Tribunal File No.: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

First Nations Child and Family Caring Society and Assembly of First Nations

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

Respondent

- and -

Chiefs of Ontario, Amnesty International Canada Nishnawbe Aski Nation

Interested Parties

- and -

Congress of Aboriginal Peoples

Interested Party on Motion

Written Submissions of the Canadian Human Rights Commission

(on the Caring Society's motion to be heard March 27-28, 2019, regarding eligibility under Jordan's Principle)

I. Overview

1. At issue on this motion is whether the Respondent ("Canada") has complied with the Tribunal's earlier Rulings by adopting eligibility criteria under Jordan's Principle that fully address the discriminatory practices identified therein. The First Nations Child and Family Caring Society (the "Caring Society") argues that the criteria adopted by Canada are too narrow. It seeks a ruling that gives guidance on the issues, and requires Canada to consult with the parties, adopt a revised

approach that complies with the Tribunal's guidance, and report back to the Tribunal within specified timelines.

2. The Tribunal has encouraged the parties to work together to reach agreements on how to implement its Rulings. The Commission agrees that is to be preferred wherever possible, and remains committed to that process. At the same time, the Commission agrees that discussions around Jordan's Principle eligibility have stalled, and that it will be helpful for this Tribunal to provide some guidance in this regard, after hearing from the Caring Society, Canada, Amnesty International ("Amnesty"), and the participating representative Indigenous organizations.

3. For purposes of this motion, the Commission does not itself take a position on whether Canada's current policy approach does or does not comply with the Tribunal's past Rulings. Instead, the Commission provides some general submissions regarding (i) the Tribunal's retained jurisdiction to address these matters, and (ii) evidence, past findings and/or legal principles that it encourages the Tribunal to consider, as it decides whether to grant any relief that other parties may seek. Ultimately, the Commission urges a human rights-based approach that will result in workable criteria that target benefits to children who have been shown to have the kinds of needs that Jordan's Principle is intended to address – i.e., children who face jurisdictional gaps in services, and/or who have heightened service needs that go beyond normative standards, for reasons relating to discrimination and historic disadvantage.

II. Materials and Process

4. In preparing these Submissions, the Commission has had the opportunity to review, among other things, (i) Canada's submissions dated January 29, 2019, (ii) Amnesty's submissions dated January 30, 2019, (iii) the Caring Society's submissions dated February 4, 2019, (iv) the submissions of the Congress of Aboriginal Peoples ("CAP") dated March 12, 2019, (v) the Tribunal's interim Ruling regarding eligibility under Jordan's Principle in cases involving urgent and/or life-threatening needs (2019 CHRT 7), and (vi) various proposals from Canada, Chiefs of Ontario ("COO") and the Caring Society for changes to the interim Order. On occasion, these Submissions respond or refer back to aspects of these submissions and materials.

5. Further to the Tribunal's directions dated March 11, 2019, the Commission anticipates that the Assembly of First Nations ("AFN"), the Nishnawbe Aski Nation ("NAN") and COO will be delivering their written submissions on March 20, 2019. If the Commission has any additional

comments in response to any such submissions, it will make them during oral argument at the upcoming hearing dates on March 27 and 28, 2019.

III. The Tribunal's Retained Jurisdiction

6. Before discussing the substance of the issue currently before the Tribunal, it is worthwhile to briefly revisit the Tribunal's previous findings regarding the nature and scope of its retained jurisdiction. These findings should continue to inform the Tribunal's approach to the question currently before it.

7. As the Tribunal emphasized in earlier implementation rulings, its task under the *CHRA* is to ensure that quasi-constitutional rights are given full recognition and effect, through the construction of effective and meaningful remedies. This can be an intricate task that demands innovation and flexibility.[1] Where remedying discriminatory practices will involve complex program reform, it may be best for the Tribunal to give guidance and leave it to parties to work on the details, particularly where there is a need for data collection to inform implementation. This will necessarily entail some back and forth between the parties and the Tribunal.[2]

8. The Tribunal has repeatedly encouraged the parties to collaborate and work together outside the litigation process, with a view to resolving as many aspects of immediate, medium and long-term reform as possible.[3] In that regard, it has on occasion issued consent orders, adopting and endorsing remedial measures that have been agreed among the parties.[4] However, the Tribunal has also said that it will make further orders if need be, to ensure that the discriminatory practices identified in the Decision are eliminated.[5]

9. In considering whether further orders are appropriate, the Tribunal is to act on a principled and reasoned basis, considering the particular circumstances of the case and the evidence and

