Court File Nos: T-1621-19
T-1559-20

FEDERAL COURT

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Applicant

- and -

FIRST NATIONS CHILD AND FAMILY

CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

Respondents

- and -

CONGRESS OF ABORIGINAL PEOPLES

Intervener

(in T-1559-20)

MEMORANDUM OF FACT AND LAW OF THE INTERESTED PARTY CHIEFS OF ONTARIO

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I. SUMMARY

1. Chiefs of Ontario (COO) is an Interested Party in *First Nations Child and Family Caring Society and Assembly of First Nations v. A-G Canada* before the Canadian Human Rights Tribunal. COO has participated in these proceedings to put forward the perspectives of the 133 First Nations in Ontario, as guided by the Ontario Chiefs-in-Assembly.

2. COO's submissions in this judicial review numbered T-1559-20 focus on the aspects of 2020 CHRT 20 and 2020 CHRT 36 (the "First Nations Child decisions" or "the decisions") regarding the interpretation of the Tribunal's previous rulings on eligibility for Jordan's Principle services.

3. COO's submissions are grounded in respect for First Nations' self-determination over who belongs to their communities. COO submits the Tribunal's First Nations Child decisions are reasonable because where the Tribunal's decisions had potential to tread on First Nations' rights, the Tribunal ordered that First Nations be involved in decision making about their own rights, and ultimately leave the determination of who is a community member for the purposes of Jordan's Principle up to First Nations.

4. Canada's submissions point to various reasons why the First Nations Child decisions are unreasonable, and many of those submissions focus on a lack of consent, consultation, and agreement among First Nations. These submissions use language that are couched in respect First Nations' self-determination over membership and citizenship. However, Canada's submissions rest on false premisesakn to their logical conclusion would render any remedy given unreasonable. For instance, they are driven by notions that all First Nation must agree to the same thing, that the Tribunal should not order remedies until there is First Nations' consent or agreement, and that the decisions somehow obligations on or make decisions for First Nations.

5. The cloak of consent and consultation invoked by Canada is illusory. An examination of the Tribunal's First Nations Child decisions reveals the Tribunal's consideration of factors relating to First Nations' self-determination and ability to implement the decisionsand crafted a remedy that seeks to involve First Nations in deciding whether and how to participate in implementing the Tribunal's decisions.

6. Rather that dissuade the Tribunal from attempting to craft remedies that are responsive to the discrimination at hand while also being respectful of self-determination and the diversity of First Nations' views, situations, and experiences, this Court should endorse such approaches.

7. COO submits that the First Nations Child decisions are reasonable and this judicial review should be dismissed.

II. FACTS

8. The First Nations Child decisions order Canada to consider whether Canada must entertain applications from two categories of children who may apply for Jordan's Principle services: (1) Children who are unregistered under the *Indian Act*, but have one parent who is registered under the *Indian Act* (called the "unregistered child/registered parent" category in these submissions) and (2) children who do not fit in any of the other categories but are nonetheless recognized by their First Nation as a community member for the purposes of Jordan's Principle (called the "community recognition" category in these submissions).

9. In the proceedings before the Tribunal COO adduced affidavit evidence from Grand Chief Joel Abram. Grand Chief Abram's evidence was that the Chiefs of Ontario Chiefs-in-Assembly have passed at least six resolutions since 1978 calling for recognition of First Nations' inherent authority and jurisdiction to define their own membership and citizenship, denouncing the *Indian Act* provisions which define First Nations' status and membership, and calling for First Nations control over these matters. Grand Chief Abram's evidence was that First Nations do not support the *Indian Act* provisions on registration as

a means for defining their membership or citizenship.[1] That evidence was not challenged by Canada.

10. The Grand Chief also provided evidence about the practical concerns facing First Nations, andproposed considerations in making a decision about a community recognition process, for instance , in that First Nations in Ontario do not necessarily have the resources to devise and implement mechanisms for community recognition.[2]

III. POINTS IN ISSUE

11. COO makes submission on the following issues to be decided by this Court:

    A. What is the appropriate standard of review?

    B. Has Canada demonstrated that the First Nations Child decisions are unreasonable?

IV. ARGUMENT

The Effect of the New Eligibility Categories

12. The two new eligibility categories recognized by the Tribunal are distinct in terms of whether and how each category affects First Nations' self determination over membership/citizenship. This distinction is important when assessing gtheovethe reasonableness of the Tribunal's decisions and Canada's submissions.

