Federal Court  Cour fédérale

Date: 20250623

Docket: T-1255-25

Citation: 2025 FC 1132

Ottawa, Ontario, June 23, 2025

PRESENT: The Honourable Madam Justice Conroy

BETWEEN:

PATRICK CULLY

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Patrick Cully, seeks judicial review of a decision made by a Senior Assistant Deputy Minister at Indigenous Services Canada [ISC] on May 15, 2025 [Appeal Decision]. The Appeal Decision upheld, in-part, an initial ISC decision which denied the Applicant's application for Jordan's Principle funding.

[2] The Jordan's Principle application sought funding for full-time Applied Behavioural Analysis [ABA] therapy for a year for the Applicant's daughter, Scarlet, who was diagnosed with autism spectrum disorder.

[3] Time was of the essence in the hearing and determination of this judicial review. The filing deadlines and hearing were expedited by Case Management Judge Molgat, and I heard the merits of the judicial review on June 16, 2025.

[4] The Applicant submits that the Appeal Decision is unreasonable and that it was determined through a flawed and unfair procedure.

[5] I conclude that the Appeal Decision is unreasonable. It is untenable given the legal constraints that bear upon the exercise of ISC's discretion when interpreting and applying Jordan's Principle.

[6] The Appeal Decision is set aside and shall be remitted to the Appeals Secretariat for reconsideration in accordance with the Court's reasons and the Applicant's further submissions. Given the importance of a timely decision for the Applicant, the matter is remitted on the following terms:

a) The Applicant shall file, on or before July 4, 2025, any additional evidence and further submissions with the Appeal Secretariat for reconsideration by the External Expert Review Committee [EERC]; and

b) ISC shall communicate its redetermination decision to the Applicant on or before July 18, 2025.

[7] The parties are at liberty to amend the above timelines by agreement, with no requirement to seek an amended Order from the Court.

II. Background

[8] Scarlet just celebrated her fifth birthday. She is a member of Batchewana First Nation and is eligible to be registered for status under the *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. She lives off-reserve in Thunder Bay, Ontario with her parents. Her mother is also a member of the First Nation and is a registered status Indian under the *Indian Act*.

[9] In April 2023, just before her third birthday, Scarlet was formally assessed by a clinical psychologist, Dr. Christopher Mushquash. He diagnosed her with autism spectrum disorder (Level 2) with language impairment. Amongst other supports, he recommended that she participate in full-time ABA therapy until she is ready to attend school. A year later, in April 2024, Dr. Mushquash confirmed his recommendations for Scarlet.

[10] Scarlet struggles with verbal and non-verbal communication, resulting in difficulties in identifying and meeting her needs. Prior to receiving supports, her communications skills were limited to the use of gesture, echolalia and repetition of words. She used a device that allowed her to communicate her needs non-verbally. She had frequent meltdowns and temper tantrums, sometimes as many as three a day. She struggled with transitions between activities, during

changes in her routine, and in unfamiliar or uncomfortable settings. Ultimately, she was highly dependent on her parent's assistance with all daily activities.

[11] In July 2023, ISC approved Jordan's Principle funding in the amount of $190,300 for autism therapies and supports for Scarlet. This included funding for her to receive part-time ABA therapy at Ignite Behavioural Consulting Inc. [Ignite] from the spring of 2024 to September 2024. In addition to the part-time ABA therapy, Scarlet attended the part time "entry to school" program, facilitated by the Ontario Autism Program [OAP], for six months starting in April 2024.

[12] On September 10, 2024, Scarlet attended her first and only day of school. Shortly after arriving, she injured herself while in distress, and the administrators told the Applicant that they could not accommodate Scarlet's needs. With consultation from Carolyn Mancuso, Scarlet's Registered Behaviour Analyst and ABA therapy service provider at Ignite, and consistent with the recommendation of Dr. Mushquash, the Applicant placed Scarlet in full-time ABA therapy, in an effort to address the difficulties that prevented her from attending school.

[13] On September 12, 2024, the Applicant submitted a Jordan's Principle funding application for half-day ABA therapy sessions, five days per week for a 12-month period.

