

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

MISSISSAUGAS OF THE NEW CREDIT FIRST NATION

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

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

Respondent

**FACTUM OF THE PROPOSED INTERESTED PARTY, FIRST NATIONS CHILD AND
FAMILY CARING SOCIETY OF CANADA (“CARING SOCIETY”)**

Dated: September 7, 2016

JURISTES POWER | POWER LAW

130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Tel.: (613) 702-5560
Fax: 1 (888) 404-2227

David P. Taylor
Marion Sandilands

CLARKE CHILD & FAMILY LAW

36 Toronto Street, Suite 950
Toronto, ON M5C 2C5

Tel.: (416) 260-3030
Fax: (647) 689-3286

Sarah Clarke

**Counsel for the Proposed Interested Party,
First Nations Child Family Caring Society
of Canada (“Caring Society”)**

TO: **CANADIAN HUMAN RIGHTS TRIBUNAL**
Attn: Judy Dubois, Registry Officer
160 Elgin Street, 11th Floor
Ottawa, ON K1A 1J4

AND TO: **Kent Elson**
KLIPPENSTEIN BARRISTERS & SOLICITORS
160 John Street
Toronto, ON M5V 2E5
Tel.: (416) 598-0288
Fax: (416) 598-9520

Counsel for the Complainant, Mississaugas of the New Credit First Nation

AND TO: **Michael Beggs and Daniel Luxat**
JUSTICE CANADA
Senior Counsel
Exchange Tower
130 King Street West, Suite 3400
Toronto, ON M5X 1K6
Tel.: 416-973-0942

Counsel for the Respondent, the Attorney General of Canada

AND TO: **Brian Smith**
Litigation Services
CANADIAN HUMAN RIGHTS COMMISSION
344 Slater Street
Ottawa, ON K1A 1E1

Counsel for the Canadian Human Rights Commission

TABLE OF CONTENTS

		PAGE
PART I	STATEMENT OF FACT	6
A.	Overview	6
B.	The Mandate of the Caring Society	9
C.	Jordan’s Principle	11
PART II	ISSUES AND THE LAW	15
A.	Applicable Legislation	15
B.	Principles Governing Interventions	16
(a)	The Caring Society’s Expertise Will be of Assistance to the Tribunal	17
(b)	The Caring Society’s Involvement Will Add to the Legal Position of the Parties	18
(c)	The Proceeding Will Have an Impact on the Moving Party’s Interests	19
PART III	SUBMISSIONS	20
A.	Submissions to be Advanced by the Caring Society	20
B.	The Caring Society Will Not Delay These Proceedings	24
PART IV	ORDER SOUGHT	25
Schedule “A”	List of Authorities	27
Schedule “B”	Statutes and Regulations	27
Schedule “C”	International Materials	29
Schedule “D”	Tribunal Record	30

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

MISSISSAUGAS OF THE NEW CREDIT FIRST NATION

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

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

Respondent

**FACTUM OF THE PROPOSED INTERESTED PARTY, FIRST NATIONS CHILD AND
FAMILY CARING SOCIETY OF CANADA (“CARING SOCIETY”)**

PART I STATEMENT OF FACT

A. Overview

1. The First Nations Child and Family Caring Society of Canada (“Caring Society”) seeks interested party status in these proceedings, pursuant to Rules 3 and 8 of the *Canadian Human Rights Tribunal Rules of Procedure* (“the Tribunal Rules”).¹ Specifically, the Caring Society seeks leave to cross-examine the Respondent’s witnesses regarding the application of Jordan’s Principle to this complaint and to make written and oral submissions regarding the application of Jordan’s Principle to this complaint.

2. The Caring Society is the only national organization with the specific mandate to promote the welfare of First Nations children and families. The Caring Society provides research, training, public education, networking and policy expertise in First Nations child welfare and children’s rights, nationally and internationally.