13. While the unregistered child/registered parent category (what Canada calls the "cut-off") has no potential to engage questions of self-determination over membership, the "community recognition" category does concern First Nations' rights to determine their own membership/citizens.

14. The Tribunal's decisions regarding unregistered children/registered parents do not require a First Nation to participate in any part of the confirmation of a child's eligibility. The implementation will proceed as with other Jordan's Principle requests for services: a child

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[1] Affidavit of Grand Chief Joel Abram, sworn March 1, 2019, at paras 10-17, and at Ex. "A".
[2] Affidavit of Grand Chief Joel Abram, sworn March 1, 2019, at para. 17.

in such a category will request a service. ISC will determine eligibility and the service will be provided based on that eligibility criteria, without any need for a First Nation to validate the need or eligibility.[3] It is not dissimilar from other federally-provided programs which are made available to unregistered First Nations people.

15. The recognition of the unregistered child/registered parent category does not have any potential affect First Nations' self-determination over citizenship or membership. The decision that such children are eligible for Jordan's Principle services has no effect on First Nations' right to determine their membership/citizenship. It does not change eligibility under any of the *Indian Act*, nor does it not alter the provisions of any First Nation's custom election code or citizenship law.

16. On the other hand, in the community recognition category, Canada is required to seek confirmation from a First Nation where an unregistered child claims to be affiliated with or recognized by a specific First Nation.[4] In turn, the First Nation has the option of recognizing someone outside its current membership list. This does engage First Nations' rights to self determine.

17. At Schedule A of 2020 CHRT 36, the Tribunal confirms and orders the process the parties agreed to after negotiation, by which Canada will seek confirmation from a First Nation. Schedule A does not dictate to a First Nation that it must recognize anyone, nor does it dictate how a First Nation would undertake that process. What Schedule A does is provide a funding mechanism for a First Nation who chooses to participate in the community recognition process, and leaves space for the First Nation to determine for itself whether and how it will do so.

18. The Tribunal was faced with a decision about children who claim affiliation or recognition by a First Nation. Faced with that question, and after considering submissions of the parties

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[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)*, 2020 CHRT 20, at paras. 272-273.

[4] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2020 CHRT 36, at Schedule A.

and the relevant legal and factual context, the Tribunal decided that First Nations should make decisions about whether and how to recognize a community affiliation from a person not on the First Nation's membership list.[5]

19. Contrary to Canada's submissions at para 149, the Tribunal's decision at 2020 CHRT 36 about community recognition does not obligate a First Nation to do anything.

20. Rather than obligate a First Nation to take any action at all, or dictate what action to take, the Tribunal's decision makes space for a First Nation to make a choice about both whether to recognise unregistered persons, and how the First Nation will do so.

21. The Tribunal's decision is clear that a First Nation recognizing a person as part of the community for the purposes of Jordan's Principle under the community recognition category does not mean that the First Nation must also recognize them as a member or citizen for purposes other than Jordan's Principle. But it does not require First Nations to alter their membership or citizenship laws. It does not alter the *Indian Act* registration provisions.[6]

The Standard of Review and the Context of the Decisions

22. COO concurs with Canada and the other parties that the standard of review of the decisions is reasonableness.

23. The Supreme Court of Canada in *Vavilov* held that a reasonableness review prompts the reviewing court to examine the reasons with "respectful attention" to the reasons to understand how the Tribunal came to its decision.[7] The Supreme Court tells us that a reasonable decision is one that is "based on an internally coherent and rational chain of

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[5] 2020 CHRT 20 at para. 321.
[6] See 2020 CHRT 20 at para. 84.
[7] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para. 84 [*Vavilov*].

analysis and that is justified in relation to the facts and law that constrain the decision maker".[8]

24. While Canada argues that the Tribunal's decisions do not meet the standard of reasonableness, Canada does not engage in the review process that *Vavilov* directs. Canada's submissions do not engage with the Tribunal's chain of analysis. Instead, Canada's submissions focus on the outcomes reached in the First Nations Child decisions, without engaging in a review of how the Tribunal arrived at those outcomes.