[14] On October 28, 2024, the Applicant submitted an urgent updated request to ISC for Jordan's Principle support to continue Scarlet's ABA therapy on a full-time basis. The updated application sought funding for 12 months of full-time ABA therapy in the amount of

$217,650.50. Appended to the application form were the following: an April 13, 2023 psychological assessment by Dr. Mushquash; a letter of support of the same date from Dr. Mushquash confirming the diagnosis and the recommendation of full-time ABA therapy until school readiness is achieved; a letter dated April 25, 2024 from Dr. Mushquash reiterating his recommendations from the year previous; and, a quote from Ignite setting out the cost for full-time ABA therapy.

[15] From October 2024 to March 2025, while waiting for ISC to process the updated application, Ignite provided full-time ABA therapy to Scarlet.

[16] The Applicant describes Scarlet's progress while in full-time ABA therapy as remarkable. Her communication skills, tolerance, independence, social skills, and ability to regulate her emotions improved. She is able to communicate with words and identify her needs verbally, and she allows her caregivers to effectively support her. She is developing social skills and has begun to make friends. She also learned to brush her teeth, wash her hair, and wash her hands independently. However, she is still working on activities of daily living: for instance, she is still learning to use utensils and to use the toilet.

[17] By letter dated March 27, 2025, ISC denied funding for Scarlet's full-time ABA therapy. ISC said it was "not aware of an existing government service that currently provides funding for full time ABA Therapy in lieu of school based educational supports," so Jordan's Principle did not apply.

[18] As a result, Ignite was no longer able to provide full-time ABA therapy for Scarlet as her parents could not afford the cost. From March 31, 2025, to April 8, 2025, Scarlet was without therapy and the evidence shows she experienced major setbacks. She was less communicative, had more meltdowns and struggled to communicate her needs. Her toileting routine was disrupted, and her diet and sleep suffered.

[19] On April 9, 2025, Scarlet was able to resume full-time ABA therapy thanks to the support of an anonymous donor.

[20] On April 16, 2025, the Applicant challenged the March 27 denial through ISC's internal appeal procedure. In addition to the material provided to ISC in October 2024, counsel for the Applicant provided written submissions, as well as support letters from Scarlet's parents and Ms. Mancuso.

[21] The support letters describe Scarlet's significant progress while receiving full-time ABA therapy, as well as her regression when the ABA therapy ceased following ISC's March 27, 2025 denial.

[22] Ms. Mancuso's letter explains that Scarlet is on the waitlist for funding for Core Clinical Services, which includes ABA therapy, through the OAP. She advises that the waitlist is five to seven years, and that the maximum funding available for all Core Clinical Services through the OAP is $65,000.

[23] Evidence was also provided by Dr. Ryan Giroux, a Métis General Pediatrician with a clinical focus on Indigenous child health, including the diagnosis and management of neurodevelopmental diagnoses such as autism. In a letter dated April 23, 2025, Dr. Giroux opines that Scarlet is in a critical window for ABA therapy, as neurodevelopmental plasticity in early childhood allows young children to acquire foundational skills more rapidly. He explains that part-time ABA therapy (i.e., 10 – 15 hours per week) may not be sufficient for children excluded from school with more complex needs. He also describes the significant inequities that Indigenous children face in the diagnosis and treatment of autism. Referencing published studies, he explains that the "evidence clearly supports the provision of early, intensive, and uninterrupted ABA services to all children with ASD. In legal or policy decisions limitations to such access—particularly for children from Indigenous communities or those without school placement —constitute a serious risk to their developmental trajectory and long term well-being."

[24] Dr. Giroux expresses concern that Scarlet "may be without educational and developmental supports for months to years as she waits for adequate funding and service coordination to support her success into matriculating into school." He concludes that "[a]t minimum, Scarlet should be urgently approved for funding for full time ABA as requested for the next year, where her family and service providers (physician, school educators, ABA providers, others) can coordinate a gradual entry to school program."

[25] The Respondent does not challenge the Applicant's evidence regarding Scarlet's diagnosis or recommended treatment plan.

III. Decision Under Review

[26] On May 15, 2025, ISC rendered its Appeal Decision, granting partial funding of $24,500.

