Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 7
Date: February 21, 2019
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 and Edward P. Lustig

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I. Context

[1] The Complainants, the First Nations Child and Family Caring Society (the Caring Society) and the Assembly of First Nations (the AFN) have 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 ethnic origin, contrary to section 5 of the *Canadian Human Rights Act,* RCS 1985, c H-6 (the *CHRA*).

[2] In a decision dated March 14, 2011 (see 2011 CHRT 4), the Tribunal granted a motion brought by the Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada) (INAC), for the dismissal of the Complaint on the ground that the issues raised were beyond the Tribunal's jurisdiction (the jurisdictional motion). That decision was subsequently the subject of an application for judicial review before the Federal Court of Canada.

[3] On April 18, 2012, the Federal Court rendered its decision, *Canada (Human Rights Commission) v. Canada (Attorney General*), 2012 FC 445 (Caring Society FC), setting aside the Tribunal's decision on the jurisdictional motion. The Federal Court remitted the matter to a differently constituted panel of the Tribunal for redetermination in accordance with its reasons. The Respondent's appeal of that decision was dismissed by the Federal Court of Appeal in *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (Caring Society FCA).

[4] In July 2012, a new Panel, composed of Sophie Marchildon, as Panel Chairperson, and members Réjean Bélanger and Edward Lustig, was appointed to re-determine this matter (see 2012 CHRT 16). It dismissed the Respondent's motion to have the jurisdictional motion re-heard, and ruled the Complaint would be dealt with on its merits (see 2012 CHRT 17).

[5] 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 *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*.

[6] In the *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, INAC was ordered to immediately implement the full meaning and scope of Jordan's Principle (see the *Decision* at paras. 379-382, 458 and 481). The *Decision* and related orders were not challenged by way of judicial review.

[7] Three months following the 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.

[8] 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). Again, the ruling and related orders were not challenged by way of judicial review.

[9] 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.

[10] 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.

[11] 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.

[12] 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). This third ruling was also not challenged by way of judicial review.

[13] 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 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 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).
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> 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 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 Decision at paras. 399-427), (see 2017 CHRT 14, at para.69).
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> 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).

> This potential gap in services was highlighted in the Pictou Landing Band Council v. Canada (Attorney General), 2013 FC 342 case and in the 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 Decision (see 2017 CHRT 14, at para.72):
>
> In her own recent comprehensive research assessing the health and well-being 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). (see 2016 CHRT 2 at para. 421).
>
> 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 2016 CHRT 2 at para. 422).

[14] 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 *Decision*, which findings Canada accepted and did not challenge. The discrimination found in the *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 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).

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 2017 CHRT 14, at para.75).

[15] 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 *Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the *Decision*, especially with respect to allocating dedicated funds and resources to address some of these issues (see *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 *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 *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).

[16] The above will also inform some of the reasons in this ruling.

[17] 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.

[18] 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 some aspects of the orders on consent of the parties and 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.

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

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).

[20] 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 now. To be fair, on this issue, the Panel believes that it should focus on ensuring its remedies are efficient in light of the evidence before it and, in the best interests of children, more than on Canada's compliance.

[21] The parties who have been discussing the issue outside the Tribunal process have not yet reached a consensus on this issue. Therefore, the adjudication of the compliance with this Tribunal's orders of Canada's definition of "First Nations child" for the purposes of implementing Jordan's Principle is now being requested by the Caring Society.

[22] Upon consideration, the Panel believes the issue of a "First Nations child" definition is best addressed by way of a full hearing. The Panel Chair has 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 ("UNHRC") *McIvor Decision* findings that sex discrimination continues in the *Indian Act*, 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*. Additionally, 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.* 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 will be addressed by all parties.

[23] 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, 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.

[24] 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 2016 CHRT 2 (the *Decision*)].

[25] 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.

[26] 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 for 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.

II. Motion for relief

[27] The Caring Society, makes a motion for further relief to ensure that this Tribunal's Orders of January 26, 2016 (2016 CHRT 2), April 26, 2016 (2016 CHRT 10), September 14, 2016 (2016 CHRT 16) and May 26, 2017 (2017 CHRT 14) are effective, specifically regarding the definition of "First Nations Child" in those orders. This motion is made under Rule 3 of the Canadian Human Rights Tribunal Rules of Procedure, pursuant to Rules 1(6), 3(1), 3(2), and 5(2), and pursuant to the Canadian Human Rights Tribunal's continuing jurisdiction in this matter. The proposed motion will be heard orally. The Caring Society submits that the motion is for:

> An order that, pending the adjudication of the compliance with this Tribunal's orders 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 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.

[28] The Tribunal heard the parties' submissions on the motion for relief on January 9, 2019 and took the matter under reserve.

A. Summary of the parties' positions

[29] In sum, the Caring Society contends that Canada's failure to seek direction from the Tribunal or to take measures to address urgent requests from First Nations children who do not have *Indian Act* status and who are not ordinarily resident on-reserve risks undermining the effectiveness of the Tribunal's orders by risking irremediable harm to these children.

[30] In November 2018, the Caring Society intervened to pay for medical transportation for a young First Nations child without *Indian Act* status who required a medical diagnostic service 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.

