First Nations Child & Family Caring Society of Canada

October 15, 2021

Canada's request for Judicial Review at the Federal Court on Human Rights Compensation and Eligibility - Federal Court file: T-1559-20 & T-1621-19

Background

In 2007, the First Nations Child & Family Caring Society (Caring Society) and the Assembly of First Nations filed a human rights complaint under the *Canadian Human Rights Act* (CHRA) alleging that the Government of Canada's flawed and inequitable provision of First Nations Child and Family Services (FNCFS) and its failure to properly implement **Jordan's Principle** was discriminatory on the prohibited grounds of race, national or ethnic origin. Over the next nine years, Canada brought numerous unsuccessful motions to get the case dismissed on jurisdictional grounds. In 2013, the Canadian Human Rights Tribunal (Tribunal) began 72 days of hearings ending in October 2014. On January 26, 2016, the Canadian Human Rights Tribunal issued its order on the merits of the case, substantiating the discrimination and ordering Canada to immediately cease its discriminatory conduct. Canada did not contest this order but failed to comply (obey the order). Since 2016, the Tribunal has issued 20 non-compliance and procedural orders.

Canada filed for judicial review (appeal) of 2020 CHRT 20 and 2020 CHRT 36, confirming that First Nations children recognized by their Nations are eligible for Jordan's Principle. Canada also applied for judicial review of 2019 CHRT 39, an order providing human rights compensation to eligible victims (many of whom are still children). In all cases, Canada wanted the orders quashed (overturned entirely). All of the Tribunal orders and the parties' legal submissions (factums) relevant to Canada's two appeals are posted on the **I am a Witness timeline.**

Canada's Judicial Review of eligibility for Jordan's Principle (2020 CHRT 20 and 2020 CHRT 36)

In a legal order, the Tribunal ordered Canada to apply Jordan's Principle, a child-first principle, to "all First Nations children" to ensure First Nations children get the services they need when they need them. Canada interpreted that to exclude First Nations children who do not have *Indian Act* status and live off-reserve. In December 2018, the Caring Society brought a non-compliance motion to the Tribunal. After a hearing, the Tribunal found that Canada must ensure that First Nations children who are recognized by their Nations for the purpose of Jordan's Principle are eligible for Jordan's Principle regardless of their *Indian Act* status. By filing for judicial review, Canada sought to quash this order. Canada was opposed by the Caring Society, the Assembly of First Nations, Chiefs of Ontario, the Canadian Human Rights Commission, Nishnawbe Aski Nation, Congress of Aboriginal Peoples and Amnesty International.

Canada's Judicial Review of the compensation order (2019 CHRT 39)

In September 2019, the Tribunal found that Canada's "willful and reckless" discrimination against First Nations children and some caregivers resulted in a "worst-case scenario" contributing to unnecessary family separations, harms and in some cases, the deaths of children. Canada has not contested orders that substantiated these harms, including subsequent orders to ensure Canada's compliance with the Tribunal's January 2016 decision (2016 CHRT 2) requiring it to cease its discriminatory conduct. The Tribunal ordered Canada to pay the maximum amount allowable under the CHRA ($40,000) to compensate certain First Nations children and their parents or grandparents who were affected by Canada's discriminatory treatment in child welfare or implementation of Jordan's Principle. The Tribunal set the start date for compensation at January 1, 2006, as the Canadian Human Rights Act allows for claims dating back one year before the Complaint was filed. The Tribunal has determined that the discrimination in Canada's provision of child and family services is ongoing, meaning the longer Canada delays compliance, the more victims there will be who are eligible for compensation. By filing for judicial review with the Federal Court, Canada sought to quash the compensation order. Canada was opposed by the First Nations Child and Family Caring Society of Canada, the Assembly of First Nations, Chiefs of Ontario, the Canadian Human Rights Commission, Nishnawbe Aski Nation and Amnesty International.

It is important to recognize that human rights compensation is different from a class action. The human rights damages that the Tribunal

awarded were for the infringement of dignity and the harms associated with Canada's unlawful discrimination. Victims can seek additional compensation from Canada above and beyond the $40,000 via other processes, including class actions.

