Court File No. A-270-25

FEDERAL COURT OF APPEAL

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Appellant

and

JOANNE POWLESS

Respondent

and

ASSEMBLY OF MANITOBA CHIEFS and THE FIRST NATIONS CHILD AND CARING SOCIETY OF CANADA

Interveners

Pursuant to subsection 27 (1) of the *Federal Courts Act,* R.S.C. 1985, c.F-7.

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, JOANNE POWLESS

September 25, 2025

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OVERVIEW

1. This appeal addresses the urgent health needs of two First Nations children, who live on-reserve, in a house that is making them very sick. It is the first time this Court has had to consider Jordan's Principle—a principle that the Federal Court had addressed only twice, before this year.[1]

2. Jordan's Principle is well-defined. It has been the subject of numerous Canadian Human Rights Tribunal ("**CHRT**") decisions over the past decade, which have repeatedly ordered Canada to cease applying narrow definitions of Jordan's Principle and to immediately implement its full meaning and scope. These orders bind Canada. They have either not been judicially reviewed, or Canada's attempts at judicial review have been discontinued or dismissed.

3. Jordan's Principle is a simple idea: because of the systemic inequities they face, First Nations children should receive the services they need, when they need them, regardless of the level of government involved. Under Jordan's Principle, First Nations families can request services for their children from the government department of first contact (here, Indigenous Services Canada, or "**ISC**"). If the requested service is available to all other children, the government department of first contact must pay for the service.[2] As the CHRT has made plain since 2017, if the requested service is not available to all other children or lies beyond the normative standard of care, the government department of first contact must still evaluate the child's needs and determine if the request should be met to ensure: (i) substantive equality in the provision of services to the child (i.e., to meet the needs flowing from "the historical and systemic disadvantages faced by First Nations children")[3] (ii) culturally appropriate services to the child, or (iii) to safeguard the best interests of the child.[4]

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[1] *Pictou Landing Band Council v Canada (AG)*, 2013 FC 342; *Malone v Canada (AG)*, 2021 FC 127 [*Malone*].
[2] 2017 CHRT 14 at para 135(1)(B)(iii), as amended by 2017 CHRT 35.
[3] *Schofer v Canada (Attorney General)*, 2025 FC 50 at para 17 [*Schofer*].
[4] 2017 CHRT 14 at para 135(1)(B)(iv), as amended by 2017 CHRT 35. See also: *Canada (AG) v FNCFCSC et al*, 2021 FC 969 at paras 40–44 [*Caring Society—FC*];

4. In this appeal, Canada seeks to re-litigate issues the CHRT has already resolved, and effectively mounts a collateral attack on a decade's worth of CHRT orders. Canada asks this Court to adopt a novel definition of Jordan's Principle to justify the administrative decision under review. This novel definition is both absent from and inconsistent with the CHRT's jurisprudence.

5. The decision under review arose from a Jordan's Principle request made by Joanne Powless, a First Nations grandmother, who sought mould remediation to her home for the benefit of her two grandchildren. Both children suffer from moderate-to-severe asthma, exacerbated by the mould-infested, dilapidated condition of their home. Absent mould remediation, the children's doctor opined that they face "life-threatening asthma exacerbations," and "lifelong consequences."[5]

6. ISC refused to approve Joanne's request. ISC's decision is consistent with a troubling pattern, documented in several of the CHRT's decisions, of Canada side-stepping or unduly narrowing the scope of Jordan's Principle. ISC's refusal in this case rested on two grounds: first, that Jordan's Principle applies only where there is an "existing government service" offered to others; and second, that an ameliorative program called the Residential Rehabilitation Assistance Program ("**RRAP**"), which addresses the health and safety of on-reserve housing, was not an "existing government service" because of s. 15(2) of the *Canadian Charter of Rights and Freedoms* ("***Charter***"). These reasons are inconsistent with the CHRT's binding orders, which acted as legal constraints on ISC's decision-making.

7. Joanne sought judicial review. The Federal Court quashed ISC's decision, concluding that it unreasonably narrowed the scope of Jordan's Principle. As the Federal Court recognized, ISC's decision rests on a flawed interpretation of Jordan's Principle that disregards the CHRT's binding orders. The decision also wrongly equates Canada's statutory human rights obligations under the *Canadian Human*

Malone at para 8; *Cully v Canada (AG)*, 2025 FC 1132 at para 51(v) [*Cully*]; *Powless v Canada (AG)*, 2025 FC 1227 at para 45(c) [*Powless*].

[5] Letter from Dr. Giroux re Ze. D dated July 19, 2024 ["Giroux Letter re Ze. D"], Certified Tribunal Record [Appeal Book [AB], Tab 6 at 376]; Letter from Dr. Giroux re Za. D dated July 19, 2024 ["Giroux Letter re Za. D"] [AB, Tab 6 at 377].

Rights Act ("***CHRA***"), with those under s. 15(1) of the *Charter*, and misreads s. 15(2).

8. The Federal Court identified the proper standard of review and applied it correctly. Joanne asks that this Court dismiss the appeal.

PART I - STATEMENT OF FACTS

A. Ze. D and Za. D's Mould-Infested Home

9. Ze. D and Za. D are eight- and ten-years old. They reside on Oneida Nation of the Thames Settlement, with Joanne (their grandmother), their father, and their uncle.

10. Ze. D and Za. D live in a mould-infested home.[6] The ceiling is pockmarked with holes and reveals a thick, mottled layer of mould resting inside. Mould spores coat the kitchen walls, the bathroom, and bedrooms, eating at the drywall.[7] One contractor, after inspecting the home, opined that it "needs to be rebuil[t]" and "correction to the exterior of the house is necessary" to prevent "danger to [Joanne], [her] family and kids."[8]

11. Ze. D and Za. D have moderate-to-severe asthma, caused and exacerbated by their mould-infested home.[9] Ze. D experiences chest pain, trouble sleeping through the night, repeated coughing, wheezing, and other respiratory conditions that force her to miss school. She has been hospitalized several times for asthma-related reasons, and has attended the emergency room due to respiratory difficulties.[10] Za. D developed asthma because of the mould-infested home. She struggles to exercise because of breathing problems, has difficulty sleeping, and has also missed school.

12. Ze. D's and Za. D's doctor found that mould removal is a "life-saving necessity" for the sisters.[11] He remarked that the mould has "heavily influenced" their asthma and that, absent intervention, they may face "reduced school functioning and educational

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[6] *Powless* at paras 11–13; Affidavit of J. Powless, affirmed January 27, 2025 ["Powless Affidavit"] at paras 1–2, 6, 12–14 [AB, Tab 7 at 442–444].
[7] Photos Taken by J. Powless [AB, Tab 6 at 383–394].
[8] Email from J. Pankiewicz to J. Powless dated May 29, 2022 [AB, Tab 6 at 52].
[9] See, e.g. Powless Affidavit at paras 7–9 [AB, Tab 7 at 443]; Giroux Letter re Ze. D [AR, Tab 6 at 376]; Giroux Letter re Za. D [AB, Tab 6 at 377].
[10] *Powless* at paras 9–10; Giroux Letter re Ze. D [AB, Tab 6 at 376]; Powless Affidavit at paras 7, 66–67 [AB, Tab 7 at 443, 456].
[11] Giroux Letter re Ze. D [AB, Tab 6 at 376].

attainment," "life-threatening asthma exacerbations," and "lifelong consequences."[12]

13. Joanne is Ze. D's and Za. D's legal guardian and primary caretaker. Aside from caring for Ze. D and Za. D full-time, Joanne also holds the unpaid role of Faithkeeper in her community. She cannot work and currently receives social assistance.[13]

B. Jordan's Principle: A Primer

14. To provide for Ze. D and Za. D, and to remedy their unsafe living conditions, Joanne filed several requests to ISC under Jordan's Principle. Her latest request to Jordan's Principle, described below, forms the basis for this appeal.