[31] The AFN submits, the Caring Society's motion raises questions of "First Nations children" that are entitled to benefit from Jordan's Principle and whether that includes non-status Indians. This in turn raises the issue of First Nations citizenship. The issues of First Nations children and citizenship go to the heart of First Nations jurisdiction and self-determination. The AFN takes these issues very seriously, as demonstrated by the AFN Resolutions attached as exhibits to the Affidavit of Cindy Blackstock affirmed December 5, 2018, and filed in support of the Caring Society's motion.

[32] The AFN takes the position that the questions raised in this interim motion deserve a full hearing before the Tribunal prior to any decisions are made that have the potential for far-reaching implications on First Nations and their jurisdictions.

[33] Nevertheless, the AFN is mindful of the concerns raised by the Caring Society's motion, particularly in that irreparable harm could be caused to innocent children who might be denied the benefits of Jordan's Principle. Accordingly, the AFN does agree, in part, with the Caring Society's motion for interim relief. The AFN suggested interim solutions with possible parameters should the Tribunal decide to grant the Caring Society's motion. This will be discussed later.

[34] Moreover, the AFN notes that the Panel indicated awareness of and sensitivity to the issue of First Nation self-determination in its previous Decisions. The AFN respectfully requests that the Panel continue to exercise caution in issuing orders that have implications for First Nations, particularly with respect to their autonomy, self-determination

and self-government. This should be taken into account in a ruling on the Caring Society's interim motion.

[35] The Commission takes no position on this point except for highlighting the fact that no party has disputed the Tribunal's jurisdiction to make an order as the one sought by the Caring Society.

[36] The COO and the NAN take no position on the motion. NAN added it does not object to the AFN's letter dated January 7, 2019 which includes the AFN's submissions on the Caring Society's motion.

[37] In sum, Canada objects to the motion and submits it is premature and requests that the Tribunal exercise its discretion to refuse to hear the motion for relief at this interlocutory stage. Canada asks that the motion be dismissed.

[38] Canada is having ongoing discussions on the issue of "First Nation child" with the parties in this case and nations across Canada. Canada argues that Indigenous identity is a complex question (see Dr. Valerie Gideon's affidavit, dated December 21st, 2018, at paragraphs 40-41). It is defined in the *Indian Act* and that definition is being used and implemented in all Government of Canada programming, including Jordan's Principle. The definition of a "First Nations child" for the purposes of Jordan's Principle is an issue that Canada hopes to continue working on through consultation with First Nations leadership outside the Tribunal process.

[39] In any event, Canada argues the Caring Society has not demonstrated a strong prima facie case as per the Supreme Court decision in *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5, (CBC) and, that the test for serious issue when a mandatory injunction is sought, is higher and more difficult to meet. Canada submits that Brown J. held that the moving party "must demonstrate a strong prima facie case that it will succeed at trial." The moving party must show a "strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations ..." and this should apply regardless of this case being a human rights case. Furthermore, Canada contends that the Caring Society has not brought an actual case that shows irreparable harm. The evidence before the Tribunal concerns a child who was

seeking transportation costs to participate in a case study designed to approve a molecule for future use in a diagnostic procedure. Canada further submits, there is no evidence that the child faced irreparable harm if the transportation costs were not paid. In any event, the costs were paid by the Caring Society and there is no evidence that irreparable harm would occur in the future if the remedy is not granted. Canada adds that irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured by the time a final decision is made (see *RJR MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311).

[40] On the balance of convenience, Canada argues it is not in the interests of justice to grant an order that is too vague to be properly implemented or enforced. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Canada argues that the Caring Society must demonstrate the public interest benefits that flow from the granting of the relief sought and failed to do so. Additionally, Canada submits that the public interest is better served by a continuation of the use of the current definition of “First Nations child” for the purposes of Jordan’s Principle. It allows for the application of consistent, objective parameters regarding eligibility for Jordan’s Principle.

[41] Furthermore, according to the AGC, Canada has given direction and training to its employees based on the July 5, 2018 definition described in Dr. Gideon’s affidavit. She has explained that it will be difficult to address the needs of children in a consistent and fair manner without a clear definition of “First Nation child”. Also, the Caring Society’s proposed definition is open ended and not clearly defined. Granting the requested relief and ordering the government to apply such a definition will introduce confusion and uncertainty in Canada’s attempt to implement Jordan’s Principle in a fair and consistent manner.

[42] According to Canada, it has set up a process to verify if a child and/or the family/guardian is registered or is eligible for status by working directly with the Office of Indian Registry. 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).

[43] The Caring Society disagrees with Canada that it needs to demonstrate a strong prima facie case since we are in the context of a human rights case. Rather, it argues that the appropriate criteria is found in the *Manitoba (A.G.) v. Metropolitan Stores Ltd.* [1987] 1 SCR 110 (Metropolitan) case and that all that is necessary is to satisfy the court that there is a serious question to be tried as opposed to a frivolous or vexatious claim. In this case, the Caring Society contends it meets this condition.

[44] The Caring Society also submits that children’s emergencies can’t wait for hearing dates to have their needs met in life threatening situations such as exemplified by S.J’s case. S.J’s case will be discussed further below. According to the Caring Society, the balance of convenience favours the non-status off-reserve children who encounter urgent/life threatening situations.