[27] The Appeal Decision identifies the OAP as a government program "specially designed to improve the situation identified in [the Applicant's] Jordan's Principle request for funding for ABA therapy." It concludes that the OAP is a special program within the meaning of s. 16(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA] or an ameliorative program for the purposes of s. 15(2) of the *Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

[28] It goes on to state that Jordan's Principle is concerned with allowing First Nations children to have substantively equal access to existing government services that are available to the general public. It finds that Jordan's Principle "is not intended to provide access to or change the scope of special or ameliorative programs that are expressly permitted" under s. 16(1) of the CHRA and s. 15(2) of the *Charter*.

[29] Despite finding that substantive equality does not require ISC to fund the Applicant's request, the Appeal Decision grants bridge funding in the amount of $24,500. It finds that this amount is equivalent to what would have been available to Scarlet through the OAP. It notes that the funds are being provided, "as a matter of policy rather than legal obligation."

[30] The bridge funding provided in the Appeal Decision will be sufficient to maintain Scarlet's therapy until July 4, 2025.

[31] After the judicial review hearing, the parties advised the Court by letter that ISC has agreed to provide an additional $16,000 in funding. The effect of this additional funding is that Scarlet will remain in full-time ABA therapy until at least August 1, 2025. Afterwards, Ignite will hold Scarlet's place in its program until August 29, 2025. If or when Scarlet loses her spot in the program, she will be put on a six to 18-month waitlist.

IV. Overview of Jordan's Principle

[32] Jordan's Principle is a legal principle, grounded in substantive equality, the precise contours of which is contested and evolving. It is not a program and its scope and implementation is not set out in statute.

[33] ISC's discretion to make decisions on funding applications pursuant to Jordan's Principle is constrained by applicable jurisprudence and by certain orders of the Canadian Human Rights Tribunal [CHRT], arising from a 2007 complaint by the First Nations Caring Society of Canada and the Assembly of First Nations.

[34] The CHRT complaint was decided in January 2016, following more than 70 hearing days: *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 [Merit Decision]. The Merit Decision found there was sufficient evidence to establish a *prima facie* case of discrimination under the CHRA with respect to Canada's funding of the First Nations Child and Family Services Program [FNCFS Program] and the funding of Jordan's Principle for related health services to First Nations children.

[35] The matter before the CHRT is ongoing. The CHRT has retained jurisdiction over the matter and has issued subsequent orders, including with respect to Jordan's Principle.

[36] In *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969, Justice Favel upheld the CHRT's decision to retain jurisdiction over the matter and endorsed the "dialogic approach" fostered by the Tribunal (paras 135 to 139).

[37] The genesis and development of Jordan's Principle is briefly summarized below, along with the CHRT rulings relevant to the present judicial review. The background and procedural history up to 2021 is also set out in Justice Favel's decision at paragraphs 2 to 72.

[38] Jordan's Principle is named in honour of Jordan River Anderson, who was born to a family from Norway House Cree Nation in Manitoba. Jordan had a serious medical condition. His family surrendered him to provincial care so he could obtain the necessary medical treatment as the required care was not available on reserve. After spending the first two years of his life in a Winnipeg hospital, he could have moved to a home to receive specialized care. The federal and provincial governments could not agree on who would pay for his home-based care. This jurisdictional dispute persisted for years. Jordan passed away in 2005 when he was five years old, having spent his entire life in hospital. Because of the jurisdictional dispute, Jordan never had the opportunity to move to a home: Merit Decision at para 352.

[39] In 2007, the House of Commons unanimously adopted the following motion (House of Commons Debates, 39-2, No. 12 (31 December 2007) at 642 (Hon Ms. Crowder)):

> That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

[40] In response, Aboriginal Affairs and Northern Development Canada [AANDC], along with Health Canada, entered into a Memorandum of Understanding on Jordan's Principle. Federal funding was allocated for Jordan's Principle between 2009 and 2012: *Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2021 FC 969 at para 14. These funds were never accessed, and the CHRT found that this was due to Canada's overly narrow interpretation of Jordan's Principle: Merit Decision at paras 356, 380-381.