15. Jordan's Principle is a simple idea: First Nations children should receive the services they need, when they need them, regardless of the level of government from which the service is sought.[14] The CHRT has explained that Jordan's Principle is a child-first principle, meant to ensure First Nations children receive services that are available to all other children without delay:

> Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident or off reserve […]. 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, physical therapy, speech therapy, medical equipment, and physiotherapy.[15]

16. Jordan's Principle is named for Jordan River Anderson, who was born into a First Nations family.[16] Like Ze. D and Za. D, Jordan had serious medical needs. To ensure he received proper treatment, his family surrendered him into provincial care. After spending two years in hospital, Jordan could have moved to a therapeutic foster home close to his medical facilities. Instead, for the next two years, the federal and provincial governments argued over who should pay for Jordan's foster home costs. They were still arguing when Jordan passed away, at the age of five, having never spent a day in

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[12] Giroux Letter re Ze. D [AB, Tab 6 at 376]; Giroux Letter re Za. D [AB, Tab 6 at 377].
[13] *Powless* at para 1; Powless Affidavit at paras 2–4, 7, 9 [AB, Tab 7 at 442–443].
[14] 2020 CHRT 20 at para 99 [2020 CHRT 20], aff'd in 2021 FC 969.
[15] 2017 CHRT 35 at para 135(1)(B)(i) and (ii) [emphasis added].
[16] 2016 CHRT 2 at para 352.

a family home.[17] After Jordan's death, the House of Commons unanimously passed Motion No. 296, calling on the federal government to adopt Jordan's Principle. Two years later, in 2009, Health Canada and Aboriginal Affairs and Northern Development Canada ("**AANDC**") signed a Memorandum of Understanding on Jordan's Principle.[18]

17. Canada's implementation of Jordan's Principle is governed by several CHRT decisions and orders. These orders are final and binding on Canada,[19] and are registered as orders of the Federal Court under s. 57 of the *CHRA*. To understand Jordan's Principle's scope—and the flaws in Canada's arguments before this Court—it is useful to briefly review some of them.

i. 2016 CHRT 2 (the "Merits Decision"): Findings of Discrimination and Order to Implement Jordan's Principle

18. In 2007, the First Nations Child and Family Caring Society of Canada ("**Caring Society**") and the Assembly of First Nations filed a *CHRA* complaint (the "**Complaint**"). The Complaint alleged that AANDC's provision of child and family services on-reserve discriminated against First Nations children and families, as did Canada's narrow implementation of Jordan's Principle.[20]

19. In 2016, the CHRT found that Canada had discriminated against First Nations children and families in providing child and family services (the "**Merits Decision**").[21] It specifically found that Canada's definition and implementation of Jordan's Principle—then, restricted to inter-governmental disputes about First Nations children with multiple disabilities—was "narrow…and inadequate", resulting in "service gaps, delays and denials."[22] It ordered AANDC to "cease applying its narrow definition" and to "immediately implement the full meaning and scope of Jordan's [P]rinciple"[23].

20. In the Merits Decision, the CHRT rejected Canada's argument (similar to those it

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[17] 2016 CHRT 2 at para 352.
[18] 2016 CHRT 2 at paras 353–354.
[19] 2016 CHRT 2; 2016 CHRT 10; 2016 CHRT 16; 2017 CHRT 14; 2017 CHRT 35; 2019 CHRT 7; 2020 CHRT 20 (aff'd 2021 FC 969); 2025 CHRT 6.
[20] *Caring Society—FC* at para 7.
[21] 2016 CHRT 2 at paras 461–467.
[22] 2016 CHRT 2 at para 458.
[23] 2016 CHRT 2 at para 481.

raises before this Court) that the *CHRA* requires an assessment of the adequacy of programs for First Nations children against existing programs available to other children.[24] The CHRT found that Canada was unable to assess comparability with programs generally available to other children, as such programs failed to account for First Nations children's unique circumstances:

> …this analysis is not able to recognize that disadvantaged groups may have higher levels of need for services (due to poverty, poor housing conditions, higher levels of substance abuse, and exposure to family violence) or that services or placement options they require may be at a substantially higher cost for services.[25]

21. Canada also argued that several ameliorative programs, including a "Non-Insured Health Benefits program," already considered the specific needs of First Nations children.[26] The CHRT, however, found that poor coordination among these programs actually contributed to the service gaps Jordan's Principle is meant to close:

> For example, once a child is in care, the FNCFS Program cannot recover costs for Non-Insured Health Benefits from Health Canada. In that situation, Health Canada deems that there is another source of coverage (the FNCFS Program); however, AANDC does not have authority to pay for medical-related expenditures. Generally, there is confusion in how to access non-insured health benefits…[27]

22. The CHRT retained jurisdiction over the Complaint, to ensure Canada implemented the CHRT's orders.[28] Canada did not seek judicial review.

ii. 2016 CHRT 10: Failure to Immediately Implement Jordan's Principle

23. In 2016 CHRT 10, the CHRT considered its approach to its "broad remedial authorities," meant to address the "discriminatory practices identified in the [Merits] Decision."[29] It also observed that Canada had "begun discussions" on expanding the federal government's implementation of Jordan's Principle, but had failed to

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[24] 2016 CHRT 2 at paras 316–319.
[25] 2016 CHRT 2 at para 336. See also: 2020 CHRT 15 at paras 114–116.
[26] 2016 CHRT 2 at para 361.
[27] 2016 CHRT 2 at para 370.
[28] 2016 CHRT 2 at para 494.
[29] 2016 CHRT 10 at paras 17, 19.

"immediately implement the full meaning and scope of Jordan's Principle," contrary to the Merits Decision.[30]

24. The CHRT reiterated that it had ordered Canada to "immediately consider Jordan's Principle as including all jurisdictional disputes (this includes disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities)."[31] The CHRT also explained that there was an increased need to retain jurisdiction because remedial orders responding to systemic discrimination can be difficult to implement.[32]

iii. 2016 CHRT 16: Attempt to Narrow Jordan's Principle to On-Reserve

25. In 2016 CHRT 16, the CHRT found that Canada had once again unduly restricted Jordan's Principle's scope. Canada had "narrowly interpreted" Jordan's Principle to "apply [only] to First Nations children on reserve," rather than "all First Nations children",[33] contrary to the Merits Decision. Canada had also wrongfully limited Jordan's Principle's application to First Nations children with "disabilities and those who present with a discrete, short-term issue."[34] The CHRT ensured Canada undertook "not to decrease or further restrict funding for First Nations child and family services or children's services covered by Jordan's Principle."[35]

26. Canada did not seek judicial review of 2016 CHRT 10 or 2016 CHRT 16.

iv. 2017 CHRT 14 and 35: Attempt to Narrow Jordan's Principle to Services Comparable to Existing Normative Standards of Care

27. In 2017 CHRT 14, which was decided sixteen months after the Merits Decision, the CHRT found that Canada still had not complied with the Merits Decision, nor the orders in 2016 CHRT 10 and 16.[36] It also observed that undue emphasis on the "normative standard of care" or "comparable" services risked creating further service

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[30] 2016 CHRT 10 at para 32 [emphasis added].
[31] 2016 CHRT 10 at para 33 [emphasis added].
[32] 2016 CHRT 10 at para 36.
[33] 2016 CHRT 16 at para 118.
[34] 2016 CHRT 16 at para 119.
[35] 2016 CHRT 16 at para 122.
[36] 2017 CHRT 14 at paras 67, 80.

gaps, and would fail to ensure substantive equality:

> [69] 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 [Merits] *Decision* with respect to substantive equality and the need for culturally appropriate services. 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 […]
>
> [71] 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.[37]

28. The CHRT thus underscored that Canada must be prepared to "go beyond the normative standard of care," when responding to Jordan's Principle requests, given that "First Nations children may need additional services that other Canadians do not"[38]:

> [73] Therefore, the fact that it is considered an "exception" to go beyond the normative standard of care is concerning given the findings in the [Merits] *Decision,* which findings Canada accepted and did not challenge. The discrimination found in the [Merits] *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.[39]

29. To that end, the CHRT ordered that Canada cease "perpetuating definitions of Jordan's Principle that are not in compliance with the [CHRT's] orders", and specified that Jordan's Principle's scope extends beyond the normative standard of care:

> …When a government service is not necessarily available to all other children or is beyond the normative standard of care, the government of

[37] 2017 CHRT 14 at paras 69–71 [emphasis added, citations omitted].
[38] 2017 CHRT 14 at para 72 [emphasis added]. See also: *Schofer* at para 18.
[39] 2017 CHRT 14 at para 73.