B. Law analysis

[45] The Panel understands why the parties brought the interlocutory injunctions principles and case law into this process given the nature of the Caring Society’s request. However, none of the parties have presented arguments addressing the Tribunal’s jurisdiction to deal with interlocutory injunctions except from stating that the Tribunal has this power under the *Act*. The fact that no one disputes the Tribunal’s jurisdiction to deal with the order sought does not answer the question. In any event, the Panel does not view this request as it is characterized by the parties. Rather, it views it as a clarification and refinement of previous orders to ensure that the Tribunal’s remedies are effective. Since crafting remedies in this case is an intricate task, the Tribunal ordered Canada to report on its progress every 6 months (see 2017 CHRT 14 at para. 135 (2) D) and invited the parties to come back to the Tribunal should they want to cross-examine Canada’s affiants and

make submissions on Canada's implementation or if they experienced difficulties in the implementation stage. The Panel finds this is what the Caring Society did here. The Caring Society also proposed a two-step process to address the matter. Because this is no simple question, a full hearing is required on the issue of defining a "First Nation child" and, interim orders are requested to prevent harm to non-status off-reserve children in urgent situations, while the Tribunal adjudicates the definition issue.

[46] This case is unlike many cases involving interlocutory injunctions requests where the Courts have not yet heard the matter on its merits and consequently, risk making orders in the interim that may end up not to be appropriate after a full hearing on the merits.

[47] In this case, it is very different as the Tribunal has heard the merits of the case extensively and made findings and orders. It retained jurisdiction given the complexity of the remedies and the immediate, mid-term and long-term relief remedies and the necessity to assess if remedies are effective and implemented. This necessarily requires some back and forth between the parties and the Tribunal unless, all parties agree and propose consent orders, to the Tribunal. Moreover, the parties have previously established there is a lack of data and a need for data collection to inform the crafting of appropriate long-term remedies. For ease of reference to the reader, we have reproduced some paragraphs of recent Tribunal decisions on Jordan's Principle and on further remedies that support our reasons:

> Once it is established that discrimination or a loss has been suffered, the Tribunal must consider whether an order is appropriate (see s. 53(2) of the *Canadian Human Rights Act* ["the Act"]). In this regard, the Tribunal has the duty to assess the need for orders on the material before it; or, it can refer the issue back to the parties to prepare better evidence on what an appropriate order should be (see *Canadian Human Rights Commission v. Canada (Attorney General*), 2010 FC 1135 at paras. 61 and 67, aff'd 2011 FCA 202 ["*Walden*"]). In determining the present motions, this is the situation in which the Panel finds itself. (see 2017 CHRT 14 at para. 27).
>
> In the *Decision*, while the Panel made general orders to cease the discriminatory practice and take measures to redress and prevent it, it also explained that it required further clarification from the parties on the relief sought, including how immediate and long-term reforms can best be

implemented on a practical, meaningful and effective basis (see para. 483). Indeed, while the Panel was able to further elaborate upon its orders in its subsequent rulings based upon additional information provided by the parties, the Panel continued to retain jurisdiction over the matter pending further reporting from the parties, mainly from Canada (see 2016 CHRT 10 and 2016 CHRT 16). That is to say that, as opposed to determining the merits of a complaint, the Tribunal's determination of appropriate remedies is less about an onus being on a particular party to prove certain facts, and more about gathering the necessary information to craft meaningful and effective orders that address the discriminatory practices identified. (see 2017 CHRT 14 at para. 28).

Consistent with this approach, and as this Panel has previously stated, the aim in making an order under section 53 of the *Act* is to eliminate and prevent discrimination. On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *Act* and meaningful in vindicating any loss suffered by the victim of discrimination. However, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task and may require ongoing supervision (see 2016 CHRT 10 at paras. 13-15 and 36). (see 2017 CHRT 14 at para. 29).

It is for these reasons that, absent a gap in the evidentiary record, the Panel does not consider the question of burden of proof to be a material issue in determining the present motions. As 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).

In the same vein, the Panel's role in ruling upon the present motions is not to make declarations of compliance or non-compliance per se. Rather, in line with the remedial principles outlined above, the Panel's purpose in crafting orders for immediate relief and in retaining jurisdiction to oversee their implementation is to ensure that as many of the adverse impacts and denials of services identified in the *Decision* are temporarily addressed while INAC's First Nations child welfare programing is being reformed. That said, in crafting any further orders to immediately redress or prevent the discrimination identified in the *Decision*, it is necessary for the Panel to examine the actions Canada has taken to date in implementing the Panel's

> orders and it may make findings as to whether those actions are or are not in compliance with those orders. (see 2017 CHRT 14 at para. 31).
>
> As the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para. 32, "[o]ften it may be more desirable for the Tribunal to provide guidelines in order to allow the parties to work out between themselves the details of the [order], rather than to have an unworkable order forced upon them by the Tribunal." This statement is in line with the Panel's approach to remedies to date in this matter. In order to facilitate the immediate implementation of the general remedies ordered in the *Decision*, the Panel has requested additional information from the parties, monitored Canada's implementation of its orders and, through its subsequent rulings, provided additional guidance to the parties and issued a number of additional orders based on the detailed findings and reasoning already included in the *Decision*. (see 2017 CHRT 14 at para.32).
>
> While that approach has yielded some results, it has now been over a year since the Decision and these proceedings have yet to advance past the provision of immediate relief. The Complainants, the Commission and the Interested Parties want to see meaningful change for First Nations children and families and want to ensure Canada is implementing that change at the first reasonable occasion. The Panel shares their desire for meaningful and expeditious change. The present motions are a means to test Canada's assertion that it is doing so and, where necessary, to further assist the Panel in crafting effective and meaningful orders. (see 2017 CHRT 14 at para. 33).
>
> This is the context in which the present motions have been filed. The Tribunal's remedial discretion must be exercised reasonably, in consideration of this particular context and the evidence presented through these motions. That evidence includes Canada's approach to compliance with respect to the Panel's orders to date, which evidence can be used by the Panel to make findings and to determine the motions of the parties. (see 2017 CHRT 14 at para. 34).