[41] Early implementation of Jordan's Principle by AANDC was based on the following definition (*Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342 at para 84 [*Pictou*]):

> Jordan's Principle is a child-first principle which exists to resolve jurisdictional disputes between the federal and provincial governments regarding health and social services for on-reserve First Nations children. It ensures that a child will continue to receive care while the jurisdictional dispute between the provincial and federal government is resolved but does not create a right to funding that is beyond the normative standard of care in the child's geographic location.

[42] This early definition limited access to Jordan's Principle funding to situations that met the following conjunctive criteria (*Pictou* at para 84):

a) First Nations child lives on reserve;

b) First Nations child assessed by professionals to have multiple disabilities requiring services from multiple providers;

c) There is a jurisdictional dispute between the federal and provincial governments; and

d) Services to be provided are comparable to the standard of care (or "normative standard" as it is often called) set by the province.

[43] Each of the above constraints has been rejected or refined either by this Court or by the CHRT in the Caring Society litigation.

[44] In *Pictou*, decided in 2013, Justice Mandamin stated that "Jordan's principle is not to be narrowly interpreted" and found that the Government of Canada's interpretation with respect to intergovernmental disputes was too narrow: *Pictou* at paras 85 to 87 and 95.

[45] In its Merit Decision, the CHRT concluded that Canada's narrow interpretation of Jordan's Principle resulted in there being no cases approved for funding to that point. It found that Canada's narrow definition and inadequate implementation of Jordan's Principle defeated its purpose, and resulted in service gaps, delays and denials for First Nation children: Merit Decision at paras 381, 391 458.

[46] The CHRT therefore ordered AANDC "to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle": Merit Decision at para 481. Canada did not seek judicial review of the Merit Decision.

[47] In April of 2016 the CHRT issued its first compliance order. *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 10 [2016 CHRT 10]. It reminded the parties that the Merit Decision had ordered the government to "immediately implement the full meaning and scope of Jordan's Principle;" the order was not to "immediately begin discussions": 2016 CHRT 10 at para 32. It further ordered, among other things, that (para 33):

> a) Indigenous and Northern Affairs Canada [INAC] immediately consider Jordan's Principle as including all jurisdictional disputes, including disputes between federal departments;
>
> b) The principle be applied to all First Nation children, not only those with multiple disabilities; and
>
> c) The organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided.

[48] On September 14, 2016, the CHRT issued its second compliance order, directing that Canada apply Jordan's Principle to all First Nation children, regardless of whether they live on or off reserve: *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 16 at paras 118-119.

[49] Further compliance orders issued by the CHRT in 2017 are central to the present judicial review: *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14 at para 135 [2017 CHRT 14]; *First Nations Child & Family Caring Society of Canada et al v*

Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2017 CHRT 35 [2017 CHRT 35].

[50] In 2017 CHRT 14, the CHRT described a "repeated…pattern of conduct and narrow focus with respect to Jordon's Principle" (para 50) and ordered that Canada immediately "cease relying upon and perpetuating definitions of Jordan's Principle that are not in compliance with the Panel's [earlier] orders" (para 135).

[51] The CHRT also set out what it described as five "key principles" that govern Canada's definition and application of Jordan's Principle [collectively, Key Principles]. It ordered that "Canada shall not use or distribute a definition of Jordan's Principle that in any way restricts or narrows the [Key Principles]" (2017 CHRT 14 at para 135). The Key Principles, confirmed with the parties' proposed amendments in 2017 CHRT 35, are as follows:

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 administrativecase 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…After the recommended service isapproved 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 beforethe 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.

[**emphasis added**]

[52] With respect to the emphasis on the "normative standard of care" or comparable services in Canada's proposed iterations of Jordan's Principle, the CHRT had the following to say in 2017 CHRT 14 at paragraphs 69 to 73:

- It was concerning that Canada considered it an "exception" to go beyond the normative standard of care given the findings in the Merit Decision.

- "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 …"

- The normative standard of care in a province may help to identify some gaps in services to First Nations children. It is also a good indicator of the services that any child should receive, whether First Nations or not. "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."

- 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. First Nations children may need additional services that other Canadians do not.