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[1] 2016 CHRT 10 at paras. 11-18; 2017 CHRT 14 at paras. 27-34; 2018 CHRT 4 at paras. 51-52.
[2] 2019 CHRT 7 at paras. 47-50.
[3] For examples, see: 2016 CHRT 16 at para. 12; 2017 CHRT 7 (Choose Life) at paras. 7, 18, 22 and 26-27; 2017 CHRT 35 (Jordan's Principle amendments) at para. 8; 2018 CHRT 4 at paras. 68 (per the Panel) and 454 (per the Panel Chairperson).
[4] For examples, see: 2017 CHRT 7 (Choose Life); 2017 CHRT 35 (Jordan's Principle amendments); 2019 CHRT 1 (Obstruction and costs). The interim Ruling on Jordan's Principle eligibility also acknowledged the utility of consent orders: 2019 CHRT 7 at para. 47.
[5] 2016 CHRT 16 at para. 13; 2017 CHRT 14 at para. 33.

information presented.[6] Among other things, it can examine the actions Canada has taken to date to implement the remedies already granted, and make findings about whether those actions have or have not fully addressed the discriminatory practices at issue.[7]

10. If the Tribunal examines the information provided, and concludes that Canada has implemented policies that satisfactorily address the discrimination found in the Decision, no further orders will be required.[8]

11. However, if the Tribunal is not satisfied that Canada is remedying discrimination in a responsive and efficient way, without repeating patterns of the past, it may be justified in intervening.[9] In such circumstances, it would be open to the Tribunal to make such further orders as are needed to ensure the discrimination is remedied in an effective and meaningful way. For example, the Tribunal might direct Canada to amend a policy that has been shown to have a discriminatory impact. It might clarify a point or concept that has been in dispute, then leave it to the parties to continue their consultations and discussions with that clarification in mind. It would also be open to the Tribunal to refer the issues back to the parties, if needed, to prepare better evidence on what an appropriate order would be.[10]

IV. Background

(A) Past Rulings on Jordan's Principle

12. In its initial decision on liability (the "Decision"), the Tribunal found that Canada had adopted an unduly narrow definition of Jordan's Principle, and ordered it to immediately adopt and implement a compliant approach.[11]

13. In subsequent rulings, the Tribunal found that Canada had not yet complied with the initial Decision. It exercised its retained jurisdiction by making further Orders that clarified the content

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[6] 2017 CHRT 14 at para. 34.
[7] 2017 CHRT 14 at para. 31; 2018 CHRT 4 at para. 18.
[8] 2018 CHRT 4 at para. 54.
[9] 2018 CHRT 4 at paras. 50-54.
[10] 2017 CHRT 14 at para. 27.
[11] 2016 CHRT 2 at paras. 379-382 and 481.

of Jordan's Principle, and required that Canada adopt certain procedures and service standards, and adequately publicize its revised approach.[12]

14. Taken together, the Tribunal's rulings to date describe Jordan's Principle as serving at least two important purposes for "all First Nations children"[13]:

a) First, Jordan's Principle ensures that First Nations children do not experience jurisdictional gaps in services, due to the lack of on-reserve and/or surrounding services.

b) Second, Jordan's Principle can allow for the delivery of services that go beyond the normative standard of care that is otherwise available to persons in the province or territory. This aspect of Jordan's Principle is rooted in a recognition that First Nations children may have additional needs that stem from discrimination and other disadvantages, including those relating to the intergenerational effects of colonialism, displacement, residential schooling, the 60s Scoop, and so on. Because of this unique history, First Nations children may require additional services that other children do not, and/or require that services be delivered in a different manner that is appropriate for their cultural, historical and geographical needs and circumstances.

15. In both these ways, Jordan's Principle helps to achieve substantive equality, and to ensure that the actual needs of First Nations children are met, and that their best interests are considered and addressed.

(B) First Nations Citizenship

16. In its rulings to date, the Tribunal has described Jordan's Principle as existing for the benefit of "all First Nations children." Neither the Decision nor the subsequent rulings appear to have expressly defined what the Tribunal meant when using that term in connection with eligibility under Jordan's Principle.[14]

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[12] 2016 CHRT 10 at paras. 30-34; 2016 CHRT 16 at paras. 114-120; 2017 CHRT 14 at paras. 133-134 (as amended by 2017 CHRT 35).

[13] See, for example: 2017 CHRT 14 at paras. 69-73. For additional passages recognizing that the unique context may require going beyond normative standards of care in order to promote substantive equality, see: 2016 CHRT 2 at paras. 402-427 and 464-465; and 2019 CHRT 7 at para. 74.