[48] In its February 1, 2018 ruling, the Tribunal citing the Supreme Court of Canada wrote:

> Despite occasional disagreements over the appropriate means of redress, the case law of this Court, (…), stresses the need for flexibility and imagination in the crafting of remedies for infringements of fundamental human rights (…), (see 2018 CHRT 4 at para. 52).
>
> This being said, the Panel 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] 1 SCR

> 99), and commends it for adopting this approach. The Panel ordered that the specific needs of communities be addressed and this involves consulting the communities. However, the Panel did not intend this order to delay addressing urgent needs. It foresaw that while agencies would have more resources to stop the mass removal of children, best practices and needs would be identified to improve the services while the program is reformed, and ultimately child welfare would reflect what communities need and want, and the best interest of children principle would be upheld. It is not one or the other; it is one plus the other (see 2018 CHRT 4 at para. 66).

[49] The Panel previously addressed the appropriate approach to remedies in this case:

> While ongoing discussion with Indigenous Peoples, provinces and, territories are necessary to reform the system, the Panel believes it can be done at the same time as immediate-mid-term relief is allocated. It will also allow Canada and all partners to obtain current data informing long term reform. (see 2018 CHRT 4 at para. 168).
>
> Until such time as one of the options below occur (…) Evidence is brought by any party or interested party to the effect that readjustments of this order need to be made to overcome specific unforeseen challenges and is accepted by the Panel. (see 2018 CHRT 4 at para. 413 (4)).
>
> The Panel also recognizes that in light of its orders and the fact that data collection will be further improved in the future and the NAC's work will progress, more adjustments will need to be made as the quality of information increases. (see 2018 CHRT 4 at para. 237).

[50] All the above support our interpretation of what the Tribunal's approach to remedies is in this nation-wide multi-faceted and complex case.

[51] Additionally, the Panel notes that no one made submissions on the *Canada (Human Rights Commission) v. Canadian Liberty Net (T.D.) (Liberty Net)* Federal Court decision. *Liberty Net* is cited in the CBC case. The AGC relied upon the CBC case. In *Liberty Net*, the Canadian Human Rights Commission sought an interlocutory order from the Federal Court and not the Tribunal regarding an ongoing issue of hate speech. The complaints were before the Tribunal and had not yet been heard on their merits. The Federal Court decided it had jurisdiction to make such an order akin to the powers of Provincial Superior Courts. It also clarified that it did not have a final "cease and desist" power and stated the Tribunal had this power at the end of an inquiry, once the case was heard on its merits.

[52] In our view, the “cease the discriminatory practice” remedy found at section 53 (2) a of the *CHRA* is an “injunction like” power and becomes available to the Tribunal once discrimination has been found. In fact, section 53 (2) of the *CHRA* reads as follows: *If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate* (...). This is the case here. The case was heard on its merits, discrimination was found and the Jordan Principle orders are meant to eliminate discrimination, *redress the discriminatory practice and to prevent the same or a similar practice from occurring in future* (see section 53 (2) a of the *CHRA*). The Tribunal remained seized of the case and assesses the implementation of its orders to ensure they are efficient. Given this finding, it is not necessary here to analyse if the Tribunal has jurisdiction to order interlocutory injunctions when a case has not yet been heard on its merits.

[53] The fact that another hearing will take place before the Tribunal to deal with compliance to its orders and with the definition of a “First Nation child” does not change the nature of the proceedings in this case. In any event, this case is quite different given that the Tribunal has heard the case on its merits and has issued orders in 9 different rulings and, monitors the implementation of its orders, to assess if they are effective, in the best interests of children. In sum, the Panel finds the Tribunal’s powers to make interim orders flow from section 53 (2) of the *CHRA* and the Panel’s previous orders and retention of jurisdiction.

[54] Furthermore, while the specific issue of a “First Nation child” has not yet been resolved, the Tribunal has great appreciation for Jordan’s Principle matters and is in a position to make findings and further orders in light of the new evidence and the motion materials.

[55] Additionally, the Supreme Court in *CBC* refers to the “chambers judge” which may suggest the request was made before an applications Judge. In an interlocutory stage, the parties are able to access the Court rapidly to deal with emergencies. Superior Courts are frequently asked to rule on interlocutory injunctions requests and consequently have a

process to access Judges very quickly should someone require to do so. The Tribunal, while it has a mandate to deal with complaints expeditiously, does not have the same process. The Panel worries that if an urgent situation occurs concerning a child it may not be able to hear the case the same day or in the next few days. Canada's suggestion that the Tribunal should only rule on an emergency case at the time it is brought forward before it is unpractical. This coupled with the analysis of the evidence supports the need for a further order and reinforces the need for a timely and independent appeals mechanism involving health professionals and other professionals, to address such requests under Jordan's Principle. This will be revisited in the analysis section below.

III. Analysis

[56] For the purposes of this ruling, while the Panel considered all the evidence, the Panel has not focused its reasons and findings on Canada's "First Nation child" definition since it has decided to hold a full hearing on this issue.