25. The Supreme Court in *Vavilov* urges the reviewing court to consider the context of the decision to determine what is reasonable in a given case.[9]

26. In this case, COO submits that the contextual and legal facts that have bearing on the First Nations Child decisions include common law regarding First Nations' jurisdiction and authority, statutory authority, statutory interpretation, the effect of the decision on the parties and international law and the *Constitution Act of Canada*. These contextual factors will be cited throughout these submissions.

27. The First Nations Child decisions about the community recognition category required the Tribunal to make a decision at the intersection of remedies for discrimination under the *Canadian Human Rights Act* and rights that are recognized and affirmed by section 35 of the *Constitution Act of Canada* along with other international instruments, federal and provincial legislation and policy.

28. Furthermore, the Tribunal was constrained by the context and took into account the fact that it must not develop remedies that wade into territory of infringing on constitutionally

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[8] *Vavilov* at para. 85.
[9] *Vavilov* at paras. 106 and 114.

protected rights, and must similarly develop remedies that accord with principles of international law[10] and the rights protected by section 35 of the *Constitution Act*.[11]

29. It is clear from a review of the reasons that an animating principle of the Tribunal's remedial approach in the First Nations Child decisions is a respect for the context and the need to be conscious of respecting First Nations' rights to self determination over membership/citizenship.

Self Determination over Membership/Citzienship is Recognized in Canadian Law

30. Since colonization, Canadian legal systems have sought to disrupt and subvert First Nations' self determination over membership/citizenship through mechanisms such as the *Indian Act*.[12]

31. The boundaries of the *Indian Act* registration and Indigenous Services Canada-controlled Band list are not typically the metric of whether one is a First Nations person in Canadian law, and the *Indian Act* is not the metric of who determines that question. Numerous examples of Canadian law and policy reject the categorical approaches to Indian registration that is set out in the *Indian Act*, in favour of First Nations self-determination models.

32. *The Government of Canada's Approach to the Implementation of the Inherent Right and Negotiation of Aboriginal Self-Government* recognizes that First Nations have the inherent right to determine their own membership protected by s.35 of the *Constitution Act*, and as such membership is a topic in self-government negotiations.[13]

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[10] *R v Hape*, 2007 SCC 26 at para. 56.
[11] *Wsáneć School Board v British Columbia*, 2017 FCA 210 at para 29.
[12] Brenda L Gunn, "Moving Beyond Rhetoric: Working Toward Reconciliation Through Self-Determination", (2015) 38-1 *Dalhousie Law Journal* 237.
[13] *The Government of Canada's Approach to Implementation of the Inherent Right and Negotiation of Self-Government*, online: <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>, in which Canada acknowledges that membership is "integral" to the distinctive culture of First Nations peoples, and can be the subject of negotiation.

33. Self-determination on the matter of membership/citizenshipis recognized by the *United Nations Declaration on the Rights of Indigenous Peoples.*[14] Canada has introduced legislation to make UNDRIP part of Canadian law.[15]

34. The preamble of *An Act respecting First Nations, Inuit and Métis children, youth and families* acknowledges Canada's commitment to respecting the *United Declaration on the Rights of Indigenous Peoples*[16] ("*The UN Declaration*"), and acknowledges First Nations' right to self-govern over matters related to child and family services.[17] The Act's stated purpose is to implement the *UN Declaration* and to recognize the right to self-govern in matters related to child and family services.

35. *An Act respecting First Nations, Inuit and Métis children, youth and families* does not define "Indigenous Child" or "First Nation" or "First Nation child". It instead creates space for First Nations to do this for themselves when exercising jurisdiction to make child welfare laws.

36. In Ontario, the *Child Youth and Family Services Act*[18] (the "CYFSA") also acknowledges *The UN Declaration* in its preamble. The legislation also recognizes that a First Nations child's "band or community" is a band or community of which the child is a member, or with which the child identifies.[19] It does not limit the ability of an unregistered First Nations child from identifying with a community and also from being able to benefit from the ameliorative provisions regarding First Nations children that are set out in the CYFSA. First Nations are free to advocate for any First Nations child in court or

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[14] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, esp. Article 33.
[15] Bill C-15,*An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43 Parl, 2021.

[16] An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24, preamble.
[17] *An Act respecting First Nations Inuit and Métis children, youth and families*, s 8.
[18] SO, 2017 c 14, Sched I, preamble.
[19] Child Youth and Family Services Act, SO, 2017 c 14, Sched I, s 2(4).

otherwise, through the mechanism set out in the CYFSA. The CYFSA does not dictate who a First Nations child is and does not confine the *Indian Act* definition.