[14] In its interim Ruling connected with the present motion (2019 CHRT 7), the Tribunal clarified that in cases involving urgent and/or life-threatening service needs, "First Nations children" would include children without

17. Before discussing how Canada has decided to operationalize the term (see the next section, below), it may be appropriate to provide a brief overview, in no particular order, of different concepts or sources of law that may relate to questions of First Nations citizenship and belonging. It is hoped this review will provide useful background information, as the Tribunal considers the issues now before it.

a) The *Indian Act* purports to define who Canada will recognize as an "Indian" for the purposes of that statute, and related federal laws and policies. According to the *Indian Act*, an "Indian" is a person who either is registered, or eligible to be registered, based on a set of eligibility criteria written into the legislation.[15] Such persons are sometimes referred to as having "status." However, it must be remembered that the status conferred under the *Indian Act* is a colonial legal construct that does not necessarily reflect First Nations' customs and traditions for determining their own membership.[16]

   Canadian courts have found numerous aspects of the *Indian Act* status provisions to be discriminatory over the years, for example by virtue of their differential treatment of women and matrilineal descendants.[17] Although these court decisions have led to legislative amendments that addressed some of these matters, the United Nations Human Rights Committee recently confirmed that residual sex discrimination remains in the *Indian Act*, limiting the rights of affected persons to enjoy their own culture together with the other members of their group, contrary to international human rights guarantees.[18]

b) Since 1985, the *Indian Act* has separated the notion of "membership" from that of registration, stating in s. 10 that First Nations may choose to adopt custom membership codes that define their own membership, subject to certain criteria in the *Indian Act*. Where a First Nation chooses to adopt a custom membership code under s. 10 of the *Indian Act*, it becomes responsible for maintaining its own membership list, in accordance with the

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status, living off-reserve, who are "recognized as members by their Nation." As will be discussed later in these Submissions, some parties have raised questions with respect to this clarification. In any event, that interim Ruling will eventually be superseded by whatever order the Tribunal will make on the merits of the current motion.

[15] *Indian Act*, R.S.C. c. I-5, ss. 2 (definition of "Indian") and 6.

[16] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para. 4.

[17] For two examples, see: *McIvor v. Canada (Indian and Northern Affairs, Registrar)*, 2009 BCCA 153; and *Descheneaux v. Canada (Attorney General)*, 2015 QCCS 3555.

[18] Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2020/2010*, UN Doc CCPR/C/124/D/2020/2010 (11 January 2019) (re McIvor) at paras. 7.6, 7.10-7.11, and 8-10.

terms of its custom code. The number of members recognized under a First Nation's custom membership codes may be more or less than the number of persons with *Indian Act* status who trace their ancestry to that First Nation. Where a First Nation has not enacted its own membership code, the Indian Registrar at Indigenous Services Canada ("ISC") will maintain a membership list for the First Nation, using the criteria that Canada uses for determining registration under the *Indian Act*.[19]

c) A number of First Nations have entered into self-government agreements or arrangements that contain provisions that determine citizenship. For example, this is the case in much of the Yukon. The numbers of citizens recognized under these agreements or arrangements can exceed the numbers of persons with *Indian Act* status residing in the territory of the self-governing First Nation.[20]

d) First Nations may have traditional laws with respect to citizenship, which exist as a matter of inherent sovereignty, independent of the *Indian Act* or any negotiated self-government agreements or arrangements.[21]

18. No discussion of these matters is complete without mention of at least two additional authorities, which speak more generally to the rights of Indigenous peoples to self-determination, and/or control of citizenship within their communities.

19. First, section 35(1) of the *Constitution Act, 1982*, states that, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The Government of Canada has acknowledged that s. 35 has reconciliation as a fundamental purpose,

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[19] *Indian Act*, *supra* ss. 8-11.
[20] See, for example, the circumstances described in *Teslin Tlingit Council v. Canada (Attorney General)*, 2019 YKSC 3, at paras. 10-12, 17 and 39. In this case, the Yukon Supreme Court held that when negotiating financial transfers under the self-government agreement, Canada was obliged to take into account the number of citizens recognized under the agreement, rather than the more limited number of persons registered under the *Indian Act*.
[21] There are a few references in the Joint Record to First Nations that have taken or are exploring this approach, such as the Anishinabek Nation, and the Temagami First Nation. See: Affidavit of Grand Chief Joel Abram (Association of Iroquois and Allied Indians) affirmed March 1, 2019, at para. 15; and Affidavit of Valerie Gideon sworn June 21, 2018, at Exhibit G, p. 4 (information from Lyndia Jones, Health Director, Independent First Nations). Similarly, the Tribunal noted in *Jacobs v. Mohawk Council of Kahnawake* that the respondent Nation had adopted its own membership law, outside of the *Indian Act* structure: 1998 CanLII 3994 (CHRT) at p. 15.