> 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.[40]

30. Canada sought judicial review of 2017 CHRT 14, but discontinued it after 2017 CHRT 35, in which the CHRT provided a modified definition of Jordan's Principle that accounted for service assessments and clinical case conferencing. [41]

v. 2020 CHRT 15: Attempt to Narrow Definition of Service Gaps

31. In 2020 CHRT 15, the CHRT rejected Canada's argument, also made in 2016 CHRT 2 and resurrected before this Court, that a "service gap," for the purposes of Jordan's Principle, exists only where the service in question is one "ordinarily provided to other children in Canada".[42] Canada also argued—as it does before this Court—that several ameliorative programs already consider the specific needs of First Nations children.[43] The CHRT found that 2016 CHRT 2 provided a complete response to these arguments: "the [CHRT] rejects the following parameters proposed by Canada that … the service must have been normally publicly funded for any child in Canada."[44]

32. The CHRT also expressed concern that Canada's arguments contested the "systemic discrimination already found in the *Merit Decision*."[45] It underscored that the Merits Decision was unchallenged and that "[a]dvancing arguments and evidence now to challenge the [CHRT's] previous systemic discrimination findings […] cannot be permitted."[46] Canada sought judicial review of this decision, did not succeed before the Federal Court, and abandoned its subsequent appeal.[47]

vi. 2025 CHRT 6: Ongoing Issues Implementing Jordan's Principle

33. In 2025 CHRT 6, the CHRT clarified that Jordan's Principle was not open-ended.

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[40] 2017 CHRT 35 at para 135(1)(B)(iv) [emphasis added].
[41] 2017 CHRT 35 at para 135(1)(B)(iii); *Caring Society—FC* at para 41.
[42] 2020 CHRT 15 at paras 69–74, 106–109, 111–115.
[43] 2020 CHRT 15 at para 73 and 113–115.
[44] 2020 CHRT 15 at para 107.
[45] 2020 CHRT 15 at para 116.
[46] 2020 CHRT 15 at para 173. See also 2020 CHRT 15 at paras 108, 119 and 172.
[47] *Caring Society—FC* at paras 208–209 and 216.

Rather, essential services provided under Jordan's Principle were to be defined based on "the real needs of First Nations children"[48] and "not wants, aspirations or anything that could improve well-being without any limit."[49] It went on to say that lack of access to "safe housing", among other things, "is what the [CHRT] had in mind when it ordered services to go above the normative standard."[50]

34. The CHRT also addressed Canada's argument, made in prior steps of that proceeding and similar to that made before this Court, that because other federal programs cover services requested under Jordan's Principle, these services fall outside of Jordan's Principle's scope. The CHRT noted that Canada "may overestimate the eligibility and responsiveness of the other federal programs" and "this is why Jordan's Principle has been so needed."[51] It also rejected the contention that other social programs at the federal, provincial, and community levels are sufficient to oust Jordan's Principle: "a simple referral because a list of other services exists, may not be responsive to the children's needs."[52]

35. Finally, the CHRT commented on Canada's continued refusal to implement Jordan's Principle's full scope and meaning—and its repeated use of arguments already rejected by the CHRT: "The [CHRT] is seeing similar arguments from Canada in the motions than the ones argued in previous motions."[53] Although the CHRT ordered Canada to "eliminate gaps and the lack of coordination in federal programs offered to First Nations children,"[54] it found that Canada still had not done so "8 years after the [CHRT's] *Merits Decision* and 7 years after the [CHRT]'s Jordan's Principle specific rulings and orders in 2017 CHRT 14 and 35."[55]

36. Canada sought judicial review of these findings, but abandoned the application.

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[48] 2025 CHRT 6 at para 64.
[49] 2025 CHRT 6 at para 65.
[50] 2025 CHRT 6 at paras 63–64.
[51] 2025 CHRT 6 at para 95.
[52] 2025 CHRT 6 at para 159.
[53] 2025 CHRT 6 at para 363.
[54] 2025 CHRT 6 at para 359.
[55] 2025 CHRT 6 at para 382.

C. The First Request, Denials, and Judicial Review

37. On June 8, 2022, Joanne submitted a Jordan's Principle request to ISC, on Ze. D and Za. D's behalf, for mould remediation and repairs. The request aimed to address Ze. D's and Za. D's respiratory conditions, arising from the mould in their home (the "**First Request**").[56] Joanne obtained two estimates for the cost of the repairs: $191,514.62 and $187,467.00.[57] She also qualified for a $25,000 loan through her Nation's Housing Department. However, the loan would cover only a fraction of the repair costs, and Joanne worried that she would not be able to repay it.[58]

38. On January 24, 2024, ISC denied the First Request (the "**First Denial**"). Among other things, the First Denial stated that "major renovations fall outside of Jordan's Principle scope."[59] Joanne appealed. On February 22, 2024, the Jordan's Principle Appeals Secretariat advised that ISC denied the appeal (the "**First Appeal Denial**"), as "[m]ajor structural changes are outside of Jordan's Principle scope."[60]

39. Although the First Request was denied, the Expert External Review Committee ("**EERC**") (an external, non-governmental expert panel that makes recommendations to ISC)[61] had observed that the children were "living in an environment that is detrimentally impacting the [*sic*] overall health and wellbeing,"[62] and that "no child should have to live in a house that is making them sick."[63] Notably, all members agreed that granting the request would serve substantive equality, as "Bands are chronically underfunded to meet housing needs in the Community, resulting in poorly built houses

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[56] Email from K. Ninham to Jordans Principle ON dated June 8, 2022 at 11:02AM [AB, Tab 6 at 54–57].
[57] Powless Affidavit at paras 30–32 [AB, Tab 7 at 447]. See also Quote from Eagle Eye Construction [AB, Tab 6 at 153] and Quote from C. Schmitt Custom Build and Renovations [AB, Tab 6 at 154–155].
[58] Powless Affidavit at para 37 [AB, Tab 7 at 448].
[59] Email from ISC to K. Goldman dated January 24, 2024, [AB, Tab 6 at 193–194].
[60] Letter from Jordan's Principle Appeal Secretariat to K. Goldman dated February 22, 2024 [AB, Tab 6 at 258–259].
[61] 2025 CHRT 6 at para 483.
[62] First Appeal Denial dated Feb. 14, 2024 [First Appeal Denial][AB, Tab 6 at 244].
[63] First Appeal Denial [AB, Tab 6 at 246] [emphasis added].

with structural issues and mold".[64]

40. Joanne challenged the First Appeal Denial in Federal Court.[65] Her challenge was discontinued on September 4, 2024, pursuant to an agreement with Canada.[66] Joanne filed a new Jordan's Principle request that same day (the "**Second Request**").

D. The Second Request, Denials, and Judicial Review

41. The Second Request sought funding for mould remediation and repairs, personal hygiene and care needs, and housing during the remediation and repair work.[67]

42. On September 10, 2024, ISC denied the Second Request (the "**Second Denial**"). In the Second Denial, ISC determined that "Jordan's Principle [did] not apply" for two reasons. First, ISC stated that "Jordan's Principle is designed to ensure that First Nations children have the same access to government services as other children across Canada."[68] Since ISC was "unaware of any existing government service that provides funding to Canadians for mould remediation," Jordan's Principle did not apply.[69]

43. Second, ISC cited a government program called the "Canada Mortgage and Housing Corporation's (CMHC) On-Reserve Residential Rehabilitation Assistance Program (RRAP)," which was "specifically designed to improve the health and safety of on-reserve housing."[70] ISC opined that the RRAP was an "ameliorative program" for the purposes of s. 15(2) of the *Charter*.[71] Since "Jordan's Principle is concerned with enabling First Nations children to gain substantively equal access to existing government services that are available to the general public", and is "not intended to provide access or change the scope of special or ameliorative programs", Jordan's Principle did not apply.[72]

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[64] First Appeal Denial [AB, Tab 6 at 244].
[65] Federal Court File No. T-621-24.
[66] *Powless* at para 20.
[67] Powless Affidavit at paras 44, 62 [AB, Tab 7 at 450, 454].
[68] Second Denial dated September 10, 2024 [Second Denial] [AB, Tab 6 at 299].
[69] Second Denial [AB, Tab 6 at 299].
[70] Second Denial [AB, Tab 6 at 299].
[71] Second Denial [AB, Tab 6 at 299–300].
[72] Second Denial [AB, Tab 6 at 300].