37. The Supreme Court of Canada has also recently commented on First Nations' rights to self-determine their membership. In *R v. Desautel*, a case concerning whether individuals from outside of Canada were entitled to avail themselves of the protections of section 35 of the *Constitution Act*, 1982, Rowe J writing for the majority said:

> In my view, the authoritative interpretation of *s. 35(1)* of the *Constitution Act, 1982*, is for the courts. It is for Aboriginal peoples, however, to define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices. [Emphasis added][20]

38. The Federal Court of Canada acknowledges that administrative decision makers should make decisions while weighing the values behind section 35 of the Constitution Act.[21]

39. The *Indian Act* sets up two systems of membership: one where the First Nation membership list ("the Band list") is controlled by the Minister, and one where it is controlled by the First Nation.[22] The *Indian Act* also controls who is recognized by Canada as an "Indian" (regardless of whether a person appears on a Band list).[23]

40. The *Indian Act* alone stands out as the Canadian legal instrument which fails to recognize self determination of membership/citizenship for all First Nations, in the ISC-controlled Band List system.

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[20] *R. v. Desautel*, 2021 SCC 17 at para. 86.
[21] *Wsáneć School Board v. British Columbia*, 2017 FCA 210 at para. 29.
[22] Indian Act, RSC 1985, ss 8-10.
[23] *Indian Act*, RSC 1985, ss 5-13.

41. Canada does not talk about First Nations self-determination or self-government over membership in its submissions with regard to the Tribunal's reasonableness. Despite the aforementioned rich legal and policy landscape acknowledging First Nations' rights to self determine over membership and citizenship, Canada cites only the *Indian Act* in its submissions about reasonableness.

The Decisions Were Reasonable

42. COO adopts and relies on the submissions by the First Nations Child and Family Caring Society regarding the evidence used by the Tribunal to make the decisions.

43. Canada submits at para. 145 of its submissions that the decision recognizing eligibility under this category "decides a complex question of identity that was not before the Tribunal, and on which there is no consensus among First Nations." This mischaracterizes the decisions. The Tribunal ordered Canada to consider providing children who are not registered under the *Indian Act* and who are not members of First Nations with service. The Tribunal does not decide a question of identity. The decisions do not have the effect of declaring such children members of First Nations, or registering them as "Indians" under the *Indian Act*. As such, it does not weigh into matters of First Nations' self-determination over membership, citizenship, or identity. It groups those children in with other "non-status" First Nations children for the purposes of program eligibility.

44. The "community recognition" category intersects with self-determination. It does not, however, impose obligations on First Nations to make any decision about their citizens or members, as submitted by Canada.

45. The Tribunal was asked to decide on the application and interpretation of the *Canadian Human Rights Act*. Where its decisions may wade into matters that have implications for First Nations' inherent and recognized constitutional rights about identity, membership and

citizenship, it is appropriate for the Tribunal to make a decision that would allow First Nations to have control over such matters. This principle finds support in *Desautel*.[24]

46. This context of Indigenous self-determination rights over membership and citizenship was amply considered by the Tribunal in the First Nations child decision as part of its reasoning, for example;

- Consideration of international law; [25]
- Consideration of rights protected by s. 35 of the *Constitution Act*;[26] [27]
- Consideration of COO's submissions about capacity funding;[28]
- Consideration of COO's submissions about self-determination;[29]
- Consideration of the *Indian Act;*[30]
- Consideration of *An Act Respecting First Nations Inuit and Metis Children Youth and Families.*[31]

47. Further, the Tribunal was careful not to impose obligations on First Nations as third parties, and to distinguish between citizenship/membership and program eligibility, which was responsive to the concerns of COO, AFN, and Canada in their submissions before the Tribunal.[32]

48. The Tribunal's decision allows First Nations a choice of whether to move outside the confines imposed by the *Indian Act* for the purposes of Jordan's Principle services on request of a child, or whether to remain within those confines.

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[24] *Desautel* paras. 85-86.
[25] 2020 CHRT 20 at paras. 136-157.
[26] 2020 CHRT 20 at para. 135; 175-196.
[27] 2020 CHRT 20 at para. 24;
2020 CHRT 20 at para. 220.

[29] 2020 CHRT 20 at para. 47, 50.

