File No. T1340/7008

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

Respondent

-and-

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

CONGRESS OF ABORIGINAL PEOPLES

Interested Party on Motion

WRITTEN SUBMISSIONS OF THE INTERESTED PARTY NISHNAWBE ASKI NATION ("NAN") REGARDING DEFINITION OF "FIRST NATIONS CHILD" FOR APPLICATION OF JORDAN'S PRINCIPLE

FALCONERS LLP
Barristers-at-Law
10 Alcorn Avenue, Suite 204
Toronto, Ontario M4V 3A9

Tel.: (416) 964-0495
Fax: (416) 929-8179

Julian N. Falconer L.S.O. # 29465R
Akosua Matthews L.S.O. # 65621V
Molly Churchill L.S.O. # 72510P

Lawyers for the Interested Party, Nishnawbe Aski Nation ("NAN")

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PART I: OVERVIEW

1. Jordan's Principle is a child-first, human rights-based, remedial legal rule intended to provide an immediate solution to entrenched practices of discriminatory conduct against First Nations children in the context of provision of public services. Jordan's Principle is named in honour of Jordan River Anderson, a young First Nations boy who never had the opportunity to live in a family environment because both Canada and the province of Manitoba refused to provide him with needed medical services and equipment to live outside of hospital walls.

2. The contours and reach of Jordan's Principle have been clarified by this Tribunal in its initial decision on the merits in this case (2016 CHRT 2), and in subsequent orders including those crafted collaboratively with the parties. Once again, the parties find themselves turning to the Tribunal to resolve a dispute that has emerged regarding Canada's operationalization of Jordan's Principle.

3. NAN supports the First Nations Child and Family Caring Society's ("the Caring Society") motion for determination of Canada's definition of "all First Nations children" in the context of the Tribunal's orders regarding Jordan's Principle. Specifically, NAN submits that Canada's operationalization of Jordan's Principle continues to be unduly restrictive and therefore non-compliant with the orders of this Tribunal. By using the twin pillars of *Indian Act* status and on-/off-reserve residency to delineate which children are entitled to services pursuant to Jordan's Principle, Canada is reinforcing colonial, paternalistic, bureaucratic practices of exclusion that are incompatible with non-discrimination, reconciliation, and self-determination.

4. NAN rejects the idea that using these twin foundations (*Indian Act* status and place of residency) is a legitimate way of determining who is a "First Nations child" for the purposes of application of Jordan's Principle. It is imperative that Jordan's Principle be operationalized in a non-discriminatory manner respectful of First Nations' inherent jurisdiction regarding citizenship, and which does not download administrative burdens or potential liability onto First Nations.

PART II: FACTS

5. NAN does not believe the facts are in dispute; however, for clarity, NAN relies on the facts as set out in the submissions of the Caring Society and the Canadian Human Rights Commission ("CHRC").

PART III: ISSUES AND LAW

6. The main issue before the Tribunal is whether Canada's current definition of "First Nations child" for the purposes of application of Jordan's Principle is compliant with the orders of this Tribunal. If it is not, the further issue arises as to what an appropriate order would be.

7. As emphasized by other parties, this motion and the submissions made on the motion are limited to the specific context of a definition of "First Nations child" to be used for application of Jordan's Principle; they do not extend to a definition for any other purposes.

8. As with the submissions made by Chiefs of Ontario ("COO"), NAN's submissions in this motion should in no way be construed as a rejection or limitation of First Nations inherent jurisdiction and law-making authority, including regarding citizenship.

A. Jordan's Principle Falls Squarely Within the Scope of the Complaint and the Tribunal Has Jurisdiction to Make Orders Regarding Jordan's Principle

9. NAN adopts the position of the Caring Society and the CHRC that Jordan's Principle has always been an integral part of the complaint. NAN relies on the reasoning and argument outlined at paragraphs 14-22 of the Caring Society's written submissions and at paragraphs 30-34 of the written submissions of the CHRC on this point. NAN recognizes that Jordan's Principle has been directly implicated in these proceedings since well before NAN was granted interested party status. Indeed, the Choose Life Order crafted by NAN was directly inspired and informed by Jordan's Principle.