and that it grounds Canada's recognition of the right of Indigenous peoples to self-determination, including inherent rights of self-government.[22]

20. Second, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has a number of provisions that similarly recognize the rights of Indigenous peoples to self-determination, including rights to autonomy or self-government in matters relating to their internal and local affairs.[23] Articles 9 and 33 further state that (i) Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned, and (ii) Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. Article 19 requires States to consult and cooperate in order to obtain the "free, prior and informed consent" of Indigenous peoples before adopting and implementing legislative or administrative measures that may affect them.

21. Canada has ratified the UNDRIP, but has not yet enacted it into domestic law.[24] However, Canada has fully endorsed the UNDRIP, and committed to implementing it through the review of laws and policies, as well as other collaborative initiatives and actions.[25] Further, and importantly, this Tribunal has already provided an analysis of the UNDRIP and its relevance to this proceeding.[26] Amnesty has also provided detailed written submissions that thoroughly canvas international instruments and decisions that may be of relevance on this motion, including the UNDRIP.[27] The Commission does not propose to repeat all that information here, and instead simply encourages the Tribunal to continue to take heed of its earlier conclusion that, "…national legislation such as the *CHRA* must be interpreted so as to be harmonious with Canada's commitments expressed in international law including the UNDRIP."[28]

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[22] Department of Justice, Canada. *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, Principles 1, 2 and 4 (Joint Record, Vol. 8, Tab 45) ("*Canada Principles*").
[23] *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007), Articles 3 and 4.
[24] As at the date of these Submissions, a private member's bill that would adopt the UNDRIP into domestic law -- *Bill C-262: An Act to ensure that the laws of Canada as in harmony with the United Nations Declaration on the Rights of Indigenous Peoples* – is before the Senate for second reading.
[25] *Canada Principles*, at p. 3.
[26] 2018 CHRT 4 at paras. 72-83.
[27] Written Submissions of the Interested Party Amnesty International Canada dated Jan. 30, 2019 ("Amnesty Submissions").
[28] 2018 CHRT 4 at para. 81.

(C) Canada's Policy Approach to Eligibility under Jordan's Principle

22. With the foregoing background in mind, we can now proceed to examine the criteria that Canada has chosen to use, for the sole and specific purpose of determining eligibility for services funded pursuant to Jordan's Principle.

23. In this regard, Canada says that it settled on its expanded policy approach as of June 19, 2018, and communicated that approach to the members of the Consultation Committee on Child Welfare (the "Consultation Committee") on July 5, 2018.[29] According to its written submissions with respect to Jordan's Principle, under this approach, Canada recognizes only the following three categories of children as being eligible to receive services pursuant to Jordan's Principle:

a) children registered under the *Indian Act*, living on or off reserve;
b) children eligible to be registered under the *Indian Act*, living on or off reserve; and
c) "non-status Indigenous children" who are ordinarily resident on reserve.[30]

24. While Canada clearly states in its written submissions that these are the only categories of "First Nations children" recognized for purposes of Jordan's Principle, it previously provided different information to the members of the Consultation Committee. For example, on June 21, 2018 – two days after Canada is said to have approved its current policy approach – ISC staff advised that where a First Nation has a self-government agreement, or self-government legislation, eligibility under Jordan's Principle will be determined based on whether the child is included in the membership code of the self-governing First Nation.[31] Similar information appears to have been provided as recently as January 9, 2019, when ISC staff confirmed that non-status First Nations children from self-governing First Nations in the Yukon are eligible for services and supports through Jordan's Principle, where the First Nation provides written confirmation of their citizenship.[32]

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[29] Affidavit of Dr. Valerie Gideon sworn Dec. 21, 2018, at paras. 14 and 18 (Joint Record, Vol. 6, Tab 39).
[30] Respondent Submissions (re Jordan's Principle) dated Jan. 29, 2019 ("Canada's Submissions"), at para. 1. With respect to the third category, it is unclear to the Commission what criteria ISC uses to determine whether non-status children ordinarily resident on reserve are or are not "Indigenous."
[31] Reply Affidavit of Dr. Valerie Gideon sworn June 21, 2018, at para. 5 and Exhibit E, q. 10 (Joint Record, Vol. 5, Tab 38).
[32] Affidavit #4 of Doreen Navarro affirmed Jan. 28, 2019, at para. 8 and Exhibit G (Caring Society Motion Record, Tab 1).