[53] In 2025, Justice Zinn again emphasized that Jordan's Principle "must be interpreted broadly and liberally rather than narrowly, so that it can effectively address the unique hardships confronting First Nations children": *Schofer v Attorney General of Canada*, 2025 FC 50 at para. 17 [*Schofer*], citing *Pictou* at paras 85-86, 95.

[54] The parties agree that substantive equality is central to the interpretation and implementation of Jordan's Principle. As summarized by Justice Zinn at para 18 of *Schofer*:

> First Nations children may need services beyond those typically provided to non-First Nations children due to systemic inequities including socio-economic challenges, intergenerational trauma, and cultural access barrier: [Merit Decision] at para 18. The ISC's Back to Basics policy document [B2B] echoes this understanding. It directs decision-makers to "presume that First Nations children need services going beyond the kinds or levels of services available to non-First Nations children due to the unique disadvantage that they face."

> [see also *First Nations Child & Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2025 CHRT 6 at paras 562-563]

[55] ISC's discretion to make funding decisions pursuant to Jordan's Principle is constrained by CHRT orders in the Caring Society litigation (assuming they have not been set aside by judicial review) and the relevant jurisprudence outlined above.

[56] While the parties' arguments here did not focus on it, the record for the Appeal Decision indicates that ISC has operating procedures related to the processing of requests under Jordan's Principle, and that they were updated in the past year pursuant to an Operational Bulletin. Generally, internal operating procedures are not binding and cannot be relied on to fetter a decision-maker's findings, but they can guide the reasonableness of the decision-making process. Published operating procedures may also factor into whether a particular decision is reasonable: see e.g., *Ghirmatsion v Canada (Citizenship and Immigration)*, 2011 FC 519 at para 63; *Hassan v Canada Minister of Immigration, Refugees and Citizenship)*, 2019 FC 1096 at para 20.

V. Issues and Standard of Review

[57] The Applicant raises the following issues on judicial review:

(1) Was the Appeal Decision unreasonable?

(2) Did the Appeal Decision fail to engage with and balance, or misinterpret s. 15(2) of the *Charter*?

(3) Did the Appeal Decision misinterpret s. 16(1) of the CHRA?

(4) Was there procedural unfairness in rendering the Appeal Decision?

(5) What is the proper remedy?

[58] The Respondent raises as a preliminary issue the admissibility of certain affidavits in the Amended Applicant's Record.

[59] The parties agree that the standard of review for the merits of the Appeal Decision is reasonableness: *Schofer* at para 16.

[60] The Applicant properly notes that issues of procedural fairness are considered on a standard akin to correctness: *Schofer* at para 16, citing *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 56.

[61] With respect to the implication of the *Charter* in this application, the applicable standard of review would depend on the nature of the Applicant's challenge to the Appeal Decision. As noted at paragraph 67 of the Applicant's Memorandum of Fact and Law, "[t]o the extent that ISC concluded that the value of substantive equality was not engaged in [the Applicant's] circumstances, this issue is reviewable for correctness." On the other hand, "[i]f ISC concluded that substantive equality was engaged…but that funding should nonetheless be withheld," the Appeal Decision is reviewable on the reasonableness standard.

[62] This characterization of the applicable standard of review as dependent on the nature of the *Charter* question on judicial review is consistent with this Court's decision in *Mombourquette v Canada (Attorney General)*, 2024 FC 2093 [*Mombourquette*].

[63] In *Mombourquette*, Justice Southcott reviewed jurisprudence from the Supreme Court of Canada on this issue at paras 45-57. He concluded that determinations of whether the *Charter* is engaged, and whether an administrative decision limits *Charter* protections, are matters of correctness: *Mombourquette* at paras 64, 67, 69. For further clarity, a majority of the Supreme Court of Canada in *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 held at para 63 that "[t]he issue of constitutionality on judicial review – of whether a *Charter* right arises, the scope of its protection, and the appropriate framework of analysis – is a 'constitutional questio[n]' that requires 'a final and determinate answer from the courts' (*Vavilov*, at paras. 53 and 55)."