B. Grappling with Human Rights Law in a Colonial Context in the Era of Reconciliation: Relying on *Indian Act* Categories is Discriminatory

> *"The law has been, and continues to be, a significant obstacle to reconciliation."*[1]
>
> "*The* Indian Act *undermined and removed Indigenous legal orders [...]."*[2]
>
> *"How can [...] practitioners and society [...] make space within the legal landscape for Indigenous legal orders? [...F]irst, by recognizing the true nature and scope of the challenge; second, by recognizing the preconceptions and limitations which hamper the existing Canadian legal perspective; and third, by recognizing the need for humility, respect and receptivity in our individual and collective approaches to Indigenous legal orders."*[3]

10. The Panel Chair has asked the parties to make submissions on "international law including the *United Nations Declaration on the Rights of Indigenous Peoples*, the recent UN Human Rights Committee's ("UNHRC") *McIvor Decision* [...], Aboriginal law, human rights and

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[1] Schedule A, Tab 1: Truth and Reconciliation Commission of Canada (2015). *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, at 202.
[2] Justice Canada, "Spotlight on *Gladue*: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System", found at Exhibit "A" to Affidavit #5 of Doreen Navarro, affirmed February 4, 2019, at p. 15, Tab 3 of the Feb 4 CSMR.
[3] The Honourable Chief Justice Lance Finch of the Court of Appeal for British Columbia, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice", prepared for the Continuing Legal Education Society of British Columbia, November 2012, at para 8.

substantive equality, constitutional law, and other aspects, in order to allow the panel to make an informed decision on the issue of the 'First Nation child' definition [...]."[4] NAN recognizes the Tribunal's desire to find ways to apply Canadian law – including human rights law – in non-colonial and non-oppressive ways that further rather than frustrate true reconciliation, and the Tribunal's acknowledgment that the pathway to achieving this goal is neither easy nor obvious.

11. In *A Declaration of Nishnawbe-Aski (The People and the Land)* ("the Declaration"), NAN[5] outlined for the people and leaders of Ontario and Canada its understanding of NAN's relationship with them.[6] The Declaration is an assertion of the inherent rights and jurisdiction possessed by the people of NAN. The Declaration also recognizes that colonial practices and imposition of foreign laws have impeded exercise of those rights and jurisdiction, and that cooperation by Canada is required to fully enable such exercise. The subject matter of this present motion cannot be understood outside of the relationship and truths described in the Declaration.

12. NAN has had the opportunity to read the thoughtful and clear submissions of the Caring Society, Amnesty International, and COO (advance draft copy). NAN supports the submissions of the Caring Society and Amnesty International, subject to concerns raised below regarding "best interests of the child". NAN further supports the submissions of COO regarding the imperative that any order from this Tribunal must respect First Nations' jurisdiction and internal capacity. Rather than repeat these submissions in different words,

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[4] Interim Decision, at para 22.
[5] under its former incarnation as Grand Council Treaty #9
[6] Para. 10 and Exhibit A of the affidavit of Bobby Narcisse, sworn March 20, 2019 ("the Narcisse Affidavit")

NAN has crafted its submissions to complement those of the Caring Society, Amnesty International, and COO and to raise a new point for consideration.

i) *Canada's Definition is Discriminatory Because it Excludes First Nations Children Recognized by a First Nation as Belonging to That First Nation*

"[T]he non-status Indians are an integral part of our Nation [...]."[7]

13. NAN adopts and relies on the Caring Society's submissions[8] that Canada's definition is discriminatory because it excludes First Nations children recognized by a First Nation, found at paragraphs 34 to 43 of its written submissions, and takes this opportunity to discuss further evidence in support of those submissions. There is no principled basis for Canada to use *Indian Act* status and place of residency as criteria for application of Jordan's Principle. To continue to impose colonial categories is inconsistent with: the *United Nations Declaration on the Rights of Indigenous Peoples*; with Canada's commitment to reconciliation; and, with human rights principles that prohibit discrimination along the lines of race/national/ethnic origin and reserve residency.

14. Article 33 of the *United Nations Declaration on the Rights of Indigenous Peoples* guarantees the right of Indigenous people to "determine their own identity or membership in accordance with their customs and traditions." NAN submits that the presumption of conformity[9] applies to the interpretation of Jordan's Principle (i) as a legal rule[10], and (ii) as a principle at the heart of remedies issued pursuant to the *Canadian Human Rights Act* ("*CHRA*"). Jordan's Principle therefore must be interpreted in a manner that is consistent with First

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[7] Paras. 16-17, and Exhibit F "Resolution 83/15 ("Non-Status Indians")" of the Narcisse Affidavit.
[8] Subject to NAN's submissions regarding "best interests of the child".
[9] See paras. 14-15 of the written submissions of Amnesty International.
[10] Interim Order, at para 25.