3. The Caring Society seeks interested party status in these proceedings in order to bring its unique perspective to bear with regard to the interpretation and application of Jordan’s Principle. The Caring Society was intimately involved in developing and drafting Jordan’s Principle. As such, the Caring Society will provide insight and assistance to the Canadian Human Rights Tribunal (“the Tribunal”) with respect to the impact of Jordan’s Principle in the context of this complaint and the *Canadian Human Rights Act* (“CHRA”)² in particular, as well as the implications for Canada pursuant to its obligations under the United Nations Convention on the

¹ *Canadian Human Rights Tribunal Rules of Procedure (03-04-05)*, (the “Tribunal Rules”).

² *Canadian Human Rights Act*, RSC 1985, c H-6, (“CHRA”).

Rights of the Child (the “CRC”) and the United Nations Declaration on the Rights of Indigenous Peoples (the “UNDRIP”).³

4. Jordan’s Principle is a child-first principle ensuring First Nations children can access public services on the same terms as all other Canadian children. It states that where a government service is available to all other children and a dispute arises between Canada and a provincial/territorial government, or between departments in the same government, regarding the responsibility for services to a First Nations child, the government of first contact provides access to the service in question and may seek reimbursement from the other level of government/department after the child has received the service. In other words, Jordan’s Principle is a procedural safeguard developed to ensure that all First Nations children have access to, and receive, the same benefits and entitlements as all other Canadian children.

5. Jordan’s Principle will likely play a central role in the resolution of the issues in this complaint. The Mississaugas of the New Credit First Nation (“MNCFN”) challenge Canada’s alleged failure to provide sufficient special education funding to actual costs, leaving these children’s families in the position of either covering these costs themselves, or not receiving required services.⁴ If the allegations relating to discrimination are substantiated, the burden placed on these families flies in the face of Jordan’s Principle, particularly where special education services are available at no cost to children living off-reserve.⁵ In referring this complaint to the

³ *United Nations Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol 1577, p. 3, (entered into force 2 September 1990); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007).

⁴ MNCFN Complaint form at pp 1 and 3.

⁵ *Education Act*, RSO 1990, c E.2 at s 170(1)(7).

Tribunal, the Commission noted the complexity of the systemic issues surrounding the provision of special education services on-reserve. Jordan's Principle can address these systemic complexities as well, by placing the emphasis on the experience and needs of the child, as opposed to the bureaucracies that surround her.⁶

6. The Caring Society has a direct and substantial interest in the issues raised in this case, and in particular the interpretation and application of Jordan's Principle. The unique and historical status of First Nations peoples is such that many services ordinarily provided to Canadians by the provinces and territories are provided to First Nations peoples by the federal government, through agencies funded and controlled several federal departments including Aboriginal Affairs and Northern Development Canada, now Indigenous and Northern Affairs Canada ("INAC"). Jordan's Principle is a procedural mechanism developed to ensure that First Nations children have access to, and receive, the same public services and benefits on the same terms as other Canadian children. If Jordan's Principle is narrowly construed and limited, First Nations children will be precluded from accessing a procedural mechanism designed to redress any and all unfair, inadequate or discriminatory service provision.

7. The Caring Society also has a direct interest in the issues and outcome of these proceedings as a complainant in *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)* ("the Caring Society's CHRA complaint"), in which the Tribunal substantiated the Caring Society's complaint earlier this

⁶ Canadian Human Rights Commission Assessment Report, dated September 28, 2009, at paras 60-61.

year and is currently considering submissions on remedy.⁷ The Caring Society's *CHRA* Complaint also dealt with the federal government's failure to adequately implement Jordan's Principle. The Tribunal found that the federal government's unduly narrow implementation of Jordan's Principle caused an adverse effect to First Nations children.⁸

8. If granted interested party status, the Caring Society will provide the Tribunal with submissions regarding the following issues:

- (a) the interpretation and application of Jordan's Principle in the context of special education services;
- (b) the inappropriateness of narrowly construing Jordan's Principle, and the potential impact of such an approach on First Nations children living on and off reserve; and
- (c) the impact of narrowly construing Jordan's Principle on Canada's obligations under the *CHRA*, the CRC and the UNDRIP.

B. Mandate and Unique Perspective of the Caring Society

9. The Caring Society is a non-profit organization committed to research, policy development and advocacy on behalf of First Nations agencies that serve the well-being of children, youth and families including those living on-reserve. As a national non-profit

⁷ Affidavit of Dr. Cindy Blackstock, affirmed September 6, 2016 (the "Blackstock Affidavit"), at para 35, Motion Record of the Proposed Interested Party, First Nations Child and Family Caring Society ("MR"), p 7 of Blackstock Affidavit.; *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 at para 393 [*Caring Society's CHRA Complaint*].