44. Joanne appealed the Second Denial.[73] To support her appeal, Joanne included a letter from her Nation's Housing Manager that stated its RRAP funding was already "allocated and maxed out."[74] In the letter, the Housing Manager noted that the costs of the requested remediation and repairs would exceed the funding available.[75]

45. On November 28, 2024, the Senior Assistant Deputy Minister ("**SADM**") at ISC denied Joanne's appeal (the "**Second Appeal Denial**"). The SADM noted that the EERC recommended that ISC deny Joanne's request, but the SADM had done so "for the reasons outlined below"—namely, the same two reasons ISC relied on in the Second Denial.[76] Notably, these reasons did not: (i) address Ze. D or Za. D's circumstances, health needs, or best interests, nor (ii) speak to the historic disadvantages that First Nations children face in relation to housing.[77]

46. Although the Second Request was denied, all of the EERC members agreed that mould remediation was in Ze. D's and Za. D's best interests, as "their current home is unsafe."[78] They also found that granting the request would ensure substantive equality for the children, but that it was outside Jordan's Principle's housing authorities.[79]

47. On November 29, 2024, Joanne commenced the underlying judicial review.

E. The Decision Below

48. The Federal Court granted Joanne's judicial review. It identified reasonableness as the standard of review for the Second Appeal Denial, and correctness for whether *Charter* rights or values were engaged.[80] It reviewed the definition of Jordan's Principle, noting that "First Nations children may need services beyond those typically

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[73] Email from D. Taylor to ISC dated November 14, 2024 [AB, Tab 6 at 413].
[74] Email from V. Doxtater to D. Taylor dated October 22, 2024 at 2:29PM [Doxtater Email], [AB, Tab 6 at 399].
[75] Doxtater Email, [AB, Tab 6 at 399].
[76] Second Appeal Denial Letter dated November 28, 2024 [Second Appeal Denial Letter] [AB, Tab 6 at 439].
[77] Second Appeal Denial Letter [AB, Tab 6 at 439–440].
[78] EERC Presentation Form dated November 28, 2024 [EERC Presentation Form] [AB, Tab 6 at 435].
[79] EERC Presentation Form [AB, Tab 6 at 435–436].
[80] *Powless* at paras 37–39.

provided to non-First Nations children due to systemic inequities including socio-economic challenges, intergenerational trauma, and cultural access barriers."[81] It also outlined several CHRT decisions, including 2016 CHRT 2, 2017 CHRT 35, 2019 CHRT 7, and 2025 CHRT 6, that operate as constraints on ISC's decision-making.[82]

49. With these constraints in mind, the Court found that "it was unreasonable for ISC to deny the request by narrowly framing it as a housing remediation request, rather than assessing it through a substantive equality lens and the health and best interests of the children, as Jordan's Principle requires."[83] It also found that ISC focused unduly on comparable services, like the RRAP: "The issue is not whether the RRAP is an ameliorative program, but whether the children's health needs were adequately addressed."[84] This undue focus "ignore[d] the core principle of substantive equality, which requires consideration of historical disadvantage and the best interests of the children."[85] Importantly, the Court determined that the RRAP was "either inaccessible or inadequate to address the health needs of these children," and "offere[ed] no relief nor benefits to address the health conditions suffered by the children."[86]

PART II - POINTS IN ISSUE

50. In this appeal, Canada advances several arguments that seek to re-define Jordan's Principle, contrary to the CHRT's binding orders. As the Federal Court noted in *Canada (AG) v First Nations Child and Family Caring Society of Canada*, these orders are final: if Canada wanted to challenge them, "it should have done so earlier."[87] While Joanne addresses these arguments, there are in fact only two issues in this appeal:

(a) Did the Federal Court identify the appropriate standard of review? **Yes.**

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[81] *Powless* at para 42, citing *Schofer* at para 18.
[82] *Powless* at para 45.
[83] *Powless* at para 43 [emphasis added].
[84] *Powless* at para 46.
[85] *Powless* at para 46.
[86] *Powless* at para 50.
[87] *Caring Society—FC* at para 231 (see also at para 224).

(b) Did the Federal Court apply the standard of review correctly? **Yes**. **The Second Appeal Denial misapplied Jordan's Principle.**

PART III - STATEMENT OF SUBMISSIONS

A. ISC Has Not Met Its Tactical Burden on Appeal and Instead Engages in a Collateral Attack on the CHRT's Orders

51. On appeal, this Court must "determine whether the Federal Court identified the appropriate standard of review," and "decide whether it applied that standard properly."[88] When faced with reasons that provide a "complete answer to all the arguments that [the appellant] advances," however, the appellant bears a "strong tactical burden" to show that the Federal Court's reasoning is flawed. [89]

52. Canada has not met its burden on appeal. First, the parties agree that the Federal Court identified the appropriate standards of review: reasonableness for the Second Appeal Denial,[90] and correctness for whether *Charter* rights are engaged.[91] Second, the Federal Court provided a complete answer to the issues raised. It canvassed the relevant legal constraints on ISC—namely, the CHRT orders on Jordan's Principle,[92] and related Federal Court decisions[93]—and based on these constraints, it concluded that the Second Appeal Denial was unreasonable. It noted that ISC failed to assess Joanne's request through a substantive equality lens, with reference to the children's health and best interests, "as Jordan's Principle requires."[94] It also found that ISC's search for a comparable service failed to engage with the evidence that "those programs were either

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[88] *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 51.
[89] *Bank of Montreal v Canada (AG)*, 2021 FCA 189 at para 4; *Grewal v Canada (AG)*, 2022 FCA 114 at para 11; *Sun v Canada (AG)*, 2024 FCA 152 at para 4; *Kandasamy v Canada (AG)*, 2024 FCA 181 at para 7; *Power Workers' Union v Canada (AG)*, 2024 FCA 182 at para 181; *Canadian Coalition for Firearm Rights v Canada (AG)*, 2025 FCA 82 at para 25.
[90] A.F. at para 24 [A.F.]; *Powless* at paras 37–38.
[91] A.F. at para 24; *Powless* at para 39.
[92] *Powless* at paras 45(a)–(d), citing 2016 CHRT 2 at paras 481–482, 2019 CHRT 7 at paras 12-14, 2017 CHRT 35 at para 135(B)(iv), and 2025 CHRT 6 at para 160.
[93] *Powless* at paras 41–42, citing *Caring Society – FC* at paras 12–72 and *Schofer* at paras 17–21.
[94] *Powless* at para 43 [emphasis added].

inaccessible or inadequate to address the health needs of these children."[95]

53. Canada identifies no errors in the Federal Court's reasoning, which is enough to resolve this appeal, as it is only the Federal Court's decision that is before this Court. Instead, Canada advances a suite of arguments that seek to re-interpret and re-define the CHRT's orders on Jordan's Principle. These arguments seek to alter these orders.