Nations' right to determine their own identity or membership in accordance with their customs and traditions. Canada's current operationalization of Jordan's Principle, which relies on colonial constructs of *Indian Act* status and reserve residency, is not consistent with this right and it is discriminatory by arbitrarily excluding some First Nations children on the basis of status and off-reserve residency.

15. NAN and COO have consistently rejected use of the *Indian Act* as a parameter for determining belonging, identity, and membership. For example, on August 25, 1982, NAN passed the following resolution:

> WHEREAS many of our people are non-status Indians; and,
>
> WHEREAS many of these people that are classified as non-status Indians by the Governments are our brothers, sisters, and relatives;
>
> THEREFORE BE IT RESOLVED that all our communities on Nishnawbe-Aski recognize non-status Indians as part of our communities; and
>
> THEREFORE BE IT FURTHER RESOLVED that the Executive Council of the Nishnawbe-Aski take actions to ensure that the rights of these peoples are protected.[11]

16. The next year, NAN passed the following resolution:

> WHEREAS, the non-status Indians in our communities are our brothers and sisters; and,
>
> WHEREAS, we the Nishnawbe-Aski agreed to protect their right as Indians of our Nation.
>
> THEREFORE BE IT RESOLVED that we the Nishnawbe-Aski make it clear at all First Ministers' Conferences that the non-status Indians are an integral part of our Nation;

[11] Para. 14-15 and Exhibit E "Resolution 82/9 ("Recognizing Non-Status Indians")" of the Narcisse Affidavit.

> BE IT FURTHER RESOLVED that we demand the First Ministers to recognize the restoration of rights which the non-status Indians have been deprived.[12]

17. In a related vein, NAN passed a resolution in August of 1983 regarding non-recognition by Canada of entire First Nations communities:

> WHEREAS, the Nishnawbe-Aski Nation is made up of a number of communities; and,
>
> WHEREAS, not all of these communities are recognized (as real Indian Communities) by the Department of Indian Affairs,
>
> THEREFORE BE IT RESOLVED that the Executive Council actively lobby with the Federal Government to aquire [*sic*] de facto band status for all unrecognized communities within the Nishnawbe-Aski Nation.[13]

18. Exhibit "A" to the affidavit of Grand Chief Joel Abram filed by COO contains further relevant resolutions passed by COO. Taken together, these resolutions by NAN and COO, as well as the AFN resolutions cited at paragraph 38 of the Caring Society's written submissions, make it clear that *Indian Act* status has consistently been rejected by First Nations as a legitimate way of determining belonging.

19. Furthermore, NAN relies on the submissions of the CHRC regarding the Supreme Court's decisions in *Daniels* and *Lovelace* (2000) but goes further by stating that this Tribunal *should* consider the Supreme Court's findings and statements in these decisions regarding First Nations without Indian status.[14]

20. Similarly, NAN has consistently rejected on-reserve residency as a prerequisite for membership and belonging. Recent articulations of this rejection have been made in the

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[12] Paras. 16-17 and Exhibit F "NAN Resolution 83/15 ("Non-Status Indian") of the Narcisse Affidavit.
[13] Para. 18-19 and Exhibit G "NAN Resolution 83/11 ("Band Status") of the Narcisse Affidavit.
[14] CHRC submissions, at para 44.

context of NAN's continued assertion of inherent jurisdiction over its children *regardless of their place of residency.*[15] An estimate compiled by historian John S. Long in 2010 indicates that about 1/3 of all members of NAN First Nations communities live off reserve.[16]

21. Canada's current operationalization of Jordan's Principle automatically excludes children on the basis that they are not eligible for status under the colonial *Indian Act* regime and do not live on colonially-constructed reserves. Canada's operationalization fails to consider First Nations' own ways of determining identity and membership, and instead relies on colonial bureaucratic categories. Canada's approach is thus inconsistent with its obligations under the *United Nations Declaration on the Rights of Indigenous Peoples*, and additionally, it is inconsistent with a proper interpretation of the remedies previously ordered by this Tribunal pursuant to the *CHRA*.

ii) Canada's Definition is Discriminatory Because It Excludes First Nations Children Who Have Lost Connection to their First Nations Communities Due to Colonial, Assimilative, and/or Discriminatory Policies and Practices

22. NAN once again relies on the submissions of the Caring Society on this point, found at paragraphs 44-53 of its written submissions. NAN emphasizes, however, that many of the colonial, assimilative, and discriminatory policies and practices of Canada that have resulted in a loss of connection between First Nations individuals and their First Nations communities were developed and enacted in the name of the "best interests of the child." The connection between "best interests of the child" and the grave harms inflicted by the Indian Residential Schools system and the 60s Scoop is an area of great concern to NAN and is discussed below