⁸ Blackstock Affidavit, at para 35, MR, p 7 of Blackstock Affidavit; Caring Society's *CHRA* Complaint at para 393; *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 10 at para 30 [*Caring Society remedy proceedings*].

organization, the Caring Society provides quality resources to communities across Canada to draw upon and to assist them in developing community-focused solutions.⁹

10. The Caring Society works closely with First Nations communities, both through grassroots initiatives, such as its Touchstone of Hope program, and on issues of regional and national concern in collaboration with leadership organizations, including the Assembly of First Nations (“AFN”), the Assembly of Manitoba Chiefs (“AMC”) and the Norway House Cree Nation (“Norway House”).¹⁰

11. The Caring Society works with, and promotes the voices of, First Nations children and families, nationally and internationally. At the national level, the Caring Society has initiated Canada-wide research, youth engagement, and family reconciliation initiatives, aimed at improving the safety and well-being of First Nations youth and families.¹¹

12. Internationally, the Caring Society has represented the interests of First Nations child and family service agencies in submissions to the United Nations Committee on the Rights of the Child (the “UNCRC”), the United Nations Permanent Forum on Indigenous Issues, the Committee on Economic, Social and Cultural Rights, and the Sub Group on Indigenous Child Rights. The Caring Society has also made presentations in South Africa, New Zealand, Norway, Ireland, Taiwan, Australia and the United States. The Caring Society has and continues to partner with international child welfare organizations such as the Secretariat for National Aboriginal and Islander Child Care

⁹ Blackstock Affidavit, at para 5, MR, p 2 of Blackstock Affidavit.

¹⁰ Blackstock Affidavit, at para 10, MR, p 3 of Blackstock Affidavit.

¹¹ Blackstock Affidavit, at para 7, MR, p 2 of Blackstock Affidavit.

(SNAICC) in Australia, the Child Welfare League of America and the National Indian Child Welfare Association in the United States.¹²

13. The Caring Society's most important and urgent work, however, has been its research, policy work and public education and engagement to promote equitable, culturally based and evidence informed services for First Nations children. More particularly, the Caring Society seeks to remedy longstanding inequalities in the federal government's provision of child welfare, education and health services to First Nations children as compared to what other children in Canada receive.

14. For instance, the Caring Society was granted intervener status at the Supreme Court of Canada in *Moore v British Columbia (Education)*, 2012 SCC 61 and at the Federal Court of Appeal in *Canada (Attorney General) v Pictou Landing Band Council et al* (Docket #A-158-13). The Caring Society has made numerous submissions to parliamentary committees and has also worked with First Nations, First Nations organizations and the family of the late Shannen Koostachin to promote Shannen's Dream, an initiative to promote and secure access to equitable and culturally-based education for First Nations children and youth.¹³

C. Jordan's Principle

15. Jordan's Principle is named after Jordan River Anderson, a five-year old child from Norway House Cree Nation in Manitoba who died in a Winnipeg hospital in 2005. Although cleared by doctors

¹² Blackstock Affidavit, at para 13, MR, p 3 of Blackstock Affidavit.

¹³ Blackstock Affidavit, at para 12, MR, p 3 of Blackstock Affidavit.

to live in a family home, Jordan's illness meant he was unable to live there without in-home care. The governments of Canada and Manitoba disagreed as to which of them should pay for Jordan's in-home care, given his on-reserve First Nations status. As a result of this disagreement, Jordan remained in a hospital room unnecessarily for over two years before he tragically died there at the age of five, never having the opportunity to live in a family home.¹⁴

16. In memory of Jordan, and in keeping with the non-discrimination provisions of the *Charter of Rights and Freedoms* as well as the CRC, the Caring Society worked with Jordan's family, Norway House, AMC, and AFN to develop and promote Jordan's Principle.¹⁵ Recognizing the significant work done by Jordan's family, community and others to advocate for a child-first policy to resolve these disputes, Dr. Cindy Blackstock, the Caring Society's Executive Director, drafted the language now known as "Jordan's Principle". The Caring Society also hosts the Jordan's Principle website (www.jordansprinciple.ca).¹⁶