25. While there may currently be a lack of clarity around this potential fourth category, it seems clear that Canada does not consider the following categories of children to be eligible under Jordan's Principle:

a) non-status children ordinarily resident off reserve who are recognized by First Nations as members, pursuant to custom membership codes adopted under s. 10 of the *Indian Act*;
b) non-status children ordinarily resident off reserve who are recognized by First Nations as citizens, by virtue of traditional laws adopted outside of the *Indian Act* scheme, pursuant to inherent rights of self-government; or
c) non-status children ordinarily resident off reserve who have First Nations ancestry, but who do not have any membership or citizenship ties recognized by their ancestral First Nations.

26. The practical consequence for these excluded children is that they will have access to the same health and other social services as the general population of children living off reserve. They will not be able to take advantage of the opportunity, made possible under Jordan's Principle, to obtain services that go beyond the normative standards of care in the provinces or territories where they reside.

V. Questions before the Tribunal

27. As the Commission understands it, the issues currently before the Tribunal are:

a. does Canada's current policy approach to eligibility under Jordan's Principle fully address the discrimination identified by the Tribunal?, and
b. if not, what further orders (if any) are appropriate?

VI. Submissions

(A) Scope of the Motion

28. The Caring Society, Amnesty and Canada have all stressed their views that this motion relates only to eligibility to receive services from the federal government under Jordan's Principle.[33] The Commission agrees. Nothing in these Submissions is meant to comment in any way on the approach that First Nations should or should not take in exercising rights to determine

[33] First Nations Child and Family Caring Society of Canada Written Submissions re Definition of "All First Nations Children" under Jordan's Principle dated Feb. 4, 2019 ("Caring Society Submissions") at paras. 8-9; Canada's Submissions at para. 3; Amnesty Submissions at para. 24.

their citizenship, or that Canada should or should not take to registration under the *Indian Act*. In the Commission's view, any such matters would be outside the scope of the current proceeding.

29. The Panel appears to have recognized this same distinction in its interim Ruling with respect to these issues, noting that there is a "significant difference" between determining (i) who is a 'First Nation child' for purposes of citizenship within a First Nation, and (ii) who is a 'First Nation child' eligible to receive services under Jordan's Principle.[34] The present motion puts the latter question before the Tribunal, but not the former.

(B) Scope of the Proceeding

30. The Caring Society has noted suggestions from Canada that the current issues around eligibility under Jordan's Principle were not part of the complaint as originally filed.[35] If Canada is suggesting that the issues raised on the current motion are outside the scope of the Tribunal's retained jurisdiction, the Commission disagrees, for the following reasons.

31. First, human rights complaints do not serve the purpose of pleadings in the adjudicative process before the Tribunal.[36] Instead, it is the Statements of Particulars filed with the Tribunal that set the terms of the hearing.[37]

32. Here, the Complainants' Statement of Particulars alleged that underfunding of the FNCFS Program infringed Jordan's Principle, and sought very broad relief to redress discriminatory practices in "…the application of Jordan's Principle to federal government programs affecting children…"[38] The prayer for relief thus was not limited to the FNCFS program, or tied to *Indian Act* status or reserve residency. In its responding Particulars, Canada did not argue that the relief claimed would be beyond the scope of the Tribunal proceeding. To the contrary, it acknowledged that Jordan's Principle "engages various health and social services and not solely child and family services", and engaged with the substance of the issues, asked that the allegations relating to

[34] 2019 CHRT 11 at para. 49.
[35] Caring Society Submissions at para. 14.
[36] *Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34 at para. 13.
[37] *Casler v Canadian National Railway*, 2017 CHRT 6 at paras 8-9.
[38] Statement of Particulars of the Complainants delivered June 5, 2009, at paras. 13 and 21(2)(a).

Jordan's Principle be dismissed on their merits.[39] The issues pleaded are thus broad enough to encompass the clarification now being sought regarding eligibility under Jordan's Principle.