[57] The Caring Society brought new evidence before the Tribunal in support of its motion for further relief. The Caring Society recently intervened to pay for medical transportation for a young First Nations' child 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. The Caring Society raised this case with Canada directly on November 29, 2018. Given that the matter has been resolved, the Caring Society has brought S.J.'s case as an illustrative case.

[58] At the time when the events occurred, S.J. was an 18-month-old infant who was diagnosed with hyperinsulinism, a rare, potentially life-threatening, medical condition. According to the Caring Society, S.J.'s medical team at Sick Kids Hospital in Toronto decided that she required a diagnostic scan to determine the scope of further treatment. The Caring Society in its November 29, 2018 letter to the AGC (see affidavit of Dr. Cindy Blackstock dated December 5, 2018) wrote that it: understands that S.J. has been waiting for this diagnostic scan since birth. As you can appreciate, the waitlist for the scan is quite

long, and thus missing the appointment due to inability to fund travel would lead to a lengthy delay in S.J.'s treatment. The time-sensitive nature of the window for S.J.'s diagnostic made this an urgent case.

[59] In support of its position, the Caring Society relies on a letter from S.J's physician, Dr. Jennifer Harrington that states as follows:

> S is a patient followed in the Endocrine Department at the Hospital for Sick Children. She needs to attend a medical visit at Edmonton Hospital for an essential scan that is only available there. It is important that her parents are available to provide support for her during this visit. Her parents will need leave from work for at least between November 27th to December 2nd for this visit. Thank you for your consideration of this request. Kind regards, Jennifer Harrington, MBBS, PhD Staff Physician Endocrine Division, The Hospital for Sick Children. (see Affidavit of Dr. Cindy Blackstock, dated December 5, 2018, at, Exhibit G).

[60] The Caring Society provided an email exchange between the Chiefs of Ontario contact person, Ms. Castro and Ms. Jacquie Surges from the Caring Society, providing an overview of S.J.'s situation as it is understood by Ms. Castro (see email from Miryan Castro dated November 22, 2018 to Jacquie Surges with the subject: Jordan's Principle - Med Trans - J):

> (…) On Friday, November 9, 2018, I spoke to F J. They reside in Toronto. Her daughter does not have status. Her father is non-indigenous and her mother is of mixed ancestry. She advised that she received status through the grandmother bill. She is not able to pass her status to S J. Her daughter S J has a congenital Hyper Infiliasim (sic) (the Panel believes it should read hyperinsulinism), it is the opposite of diabetes. Her pancreas creates too much insulin which leads to seizure and can cause death due to her sugars being too low. S requires a scan to see if only a certain area of her pancreas is affected or the entire pancreas is affected. The scan is required so that the doctors can do the surgery. There are only 3 places in the world that does the scan, the UK, USA (Philadelphia) and Canada (Edmonton). Her physician is at Sick kids hospital in Toronto, Dr. Jennifer Harrington (…) Sick Kids applied for funding for the scan and therefore the mother does not have to pay. The clinic requires flexibility in order for the blood work to be done, due to the procedure involving a radioactive dye and S has to go under anesthesia. They need to be at the Alberta hospital for a few days. The appointment is on Tuesday, November 27, 2018, and It has been requested that S stay until December 2, 2018.The scan will be conducted at the University of Alberta Children's hospital Nuclear Medicine Department, S will have to be put under, it is similar to a CT Scan. She will need to be injected

with a radioactive compound, which only last for 24 hours. The clinic has to make the compound and that is why there is only 3 places in the world that do this type of scan. Within 1 hour of taking the compound the scan must be completed. This will allow the doctors to see which part of the pancreas will need to be removed. Should she require the entire pancreas to be removed S will be dependent on insulin for the rest of her life. On Friday, November 9, 2018, I contacted NIHB Medical Transportation department and spoke to the Southern Ontario Program Officer for Medical Transportation, James Robertson. He advised that he would submit this case to Jordan's principle. I have advised Mr. Robertson of the issue with regarding Ms. J status card having her maiden name not her married name and that her travel documents state her married name. He required their address and telephone number and I provided him with the information and sent him the letters from Sick Kids hospital and the Albert Hospital (Which are attached). Mr. Robertson advises that he will try to see if a response from Jordan's Principle comes in today, Friday, November 9, 2018, or on Tuesday, November 13, 2018, due to the Remembrance Day holiday. On Tuesday, November 13, 2018, I was at a meeting in Ottawa at the NIHB office and followed up with James and he still did not receive a response. In my meeting with NIHB, I was informed that Mr. Robertson was starting a new position. On Wednesday, November 14, 2018, I sent emails to and left voicemail messages for Mr. Robertson following up to see if he received a response from Jordan's Principle. He sends me an email asking for the date of the procedure (which I provided to him previously on Friday, November 9, 2018. Then, I get another email stating that he is starting a new position on Thursday, November 15, 2018, but he has cc'd his colleague Rexana Stickwood, who is the new Program Officer for Southern Ontario transportation. In his email it was also cc'd to Patricia Villeneuve who is working as a liaison with NIHB and Jordan's Principle. On Friday, November 15, 2018, I sent an email to Julie Caves, Manager, Program Delivery FNHIB. Telephone calls and left voicemail messages with no response. Monday, November 19, 2018, I call Julie Caves and left voicemail message and sent her an email cc' Patricia and Rexana with all the information from the case. I then receive an email being sent to Patricia Villeneuve where I am cc'd and it states the following: Hi Trish, I believe this case went to Jordan's Principle. Can we have an update asap please? On Tuesday, November 20, 2018, I receive the following email from Patricia Villeneuve. I sent your request as soon as I received it yesterday, the case had been escalated to Jordan's Principle HQ for consideration. This case has been denied as the client is not registered and not eligible for registration in future. Up to date I never heard from James Robertson's replacement and Patricia was cc'd in the email from Mr. Robertson stating that he is leaving and that Rexana will be taking over. I contacted Patricia and she stated that there is a process, I asked for the process and then she says that it is not a definite process since Jordan's Principle is new. They needed to work with INAC to see if S was registered and if she would be eligible for status in the future.