[30] 2020 CHRT 20 at paras. 135, 165-172.
[31] 2020 CHRT 20 at paras. 158-164.
[32] 2020 CHRT 20 at para. 225.

49. The Tribunal's decision therefore is reasonable, because it takes into account the recognition of First Nations' right to decide their own membership/citizenship or community members, and does not interfere with that right.[33]

50. Canada also cites the fact that the decisions assume "that First Nations are content to decide that a person can be a member of their community for some purposes but not others." To that proposition, COO submits that this is already a reality that First Nations operate in, regardless of the decisions. It is a reality that is exacerbated by the *Indian Act*'s continued control over First Nation registration and membership, when intersecting with the other rules and legislation that concerns First Nations membership and citizenship, including the recently passed *Act Respecting First Nation Metis and Inuit Children, Youth and Families*. This fact isn't one created by the Tribunal, it is one created and perpetuated by Canada.

51. Canada submits that the Tribunal ordered Canada to fund First Nations to develop a process, which was unreasonable[34]. The Tribunal in fact ordered the consideration of a funding mechanism to allow communities to exercise their rights in light of the order.

52. It is not unusual for Canada or other governments to fund First Nations to assist them in carrying out the state's obligations.[35]. Rather than being unreasonable, it is entirely reasonable to require a government party who needs third party assistance to discharge its legal obligation to pay that third party to render the assistance, and this decision was supported by the evidence before the Tribunal that some First Nations may face problems in implementing the decision due to a lack of financial capacity to undertake and implement a process for doing so.[36]

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[33] 2020 CHRT 20 at para. 226.
[34] Canada's submissions at para. 149.
[35] See for example *Saugeen First Nation v Ontario (MNRF)*, 2017 ONSC 3456 at paras. 27, 156-160.
[36] Affidavit of Grand Chief Abram sworn March 1, 2019; see also 2020 CHRT 20 at para 220.

53. The Tribunal has the statutory authority to award remedies that are responsive to the substantiated discrimination[37], and the purpose of a systemic remedy is to craft a remedy that prevents future persons similarly situated from facing similar discrimination in the future.[38]

54. The Tribunal did consider the complexity of First Nations identity, citizenship and membership, and arrived at a reasonable conclusion. This decision is within a range of reasonable outcomes, given the fact that Canadian law and policy is moving away from strict adherence to the *Indian Act*-recognized categories of membership toward ones defined by First Nations themselves. Canada's submissions fail to engage at all with the Tribunal's chain of reasoning that ultimately favours a self-determination approach and rejects the strict confines of the *Indian Act* or custom membership codes.

The process adopted by the Tribunal was reasonable

55. COO submits the Tribunal appropriately considered the context, the rights and interests involved when crafting the decisions and the procedure it took to arrive at the decisions. The decision at 2020 CHRT 20 asked the Parties to negotiate a mechanism by which the decision regarding community eligibility could be implemented on the ground. The Tribunal asked the parties to negotiate an implementation plan for the First Nations Child decisions and remit it back to the Tribunal, resulting in the order made at 2020 CHRT 36.

56. The decision to ask the parties to participate in dialogue with Canada to determine the mechanism ultimately ordered is justifiable in light of the evidence and arguments before The Tribunal, and therefore reasonable.

57. The Tribunal's order that the parties must further negotiate to determine a mechanism for community recognition is consistent with many Supreme Court of Canada cases which guide First Nations and government parties to attempt to resolve complex matters through

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[37] Canadian Human Rights Act, RSC, 1985, c. H-6, AT S. 53(2).

[38] CN v Canada (Canadian Human Rights Commission), 1987 CanLII 109 (SCC), at pp. 1143 and 1145.

negotiation, and was directly responsive to a submission made by the Assembly of First Nations about how to resolve the matter in the case, and to the Caring Society's requested remedy.[39]

58. In so doing, the Tribunal turned its mind to the context of domestic and international legal instruments, and the submissions of First Nations parties in the litigation about respecting First Nations' rights to decide for themselves who their members are.[40]

59. The parties then submitted a proposed process, which the Tribunal reviewed, resulting in the decision at 2020 CHRT 36. Again, the Tribunal referred to its past considerations regarding self-determination and the complexity of crafting an order.[41]

60. Whereas Canada has urged this Court to review the Tribunal's decision as being unreasonable in part because of the Tribunal's unique approach to decision making, COO submits that novel circumstances, such as making decisions which have potential to affect First Nations' rights, require novel remedial approaches and outcomes when faced with a novel circumstance.