33. Second, and in any event, the Tribunal has already made Rulings dealing with the scope and meaning of Jordan's Principle, clarifying that it is not restricted to the resolution of jurisdictional disputes, and that it applies both on and off reserve, to a broad range of services.[40] The current motion simply seeks clarification of a matter that was not specifically addressed in those previous Rulings – namely, who is eligible to receive the benefits that the Tribunal has already identified and described. If Canada was of the view that matters relating to the scope of Jordan's Principle were outside the scope of the Tribunal proceeding, it should have sought judicial review of the earlier Rulings that defined the benefits currently under discussion. It did not do so, and the times for doing so have now long expired.[41]

34. In the circumstances, Canada should not now be allowed to argue that matters relating to eligibility under Jordan's Principle were never properly before the Tribunal. With respect, this would effectively amount to an impermissible collateral attack on the Tribunal's earlier Rulings. The proper approach is to recognize, in accordance with rule of law principles, that the earlier Rulings stand, and must be given their full meaning and effect. The current motion asks the Tribunal for clarification intended to assist with such implementation, and is squarely within the scope of the Tribunal's retained jurisdiction.

(C) Eligibility for Benefits - Human Rights Framework

35. At issue on this motion is whether Canada's policy approach to eligibility under Jordan's Principle complies with past Rulings by meaningfully addressing the discriminatory practices identified therein. To answer this question, the Tribunal should consider the framework typically used under the *CHRA* when determining whether benefits eligibility criteria are having a discriminatory impact.

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[39] Updated Statement of Particulars of the Respondent dated Feb. 15, 2013, at paras. 42-44 and 69.
[40] See: 2016 CHRT 2; 2016 CHRT 10; 2016 CHRT 16; 2017 CHRT 14; 2017 CHRT 35.
[41] The Commission acknowledges that Canada did file a Notice of Application challenging narrow aspects of the Tribunal's Ruling in 2017 CHRT 14, however, that proceeding was discontinued after the Tribunal amended those aspects on consent.

36. In this regard, the first step is to determine the purpose of the benefit plan in question. Once that is determined, the next step is to examine whether the eligibility criteria being used appropriately provide the benefit to the persons who share the needs or circumstances that the benefit is intended to address. If persons have such needs, but are denied the benefit because of distinctions based in whole or in part on prohibited grounds, discrimination may well exist.[42]

37. It should be noted that even where eligibility criteria for a benefit are shown to be under-inclusive and discriminatory, a respondent can still try to prove that the restrictive criteria are *bona fide* justified, for reasons relating to health, safety or cost.[43] However, it does not appear to the Commission that Canada has attempted to justify its policy approach to Jordan's Principle eligibility in such terms. As a result, the Commission does not comment further on this possibility in these Submissions.

(D) Application in the Present Case

38. As stated earlier in these Submissions, the Tribunal has already identified the dual purposes of Jordan's Principle as follows: (i) it ensures that services to First Nations children are not delayed or denied due to jurisdictional gaps; and (ii) it promotes substantive equality, by allowing for the delivery of services that go beyond normative standards of care, and respond to the actual needs that First Nations children may face as a result of discrimination and other disadvantages.[44]

39. Canada says that the three categories of "First Nations children" that it currently recognizes are likely – by virtue of their status entitlements, and/or their ordinary residence on reserve – to face jurisdictional gaps in the provision of services.[45] To the Commission's knowledge, all participants on this motion agree that these categories of children can and should be eligible. The Commission encourages Canada to continue its efforts to promote substantive equality by delivering Jordan's Principle services to these children.

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[42] The Tribunal recently described the approach as follows: "In determining whether a benefits scheme is *prima facie* discriminatory, the first step is to determine the purpose of the benefit plan. If the benefits are '…allocated pursuant to the same purpose, yet benefits differ as the result of characteristics that are not relevant to this purpose, discrimination may well exist' (*Battlefords and District Co-operative Ltd. v. Gibbs*, 1996 CanLII 187 (SCC), [1996] 3 S.C.R. 566 at para. 33)": see *Hicks v. Human Resources and Skills Development Canada*, 2013 CHRT 20 at para. 53 (affirmed *Canada (Attorney General) v. Hicks*, 2015 FC 599 at para. 76).
[43] *CHRA*, s. 15(1)(g) and 15(2).
[44] See para. 14 and footnote 13, above.
[45] Canada's Submissions, at paras. 32-33 and 38.

40. The Caring Society has raised concerns that these categories are too narrow, and that the Tribunal's Decision and Rulings should also include other children with First Nations ancestry who ordinarily reside off reserve. It identifies three additional categories that it says warrant further consideration:

a) Non-status children who are recognized by a "First Nations group, community or people" as belonging, in accordance with the customs or traditions of the group, community or people.[46]
b) Non-status children whose families lost contact with their First Nations groups, communities or peoples because of Canada's discriminatory laws or policies;[47] and
c) Non-status children off-reserve who have a single parent registered or eligible to be registered under s. 6(2) of the *Indian Act*.[48]

The Caring Society invites the Tribunal to consider its arguments in favour of extending coverage to these categories of children, and asks for Orders requiring Canada to consult with the parties, and to adopt and report back within specified timeframes on a revised policy approach that complies with the Tribunal's directions.[49]

41. As indicated earlier, the Commission does not take a position on this motion as to whether Canada's exclusion of these children does or does not comply with the Tribunal's Rulings. Instead, the Commission focuses its comments on the framework that the Tribunal ought to apply, when considering that question. In this regard, as stated above, the key question is whether the eligibility categories being used by Canada are appropriate proxies for identifying the children who have the kinds of needs that are to be addressed through Jordan's Principle.