[64] On the other hand, questions concerning an administrative decision-maker's balancing of *Charter* rights and values with their statutory mandate is a matter of reasonableness, as set out in *Doré v Barreau du Québec*, 2012 SCC 12: *Mombourquette* at paras 64-67, 69.

[65] The determinative question in this application is whether the Appeal Decision is unreasonable in light of the legal and factual constraints that govern Jordan's Principle. Specifically, whether the Appeal Decision unreasonably concluded that special or ameliorative programs are excluded from, or "carved out" of, the principle's scope. It is therefore unnecessary

to consider questions about the scope and interpretation of s. 15(2) of the *Charter*, s. 16(1) of the CHRA, or whether there was a breach of procedural fairness.

[66] Therefore, the governing standard of review is reasonableness, and no question requiring an application of the correctness standard need be determined to dispose of this application.

VI. Preliminary Issue – Admissibility of Affidavits

[67] The Respondent raises as a preliminary issue the admissibility of the following affidavits in the Amended Applicant's Record:

- The Affidavit of Jasmine Kaur, affirmed April 24, 2025 [First Kaur Affidavit];
- The Affidavit of Jasmine Kaur, affirmed May 9, 2025, Exhibit B [Second Kaur Affidavit];
- The Affidavit of Jasmine Kaur, affirmed May 26, 2025, Exhibits A to D [Third Kaur Affidavit]; and
- The Affidavit of Dr. Ryan Giroux, affirmed April 23, 2025 [Giroux Affidavit].

[68] With respect to the first two affidavits, Ms. Jasmine Kaur is a law clerk/legal assistant at the firm of Counsel for the Applicant. Her affidavits serve the purpose of admitting into evidence their exhibits.

[69] At the hearing the Applicant consented to the exclusion of the First Kaur Affidavit.

[70] The Respondent objects to the admission of Exhibit B to the Second Kaur Affidavit. Exhibit B is a letter from the Honourable Patty Hadju, Minister of ISC, dated February 10, 2025, that appears to be addressed to her provincial and territorial counterparts. The letter concerns changes to the operating procedures for processing requests under Jordan's Principle. I agree with the Respondent that the letter is new evidence that was not in front of the decision maker and does not meet any of the three exceptions for admissibility set out in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20 [*Access Copyright*].

[71] The Respondent objects to the admission of Exhibits A–D of the Third Kaur Affidavit.

[72] Exhibits A, B and D to the Third Kaur Affidavit are excerpts from three affidavits sworn by Dr. Valerie Gideon, the Deputy Minister in the Department of Crown Indigenous Relations and Northern Affairs, and the former Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at ISC. The affidavits were sworn on May 24, 2018, April 15, 2019, and March 14, 2024, in the context of proceedings before the CHRT.

[73] In her May 24, 2018 affidavit, Dr. Gideon states that the purpose of the affidavit is to "describe the efforts and actions taken by Canada to comply with the [CHRT] Orders…" Her April 15, 2019 affidavit states that the purpose is to "provide the most up-to-date information and evidence…on Canada's activities on Jordan's Principle and those ordered on mental health." Finally, the purpose of the March 14, 2024 affidavit is to "detail the exceptional growth and

actions taken to advance Jordan's Principle within ISC, as well as ISC's current Jordan's Principle operational model."

[74] I find that Exhibits A, B and D to the Third Kaur Affidavit are admissible, only to the extent that they speak to ISC's development and implementation of a new appeal process. This information is general background that assists the Court in understanding the underlying process that gave rise to the Appeal Decision under review: see *Access Copyright* at para 20(a).

[75] The "general background" exception from *Access Copyright* was described as follows by the Federal Court of Appeal in *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45:

> The "general background" exception applies to **non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below** and the categories of evidence that the parties placed before the administrator. **As long as the affidavit does not engage in spin or advocacy** – that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule.
>
> [**emphasis added**]

[76] In my view, the statements and exhibits in Dr. Gideon's affidavits, tendered as evidence by the Attorney General of Canada before the CHRT, fall within the general background exception, as described above. The information the affidavits contain concerning the

development of a new appeal process is useful and can be used in a neutral and uncontroversial way to understand the procedures that took place below, especially considering that there is no statutorily prescribed scheme which the Court can otherwise turn to in order to understand ISC's process for determining appeals of decisions on Jordan's Principle applications.