54. Canada's attempt to redefine the CHRT's orders amounts to a collateral attack on those orders.[96] These orders are final and binding on Canada, as Canada has not sought to judicially review them,[97] or has abandoned the judicial review proceedings it did commence.[98] As the Federal Court concluded in *Canada (AG) v First Nations Child and Family Caring Society of Canada*, Canada's decision not to challenge the CHRT's decision carries legal consequences.[99] This Court should not permit Canada to advance these arguments and, instead, should follow its approach in *Chipesia v Blueberry River First Nation*, in which it was "not prepared to allow the appellants to address indirectly what they should have addressed directly".[100]

B. The Federal Court Applied the Standard of Review Correctly

55. In *Vavilov*, the Supreme Court explained that reasonableness review focuses "on the decision actually made by the decision maker."[101] Where a decision maker has provided written reasons, "[a] principled approach to reasonableness review is one

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[95] *Powless* at para 49.
[96] The rule against collateral attack applies to administrative tribunals as well as courts. See: *British Columbia (Workers Compensation Board) v Figliola*, 2011 SCC 52 at para 28.
[97] 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16, 2019 CHRT 7.
[98] 2017 CHRT 14 (discontinued), 2025 CHRT 6 (discontinued), 2020 CHRT 20 and 2020 CHRT 36 (judicial review dismissed by the Federal Court in 2021 FC 969, appeal to this Court discontinued).
[99] *Caring Society – FC* at paras 141, 223–224, 231 and 289.
[100] *Chipesia v Blueberry River First Nation*, 2020 FCA 9 at para 10. See also: *Taypotat v Taypotat*, 2013 FCA 192 at para 21, rev'd in 2015 SCC 30, but not on this point: "If the appellant was of the view that this decision was made without the required community consensus, he should have challenged it at the appropriate time".
[101] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 84 [*Vavilov*].

which puts those reasons first."[102] Indeed, this Court has recognized that, post-*Vavilov*, it cannot "cooper up" administrative decision-maker's reasons.[103] Instead, it must ask "if there is a sufficient reasoned explanation in support of [the decision-maker's] decision."[104] If there is not, "the decision is unreasonable and must be quashed."[105]

56. On appeal, Canada suggests that the SADM drew several conclusions—and considered several factors—that are not reflected in the Second Appeal Denial. As noted above, the SADM denied Joanne's request because it concluded, for two reasons, that Jordan's Principle did not apply. First, since ISC was "unaware of any existing government service" that provided mould remediation funding, Ze. D and Za. D were not "denied access to either a service" within the meaning of s. 5 of the *CHRA*, "or a benefit within the meaning of [s.] 15(1)" of the *Charter*.[106] Second, the RRAP was not a "government service", for the purposes of identifying a service gap, because "Jordan's Principle is […] not intended to provide access to or change the scope of special or ameliorative programs."[107]

57. Notably, and despite Canada arguing otherwise, the SADM's reasons did not conclude that "there was no discriminatory gap in an existing service",[108] did not apply "appellate jurisprudence on substantive equality […] to the facts",[109] did not consider Ze. D or Za. D's "health and medical issues",[110] nor did they consider how to prioritize funding "based on relevant legal and policy principles."[111]

58. The SADM's reasons contradict the relevant legal constraints that operate on ISC, including the CHRT's binding orders and Federal Court jurisprudence. As outlined below, the Federal Court properly found this was unreasonable, and accordingly,

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[102] *Vavilov* at paras 83–84.
[103] *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at para 10 [*Alexion*], application for leave to appeal dismissed, 2022 CanLII 21677 (SCC).
[104] *Alexion* at para 10
[105] *Alexion* at para 10
[106] Second Appeal Denial Letter [AB, Tab 6 at 439].
[107] Second Appeal Denial Letter [AB, Tab 6 at 440].
[108] A.F. at paras 26, 36, 48-49.
[109] A.F. at paras 26, 46.
[110] A.F. at para 47, 49.
[111] A.F. at para 49.

quashed the Second Appeal Denial.

i. ISC's Decision Ignored the Legal Constraints in the CHRT's Orders

59. The Federal Court quashed the Second Appeal Denial because it "reflect[ed] an unduly narrow and inconsistent application of Jordan's Principle."[112] This narrow application stems from ISC's flawed reading of Jordan's Principle, reflected in the underlined portions of the following passage from the Second Appeal Denial:

> Jordan's Principle is based on the legal concept of substantive equality. It serves to ensure that First Nations children can benefit equally from existing government services i.e. services available to the general public, like other children across Canada, taking into account the need for culturally appropriate service supports, and to safeguard the best interests of First Nations children in light of their particular needs. It recognizes that to allow First Nations children to access substantively the same level of services as other children in Canada, First Nations children may need resources or supports that are not provided to all others, or that are beyond normative standards, within the context of an underlying government service available to the general public. These kinds of supports account for the unique circumstances, experiences and needs of the child, as a First Nations child [emphasis added].[113]

60. ISC treated the existence of a service available to the general public as dispositive of the analysis; because it was not aware of such a service, it summarily concluded that "Jordan's Principle does not apply in the circumstances of this case."[114]

61. The Second Appeal Denial is predicated on a restriction that flouts binding orders relating to Jordan's Principle. Under Jordan's Principle, if the requested service is available to all other children, the government of first contact must pay for the service.[115] But this is not the end of the analysis. As the CHRT has made plain since 2017, if the requested 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 and determine if the request should be met to ensure: (i) substantive equality in the provision of services to children (i.e., to meet the needs flowing from

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[112] *Powless* at para 43.
[113] Second Appeal Denial Letter [AB, Tab 6 at 439–440].
[114] Second Appeal Denial Letter [AB, Tab 6 at 439].
[115] 2017 CHRT 14 at para 135(1)(B)(iii), as amended by 2017 CHRT 35.

"the historical and systemic disadvantages faced by First Nations children"); [116] (ii) culturally appropriate services to the child; or (iii) to safeguard the best interests of the child.[117] ISC failed to acknowledge this requirement, let alone apply it.

62. In the Second Appeal Denial, ISC cites to portions of two CHRT decisions (2017 CHRT 35 at Annex 1(B) and 2019 CHRT 7 at para 26) to support its flawed reading. Both citations contradict ISC's reading. First, Annex 1(B) of 2017 CHRT 35 sets out the principles that ISC must apply to implement Jordan's Principle.[118] None of these principles require ISC to identify an existing service available to the general public—or, as Canada now argues, a "discriminatory gap", to grant a Jordan's Principle request.[119] Instead, Annex 1(B) states that ISC must evaluate a request, even where a government service requested by the applicant is not necessarily available to others:

> 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.[120]

63. Second, paragraph 26 of 2019 CHRT 7 contains no reference to the restrictions ISC seeks to impose on Jordan's Principle. In paragraph 26, the CHRT observed "that thousands of services have been approved since it issued its orders [in 2017 CHRT 14]. It is now proven, that this substantive equality remedy has generated significant change for First Nations children and is efficient and measurable."[121] The CHRT commented that "[t]hose 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."[122]

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[116] *Schofer* at para 17.
[117] 2017 CHRT 35 at para 135(1)(B)(iv). See also *Caring Society—FC* at paras 40–44; *Malone* at para 8; *Cully* at para 51(v); *Powless* at para 45(c).
[118] *Powless* at para 45(c); see also *Cully* at paras 51–52 and 83–90.
[119] A.F. at paras 1, 36, 41, 49.
[120] 2017 CHRT 35 at Annex(1)(B)(iv).
[121] 2019 CHRT 7 at para 26 [emphasis in original].
[122] 2019 CHRT 7 at para 25.

Paragraph 26 is thus the antithesis of ISC's flawed definition.

64. Rather than acknowledging that ISC failed to respect binding constraints, Canada seeks to retroactively justify the decision by proposing two novel restrictions to Jordan's Principle: (i) Jordan's Principle's scope should be defined with reference to "existing services";[123] and (ii) for Jordan's Principle to apply, Jordan's Principle requestors must show a "discriminatory gap" within such an "existing service."[124]

65. Again, these restrictions are unfounded. As noted above, the CHRT rejected the "existing service" criterion in 2017 CHRT 14. It underscored that "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," and "[t]he focus on a dispute […] does not account for potential gaps in services where no jurisdiction is providing the required services."[125]

66. The CHRT rejected the "existing service" criterion again in 2020 CHRT 15, reiterating that "Canada's arguments… were rejected and discussed at length" in 2016 CHRT 2.[126] The Federal Court upheld 2020 CHRT 15 on judicial review.[127]

67. The CHRT's reasons are also inconsistent with the "discriminatory gap" criterion. Adding this hurdle would, in effect, transform each Jordan's Principle request into a 'mini-*CHRA* complaint,' in which a requestor must, in Canada's words, "demonstrate unequal treatment" in that "they failed to receive a benefit provided to others or bear a burden not imposed on others."[128] This approach misconstrues the CHRT's remedial orders relating to Jordan's Principle. In 2020 CHRT 20, upheld on judicial review, the CHRT explained that Jordan's Principle serves to address underlying findings of discrimination already made by the CHRT:

> The criterion included in the [CHRT's] definition in 2017 CHRT 14 of providing services "above normative standard" furthers substantive

[123] A.F. at paras 1, 3–4, 31–32, 41, 44.
[124] A.F. at paras 1, 3–4, 36, 41, 48–49, 56–57.
[125] 2017 CHRT 14 at para 71 [citations omitted, emphasis added].
[126] 2020 CHRT 15 at paras 111–114.
[127] *Caring Society–FC*.
[128] A.F. at para 36.

