

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

**ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous and Northern Affairs Canada)**

Respondent

- and -

**CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION**

Interested Parties

**CHIEFS OF ONTARIO WRITTEN SUBMISSIONS ON THE DEFINITION OF “FIRST NATIONS CHILD”
FOR THE PURPOSES OF JORDAN’S PRINCIPLE**

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Introduction

1. These written submissions concern the definition of “First Nations child” for the purposes of eligibility for services funded by Canada pursuant to Jordan’s Principle.
2. The Caring Society has proposed that the following children, in addition to those First Nations children already recognized by Canada as being eligible, should be eligible for Jordan’s Principle services:
 - a. “Non-status” children (that is, children not registered under the *Indian Act*) 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;
 - b. Non-status children whose families lost contact with their First Nations groups, communities or peoples because of Canada’s discriminatory laws or policies;
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*.
3. Should the Tribunal make a decision that children in category “A” are eligible for Jordan’s Principle services, there arises a practical matter of implementing such an order; that is *how* is Canada to know that a child is recognized as a belonging to or being a citizen of a First Nation.

4. As a general and overriding principle, it is COO's position that First Nations have the inherent right to determine and govern citizenship within their First Nations, under their own laws, traditions and customs.¹ There are multiple resolutions of the Chiefs in Assembly (representing all of the Chiefs of First Nations in Ontario) which repeatedly affirm that citizenship is at the heart of First Nations' inherent rights.²
5. COO provides these submissions to the Tribunal to inform the Tribunal about practical considerations that arise from an order that requires First Nations to make determinations about citizenship or membership for Jordan's Principle purposes.
6. These submissions, in raising practical considerations, should not be construed as a rejection of First Nation jurisdiction and law-making authority. Instead, COO hopes to be of assistance to the Tribunal in crafting orders that can be implemented without causing delay to children who are eligible to receive Jordan's Principle services and which respect First Nations' jurisdiction over citizenship.
7. In light of the difficulties of recognition for children and First Nations in category (B) identified by the Caring Society, COO takes no position with respect to children in category (B).

¹ Affidavit of Grand Chief Joel Abram, affirmed March 1, 2019, filed in this matter, paras. 10-11.

² Affidavit of Grand Chief Joel Abram, affirmed March 1, 2019, para. 10.

First Nations' Citizenship Laws and Jurisdiction

8. First Nations' ability to exercise jurisdiction over citizenship has been affected by historic and ongoing colonial processes. Canada has not recognized First Nations' jurisdiction over citizenship since the imposition of the *Indian Act*.
9. Canada currently recognizes First Nations citizenship either through the *Indian Act* (where it is known as "membership"), or through custom membership codes that are "permitted" by section 10 of the *Indian Act*.³ If there are individuals who a First Nation considers to be its citizens but whom Canada does not, First Nations often do not receive resources from Canada to support these individuals with the programs and services available to members recognized by Canada.⁴
10. The extension of Jordan's Principle to children who a First Nation considers to be its citizens would be a move away from that *status quo*, which First Nations would largely support.
11. In addition to the imposition of the *Indian Act*, First Nations' citizenship laws and records have also been fractured by the Indian Residential School System, forced disenfranchisement, the Sixties Scoop, and the discriminatory First Nations Child and

³ [Indian Act, R. S. C. 1985 c. I-5](#), at sections 8-10.

⁴ Affidavit of Grand Chief Joel Abram, affirmed March 1, 2019, paras. 13-14 & 17.

Family Services program.⁵ These historical and ongoing colonial processes have complicated or even stymied First Nations' exercise of jurisdiction over their citizenship.

12. Currently, First Nations in Ontario differ from one another in their internal governance of citizenship. For example:

- a. Some First Nations have custom membership codes, while most do not.⁶
- b. Some First Nations have the infrastructure and capacity to assist with determining an individual's affiliation or descent from a Nation, while many do not.⁷
- c. Many First Nations in Ontario do not have existing citizenship lists that differ from those generated by Canada pursuant to the *Indian Act*.⁸

13. The fact that there are differences in approaches to citizenship governance and processes *does not mean* that First Nations in Ontario endorse or accept the *Indian Act*⁹ nor do they want to perpetuate the *status quo* in Jordan's Principle cases. Practically, however, where a First Nation does not have a custom membership list pursuant to the *Indian Act*, the recognition of a non-Band member as a citizen of the First Nation would have to proceed by way of the First Nation's laws, customs, or traditions. Those laws, customs or traditions may or may not be codified or agreed upon at present.

⁵ *Ibid*, para. 16.

⁶ Affidavit of Grand Chief Joel Abram, affirmed March 1, 2019, para. 15.

⁷ *Ibid*, para. 16.

⁸ *Ibid*, para. 16.

⁹ *Ibid*, para. 15.

How to Implement a First Nation's Recognition of Citizenship

14. It is not compatible with the Nation-to-Nation relationship¹⁰ to impose upon First Nations a procedure for the determination of the citizenship of a "First Nations child" that does not take into account First Nations' laws, citizenship codes or citizenship processes and that does not affirm a First Nation's jurisdiction to establish a system for recognition of its citizens according to its laws, traditions, and customs.
15. COO asks the Tribunal to consider the legacy of colonial interference with First Nations citizenship in making its decision.
16. For those First Nations in Ontario who maintain a custom citizenship law, system or process outside the *Indian Act* or custom membership code, it is COO's position that such a law remains the inherent and exclusive purview of the Nation. These laws are diverse and it is not known whether they are compatible with Jordan's Principle processes.
17. On receiving a request for recognition of citizenship or affiliation with a First Nation arising out of a Jordan's Principle request, there are the following possible scenarios:
 - a. The First Nation has a law, custom, tradition and a process or system for recognizing its citizens, and has capacity to respond to the request. Therefore the First Nation does respond to a request for recognition;

¹⁰ [First Nations Child and Family Caring Society of Canada et al. v Canada, 2018 CHRT 4](#), para. 437.