[77] Exhibit C to the Third Kaur Affidavit is an excerpt of the transcript from a May 7, 2019, cross-examination of Dr. Gideon. When the Court expressed its misgivings about relying on a partial transcript from a cross-examination on an affidavit, the Applicant agreed to have the exhibit excluded.

[78] Finally, the Respondent objects to the admission of Exhibit A to the Giroux Affidavit, which is his Curriculum Vitae. Exhibit A is inadmissible because it does not meet a new evidence exception in *Access Copyright*. In any case, it is of minimal relevance to the substantive issues.

VII. The Appeal Decision is Unreasonable

[79] The Appeal Decision's rationale for denying the bulk of the application for funding is that Jordan's Principle "is not intended to provide access to or change the scope of special or ameliorative programs that are expressly permitted" under s. 16(1) of the CHRA and s. 15(2) of the *Charter*. This reasoning is untenable in light of the legal and factual constraints that apply to the exercise of ISC's discretion: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*].

[80] The Applicant did not challenge the OAP or its scope. He did not ask ISC "to provide access" for Scarlet to the OAP – the application sought funding based on Jordan's Principle, not the OAP.

[81] The Respondent argues that, to qualify for Jordan's Principle funding, "there must be an existing government service, available to the general public."[1] They say the OAP is not such a program as it is not available to the general public. It is only available to children and youth under 18 who live in Ontario and are diagnosed with autism. Therefore, the Respondent says that the Appeal Decision is reasonable in concluding that the OAP is the type of program contemplated under s.15(2) of the *Charter* and s.16(1) of the CHRA.

[82] Whether the OAP is an ameliorative program under s.15(2) of the *Charter* or a "special program" under the CHRA is beside the point.

[83] The Appeal Decision imposes what amounts to a new, and potentially far-reaching, carve-out or exception to Jordan's Principle in situations where the underlying comparative program could be considered ameliorative pursuant to s.15(2) of the *Charter* or a "special program" under s.16(1) of the CHRA. This interpretation of Jordan's Principle is narrower than what is demanded by the CHRT in its Key Principles.

[1] The parties disagree on whether an existing comparator program is necessary to trigger Jordan's Principle (see, 2017 CHRT 14 at para 71). In the instant case, the OAP is an existing comparator program. Accordingly, I leave this question to be addressed in a later case.

[84] Where the Appeal Decision falters is by relying on an interpretation of Jordan's Principle that is narrower than directed by the CHRT orders and inconsistent with the case law. As noted, the CHRT orders summarized above (which have not been set aside or altered on judicial review) and the case law on Jordan's Principle constrain the exercise of ISC's discretion.

[85] Specifically, the Appeal Decision is unreasonable in light of Key Principle (iv),[2] which concerns Jordan's Principle applications that seek funding beyond the normative standard of care, which the application for Scarlet appears to do. Key Principle (iv) provides that, where a comparative government service is not available to all other children or lies beyond the normative standard of care, the government of first contact *must still evaluate the child's needs* to determine if the request should be met to ensure: (1) substantive equality in the provision of services to children; (2) culturally appropriate services to the child; and/or (3) the safeguarding of the best interests of the child: 2017 CHRT 14 at para 135; 2017 CHRT 35.

[86] The decision-maker here applied an interpretation of Jordan's Principle that is inconsistent with Key Principle (iv). They instead relied on a "carve-out" for ameliorative programs as a full answer to ISC's legal obligations under Jordan's Principle. This cut short the analysis called for by the CHRT, including with respect to substantive equality and the interests of the child. The reasons for the Appeal Decision failed to engage in any meaningful way with the central issue of substantive equality: *Vavilov* at para 128.

[2] See para 51 of these reasons.

[87] This runs afoul of the CHRT's order that "Canada shall not use or distribute a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated" in the 2017 CHRT orders: 2017 CHRT 14 at para 135, as confirmed in 2017 CHRT 35.

[88] This Court has been consistent in its direction that Jordan's Principle be interpreted broadly and liberally, and not narrowly: *Schofer* at para 17; *Pictou* at para 86.