17. Jordan's Principle is a child-first principle ensuring First Nations children can access public services on the same terms as all other Canadian children. It states that where a government service is available to all other children and a jurisdictional dispute arises between Canada and the provincial/territorial government, or between departments within the same government, regarding payment for services to a First Nations child, the government of first contact pays for the services and can seek reimbursement from the other level of government/department after the child has received

¹⁴ Blackstock Affidavit, at para 16, MR, p 4 of Blackstock Affidavit.

¹⁵ Blackstock Affidavit, at para 17, MR, p 4 of Blackstock Affidavit.

¹⁶ Blackstock Affidavit, at para 18, MR, p 4-5 of Blackstock Affidavit.

the service.¹⁷

18. In December 2007, Motion 296 was passed unanimously in the House of Commons, thus approving Jordan's Principle as a federal policy. The Caring Society was significantly involved in the development and drafting of Motion 296 as Dr. Blackstock worked closely with Jean Crowder, the Member of Parliament who prepared Motion 296 and introduced it to the House of Commons.¹⁸

19. The Caring Society also commenced the first federal challenge to the federal government's failure to implement Jordan's Principle. In 2007, the Caring Society and the AFN filed a complaint with the Canadian Human Rights Commission citing discrimination in the federal government's system for providing child welfare services to First Nations children living on reserve. The complaint asserted that the federal government's funding program used flawed and inequitable funding policies, practice and services resulting in inequitable child welfare services and benefits for on-reserve First Nations children compared to those services received by children living off reserve, contrary to the *CHRA*. The complaint also cited Jordan's Principle as a mechanism to resolve jurisdictional disputes adversely affecting First Nations children.¹⁹

20. In 2016,²⁰ the Tribunal ruled in favour of the Caring Society and the AFN and held that Jordan's Principle is "relevant and often intertwined with the provision of child and family services to First Nations".²¹ The Tribunal found that Canada had employed an unduly narrow interpretation

¹⁷ Blackstock Affidavit, at para 19, MR, p 5 of Blackstock Affidavit.

¹⁸ Blackstock Affidavit, at para 21, MR, p 5 of Blackstock Affidavit.

¹⁹ Blackstock Affidavit, Exhibit "H", MR, Blackstock Affidavit.

²⁰ *Caring Society's CHRA Complaint*.

²¹ *Ibid* at para 362.

of its obligations under Jordan's Principle: it found that the government's interpretation did "not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families", and that this caused an adverse impact on First Nations children.²²

21. In its January 26, 2016 decision, the Tribunal ordered INAC to cease its discriminatory practices and reform its funding programs and agreements to reflect the findings of the Tribunal's decision. The Tribunal also ordered INAC to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full scope of the principle.²³ In a later decision, rendered April 26, 2016, the Tribunal ordered:

INAC to immediately consider Jordan's Principle as including all jurisdictional disputes (this includes disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). Pursuant to the purpose and intent of Jordan's Principle, the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided.²⁴

22. The Attorney General of Canada did not seek judicial review of either of the Tribunal's decisions.

23. In its January 26, 2016 decision, the Tribunal retained jurisdiction to deal with the outstanding matters of clarification on the implementation of further relief. The process of resolving the outstanding remedial issues is ongoing.

²² *Ibid* at paras 381, 458.

²³ *Ibid* at para 481.

²⁴ *Caring Society remedy proceedings* at para 33.

24. The federal government has not implemented Jordan's Principle pursuant to Parliament's intentions and the language of House of Commons Motion 296 and the Tribunal's January 26, 2016 and April 26, 2016 orders. As a result, First Nations children living primarily on reserve continue to be unjustly denied public services available to all other Canadian children.²⁵ In response, the Caring Society continues to be actively involved in promoting Jordan's Principle, both on the national and international stage.²⁶

PART II ISSUES AND THE LAW

25. The only issue to be addressed on this motion is whether the Caring Society should be granted status as an interested party in these proceedings, with leave to cross-examine the Respondent's witnesses, file written submissions and participate in oral argument.