61. Canada submits that the process the Tribunal undertook which resulted in the decision at 2020 CHRT 36 rendered the decisions unreasonable, firstly because First Nations were not consulted in advance and may not consent to the First Nations Child Decisions and secondly because there were "endless process negotiations".

62. On one hand, Canada suggests that the Tribunal's decisions are unreasonable because there was neither consultation with First Nations nor First Nations' consent in advance of the

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[39] *Desautel* at paras. 87-88.. , AFN submissions at the Tribunal, paras. 66 and 67, and 2020 CHRT 20 at para 224.
[40] 2020 CHRT 36 at paras. 224-226, 212-220.
[41] 2020 CHRT 36 at paras. 21-36, 53.

decisions being made. For example, Canada states the First Nations Child decisions are unreasonable as follows[42]:

- there was not "direct consultation" with *individual* First Nations before deciding on the "community recognition" process; [43]

- First Nations haven't "reached agreement" about whether an unregistered child with one parent who has 6(2) status under the *Indian* Act should receive Jordan's Principle services; [44]

- the matter of whether children without status but with one parent registered under section 6(2) of the *Indian Act* should be eligible for Jordan's Principle raised an issue that "can only be resolved through extensive discussion among First Nations, and between First Nations and Canada…".[45]

- the remedies ordered by the Tribunal "may well be contrary to the preference of individual First Nations", presumably with respect to both categories;[46]

63. Canada argued in its submissions before the Tribunal that consultation was not an appropriate remedy, because the Tribunal could not order First Nations to do anything.[47]
64. In other parts of its submissions, Canada submits that the decisions are unreasonable because the Tribunal did order negotiations among the parties before the final decision in 2020 CHRT 36 was released, as follows:

    - "[The Tribunal] avoided addressing the problems it created and the difficult issues of community recognition and the second generation cut-off by instructing the

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[42] COO notes that Canada does not use the words "consent", preferring "reached agreement", and "the preferences of".
[43] Memorandum of Fact and Law of the Applicant at para. 145.
[44] Memorandum of Fact and Law of the Applicant at para. 150.
[45] Memorandum of Fact and Law of the Applicant at para. 154.
[46] Memorandum of Fact and Law of the Applicant at para. 156.
[47] Canada's Memorandum of Fact and Law at para. 33.

parties to devise a system themselves", which Canada goes on to submit can not meet the *Vavilov* standard and is therefore unreasonable[48] [Emphasis added]; and

- The process the Tribunal adopted, namely asking the parties to "negotiate practical solutions" to the implementation of the Decisions was an "abdication" of the Tribunal's responsibility to issue clear, practical and reviewable orders, leading to "endless process negotiations and judgements"[49].

65. These submissions taken together are contradictory.. They should be rejected by this Court.

66. If the decisions were unreasonable because there was not "extensive discussions" or "consultation" and there was no consent or agreement, the decisions can not also be unreasonable because the Tribunal did order consultation among the parties.

67. In a charitable interpretation, one could read Canada's submissions as saying that regarding the "community recognition" process, the flaw in the Tribunal's decisions was that there was no consultation on the community recognition process without every First Nation in Canada being consulted.

68. Canada's submissions suggest that "consensus" would be required from all First Nations in Canada before the unregistered child/registered parent portions of the Decisions were be made. This submission conflates the issue of eligibility for service delivery with the issue of amending the *Indian Act*. If Canada were to consider amending the *Indian Act* registration provisions, COO agrees that consultation and consent is required. However, the First Nations Child decisions do not amend to the *Indian Act* or any citizenship or membership code.

69. Canada's submissions that First Nations should be consulted and suggests they should consent to the community recognition process ordered by the Tribunal also mischaracterize

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[48] Memorandum of Fact and Law of the Applicant at para. 151
[49] Memorandum of Fact and Law of the Applicant at para 158.

what the Tribunal's order does. While the decisions may have impacts on self-determination rights, the Tribunal took this into account and ordered a process for First Nations to make such decisions for themselves should they choose to. The consent to participate in the implementation of the order by undertaking community recognition from the First Nations' side is not missing, it is *yet to come*, at a First Nation's choosing.