[61] Dr. Harrington and Ms. Castro did not testify at the hearing and also were not called by any party to testify. Rather, this email exchange was filed as an exhibit as part of Dr. Blackstock's unchallenged solemnly affirmed affidavit. Therefore, the evidence is considered hearsay which is admissible before the Tribunal who, in turn will weigh the evidence before it. No one has challenged the authenticity of Dr. Harrington's letter. The Tribunal believes that there is no reason to question Dr. Harrington's letter especially that it is an official letter signed under her name and professional title. The Tribunal assessed this alongside the rest of the evidence.

[62] Ms. Castro's email provides specific details in regards to S.J.'s case which is also weighed alongside the rest of the evidence.

[63] On this point, the Caring Society's position is that Canada's refusal to apply Jordan's Principle to S.J.'s case based on her lack of (and ineligibility for) *Indian Act* status is rooted in a deeply colonial ideology and practice, consistent with the "old mindset" the Tribunal has repeatedly identified as problematic during the compliance phase of this complaint. S.J. does not have *Indian Act* status due to Canada's restrictions regarding the descendants of persons, like S.J.'s mother, who have status pursuant to subsection 6(2) of the *Indian Act.* The Caring Society submits that the reason that S.J. is not eligible for *Indian Act* status is due to her father, C.J., not having *Indian Act* status, such that the "second generation cut-off rule" applies. As such, the Caring Society argues that S.J. is facing discrimination on the basis of national or ethnic origin, contrary to the Canadian Human Rights Act (CHRA). She is also facing discrimination based on age, as children of less than 18 months who have one registered First Nations parent are entitled to benefits under the Non-Insured Health Benefits Program.

[64] In sum, Canada also provided an unchallenged sworn affidavit from Dr. Gideon, who is not a medical doctor, has a different view of S.J.'s medical need and characterizes the medical need and procedural history of her case as follows in her affidavit:

> The procedure in question is part of a University research study. While I understand that S.J was receiving the appropriate care by her attending physician, on Page 5 of the Information and Consent Form, it states that the study "cannot guarantee any health benefit to your child" arising from their

participating in the study. Attached as Exhibit “E” is a copy of the Information and Consent Form outlining the purpose and focus of the study. (see affidavit of Dr. Valerie Gideon, December 21, 2018, at para.27).

On November 9, 2018, the Non-Insured Health Benefits Program (NIHB) forwarded S.J’s request to the Ontario Jordan’s Principle team as they were considering it as a denial since it did not meet the Program’s criteria. S.J was not registered and was over the age of 18 months (up to 18 months, NIHB will consider coverage of an infant under a parents’ registration number). The request was for funding to cover transportation, meals and accommodations for SJ and two escorts from Toronto to Edmonton to participate in a medical study related to the child’s medical condition. (see affidavit of Dr. Valerie Gideon, December 21, 2018, at para.26).

The attending physician did not request that a scheduled Medivac was required as this was not a medically urgent situation. In speaking to the Director of Health Services at the Ontario Ministry of Health and Long-Term Care on November 23, 2018, I confirmed that the Province of Ontario does not cover these costs for any resident in the province. Attached as Exhibit “F” is a copy of the communications with the Ministry of Health and Long-Term Care. (see affidavit of Dr. Valerie Gideon, December 21, 2018, at para. 28).

Upon receipt of the request from NIHB on November 9, 2018, the Ontario Jordan’s Principle team evaluated the request. In accordance with the JPSOP, they worked with the Office of Indian Registry to confirm if S.J or her parents were registered or eligible for status registration. The child was also determined not be a resident ordinarily on reserve. Attached as Exhibit “G” is a copy of the communications with the Registrar. (see affidavit of Dr. Valerie Gideon, December 21, 2018, at para. 29).

In accordance with the JPSOP, in recommending a denial, the region sent the request that same day for the evaluation and determination by the Assistant Deputy Minister of Regional Operations at the First Nations and Inuit Health Branch. (see affidavit of Dr. Valerie Gideon, December 21, 2018, at para. 30).

On November 13, 2018 the Assistant Deputy Minister of Regional Operations denied the request as SJ was living off reserve, was not recognized as being ordinarily resident on reserve, and was not be eligible for status registration. The denial was communicated immediately by headquarters to the Jordan’s Principle regional team. (see affidavit of Dr. Valerie Gideon, December 21, 2018 at para. 31).