42. Canada's written submissions focus almost entirely on an argument that there is little or no evidence that non-status First Nations children living off reserve are at risk of encountering jurisdictional gaps in services, akin to those faced by First Nations children with status, or who are ordinarily resident on reserve. The Commission is unable to point to any specific evidence in the record that would contradict Canada's position on this point.

43. However, this is not necessarily a full answer to the question. Based on its past rulings, the Tribunal will also need to consider whether there is an evidentiary basis for finding that any

[46] Caring Society Submissions at paras. 10 and 34-43.
[47] Caring Society Submissions at paras. 11 and 44-53.
[48] Caring Society Submissions at paras. 12 and 54-58.
[49] Caring Society Submissions at paras. 31-33 and 72.

excluded non-status, off-reserve children have actual needs for services that (i) go beyond normative standards of care, and (ii) are rooted in the kinds of historical and contemporary disadvantages that animate the substantive equality analysis – such as the legacies of stereotyping, prejudice, colonialism and displacement, and intergenerational trauma relating to residential schools or the 60s Scoop. This will be for the Tribunal to decide, based on all the information before it.

44. In considering this question, the Tribunal may wish to have regard for comments from the Supreme Court of Canada about the circumstances of non-status First Nations peoples. For example, in the recent *Daniels* decision, the Supreme Court held that non-status Indians had long been left in a "jurisdictional wasteland" that led to "significant and obvious disadvantaging consequences," depriving them of "programs, services and intangible benefits recognized by all governments as needed."[50] Similarly, in *Lovelace* (2000), the Supreme Court recognized that (i) status and non-status First Nations communities have "overlapping and largely shared histories of discrimination, poverty, and systemic disadvantage that cry out for improvement," and (ii) non-status First Nations peoples have faced disadvantages that include, among other things, "a lack of access to culturally-specific health, educational and social service programs."[51]

45. Ultimately, if the Tribunal agrees with Canada that the current approach appropriately targets Jordan's Principles services to those who need them, the Tribunal should conclude that no further orders or remedies are required. If the Tribunal were to reach that result based on a view that there is insufficient evidence on the record to support a contrary finding, it could always say as much – thus leaving it open to different parties to raise the issues again in future proceedings, based on a different evidentiary record.

46. On the other hand, if the Tribunal finds that Canada's approach risks excluding categories of children who have actual needs of the kind that Jordan's Principle is intended to address, it might find that Canada's practices have not yet sufficed to eliminate the discriminatory practices

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[50] *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, at para. 14 (citing in part the trial decision, 2013 FC 6 at paras. 107-108).

[51] *Lovelace v. Ontario*, 2000 SCC 37 at paras. 6 and 70. Despite these findings, the Court dismissed the discrimination claim brought by the non-status First Nations and Métis appellants. It found that it was open to Ontario and COO to target the profits from a casino partnership initiative towards *Indian Act* bands, rather than non-status Indigenous communities. This finding appears to have been driven in large part by a finding that one of the purposes of the partnership initiative had been to develop a "government-to-government" relationship with Ontario's First Nations band communities.

identified in its earlier rulings. In such circumstances, it would be open to the Tribunal to make a further order to provide guidance or clarification, with a view to ensuring the effectiveness of its previous orders. Depending on the nature of its findings, the Tribunal might direct Canada to amend its eligibility criteria. Alternatively, if the Tribunal is not satisfied that all the necessary information is available, it might give some additional guidance, and order the parties to continue discussing the matter at the Consultation Committee or elsewhere, in the hopes they will arrive at a mutually acceptable approach.

(E) First Nations' Future Liability and/or Indemnities

47. As at the date of these Submissions, the Tribunal's Interim Ruling requires Canada to fund services under Jordan's Principle for children who are "recognized by their First Nations."[52] The Tribunal invited the parties to provide any proposals for changes to the wording of that Ruling. A number of parties made such proposals. The Tribunal has directed that those proposals be addressed in parallel to this motion, through written submissions to be delivered by March 22, 2019. The Commission will provide its comments on the Interim Ruling proposals by that date. However, as some of the same issues are likely to arise on the full motion, the Commission wishes to respond to an aspect of COO's proposal at this time.