A. Applicable Legislation

26. Pursuant to subsection 48.3(10) of the *CHRA*, an interested party may, with leave, intervene in an inquiry on any appropriate terms and conditions.

27. Pursuant to subsection 50(1) of the *CHRA*, all parties, including interested parties, shall be given full and ample opportunity to appear at the inquiry, present evidence and make representations.

²⁵ Blackstock Affidavit, at para 22, MR, p 5 of Blackstock Affidavit.

²⁶ Blackstock Affidavit, at paras 13, 22, MR, p 3-5 of Blackstock Affidavit.

28. Leave to intervene as an interested party is governed by Rule 8 of the Tribunal Rules,²⁷ which states as follows:

Motion for interested party status

8(1) Anyone who is not a party, and who wishes to be recognized by the Panel as an interested party in respect of an inquiry, may bring a motion for an order granting interested party status.

Motion to specify extent of participation

8(2) A motion under 8(1) shall comply with the requirements of Rule 3 and shall specify the extent of the desired participation in the inquiry.

29. Rule 3(1) of the Tribunal's Rules states as follows:

Notice of motion

3(1) Motions, including motions for an adjournment, are made by a Notice of Motion, which Notice shall

- (a) be given as soon as is practicable;
- (b) be in writing unless the Panel permits otherwise;
- (c) set out the relief sought and the grounds relied upon; and
- (d) include any consents of the other parties.

B. Principles Governing Interventions

30. Section 50 of the *CHRA* gives the Tribunal wide discretion to make a determination on a motion for interested party status. The section does not provide any conditions for the exercise of this discretionary power.

31. In *Walden et al v Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)* (“*Walden*”),²⁸ the Tribunal held that interested party status would be granted where:

- (a) The prospective interested party's expertise will be of assistance to the Tribunal;

²⁷ *Canadian Human Rights Tribunal Rules of Procedure (03-04-05)*.

²⁸ 2011 CHRT 19 [*Walden*].

- (b) Its involvement will add to the legal positions of the parties; and,
- (c) The proceeding will have an impact on the moving party's interests.²⁹

(a) The Caring Society's Expertise Will be of Assistance to the Tribunal

32. As articulated above, the Caring Society has a long history of engagement and research on issues of discrimination affecting First Nations communities, on and off reserve, involving both federal and provincial/territorial governments, and agencies providing a variety of services. The Caring Society is therefore well situated to provide useful input from this different perspective.

33. As the only national organization with a specific mandate to promote the welfare of First Nations children, the Caring Society brings a perspective different from those of the MNCFN, the Commission, or the Attorney General of Canada. Unlike the other parties, the Caring Society is not a government body, and unlike the MNCFN, the Caring Society has a nation-wide perspective.

34. The Caring Society would make submissions regarding the interpretation and application of a "child-first" principle, how it applies to Jordan's Principle and its relation to the *CHRA*. Indeed, the Caring Society was intimately involved in drafting Jordan's Principle and can provide a unique perspective in this regard. Further, given its nationwide perspective, the Caring Society can provide insight into the systemic implications of Jordan's Principle in this case, including with regard to legislation in other provinces and territories.

²⁹ *Walden*, at paras 22-23.

35. The Caring Society, with its national and international perspective, will also provide the Tribunal with insight into the adverse and discriminatory effect of Canada's narrow interpretation of Jordan's Principle on First Nations communities. Finally, the Caring Society will bring this perspective to bear on the impact of narrowly construing Jordan's Principle on Canada's obligations under the CRC and the UNDRIP.

(b) The Caring Society's Involvement Will Add to the Legal Position of the Parties

36. The Caring Society anticipates that there will be some areas of commonality between the MNCFN and the Commission and the interested party. Where there is complete agreement and where the Caring Society does not have a further nuanced position, the Caring Society will not duplicate submissions already made. Where the MNCFN or the Commission have canvassed a subject in cross-examination with one of the Respondent's witnesses, the Caring Society will not duplicate any lines of questioning.