> equality for First Nations children in focusing on their specific needs which includes accounting for intergenerational trauma and other important considerations resulting from the discrimination found in the *Merit Decision* and other disadvantages such as historical disadvantage they may face. […]. Moreover, the Panel relying on the evidentiary record found that **it is the most expeditious mechanism currently in place to start eliminating discrimination found in this case** and experienced by First Nations children while the National Program is being reformed. Moreover, this especially given its substantive equality objective which also accounts for intersectionality aspects of the discrimination in all government services affecting First Nations children and families. **Substantive equality is both a right and a remedy in this case**: a right that is owed to First Nations children as a constant and a sustainable remedy to address the discrimination and prevent its reoccurrence.[129]

68. Likewise, in 2017 CHRT 14, the CHRT explained that its Jordan's Principle orders aimed to "redress or prevent the discrimination identified in the [Merits] *Decision*".[130] It also noted that its orders were made under ss. 53(2)(a) and (b) of the *CHRA*, as "Canada continues to restrict the full meaning and intent of Jordan's Principle."[131] The purpose of these orders is therefore to "redress the practice or to prevent the same or a similar practice from occurring in future",[132] and not to require independent findings of discrimination, each time a Jordan's Principle request is made.

69. To rescue its "discriminatory gap" argument, Canada suggests that the CHRT, "consistent with *Pictou Landing*, concluded that there must be an existing 'complimentary social or health' service for Jordan's Principle to apply."[133] Of course, *Pictou Landing*, a case that also noted that "Jordan's Principle is not an open ended principle", [134] predates all of the CHRT's orders. Canada ignores the CHRT's subsequent orders on Jordan's Principle, which clearly confirm that Jordan's Principle

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[129] 2020 CHRT 20 at para 89, aff'd in 2021 FC 969 [underlining emphasis in original, bold emphasis added]. The CHRT took up the same formulation in later rulings (2021 CHRT 41 at para 262; 2022 CHRT 8 at para 3; 2022 CHRT 41 at para 3; 2023 CHRT 44 at para 17; 2025 CHRT 6 at para 41.
[130] 2017 CHRT 14 at para 31.
[131] 2017 CHRT 14 at para 80.
[132] *Canadian Human Rights Act*, RSC 1985, c H-6, s 53(2)(a).
[133] A.F. at para 41.
[134] *Pictou Landing* at para 116.

can apply in the absence of comparable services.[135] In any case, the CHRT recently addressed *Pictou Landing*,[136] confirmed that Jordan's Principle is not open-ended, and provided a non-exhaustive list of factors that impact First Nations children's need for services.[137] In so doing, it emphasized that Jordan's Principle is "based on needs […], not wants, aspirations, or anything that could improve well-being without any limit."[138]

70. Canada attempts to limit Jordan's Principle for the same reason it repeatedly singled out the quantum of Joanne's request before the Federal Court: it argues that despite "extensive health-related needs", ISC "administer[s] funding that is not unlimited and needs to be prioritized based on relevant legal and policy principles."[139] In reality, Canada distorts the relevant legal and policy principles to limit its funding obligations. The Federal Court rejected Canada's allusions to limited resources. It found that ISC did not dispute the amount of funding requested and, in any case, that there was "no evidence or argument that Jordan's Principle imposes a financial limit on individual requests."[140] The Federal Court was right to do so. The amount sought is similar to the amounts in *Cully*, where the Federal Court quashed ISC's denial of funding for specialized therapy for a First Nations child.[141]

71. In any event, the CHRT has already addressed Canada's systemic financial concerns. In 2025 CHRT 6, it held that approving individual service requests was only one remedial component to address findings of discrimination:

> When the [CHRT] removed the eligibility requirement of the normative standard it was well aware that this would bring a large influx of requests given the lack of coordination and multiple gaps in Federal

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[135] 2017 CHRT 14 at paras 69–71; 2020 CHRT 15 at paras 107–114.
[136] 2025 CHRT 6 at paras 57–64.
[137] 2025 CHRT 6 at para 63: "Remoteness, lack of surrounding services, the lack of free safe drinking water, lack of road access, safe housing, lack of safe schools or special education services and screenings, assessments, and tools that will impact a child's learning abilities are some important examples that impact the needs of First Nations children. The Tribunal cannot provide an exhaustive list [emphasis added]".
[138] 2025 CHRT 6 at para 65.
[139] A.F. at para 49.
[140] *Powless* at para 52, see also: para 15.
[141] *Cully* at paras 11 (previously approved services: $190,300) and 14 (denied services: $217,650.50).

> programs. Working towards better coordination and closing gaps while implementing Jordan's Principle was necessary. The [CHRT] did not envision only one of the two.[142]

72. In sum, Joanne's case is exactly the kind of case the CHRT contemplated when it made its Jordan's Principle orders. As the Court below noted, "[t]he record shows clearly that [other programs] were either inaccessible or inadequate to address the health needs of these children."[143] Considering the evidence and the CHRT's unchallenged orders, the Federal Court properly concluded that "ISC's decision reflects an unduly narrow and inconsistent application of Jordan's Principle."[144]

ii. Canada's Conflation of s. 15 *Charter* Principles with the Interpretation of Binding *CHRA* Orders Should Be Rejected

73. In an attempt to bootstrap ISC's assertion that Jordan's Principle requires an existing service to apply, Canada contends that substantive equality requires "some standard to compare against", otherwise "there is no benefit denied for the purposes of substantive equality."[145] It also contends that "[s]ubstantive equality does not impose positive obligations on a government to remedy pre-existing inequalities in Canadian society".[146] This, according to Canada, means that Jordan's Principle applies only where "a First Nations child faces a discriminatory gap within an existing service."[147]

74. Canada's contentions rely on an anemic reading of substantive equality jurisprudence. First, Canada conflates the principle of substantive equality with the requirements developed for s. 15(1) of the *Charter*. These requirements are "[t]he means by which substantive equality is protected" under s. 15(1).[148] The fact that Jordan's Principle is animated by substantive equality does not mean applicants must effectively mount a discrimination complaint each time they seek to access a service.

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[142] 2025 CHRT 6 at para 59 [emphasis added].
[143] *Powless* at para 49.
[144] *Powless* at para 43.
[145] A.F. at para 38 [emphasis omitted].
[146] A.F. at para 35.
[147] A.F. at para 41.
[148] *R v Sharma*, 2022 SCC 39 at para 38. For a substantive equality example outside the context of s. 15(1), see: *Ewert v Canada*, 2018 SCC 30 at paras 53-55 and 65.

