First Nations Child & Family Caring Society of Canada

July 2020

Canadian Human Rights Tribunal Rules on Jordan's Principle Eligibility for First Nations Children

2020 CHRT 20

"Canada has a positive obligation towards "all First Nations children" regardless of Indian Act status or eligibility to Indian Act status." [para 318]

On July 17, 2020 the Canadian Human Rights Tribunal (Tribunal) issued a ruling on the eligibility of First Nations children with regard to receiving services through Jordan's Principle. Canada has been ordered to immediately consider eligible for services through Jordan's Principle:

- First Nations children who will be become eligible for *Indian Act* registration/status under the S-3 implementation.

The Tribunal found two other categories of First Nations children who will be eligible in the future following a further order from the Tribunal:

1. First Nations children without *Indian Act* status who are recognized by their respective First Nations; and
2. First Nations children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.

The Tribunal ordered the parties to consult regarding the criteria and mechanisms to identify these two categories of First Nations children. The parties are ordered to provide their recommendations to the Tribunal by October 19, 2020. Thereafter, the Tribunal is expected to release specific orders regarding eligibility for these two categories of First Nations children.

Background

Jordan's Principle is a child-first principle named in loving memory of Jordan River Anderson, a First Nations child from Norway House Cree Nation in Manitoba. Born with complex medical needs, Jordan spent more than two years unnecessarily in hospital while the province of Manitoba and the Canadian government argued over who should pay for his at-home care. Jordan died in the hospital at the age of five years old, never having spent a day in his family home. Jordan's Principle makes sure that First Nations children get the services they need when they need them.

On January 26, 2016, the Tribunal found that Canada is discriminating against 165,000 First Nations children by providing flawed and inequitable child welfare funding and failing to implement Jordan's Principle (2016 CHRT 2). The Tribunal found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Indigenous Services Canada (ISC) was ordered to immediately implement the full meaning and scope of Jordan's Principle.

Since the 2016 CHRT 2 ruling, there have been four non-compliance orders from the Tribunal for Canada to fully implement Jordan's Principle: 2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 14, and 2017 CHRT 35. In 2016 CHRT 10, Canada was ordered to "immediately implement the full meaning and scope of Jordan's Principle, not immediately start discussions to review the definition in the long-term" [para. 5]. The Tribunal noted that a definition, adopted by the House of Commons in 2007, for Jordan's Principle already existed. Canada was ordered to base its definition and application of Jordan's Principle on key principles, one of which was that Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve [2016 CHRT 10, para. 14].

On February 21, 2019, the Tribunal issued an interim ruling on the definition of a "First Nations child" for the purposes of Jordan's Principle. The Tribunal recognized Indigenous Peoples' inherent rights of self-determination and self-governance, including the rights to determine citizenship and membership according to their traditions and customs. As such, the Tribunal indicated that the order would not override First Nations rights and Canada was ordered to extend eligibility for Jordan's Principle to:

1) First Nations children without *Indian Act* status who live off-reserve but who are recognized by their Nation; and
2) who have urgent and/or life-threatening needs [para. 22].

The interim ruling on the definition of a "First Nations child" for the purposes of Jordan's Principle was issued until the Tribunal could provide a further order.

Orders

The issue of a "First Nations child" definition was addressed at a full hearing where the Tribunal requested that the parties make arguments through a multi-faceted lens given the probable incompatibilities between the United Nations Declaration on the Rights of Indigenous People (UNDRIP) and the *Indian Act* [para. 19]. The Tribunal addressed three issues as follows:

Issue I: Children, residing on or off reserve whom a First Nations group, community or people recognizes as belonging to that group, community or people, in accordance with the customs or traditions of that First Nations group, community or people.

The Tribunal ruled that First Nations children without *Indian Act* status who are recognized by their respective First Nations will be eligible in the future for Jordan's Principle following a further order. The parties were ordered to consult regarding the criteria and mechanism to identify this category of First Nations children [para. 229].

Issue II: First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.

The Tribunal ruled that First Nations children who do have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status will be eligible in the future for Jordan's Principle following a further order. The parties were ordered to consult regarding the criteria and mechanism to identify this category of First Nations children [para. 272].

The Tribunal ordered Canada to immediately consider eligible for Jordan's Principle services those First Nations children who will be become eligible for *Indian Act* registration/status under the S-3 implementation.

Issue III: First Nations children, residing off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFCS Program.

The Tribunal ruled it had insufficient jurisdiction to order this category of First Nations children as eligible for Jordan's Principle. Nevertheless, the Tribunal outlined that "Canada has positive obligations towards all First Nations children whether they have *Indian Act* status or not and therefore, Canada must implement specific measures to protect children regardless of status" [para. 309].

The parties were ordered to return to the Tribunal with their potential Jordan's Principle eligibility criteria and mechanism as ordered in Issues I and II by October 19, 2020 [para. 322].

Until a final order on Jordan's Principle eligibility has been issued, the 2019 CHRT 7 interim ruling remains in effect [para. 332].

For more information on this case, visit **fnwitness.ca** or email **info@fncaringsociety.com**.