37. The Caring Society will add to these proceedings its unique perspective as an advocate for First Nations children, youth, and families across Canada. In its submissions, the Caring Society will complement and add to the MNCFN's position by addressing the unique considerations of service delivery to First Nations children, particularly from a cross-jurisdictional perspective.

38. The Caring Society will not add to the documentary record in this case, and will rely on the record established by the Parties.

(c) The Proceeding Will Have an Impact on the Caring Society's Interests

39. The Caring Society has a direct and substantial stake in the present proceedings, which raise the issue of the interpretation and applications of Jordan's Principle. This question was one of the focal points of the Caring Society's *CHRA* Complaint, described above. As the Tribunal has retained jurisdiction in that Complaint to deal with remedy, the Tribunal's decision on this issue will have a direct impact on the outstanding issues in that Complaint.

40. Further, the outcome of this case will have significant ramifications not only in respect of the Caring Society's *CHRA* Complaint, but also for all First Nations children, youth, and families seeking redress for discrimination through the application of Jordan's Principle, as well as for the agencies who work with and advocate for their community's children. From a national policy perspective, the community of First Nations children and families has no other means to have their interests represented before the Tribunal and to ensure that the Tribunal has the full opportunity to consider the impact of the interpretation of Jordan's Principle on the First Nations community.

41. The interpretation of Jordan's Principle is of critical importance to First Nations children and families. Due to their unique status under s. 91(24) of the *Constitution Act, 1867*³⁰, First Nations peoples receive numerous services from the federal government through agencies funded and controlled by the federal government, rather than from the provincial/territorial governments, which provide and/or fund such services to other Canadians. Child welfare, education, and certain health care services to on-reserve First Nations children are three such examples.

³⁰ 30 & 31 Vict, c 3.

42. Where it is alleged that a service otherwise is available to the public via a provincial/territorial government and is denied or adversely provided to First Nations children by the federal government, Jordan's Principle is the only procedural mechanism available to redress this inequality. As such, the Caring Society's participation is of key importance to ensuring that the voices of First Nations children and families are heard in the Tribunal's interpretation of Jordan's Principle.

PART III SUBMISSIONS

43. If granted status as an interested party, the Caring Society would make new and different submissions regarding the interpretation and application of Jordan's Principle given its pan-Canadian point of view on these proceedings and its experience working with children and families from coast to coast to coast. These would include:

- (a) the interpretation and application of Jordan's Principle in the context of special education services;
- (b) the inappropriateness of narrowly construing Jordan's Principle, and the potential impact of such an approach on First Nations children living on and off reserve; and
- (c) the impact of narrowly construing Jordan's Principle on Canada's obligations under the *CHRA*, the CRC and the UNDRIP.

A. Submissions to be Advanced by the Caring Society

44. Jordan's Principle represents one particular consequence of federalism as it pertains to First Nations children. By virtue of section 93 of the *Constitution Act, 1867*, the provincial legislatures

have jurisdiction over education. However, pursuant to subsection 91(24) of the *Constitution Act, 1867*, Parliament has jurisdiction to legislate with respect to education for First Nations children. Subsection 91(24) of the *Constitution Act, 1867* empowers Parliament to enact laws that apply only to “Indians”, even though the subject-matter of those laws—such as education—would otherwise fall under provincial jurisdiction if they were to apply to non-Indigenous persons.

45. Whereas the ground rules of Canadian federalism laid down nearly 150 years ago focused on the division of legislative powers, the development of the welfare state and the corresponding rise of the federal spending power have changed the landscape. Based on the principle of the equal worth of every person, the federal spending power was used to induce provinces to implement social programs that meet national standards across Canada. The spirit of the system is captured in section 36 of the *Constitution Act, 1982*,³¹ which reflects the commitment of the federal and provincial governments to promote equal opportunities for the well-being of Canadians, to further economic development to reduce disparity in opportunities, and to provide essential public services of reasonable quality to all Canadians.

46. Unquestionably, education is an “essential public service” within the meaning of paragraph 36(1)(c) of the *Constitution Act, 1982*. When a particular service falls under the concurrent jurisdiction of both the federal government and of a provincial/territorial government, the doctrine of double aspect translates into shared responsibility with respect to funding for that service. While this shared responsibility may trigger much discussion between levels of government and between government departments, governments must make every reasonable effort to ensure that citizens

³¹ Schedule B to the *Canada Act 1982 (UK), 1982*, c 11.

do not suffer from jurisdictional conflicts. As a central tenet of substantive equality, this is the source of Jordan's Principle.