75. Second, Canada's vision of substantive equality ignores that the implementation of Jordan's Principle is founded on pre-existing legal findings of systemic discrimination. A government that has been found in breach of its obligations and ordered to fully implement Jordan's Principle cannot simply do so "in an incremental manner… allowing government to set its own priorities".[149]

76. Third, Canada fails to recognize the distinct purpose of human rights legislation, which the Supreme Court of Canada has described as "the final refuge of the disadvantaged and disenfranchised."[150] As Mactavish J. (as she then was) recognized in *Canada (Human Rights Commission) v Canada (AG)*, a decision that was upheld by this Court, "no one can seriously dispute that […] First Nations people are amongst the most disadvantaged and marginalized members of our society".[151]

77. Canada's arguments also borrow heavily from its position before this Court in *Dominique*. There, Canada argued that the CHRT had flouted jurisprudence that held "that governments are permitted to address social inequalities incrementally".[152] Canada also argued that the state "has no positive obligation to address social inequalities."[153] Canada's factum on this appeal is peppered with similar pleas.[154]

78. In *Dominique*, this Court rejected those arguments. It found that Canada's approach relied on "case law developed under section 15 of the *Charter*", which was distinct from "human rights legislation."[155] While *Charter* jurisprudence and statutory human rights matters could be "mutually influential", this Court held that they remain separate: "despite their obvious kinship, section 15 and human rights legislation do not use exactly the same legal tests in determining what is or is not discriminatory."[156]

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[149] A.F. at para 40.
[150] *Zurich Insurance Co v Ontario*, [1992] 2 SCR 321 at 339.
[151] *Canada (Human Rights Commission) v Canada (AG)*, 2012 FC 445 at para 334, aff'd 2013 FCA 375.
[152] *Canada (AG) v Dominique*, 2025 FCA 24 at para 53 [*Dominique FCA*].
[153] *Dominique FCA* at para 56.
[154] A.F. at paras 4, 40, 57, 58, 59 (re incrementalism) and 35, 39, 57, 59 (re no positive obligation).
[155] *Dominique FCA* at para 61.
[156] *Dominique FCA* at para 64.

After noting several differences between the two, the Court concluded that:

> it is far from clear that the principles derived from the case law relating to section 15 of the Charter that the Attorney General raises here (absence of a positive obligation to eliminate social inequalities, incrementalism, and deference to choices made to this end), which mainly focus on the relationship between Parliament and the courts, can be transposed to this case, nor is, at the very least, the extent to which they can be.[157]

79. The Court went on to find that quasi-constitutional human rights statutes, like the *CHRA*, are "essentially remedial": they "aim to identify discrimination, whether intentional or not, and eliminate it".[158] Thus, there is no basis to import *Charter*-related concepts into the substantive equality analysis under Jordan's Principle, an analysis ordered by the CHRT to redress the discrimination it found. Indeed, the CHRT's Jordan's Principle orders, which Canada has accepted, were designed to break the cycle of the federal government's past conduct:

> 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.[159]

80. Following this rationale, the Court below found that ISC was required to assess Joanne's request "through a substantive equality lens and the health and best interests of the children, as Jordan's Principle requires."[160] None of the principles Canada cites change this requirement, which is integral to the remedial nature of the CHRT's orders on Jordan's Principle.

81. Canada's arguments seem to suggest that, had the SADM conducted a 'proper' substantive equality analysis, she would have concluded that substantive equality did not require her to grant the request. But there is nothing in the record to suggest this is

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[157] *Dominique FCA* at para 68.
[158] *Dominique FCA* at para 66.
[159] 2017 CHRT 14 at para 74.
[160] *Powless* at para 43.

true. In fact, the record reveals that all EERC members, on both appeals, concluded that granting the request would serve substantive equality.[161] The SADM did not adopt the EERC's reasoning in her letter, and cannot rely on this Court to supplement an analysis on substantive equality where there is none.

iii. ISC Misinterpreted s. 15(2) of the *Charter* and s. 16(1) of the *CHRA*

82. ISC's second reason for denying Joanne's request rests on the RRAP's purported "ameliorative" nature. Although Canada acknowledged that "the RRAP is aimed to address health and safety concerns related to housing for First Nations people on reserve"[162] (the same concerns animating Joanne's request), the SADM excluded mould remediation from Jordan's Principle's scope by creating a "carve out" for "ameliorative programs". In the SADM's view, Jordan's Principle "is not intended to provide access to or change the scope of special or ameliorative programs."[163]

83. As the Federal Court has concluded twice this year, this "carve out" undermines Jordan's Principle's purpose, as stated in the CHRT orders reviewed above.[164] The Court below rejected ISC's reliance on the RRAP's ameliorative nature:

> The issue is not whether the RRAP is an ameliorative program, but whether the children's health needs were adequately addressed. ISC's focus on comparable services ignores the core principle of substantive equality, which requires consideration of historical disadvantage and the best interests of the children.[165]

84. This was an appropriate conclusion to draw. The Federal Court reached a similar conclusion in *Cully*, finding that ameliorative programs do not serve as a barrier to Jordan's Principle requests:

> 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.

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[161] First Appeal Denial [AB, Tab 6 at 244–248], EERC Presentation Form [AB, Tab 6 at 435–436].
[162] A.F. at para 18.
[163] Second Appeal Denial Letter [AB, Tab 6 at 440].
[164] *Powless* at para 46; *Cully* at paras 88–91.
[165] *Powless* at para 46.

> From its inception, the definition of Jordan's Principle has contemplated filling the gaps in services to First Nations 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. 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*.
>
> 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.[166]

85. The Second Appeal Denial's "carve out" also relies on a flawed interpretation of s. 15(2) of the *Charter* and s. 16(1) of the *CHRA*. Canada argues that "ameliorative programs" are inoculated from scrutiny under the *Charter* or the *CHRA*, so as to avoid undermining the state's ability to incrementally address social inequalities.[167] In so doing, Canada evokes the position of the dissenting judges at the Supreme Court of Canada in *Quebec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux*.[168] For its part, the Supreme Court of Canada majority in this case held s. 15(2) "protects ameliorative programs for disadvantaged groups from claims by those the program was not intended to benefit that the ameliorative program discriminates against them."[169] The majority expressly rejected arguments like the one Canada is advancing here, finding that s. 15(2) "cannot bar s. 15(1) claims by the very group the legislation seeks to protect and there is no jurisprudential support for the view that it could do so [emphasis added]."[170]

86. The Supreme Court was even clearer in *Centrale des syndicats du Québec v Quebec (AG)*, a companion appeal heard with *Alliance*, in which Abella J. held (for the

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[166] *Cully* at paras 88–91 [citations omitted].
[167] A.F. at para 4, 51, 53, 57–59.
[168] *Quebec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at paras 64–66 [*Alliance*].
[169] *Alliance* at para 31.
[170] *Alliance* at para 32.

majority, given that McLachlin C.J. agreed with her s. 15 analysis):

> The purpose of s. 15(2) is to save ameliorative programs from the charge of 'reverse discrimination'. Reverse discrimination involves a claim from someone outside the scope of intended beneficiaries who alleges that ameliorating those beneficiaries discriminates against him. It stands the purpose on its head to suggest that s. 15(2) can be used to deprive the program's intended beneficiaries of the right to challenge the program's compliance with s. 15(1) [emphasis added].[171]

87. As Canada concedes, Joanne and her grandchildren are intended beneficiaries of the RRAP. Subsection 15(2) of the *Charter* thus has no role to play in barring consideration of the RRAP in the Jordan's Principle analysis.