48. Specifically, COO raised strong concerns that (i) First Nations may not have the resources needed to promptly respond to requests for confirmation of recognition, (ii) existing membership lists may not actually reflect the customs and traditions of First Nations, and (iii) these and other circumstances may expose First Nations to liability, if refusals or delays in recognition result in service denials under Jordan's Principle. COO suggested that the Tribunal declare that the Interim Ruling does not impose any duty of care or responsibility on First Nations, and/or order Canada to indemnify First Nations for any liability they may incur.[53] The Caring Society appears to have endorsed aspects of this proposal, at least in connection with the Interim Ruling.[54]

49. The Commission acknowledges the practical issues raised by COO, and believes they are important matters that deserve further discussion at the Consultation Committee. However, with the greatest of respect to COO and the Caring Society, the Commission does not agree that it would

[52] 2019 CHRT 7 at para. 89.
[53] COO letter to the Tribunal and parties dated March 7, 2019.
[54] Caring Society letter to the Tribunal and parties dated March 8, 2019.

be appropriate to include COO's proposed terms in any final order with respect to eligibility under Jordan's Principle.

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

51. The Commission also does not feel it would be appropriate to order now that Canada always indemnify First Nations for liabilities incurred in connection with requests for recognition. Such an order would likely be outside the Tribunal's jurisdiction, to the extent it sought to impose requirements to indemnify First Nations for liability incurred at common or civil law. Even within the *CHRA* scheme, one can imagine situations where discriminatory practices within a First Nation might make it more appropriate for the First Nation, rather than Canada, to bear responsibility for any infringements.

52. Overall, the better approach would be to leave such matters to be determined in the context of future cases, using mechanisms and principles that already exist as a matter of human rights law. Take, for example, a scenario where a human rights complaint alleges that a First Nation handled a request for recognition in a discriminatory way. The First Nation might respond by saying that it did the best it could to provide a timely response, with the resources that were available to it. In such circumstances, the First Nation might be able to mount a successful undue hardship defence, saying that to dedicate the additional resources required would have resulted in undue financial hardship. The First Nation might also bring a motion to add Canada as a respondent, if it believed that Canada was ultimately responsible for the impugned conduct, for example by failing to provide the funding or other resources needed to enable the First Nation to

process requests in non-discriminatory ways.[55] If the Tribunal granted such a motion and later found an infringement, it would then be able to apportion liability as between the responsible parties, in accordance with the evidence.

(F) Matters on which the Commission takes No Position

53. Canada says it objects to any requests that the maximum age of eligibility under Jordan's Principle be raised above the ages of majority that apply in the provinces and territories from which requests for service originate.[56] This issue does not appear to have been raised by either the Caring Society or Amnesty in their written submissions. The Commission does not know if it will be raised by any other parties. For clarity, the Commission takes no position on this issue.

54. CAP appears to have asked the Tribunal for an Order that it be included in any consultations and discussions aimed at creating a suitable operational set of eligibility criteria with respect to Jordan's Principle.[57] The Commission takes no position on any such request.

VII. Order Sought

55. The Commission does not itself seek any specific orders at this time with respect to the content of eligibility criteria for Jordan's Principle. Instead, it respectfully asks the Tribunal to consider the principles and submissions outlined above, as it weighs the arguments raised by the Caring Society (as moving party), Canada (as the principal respondent), Amnesty (as interested party), and the representative Indigenous organizations participating on the motion (the AFN, COO, NAN and CAP).

56. Whatever else may come from the motion, the Commission does ask that Canada be given reasonable but prompt deadlines for clearly stating and publicizing its approach to eligibility under Jordan's Principle. At a minimum, this should require clear statements regarding the entitlements of non-status children ordinarily resident off reserve who qualify for membership or citizenship

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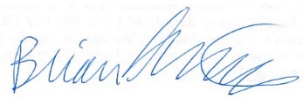
[55] *CHRA*, s. 48.9(2)(b), and *Canadian Human Rights Tribunal Rules of Procedure*, Rule 8(3), allow for the addition of respondents to an inquiry.
[56] Canada Submissions at paras. 43-45.
[57] Congress of Aboriginal Peoples Submissions to Canadian Human Rights Tribunal dated March 13, 2019, at paras. 32-35.

under a self-government agreement or arrangement, a custom membership code adopted pursuant to s. 10 of the *Indian Act*, or a traditional or customary citizenship law.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 20, 2019



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