- b. The First Nation has a law, custom, tradition and a process or system for recognizing its citizens, but does not have capacity to respond. The First Nation therefore does not respond to a request for recognition; or
 - c. The First Nation has a law, custom, or tradition but does not have an established process or system for recognizing its citizens. Therefore the First Nation does not or cannot respond to a request for recognition.
18. In the case of a Jordan's Principle request, a First Nation *should* be given the opportunity to voice its perspective on a child's citizenship.

Any Order Must Respect First Nations' Jurisdiction

19. In crafting an order, the Tribunal should avoid directing First Nations *when* and *how* to exercise their jurisdiction over citizenship.
20. COO urges that the Tribunal should make an order which mitigates the procedural, emotional, and legal burdens and risks a First Nation bears in these circumstances, and that respects First Nations' jurisdiction.
21. Any order of the Tribunal regarding recognition of a child as a citizen by a First Nation should be directed only at the mechanism of evidencing that recognition, and not *when* or *how* the First Nation should undertake the process of recognition.
22. The Tribunal's order should avoid requiring a First Nation to consider whether a child is recognized as a First Nation community member in any way that does not accord with

the First Nation's law, customs and traditions, or in any way that is otherwise outside the parameters of a First Nation's existing systems or processes.

23. Requiring a response from a First Nation in a particular timeframe or requiring a First Nation to undertake a recognition process that does not accord with their laws, customs and traditions would be antithetical to the notion of jurisdiction over citizenship.

Any Order Must Respect First Nations' Internal Capacity

24. In addition to the possibility of an order from the Tribunal treading on First Nations' jurisdiction, COO also draws the Tribunal's attention to the capacity issues that could arise if a First Nation is tasked with determining a child's citizenship for the purposes of Jordan's Principle within the legally required 12-48 hour assessment period.¹¹ This is especially so if no technical or financial support is provided to First Nations to meet the duties imposed upon them.¹²

25. First Nations should be supported to engage in citizenship law-making and to establish processes for recognizing citizenship, and be entitled to recognize their citizens for *all* federal programs or services and all First Nation provided services.¹³

26. Canada should fund First Nations in order to respond to requests for citizenship recognition for the purposes of Jordan's Principle, and should in addition provide funding to First Nations, PTOs, and other representative organizations to provide

¹¹ *Ibid*, para. 17.

¹² Affidavit of Grand Chief Joel Abram, affirmed March 1, 2019, para. 17.

¹³ Affidavit of Grand Chief Joel Abram, affirmed March 1, 2019, para. 18.

informational materials and training to First Nations' leadership and staff, if required, in order to implement the Tribunal's decision.

27. First Nations should ideally be given an opportunity and capacity to develop citizenship codes or lists that reflect their own traditions, customs, and laws for all purposes, not just for the purposes of administering Jordan's Principle, although COO recognizes this order is outside the purview of this motion.

Any Order Must Not Shift Liability from Canada to First Nations

28. COO is also concerned that requiring First Nations to respond to requests for recognition could lead to the imposition of liability against First Nations for denials of services by Canada (where, for instance, the First Nation fails to respond by a certain timeline).
29. Jordan's Principle is an initiative of the federal government aimed at ensuring substantive equality in the provision of public services to First Nations children. It is misplaced to explicitly or implicitly impose a duty or liability on First Nations arising out of a federal program that the First Nation does not control.
30. The responsibility for remedying systemic racial discrimination rests with Canada, as it was Canada, and not First Nations, who violated First Nations children's human rights. It is unacceptable to download to First Nations the responsibility of "gatekeeper" for a federal program that ultimately the First Nations don't have any control over, without

First Nations' consent and without offering First Nations any assistance in meeting any duties required by a gatekeeper role.

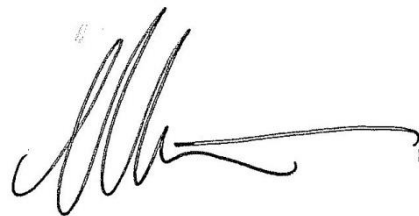
Conclusion

31. Any order the Tribunal makes with respect to the definition of "First Nations child" should take into account COO's submissions and should reflect the following principles:

- d. The Tribunal's order should not impose a duty of care or any other legal duty on First Nations to provide confirmation or recognition of citizenship or membership and Canada must remain responsible for decisions it makes under its programs;
- e. The Tribunal's order should not require, implicitly or explicitly, that First Nations recognize First Nations children in any way that is incompatible with their traditions, laws or customs for recognizing citizenship, or in any way that requires First Nations to create or undertake new systems or processes;
- f. Where a First Nations child has been recognized by a First Nation within the required timeframe to comply with Jordan's Principle, that recognition can be evidenced by email, letter or telephone call with the person designated by the First Nation for confirming such recognition, and if done by telephone Canada can confirm the recognition by letter or email to such person;

- g. Canada should provide First Nations, PTOs, and other representative organizations with funding in order to educate First Nations about the Tribunal's order, to develop systems to respond to requests to recognize citizens when a Jordan's Principle request is made, and to comply with such requests.

All of which is respectfully submitted, this 20th day of March, 2019.



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