70. Canada does not point to any authority which states that every First Nation in Canada must be consulted, or even consent, to the substance of a judgement which affects it. For better or for worse, there is no such authority. Canada does not point to who should have been doing the consultation it says was required, and also argued against consultation in its submissions before the Tribunal.

71. If Canada's suggestion is that Canada should have been doing the consultation, then it points to no authority that states that a legal remedy can not issue in a litigation until Canada has completed a consultation process or obtained consent. No such authority exists.

72. Nor does Canada point to any evidence that it has been engaging in such consultations with every First Nation, or that it has any intention to do so.

73. Canada's submissionsrefer to the Supreme Court's repeated entreaties for Canada to negotiate with First Nations an suggestthat in this case, more negotiation and consultation and even consent should occur. However, Canada's submissions effectively suggest that First Nations can't seek remedies in court until some further undefined point in time – for instance, after consultation with *every First Nation in Canada*, or when First Nations have agreed on an issue, or when there is consent, or after "extensive discussions".

74. In the same submissions, Canada says the Tribunal was unreasonable for ordering even modest short-term discussions about the mechanism by which First Nations could participate in community recognition, saying the process of "endless negotiations" was unreasonable. There were many parties representing the views of First Nations at the table, and Canada offers no explanation about why this was not sufficient in this context.

75. In any event, if the Court accepted Canada's submissions, it would create a perverse incentive for Canada to engage (or not engage) in prolonged consultations on the subjects of litigation or potential that are before the courts, in order to defer and deter courts and tribunals from making decisions and awarding remedies on matters where First Nations are affected. This is anathema to the litigation process and a quite problematic suggestion in terms of access to justice for First Nations. It should go without saying that First Nations must have access to the courts to resolve disputes with Canada in the same way as any other party may access the courts, which is affirmed in the *UN Declaration.*[50]

76. This Court should also resist entertaining the notion that every First Nation in Canada must agree on a single remedy or a single approach to any matter which affects them. Such a proposition negates the fact that First Nations are separate polities with distinct opinions, views, experiences and circumstances and is contrary to any articulation of the nature of self-determination as articulates at international law or even within the recognition of jurisdiction over children and families that Canada has acknowledged in *Act Respecting First Nations, Metis and Inuit children youth and families*.

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77. While Chiefs of Ontario agrees that negotiation is often a preferred solution, in this case there were many years of negotiation before the litigation was commenced, and ample time to negotiate since the *Merits Decision* about remedies. Any suggestion that more or any negotiation has to occur before a remedy in a court or tribunal action can be awarded should be rejected.

78. It is notable that this is not the first time in this process that Canada has used a need for consultation as an argument about why a remedy should be delayed or denied. In a previous motion about immediate relief, Canada argued that the relief requested by COO regarding

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[50] United Nations Declaration on the Rights of Indigenous Peoples, at article 8.2

funding for the Band Representative Program should not be ordered until there had been "conversations" with First Nations. The Tribunal rejected that submission.[51]

79. Canada uses a cloak of consultation and consent to argue that the First Nations Child decision is unreasonable, and points to no legal principle in support. As such, its submission that this is a marker of unreasonableness should be rejected.

IV. CONCLUSION AND ORDER SOUGHT

80. In the proceedings leading up to the decisions, the Tribunal was faced with a novel situation where it was required to consider the intersections of human rights law remedies and the rights of First Nations to decide matters of membership, citizenship and identity for themselves.

81. The Tribunal extensively considered the concerns brought by all parties when deciding how to make its decisions, and what decisions to make. Ultimately, it decided for a method of setting out a framework and directing the parties to engage in negotiations to determine how to implement the eligibility category in a way that respected First Nations jurisdiction.

82. The Tribunal made decisions that addressed the discrimination alleged by recognizing certain categories of eligibility for Jordan's Princple, and by respecting First Nations' jurisdiction where that recognition intersected with self-determination rights. Its chain of analysis led it to conclude that First Nations were in the best position to decide the matter, and that they should be funded for so doing if they choose to. This decision is reasonable and respects the facts.

83. COO submits the judicial review in T-1559-20 should be dismissed, with costs to Chiefs of Ontario.

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[51] 2018 CHRT 4, see paras 299-303; 314-315; 335; 395.

84. COO adopts the submissions and order sought of the First Nations Child and Family Caring Society with respect to T-1621-19.

All of which is respectfully submitted, this 12th day of May, 2021.

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