[65] Additionally, Dr. Valerie Gideon provided a copy of a letter titled filed as an exhibit to her affidavit: Participant Information and Consent Form-Parent of child; Title of Study: F-

DOPA PET Scan an evaluation of biodistribution and safety. (see Affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at Exhibit E). Upon review of the letter, the Panel finds it is a generic letter used to provide explanation to parents of children with different health conditions who have accepted to undergo a scan also part of this study. In fact, the letter says as much:

> FDOPA PET/CT Imaging Is a new type of scan which is beneficial to the clinical care of many different types of patients.
>
> If you agree for your child to be in this study, you will first sign this consent form. Your child will then have a small amount of 18F-DOPA injected intravenously (ie. small plastic tube inserted into a vein). After resting quietly for a period of time {generally less than 1.5 hours} a PET/CT scan will be performed either of your child's brain alone, a part of your child's body, or your child's whole body (depending on the reason for the scan). In some cases, two PET scans are performed, one right after the other. The total scan time will range from 20 minutes to 90 minutes depending on the reason for the scan.

[66] Moving on to the issue of the study's health benefits, it is true, as mentioned by Dr. Gideon, that the letter mentions there is no guarantee of any health benefits from the study. The letter also mentions the results of the scan may improve the child's clinical care. It further explains that FJDOPA is a molecule which they can image, with PET scan. Moreover, the letter states that it is useful in managing many diseases.

[67] Having reviewed the letter alongside the evidence, the Panel finds the study is not the primary reason for the scan prescribed by S.J.'s physician. The primary reason is to assist in the clinical care of patients and is useful in managing diseases. The study is a mandatory requirement from Health Canada to ensure the molecule is safe.

[68] Before Dr. Gideon's sworn affidavit was prepared, she had an email exchange with other public servants involved in S.J.'s case attached to her affidavit (See affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at exhibit F). This email exchange frames the issue as an essential scan requested by a physician which scan is also part of a study. This supports the Caring's Society's position and corroborates the evidence it presented. Furthermore, the Panel places more weight on Canada's contemporaneous statements

through its employees than Dr. Gideon's affidavit crafted in response to the Caring Society's motion:

> We have a case that has come to our attention under the above-noted number for a non-status child.
>
> The child is 1 1/2-year-old and lives in Toronto with her parents. She is followed by the Endocrine Department at the Hospital for Sick Children and has been referred by the Endocrine Division to attend an essential scan that is only available at the Edmonton Hospital on November 28th. A physician within the division identified the scan to be essential. The scan is called an 'F-DOPA'* scan (F-DOPA PET/CT scan) and is a part of a research study. (see email from Gillis, Leila (HC/SC} dated November 22, 2018, to Buckland, Robin (HC/SC} Subject: FW: Case HC-ON-1965N).

[69] The fact that the child is not covered under Jordan's Principle for lack of status is the focus of the refusal:

> Hi Melanie and Lynn, See below. Am introducing you electronically to Valerie Gideon, who is the federal Senior Assistant Deputy Minister for Indigenous Services Canada. Issue is an Ontario non-status Indian toddler who needs travel support to go to Edmonton for an endocrine scan. Feds can only provide full coverage if toddler is a status Indian. Is there a way we can support the travel? I am not totally familiar with the ins and outs of what we can cover. Can you please have someone communicate directly with Valerie? She is a valued colleague and very helpful to MOHLTC. (see email from Sharon Lee Smith (MOHLTC), dated November 22, 2018).

On Nov 22, 2018, Gideon, Valerie (HC/SC) wrote:

> Hey just wondering if you would have any advice for me on possible options we wouldn't be aware of within provincial system. Toddler is non-status so we can't cover under Jordan's Principle or NIHB but would be great to assist them. The scan is covered. The child was referred by Sick Kids and appointment booked. They need travel support.

[70] After considering all the evidence on S.J.'s case, the Panel prefers the Caring Society's evidence on a balance of probabilities (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center*), 2015 SCC 39 at para.67, [Bombardier]).

[71] In this case it appears that there is a gap in services for children over 18 months old under NIHB. The fact that the child was waiting for an essential scan since birth and was on a waiting list for all this time does not seem to have been factored in Canada's decision.

[72] This is of great concern. In this case you have a child who is 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 of an infant. The waiting list is so long that the child has been waiting for 18 months and no one seems to be considering this in the equation. The provincial waiting list is not a factor that the parents or Canada can control. The appropriate course of action could have been to extend NIHB coverage over 18 months to account for the long waiting period since, according to Dr. Gideon's own affidavit, the NIHB will consider coverage of an infant under a parent's registration number if the child is 18 months or less. S.J.'s mother has status but for the long waiting period, S.J. could have been considered under NIHB. In light of this gap in services and given the seriousness of the health issue and the delay impacts of missing the essential scan, Canada could have "erred on the side of caution" to cover the travel costs under Jordan's Principle.

[73] The Panel finds 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 *Decision* (see at, paras. 365-382 and 391). For example, in the *Decision* at para. 366, the Panel found that a four-year-old First Nations child suffered cardiac arrest and an anoxic brain injury during a routine dental examination.

She became totally dependent for all activities of daily living. Before being discharged from hospital, she required significant medical equipment, including a specialized stroller, bed and mattress, a portable lift and a ceiling track system. A request was made to Health Canada's Non-Insured Health Benefits Program requesting approval for the medical equipment. However, the equipment was not eligible under the program and required approval as a special exemption.

[74] The Province in this case does not pay for the service. Under Jordan's Principle as ordered by this Tribunal and, accepted by the parties, the normative standard of care is not a necessary requirement to cover a service under Jordan's Principle.

[75] The case of S.J. further supports the need for an independent appeal process for Jordan's Principle where some of the decision makers are composed of health professionals who act in concert with other professionals and are independent from the government.