[15] Paras. 11-12 and Exhibits "B" and "C" of the Narcisse Affidavit.
[16] Para. 13 and Exhibit "D" of the Narcisse Affidavit.

as a topic not canvassed by the other parties. This is also an issue that NAN has been consistently raising with the Consultation Committee.[17]

iii) *"Best Interests of the Child": On Whose Measure and to What End?*

23. NAN has become increasingly concerned with the uncritical way in which the principle of "best interests of the child" continues to be used in discussions regarding its children. Horrific actions have been taken against Indigenous children, over generations, in the name of the "best interests of the child." NAN's Chiefs Committee on Children, Youth & Families has articulated this concern:

> The federal government has utterly failed our children and families. In the name of "best interests of the child", first the Indian Residential Schools system and then the child welfare system have ripped our children from their families, communities, nations, and lands, inflicting great trauma. The effects of these actions are ongoing and intergenerational. Canada and its provinces have no credibility asserting a right or ability to act in our children's best interests.[18]

24. NAN recognizes the extent to which "best interests of the child" has become a key principle in domestic law as well as international law through the *United Nations Convention on the Rights of the Child*. Any discussion of the principle in relation to Indigenous children, however, must grapple with the incompatibility between (1) how that principle has been applied by federal (and provincial) decision-makers to the children and families of NAN, and (2) other fundamental aspects of domestic and international law, including human rights law, treaty relationship, Constitutional rights, and fundamental rights outlined in the *United Nations Declaration on the Rights of Indigenous People*.

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[17] Paras. 23-24 of the Narcisse Affidavit.
[18] Para. 23 of the Narcisse Affidavit.

iv) The Imperative of Minimizing Administrative Burdens

25. NAN relies on the submissions of COO that any order by this Tribunal must respect both First Nations' jurisdiction and internal capacity and must not shift liability from Canada to First Nations.

PART IV: CONCLUSION AND ORDERS REQUESTED

26. This Tribunal previously found and ordered that Jordan's Principle should not be limited to children with multiple disabilities simply because Jordan River Anderson had multiple disabilities. The Tribunal emphasized Jordan's Principle applies to "all First Nations children." Jordan's Principle must not be limited to children eligible for status pursuant to the *Indian Act* and/or "ordinarily resident on reserve" simply because Jordan River Anderson may have met these criteria. While Jordan's Principle is named in honour of Jordan River Anderson, its scope is broader than the specific context in which he lived, was denied services, and died. It is imperative that Canada cease applying a restrictive definition of "First Nations children" – incompatible with First Nations' approaches to the issue of belonging and citizenship – for purposes of application of Jordan's Principle. This is necessary to ensure that other First Nations children are not deprived, the way Jordan River Anderson was, of an opportunity alongside other children and of being treated with dignity on a substantively equal basis.

27. NAN requests an order from this Tribunal to support the process set out at paragraphs 31-33 of the written submissions of the Caring Society. NAN requests this order to ensure that "all First Nations children" is defined and operationalized in a manner that is compliant with the

requirements of the order in 2017 CHRT 14 and is respectful of First Nations' inherent jurisdiction and internal capacity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

THIS 20th DAY OF MARCH, 2019

FALCONER LLP
Barristers-at-Law
10 Alcorn Avenue, Suite 204
Toronto, Ontario M4V 3A9

Julian N. Falconer L.S.O. # 29465R
Molly Churchill L.S.O. # 72510P
Akosua Matthews L.S.O. # 65621V

Tel: (416) 964-0495
Fax: (416) 929-8179

Lawyers for Interested Party, Nishnawbe Aski Nation ("NAN")

SCHEDULE "A" – LIST OF AUTHORITIES

1. Truth and Reconciliation Commission of Canada (2015). *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada.*
2. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2 (CanLII)
3. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2017 CHRT 14 (CanLII)

SCHEDULE "B" – STATUTES AND REGULATIONS

Canadian Human Rights Act (R.S.C., 1985, c. H-6)

Purpose of Act

2. to give effect... to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices...

...

Special programs

16 (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group. [Emphasis Added]

...

Collection of information relating to prohibited grounds

16(3) It is not a discriminatory practice to collect information relating to a prohibited ground of discrimination if the information is intended to be used in adopting or carrying out a special program, plan or arrangement under subsection (1).

...

Complaint substantiated

53 (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1).

United Nations Declaration on the Rights of Indigenous Peoples

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.