88. As for s. 16(1) of the *CHRA*, Canada cites no authority to support its claim that s. 16(1) recognizes that ameliorative programs "are not a discriminatory practice and should generally be protected from equality rights-based challenges."[172] To the contrary, the CHRT specifically rejected Canada's theory of s. 16(1) of the *CHRA* in *Dominique*, which addressed Canada's discriminatory funding of First Nations policing services (which decision was upheld by this Court), finding that "[s.] 16(1) of the *CHRA* […] is intended to protect the adoption or implementation of special programs from challenges **by groups of individuals who are not covered** by the program."[173] The CHRT found that Canada's proposed approach, "that any program that has an ameliorative aspect aimed at eliminating, diminishing or preventing disadvantages […] could **never** be scrutinized or reviewed under the CHRA"[174] was "contrary to the very essence of the CHRA."[175]

89. Canada says that "there was no ameliorative program in *Dominique*",[176] but relies on a passage in which this Court summarized part of Canada's argument in that appeal. Canada ignores this Court's observation in *Dominique* that, while the Attorney General

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[171] *Centrale des syndicats du Québec v Quebec (AG)*, 2018 SCC 18 at para 32.
[172] A.F. at para 52.
[173] *Dominique v Public Safety Canada*, 2022 CHRT 4 at para 377 [emphasis in original]. [*Dominique—CHRT*] , aff'd 2023 FC 267, aff'd 2025 FCA 24.
[174] *Dominique—CHRT* at para 374 [emphasis in original].
[175] *Dominique—CHRT* at para 383.
[176] A.F. at para 60.

resiled from its reliance on s. 16(1) of the *CHRA* on appeal, it had in fact taken that position before the CHRT.[177] While Canada also asserts that *Dominique* does not address its ameliorative program argument,[178] this is an excessively formalist reading. This Court in *Dominique* expressed deep scepticism of that argument:

> Pushed to its limit, this argument would allow for tolerance of discriminatory conduct on the basis that the disadvantaged group is now better off than it was before the policy was adopted, even if the policy's implementation gives rise to equality rights concerns. It seems to me that this would result in indirect condonation of the approach whereby there can be no discrimination if the harm or adverse treatment at issue is now, all in all, minimal, an approach rejected by the Supreme Corut as being at odds with the very purpose of human rights legislation, which aims to ensure that there is no discrimination—of any level—without any consequences […].[179]

90. The Federal Court cannot be faulted for rejecting a flawed concept of s. 15(2) of the *Charter* or of s. 16(1) of the *CHRA*. Canada's arguments do not reveal constraints that bound any decision-maker involved in this matter.

iv. The Federal Court Properly Found that ISC Failed to Meaningfully Engage with the Children's Health Conditions

91. Canada suggests that the Federal Court erred by overlooking ISC's analysis of Joanne's grandchildren's health conditions.[180] However, as Canada also notes in its factum, that analysis was limited to the "Presentation Form",[181] a document in the Certified Tribunal Record that "provides the reason for recommendation to approve or deny from each [EERC] panel member".[182] While the EERC acknowledged "severe respiratory illness", "the state of disrepair of the home and how it may contribute to the children's adverse health concerns", and "the mould in the home is causing severe

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[177] *Dominique FCA* at para 79. In this appeal, Canada appears to resile from its position in *Dominique FCA* that s. 16(1) of the *CHRA* "applies only to cases of reverse discrimination" (at para 54).
[178] A.F. at para 61.
[179] *Dominique FCA* at para 84.
[180] A.F. at para 47.
[181] A.F. at para 47.
[182] A.F. at para 14.

respiratory illness, preventing the children from going to school",[183] the Second Appeal Denial mentions none of these factors. Indeed, the Second Appeal Denial says that SADM agreed with the result of the EERC's consideration, but for different reasons.[184]

92. *Vavilov* instructs that "the focus of reasonableness review must be on the decision actually made by the decision maker".[185] Where the reasons, on their face, set part of the record aside in the decision-making process, that record cannot be resurrected to buttress the reasons.[186] There is no basis to conclude that the Federal Court erred in finding that the decision-maker did not assess the health or best interests of the children.[187] As the Supreme Court recently affirmed in *Pepa v Canada (Citizenship and Immigration)*, "[t]he reasons ought to have demonstrated that the decision maker considered the consequences of the decision and whether such harsh personal consequences were justified in light of the facts, the law and Parliament's intention."[188]

PART IV – ORDER SOUGHT

93. Joanne asks that this appeal be dismissed, with lump sum costs. Given the financial imbalance between the parties, the importance of the matter to Joanne, the fact that the issues raised by Canada extend well beyond Joanne's immediate interests, and the lack of merit in Canada's grounds of appeal, this Court should exercise discretion to grant her a 50% lump sum costs award.[189]

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25TH DAY OF SEPTEMBER, 2025.

David P. Taylor
Siobhan Morris

Solicitors for the Respondent, Joanne Powless

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[183] EERC Presentation Form [AB, Tab 6 at 435–436].
[184] Second Appeal Denial Letter [AB, Tab 6 at 439].
[185] *Vavilov* at para 83.
[186] *Vavilov* at paras 95–96. See, by way of analogy: *R (Bancoult) v Foreign and Commonwealth Secretary (No 3),* [2018] UKSC 3 at para 47.
[187] *Powless* at para 51.
[188] *Pepa v Canada (Citizenship and Immigration)*, 2025 SCC 21 at para 119.
[189] As awarded in *Shanks v Salt River First Nation #195*, 2025 FCA 159 at para 16. See also *Nova Chemicals Corp v Dow Chemical Co,* 2017 FCA 25 at para 11.

PART IV - LIST OF AUTHORITIES

Tab.	Description
REGULATIONS/ STATUES	
1.	*Canadian Human Rights Act*, RSC, 1985, c. H-6
CASE LAW	
2.	*Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157
3.	*Attorney Heneral of Canada v Alexion Pharmaceuticals Inc.,* 2002 CanLII 21677
4.	*Bank of Montreal v Canada (Attorney General)*, 2021 FCA 189
5.	*British Columbia (Workers Compensation Board) v Figliola,* 2011 SCC 52
6.	*Canada (Attorney General) v Dominique*, 2025 FCA 24
7.	*Canada (Attorney General) v First Nations Child and Family Caring Society of Canada et al*, 2021 FC 969
8.	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
9.	*Canadian Coalition for Firearm Rights v Canada (Attorney General)*, 2025 FCA 82
10.	*Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18
11.	*Chipesia v Blueberry River First Nation*, 2020 FCA 9
12.	*Cully v Canada*, 2025 FC 1132
13.	*Dominique (on behalf of the members of the Pekuakamiulnuatsh First Nation) v Public Safety Canada*, 2022 CHRT 4
14.	*Ewert v Canada*, 2018 SCC 30
15.	*First Nations Child & Family Caring Society of Canada and Assembly of First Nations v Canada (Attorney General)*, 2025 CHRT 6
16.	*First Nations Child and Family Caring Society of Canada et al v Canada (Attorney General)*, 2016 CHRT 2

17.	*First Nations Child and Family Caring Society of Canada et al v Canada (Attorney General)*, 2016 CHRT 10
18.	*First Nations Child and Family Caring Society of Canada et al v Canada (Attorney General)*, 2016 CHRT 16
19.	*First Nations Child & Family Caring Society of Canada et al. v Canada (Attorney General)* 2017 CHRT 14
20.	*First Nations Child & Family Caring Society of Canada et al. v Canada (Attorney General),* 2017 CHRT 35
21.	*First Nations Child & Family Caring Society of Canada et al. v Canada (Attorney General),* 2020 CHRT 15
22.	*First Nations Child & Family Caring Society of Canada et al. v Canada (Attorney General),* 2020 CHRT 20
23.	*First Nations Child & Family Caring Society of Canada et al. v Canada (Attorney General),* 2020 CHRT 36
24.	*First Nations Child & Family Caring Society of Canada et al. v Canada (Attorney General),* 2022 CHRT 8
25.	*First Nations Child & Family Caring Society of Canada et al. v Canada (Attorney General),* 2022 CHRT 41
26.	*Grewal v Canada (Attorney General)*, 2022 FCA 114
27.	*Kandasamy v Canada (Attorney General)*, 2024 FCA 181
28.	*Malone v Canada (Attorney General)*, 2021 FC 127
29.	*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21
30.	*Nova Chemicals Corporation v Dow Chemical Company,* 2017 FCA 25
31.	*Pepa v Canada (Citizenship and Immigration)*, 2025 SCC 21
32.	*Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342
33.	*Power Workers' Union v Canada (Attorney General)*, 2024 FCA 182
34.	*Powless v Canada*, 2025 FC 1227
35.	*Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17
36.	*R (Bancoult) v Foreign and Commonwealth Secretary (No 3),* [2018] UKSC 3

37.	*R v Sharma*, 2022 SCC 39
38.	*Schofer v Canada (Attorney General)*, 2025 FC 50
39.	*Shanks v Salt River First Nation #195,* 2025 FCA 159
40.	*Sun v Canada (Attorney General)*, 2024 FCA 152
41.	*Taypotat v Taypotat*, 2013 FCA 192
42.	*Zurich Insurance Co v Ontario*, [1992] 2 SCR 321