[76] Having said this, the Panel does not believe that making an order worded exactly as requested by the Caring Society will resolve cases such as S.J.'s case since using the term urgent/life threatening is not understood the same way by everyone as demonstrated above. This will be considered in the order.

[77] Also, there is no clear evidence as part of this motion indicating that at the present time, Canada is not addressing urgent needs of non-status off-reserve first nations children as Canada defines them. Dr. Gideon in her affidavit at paras 13-14 explained their approach:

> On May 9, 2018, Mr. Sony Perron was cross-examined on his affidavits dated November 15 and December 15, 2017. During his examination, Mr. Perron confirmed that while the definition of a "First Nations child" was being considered, in urgent situations, Canada would act to provide assistance or a solution. (…) As the successor to Mr. Perron as Senior Assistant Deputy Minister, I have pursued the same course. The First Nations Service Coordination organizations we fund and the regional Focal Points we employ, work diligently to support all families and children including in cases where eligibility under Jordan's Principle may be difficult to determine. I will explain their efforts further in this affidavit.

> On June 19, 2018, Canada approved the expanded eligibility of Jordan's Principle to non-status Indigenous children ordinarily resident on reserve. This resolved any temporary uncertainty regarding the definition/eligibility of a "First Nations child" for the purposes of Jordan's Principle. The decision took into consideration the fact that most federal programs are residency based, not status based, and that Canada, as a matter of policy, already provides funding for services on reserve regardless of status. One key exception is the Non-Insured Health Benefits (NIHB) Program for which eligibility is based on registration under the *Indian Act*, or recognition by an Inuit Land Claim Organization. This program however is a supplemental, ameliorative program intended to address gaps in provincial and territorial health insurance coverage.

[78] The Panel reiterates that it is true that the child had been waiting for 18 months for the scan. Also, no medical evacuation was requested by her treating physician that suggested it was an imminent life or death situation, which could have justified doing the scan immediately. Under this narrow lens, the Panel does not find that Canada contradicted what Mr. Perron has said above.

[79] Canada, in using this lens to exercise its discretion, did not adequately consider the child's best interests. There was no evidence presented of any consideration of the health impacts on the child if she missed her essential scan after waiting 18 months and/or on delaying her treatment. S.J. needed to travel with her parents to Edmonton to undergo an essential scan so doctors could determine if only a certain area of her pancreas was affected or the entire pancreas was affected so the doctors could do the surgery. As mentioned above, she has a rare and serious condition that can lead to seizures or even death.

[80] The main reason for refusing access to Jordan's Principle was that S.J. had no Indian status because her mother is registered under 6(2) of the *Indian Act.* Therefore, even in the presence of a gap in services, she could not access those services under Jordan's Principle. The question of using *Indian Act* status or eligibility to *Indian Act* status to apply Jordan's Principle will be examined in a future hearing as mentioned above. The Panel understands the Caring Society's requested relief order to address situations such as S.J.'s until the definition of a "First Nation child" for Jordan's Principle purposes is determined.

[81] The problem is the possibility of different interpretations of what is urgent and life-threatening to a child as is exemplified in S.J.'s case. If due consideration is given to the requests made by the child's treating physician and/or professionals' assessments, this could assist in resolving the issue of different interpretations in a child's needs. This is also consistent with the amendment requests made by the parties including Canada for the inclusion of clinical case conferencing in Jordan's Principle definition as reproduced above (see also 2017 CHRT 35 at para.3).

[82] Also, Canada's argument that it would bring confusion in delivering services under Jordan's Principle to grant the Caring Society's interim relief request for urgent/life threatening cases is not valid when we review Dr. Gideon's affidavit at paras. 24-25. From Canada's affiant's own admission, few requests have been submitted for children who do not have nor are eligible for First Nations status registration. According to the JPSOP, when a request is received by a child who does not have status, the request is to be forwarded to headquarters for the evaluation and determination by PNIHB's Assistant Deputy Minister of Regional Operations. (see affidavit of Dr. Valerie Gideon, dated December 21, 2018, at para.24).

[83] Moreover, from July 1 to November 30, 2018, 17 requests for children without status but are ordinarily resident on reserve were submitted to headquarters for determination. Of the 17 requests, one was urgent and 16 were non-urgent. The expanded eligibility was applied to these requests and seven were approved, nine were denied, and one was cancelled. The one urgent case approved for dental treatment was for a child without status or a birth certificate but demonstrated that they met the criteria for ordinarily resident on reserve) as described earlier in this affidavit.

[84] In light of what happened in S.J.'s case, we find that Canada's argument on the issue of defining what is an "urgent need/life threatening" to be valid and is considered in the order below.

[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).

IV. Order

[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.

[93] The Panel invites all parties to provide any suggested wording changes to this order by **March 7, 2019**.

ORDER signed this 21st day of February, 2019.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal member

Ottawa, Ontario
February 21, 2019

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: February 21, 2019

Date and Place of Hearing: January 9, 2019
Ottawa, Ontario

Appearances:

David Taylor, Sarah Clarke and Barbara McIsaac, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke, David Nahwegahbow and Thomas Milne, counsel for Assembly of First Nations, the Complainant

Brian Smith, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C., Jonathan Tarlton and Patricia MacPhee, counsel for the Respondent

Maggie Wente and Sinéad Dearman, counsel for the Chiefs of Ontario, Interested Party

Julian N. Falconer and Akosua Matthews, counsel for the Nishnawbe Aski Nation, Interested Party