47. In *Pictou Landing Band Council v. Attorney General of Canada*, the Federal Court held that Jordan's Principle requires that the first agency contacted must respond with "child-first decisions", leaving jurisdictional and funding decisions to be dealt with later.³² The Court found that Jordan's Principle is not to be narrowly construed and that the absence of a monetary dispute will not be determinative where both levels of government "maintain an erroneous position on what is available to persons in need of such services in the province and both then assert there is no jurisdictional dispute."³³ This approach was endorsed by the Tribunal in the Caring Society's *CHRA* Complaint.³⁴ Canada discontinued its appeal prior to the hearing before the Federal Court of Appeal.

48. In the Caring Society's *CHRA* Complaint, Canada took the position that Jordan's Principle ought to be narrowly construed and engaged only under limited circumstances, arguing that Jordan's Principle is not a child welfare concept, not part of the child welfare funding program, and was outside the scope of the complaint.³⁵ The Tribunal rejected this position, and found that the government's narrow construction of the Principle caused an adverse impact on First Nations children, and thereby amounted to discrimination contrary to the *CHRA*.³⁶

³² 2013 FC 342 at para 106.

³³ *Ibid* at para 86.

³⁴ *Caring Society CHRA complaint*, above, at paras 376-381; *Caring Society remedy proceedings* at paras 30-34.

³⁵ *Caring Society CHRA complaint*, above, at para 360-361.

³⁶ *Caring Society CHRA complaint*, above, at paras 379-381, 458.

49. It is the Caring Society's position that narrowly construing Jordan's Principle in the context of this complaint will cause further adverse impacts to First Nations children and is discriminatory under the *CHRA*.

50. It could not have been Parliament's intention to exclude First Nations children from human rights protections when it unanimously passed Motion 296. It is the Caring Society's position that Jordan's Principle ought to be interpreted as it was intended: to ensure that First Nations children have access to public services on the same terms as all other Canadian children.

51. The Caring Society proposes to argue that Jordan's Principle is a means to achieve substantive equality for First Nations peoples when they are caught in jurisdictional disputes, as guaranteed by the *CHRA*. The Caring Society proposes to argue that the failure to apply, or the narrow application of Jordan's Principle, either of which may cause First Nations children to experience delays or to be denied essential services, is relevant to determining whether Canada is providing a service that discriminates on the basis of race and ethnicity and/or national origin.

52. Further, the Caring Society proposes to argue that Canada's international human rights obligations are relevant when interpreting what constitutes a prohibited discriminatory practice under the *CHRA*. The Caring Society is of the view that the CRC, as the most ratified human rights treaty in history, is binding on the Government of Canada and has a direct impact on this case. The UNCRC has criticized Canada regarding its failure to fully implement its obligations under the CRC, including its failure to address the overrepresentation of Aboriginal children in out-of-home care. The UNCRC has directed Canada to ensure that "Aboriginal children have full access to all government

services and receive resources without discrimination.”³⁷ Moreover, article 2 of the UNDRIP—a non-binding declaration that Canada has endorsed—provides that “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights”.³⁸ Jordan’s Principle must be fully and properly implemented by the federal government to demonstrate that Canada is committed to fulfilling its obligations to Indigenous children under the CRC and its commitment under the UNDRIP.

B. The Caring Society Will Not Delay These Proceedings

53. The Caring Society proposes to intervene as an interested party without unduly prejudicing or significantly delaying the determination of the rights of the Parties to these proceedings. To this end, the Caring Society proposes that its participation be limited to cross-examining the Respondent’s witnesses, filing written submissions, and participating in oral submissions.

54. In consideration of the Parties, the Caring Society has reached out to the Complainant and has obtained support for its motion to intervene.

55. The Caring Society understands that the hearing of this complaint is scheduled to begin on September 19, 2016. Counsel for the Caring Society are available throughout this week and

³⁷ United Nations Committee on the Rights of the Child, *Concluding Observations: Canada*, 5 October 2012, p 7, available [http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-CAN-CO-3-4_en.pdf].

³⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007), art. 2.

would not be in need of any adjournment of this matter in the event that the Caring Society's motion for interested party status is granted.

56. The Caring Society will abide by any schedule set by the Tribunal for the hearing of the complaint, the delivery of written materials, and for participating in oral submissions at the hearing.

57. If granted status as an interested party, the Caring Society will seek no costs and would ask that no costs be awarded against it, given the public interest nature of the Caring Society's desired participation in these proceedings.³⁹

PART IV ORDER SOUGHT

58. The Caring Society therefore respectfully requests an order granting it leave to act as an interested party, with leave to cross-examine the Respondent's witnesses, to file written submissions, and to participate in oral argument, pursuant to Rules 3 and 8 of the Tribunal Rules.

³⁹ *Spookw v Gitksan Treaty Society*, 2015 BCCA 77 at para 22.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7TH DAY OF SEPTEMBER, 2016

Dated: September 7, 2016



Sarah Clarke
David P. Taylor
Marion Sandilands

**Counsel for the Proposed Interested
Party, First Nations Child Family Caring
Society of Canada (“Caring Society”)**

JURISTES POWER | POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Tel.: (613) 702-5560
Fax: 1 (888) 404-2227

David P. Taylor
Marion Sandilands

CLARKE CHILD & FAMILY LAW
36 Toronto Street, Suite 950
Toronto, ON M5C 2C5

Tel.: (416) 260-3030
Fax: (647) 689-3286

Sarah Clarke

SCHEDULE “A” LIST OF AUTHORITIES

- Tab 1** *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. File No.: T1340/7008. Decision rendered January 26, 2016.
- Tab 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 10.
- Tab 3** *Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)*, 2011 CHRT 19.
- Tab 4** *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342.
- Tab 5** *Spookw v. Gitksan Treaty Society*, 2015 BCCA 77.

SCHEDULE “B” STATUTES AND REGULATIONS

Canadian Human Rights Tribunal Rules of Procedure (03-05-04)

Notice of motion

3(1) Motions, including motions for an adjournment, are made by a Notice of Motion, which Notice shall

- (a) be given as soon as is practicable;
- (b) be in writing unless the Panel permits otherwise;
- (c) set out the relief sought and the grounds relied upon; and
- (d) include any consents of the other parties.

Motion for interested party status

8(1) Anyone who is not a party, and who wishes to be recognized by the Panel as an interested party in respect of an inquiry, may bring a motion for an order granting interested party status.

Motion to specify extent of participation

8(2) A motion under 8(1) shall comply with the requirements of Rule 3 and shall specify the extent of the desired participation in the inquiry.

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

Intervenors

48.3(10) An interested party may, with leave of the judge, intervene in an inquiry on any terms and conditions that the judge considers appropriate.

Conduct of inquiry

50 (1) After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.

Education Act, RSO 1990, c E.2

Duties of boards

Special education programs and services

170 (1)(7) Every board shall, provide or enter into an agreement with another board to provide in accordance with the regulations special education programs and special education services for its exceptional pupils.

Constitution Act, 1867, 30 & 31 Vict. c 3.

Legislative Authority of Parliament of Canada

91 It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and the House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament extends to all Matters coming within the Classes of Subjects hereinafter enumerated; that is to say

(24) Indians, and Lands reserved for the Indians.

Legislation respecting Education

93 In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

Commitment to promote equal opportunities

36(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to (c) providing essential public services of reasonable quality to all Canadians.

SCHEDULE "C" International Materials

- Tab 1** *United Nations Convention on the Rights of the Child*, GA Res. 44/25, UN GOAR, 44th Sess., 20 November 1989 (entered into force 2 September 1990).
- Tab 2** *United Nations Declaration on the Rights of Indigenous Peoples* GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007).
- Tab 3** United Nations Committee on the Rights of the Child, *Concluding Observations: Canada*, 5 October 2012.

SCHEDULE “D” Tribunal Record

Tab 1 MNCFN Complaint form

Tab 2 Canadian Human Rights Commission Assessment Report, dated September 28, 2009