What happened during the Judicial Review?

Hearings were held June 14-18, 2021 and Justice Paul Favel heard arguments from the parties. During the hearings, Canada spoke first and gave their arguments for why the orders should be quashed. Canada did not deny the harms to children but rather suggested that harms to each child in this systemic case needed to be proven individually. The Caring Society and the other parties were then able to give their arguments in support of upholding the orders and rejecting Canada's proposal for individual harm assessments as many of the victims were children, and such reviews could be very harmful. Finally, Canada provided a response to the other parties. After this, the Federal Court closed the hearing and spent some time making their decision. While the Federal Court was deciding, the orders remained in place.

What did the Federal Court decide?

In the ruling released on September 29, 2021, the Federal Court dismissed both of Canada's requests for judicial review, upholding the decisions of the Tribunal in full.

On Jordan's Principle eligibility, Justice Favel commented:

> "The Eligibility Decision highlights the tension between nationhood, the Indian Act, and eligibility for program funding provided by the Applicant…The Respondents properly highlight the colonial legislation's adverse impact on Indigenous peoples historically and today. They also highlight that Indigenous people possess inherent Aboriginal and Treaty Rights, including the right to self-determination. These rights include the right to govern their citizens, including children and families. It is a holistic approach. On the other hand, the Applicant adopts a more limited and legalistic approach. It is fine to approach matters this way, but this approach, as a starting point, is fundamentally at odds with how Indigenous parties may approach matters. It is also not conducive to early resolution of issues arising with First Nations. The multitude of rulings and orders confirms this." para 277-278.

This means that the four established categories of eligibility for Jordan's Principle remain in place. Therefore, first Nations children meeting any one of the following criteria are eligible for consideration under Jordan's Principle:

- A child resident on or off-reserve who is registered or eligible to be registered under the *Indian Act*, as amended from time to time;
- A child resident on or off-reserve who has one parent/ guardian who is registered or eligible to be registered under the *Indian Act*;
- A child resident on or off-reserve who is recognized by their Nation for the purposes of Jordan's Principle; or
- The child is ordinarily resident on reserve

On human rights compensation, Justice Favel stated:

> "Ultimately, the Compensation Decision is reasonable because the CHRA provides the Tribunal with broad discretion to fashion appropriate remedies to fit the circumstances…From the outset, First Nations children and families were the subject matter of the Complaint and Canada always knew that the Respondents were seeking compensation for the victims. If Canada wanted to challenge these aspects of the Complaint, it should have done so earlier. Canada may not collaterally attack the Merit Decision or other decisions in this proceeding." para 231.

Canada had also raised additional concerns about procedural fairness at the Tribunal. Canada alleged that the Tribunal had not acted fairly and followed proper procedure. Justice Favel dismissed Canada's procedural fairness complaints.

What happens next?

Canada has until October 29, 2021, to appeal the Federal Court orders for Jordan's Principle and compensation to the Federal Court of Appeal.

First Nations children recognized by their Nations off-reserve remain eligible for services for Jordan's Principle. This will only change if Canada successfully appeals the Federal Court decision. The Caring Society is fully committed to defending the right of First Nations to recognize their children off-reserve for the purposes of Jordan's Principle and will actively oppose any effort by Canada to erode these rights.

If Canada does not appeal, the compensation process can move ahead. All parties informed the framework for the process, and updates will be available through **www.fnchildcompensation.ca**.

The Canadian Human Rights Tribunal case is not over. Canada is still not

complying with all aspects of the Tribunal orders. The Caring Society and other parties will continue to work to ensure equity for all First Nations children, no matter their status. In Justice Favel's words,

> "In my view, the procedural history of this case has demonstrated that there is, and has been, goodwill resulting in significant movements toward remedying this unprecedented discrimination. However, the good work of the parties is unfinished. The parties must decide whether they will continue to sit beside the trail or move forward in this spirit of reconciliation."

This information sheet is for information purposes only and does not constitute legal advice. For more information on this case and the latest updates, visit **fnwitness.ca** or email **info@fncaringsociety.com**.