, the AFN submitted that CAP failed to abide by the Panel's direction and that CAP's submissions are repetitive of the Caring Society's submissions dated February 4, 2019 regarding the definition of "First Nations child". To reiterate, the AFN submitted CAP's request to be engaged and resourced in order to participate on a consultation basis to current discussions on reform and remedies be denied, and that CAP's involvement be limited to its written submissions filed on March 13th.[87]

VI. CONCLUSION

110. Further to Canada's constitutional responsibilities to First Nations on the basis of the principle of the honour of the Crown; the entrenchment of citizenship as a s. 35(1) Aboriginal right; and Canada's international obligations, the applicability of which being supported by domestic law, Canada has failed to comply with the spirit of the Tribunal's order by failing to establish a definition of a "First Nation child" which incorporates and

[87] Letter, TM to JDubois re Response to CAPs Subs, dated March 19, 2019.

defers to First Nation jurisdiction in the area of citizenship. Canada's continued application of registration as a status Indian and residency on reserve as the determining factors for the delivery of Jordan's Principle is merely an extension of the racist, oppressive and colonial practices exerted by Canada since colonialization, which remains inherent in its programs and systems. Any decisions with respect to the notion of who a "First Nation child" is, no matter the programming at question, must be done with due regard to First Nations inherent authority on this point.

111. Further, the Caring's Society's proposed expansion to Jordan's Principle to non-status children living-off reserve also fails to address the key consideration of First Nation jurisdiction. Without due deference being given to this jurisdiction and First Nations constitutional right to determine citizenship, the proposed definition could have the effect of undermining the core purpose of Jordan's Principle, being supporting disadvantaged and underserviced First Nation children, as endorsed by their First Nation communities.

[Next Page]

VII. ORDER REQUESTED

112. A finding that Canada is in non-compliance with the Tribunal's order by failing to give due consideration to First Nation jurisdiction in the area of citizenship in limiting its eligibility to three (3) previously discussed criteria and that equally, the Caring Society's proposed definition to include non-status children living off-reserve is too expansive and fails to give consideration to First Nation jurisdiction in the area of citizenship and the concurrent right to determine whom should be viewed as a "First Nations child."

113. The AFN requests the following additional Declaration and Orders:

i. A final order that Jordan's Principle should apply to the following groups, pending a final ruling on the definition of a "First Nation Child":
    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;
    d. Individuals covered under a self-government agreement; and

ii. Relief requested by the Caring Society regarding Inuit, Métis, and Non-Status individuals be dismissed, on the understanding that these groups are entitled to file their own unique human rights complaint based on Jordan's principle.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: March 20, 2019

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NAHWEGAHBOW, CORBIERE
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VIII. LIST OF AUTHORITES

	PRIMARY SOURCES
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2.	*Canadian Charter of Rights and Freedoms*, s. 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
3.	Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Session, 42nd Parliament, Canada, December 3, 2015, Senate Second Reading.
4.	*Gender Equity in Indian Registration Act*, S.C. 2010, c. 18, formerly Bill C-3.
	Jurisprudence
5.	*Descheneaux c. Canada (Procureur Général)*, 2015 QCCS 3555.
6.	*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.
7.	*McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153.
8.	*Mikisew Cree First Nation v. Canada (Governor General in Council*), 2018 SCC 40.
9.	*Mitchell v. M.N.R.*, [2001] 1 SCR 911, 2001 SCC 33
10.	*Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79
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13.	United Nations, Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2020/2010.
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14.	*United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.
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18.	Canada, Indigenous and Northern Affairs Canada, *The Government of Canada's Response to the Descheneaux Decision*, online https://www.aadnc-aandc.gc.ca/eng/1467227680166/1467227697623
19.	Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*. Vol. 2: *Restructuring the Relationship*, (Ottawa 1996), pgs. 224-227.

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22.	Yukon First Nations Statistics Agency, Final Report, Self Government Secretariat, Council of Yukon First Nations, July 2015, Appendix C: Enrollment Reference Manual, pp. 4-5, 18. https://sgsyukon.ca/wp-content/uploads/2014/01/Appdx-C_Enrollment.manual.25May15.pdf
23.	Gurston Dacks, "Implementing First Nations Self-Government in Yukon: Lessons for Canada", (Cambridge University Press, 2004), published online March 3, 2005, p. 680, online: https://nwlc.ca/files/NWLC/resources/Dacksyukonself-government.pdf
24.	First Nations Summit submission to AANDC on the Bill C-3 Exploratory Process Regarding First Nations Citizenship, Band Membership and Registration, *We Know Who We Are and We Lift Up Our People*, (December 30, 2011), p. 10, online: http://fns.bc.ca/wp-content/uploads/1970/01/60678_FNS_Citizenship_V3R2_f__web.pdf

First Nations Child and Family Caring Society, *et al*	and	**Attorney General of Canada**	Tribunal File: T1340/7008
Co-Complainants		Respondent	

CANADIAN HUMAN RIGHTS TRIBUNAL

Written Submissions of the Assembly of First Nation regarding the Definition of "First Nations child" under Jordan's Principle (Returnable March 27-28, 2019)

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