[89] The interpretation adopted in the Appeal Decision appears to be even narrower than the earlier formulations of the principle rejected by the CHRT and this Court as too restrictive: 2017 CHRT 14 at para 50 ("option one"), 52; *Pictou* at para 87.

[90] From its inception, the definition of Jordan's Principle has contemplated filling the gaps in services to First Nation children, including where there is a comparative program that is ameliorative. For example, even the narrowest definitions of Jordan's Principle relied on by Canada included supports for children with disabilities: see *Pictou* at para 84, 2017 CHRT 14 at para 52. Further, Key Principle (ii) speaks of filling gaps in programming such as special education and speech therapy, which would likely include programs that are ameliorative pursuant to s.15(2) of the *Charter* or qualify as "special programs" under the CHRA.

[91] Finally, excluding applications where the comparator program is ameliorative would, in many instances, have the perverse effect of excluding First Nation children facing intersecting disadvantages from accessing Jordan's Principle funding to meet their needs. This would undermine the central objective of Jordan's Principle, substantive equality.

[92] Given these findings I need not address the other grounds for review raised by the Applicant.

VIII. Remedy

[93] The Applicant asks that this Court grant the ultimate relief he sought in his Jordan's Principle application: an order that ISC provide the full amount of the requested funds. In the alternative, he asks the Court to quash the Appeal Decision, remit the matter for reconsideration and order that ISC provide funding for ABA therapy until: (1) ISC grants the request on reconsideration; or (2) 45 days after ISC's denial of any subsequent appeal. In my view, neither form of relief, which are essentially directed verdicts, is appropriate in these circumstances.

[94] As a general rule, directed verdicts are limited to circumstances where it is evident to the Court that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: *Vavilov* at para 142. While the Applicant cites the same paragraph in *Vavilov* for the proposition that a concern for delay may "influence the exercise of a court's discretion to remit a matter," I do not understand this comment to suggest that urgency in the absence of an inevitable outcome warrants a directed verdict.

[95] The appropriate remedy is to remit the matter back to the Appeals Secretariat. Deference is due to the administrative entity that makes decisions within the realm of its expertise: *Pictou* at para 118. Given its expertise, the EERC is better placed than the Court to assess the Applicant's claim.

[96] I acknowledge that a timely decision is of utmost importance for the Applicant. As such, this matter will be remitted with the following timelines:

a) The Applicant must file any further submissions to the Appeals Secretariat for reconsideration by the EERC on or before July 4, 2025.

b) The appeal is to be reconsidered in accordance with the Court's reasons and the Applicant's further submissions, and a decision must be rendered on or before July 18, 2025.

c) The above timelines can be amended by agreement between the parties, with no requirement to seek an amended Order from the Court.

IX. Costs

[97] The Applicant requests elevated lump sum costs. During oral argument, the parties agreed to submit written costs submissions following receipt of the Court's reasons.

[98] If the parties cannot agree on costs, they may file submissions not to exceed five pages, double spaced, excluding any bill of costs. The Applicant's costs submissions are to be served and filed on or before June 27, 2025, and the Respondent's submissions are to be served and filed on or before July 4, 2025.

THIS COURT'S JUDGMENT is that

1. This application for judicial review is granted.

2. The Appeal Decision is set aside and shall be remitted to the Appeals Secretariat for reconsideration in accordance with the Court's reasons and the Applicant's further submissions.

3. The Applicant shall have an opportunity to file additional evidence and further submissions for reconsideration by the EERC, and shall submit any such material on or before July 4, 2025.

4. ISC shall communicate the new appeal decision to the Applicant on or before July 18, 2025.

5. The parties are at liberty to amend the deadlines set out above by agreement with no requirement to seek an amended Order from the Court.

6. If the parties are unable to agree on costs, they may file cost submissions as set out in the reasons for judgement.

"Meaghan M. Conroy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1255-25
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PLACE OF HEARING:	OTTAWA, ONTARIO
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JUDGMENT AND REASONS:	CONROY J.
DATED:	JUNE 23, 2025

APPEARANCES:

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