Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 36
Date: November 25, 2020
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Member: Sophie Marchildon
Edward P. Lustig

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Ruling Relating to Proposed Jordan's Principle Eligibility

I. Context

[1] This ruling arises in the context of a complaint by the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN) that Canada provides inequitable and discriminatory funding for First Nations children living on reserve and in the Yukon. In particular, this systemic racial discrimination manifests in many different forms including inadequate funding of child welfare services and gaps, delays and denials of services under Jordan's Principle. The Tribunal agreed with the Caring Society and the AFN that Canada's conduct was discriminatory and set out its reasons for that finding 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)*, 2016 CHRT 2 (the *Merit Decision*).

[2] In this ruling, the parties request approval of the process they have established to determine which children are eligible for consideration to receive services under Jordan's Principle. The scope of this ruling is solely in relation to Jordan's Principle: this ruling, and all the rulings in this case, explicitly avoids defining who is a First Nations child. The Tribunal respects First Nations right to determine their own citizens/members.

[3] In the *Merit Decision*, the Tribunal found that Canada's definition and implementation of Jordan's Principle was inadequate and excessively narrow which resulted in discriminatory service gaps, delays and denials of services for First Nations children (paras. 381, 391 and 458). Throughout the *Merit Decision* and subsequent rulings, the Tribunal documented a number of instances of the tragic consequences of Canada's discriminatory policy: the experiences of Jordan River Anderson (*Merit Decision*, para. 352); a child requiring medical equipment due to anoxic brain damage during a regular medical procedure (*Merit Decision*, para. 366); the failure to provide emergency mental health counselling and treatment aimed at preserving life (2017 CHRT 7, paras. 8-10); the refusal to provide services for a teenager with disabilities (2017 CHRT 14, para. 48, citing *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342); and an infant who required an essential medical diagnostic test for which Canada would not provide travel

funding because the infant lacked *Indian Act* status even though the mother had it (2019 CHRT 7, paras. 58-60).

[4] In the course of this proceeding, the Tribunal has issued a number of remedial decisions addressing Jordan's Principle. Their key points in relation to this motion are summarized below.

A. Initial Jordan's Principle Rulings

[5] In 2016 CHRT 10, the Tribunal emphasized the importance of taking immediate action to implement Jordan's Principle and recognized the efforts Canada had taken since the *Merit Decision* (paras. 2 and 9). The Tribunal noted that there was a workable definition of Jordan's Principle adopted by the House of Commons in *Motion 296* (Canada, Parliament, House of Commons Debates, 43rd Parl, 1st Sess, Vol 149, No 5 (December 11, 2019) at 279) that could serve as a basis for immediate action (para. 32). The ruling emphasized the importance of applying Jordan's Principle to all jurisdictional disputes rather than only those of children with multiple disabilities (para. 30). The ruling did not address how it could be determined whether a child was a First Nations child for the purpose of Jordan's Principle eligibility.

[6] The 2016 CHRT 16 decision reviewed updates on Canada's response to implementing Jordan's Principle and identified a number of steps for Canada to take to demonstrate it was complying with the Tribunal's orders (paras. 107-120). In its analysis, the Tribunal noted that Canada was inappropriately limiting Jordan's Principle to First Nations children living on reserve. The Panel confirmed and ordered Canada to apply Jordan's Principle to all First Nations children and not just those living on reserve (para. 118).

[7] In 2017 CHRT 14, the Tribunal addressed important issues related to Jordan's Principle. The main issue in the ruling was the scope of services and conditions Canada considered to fall under Jordan's Principle. However, the motion also considered whether Canada was appropriately complying with the order in 2016 CHRT 16 that Jordan's Principle apply to all First Nations children rather than being limited to those First Nations children

living on reserve (para. 12). The Tribunal found that the option Canada selected for implementation was overly narrow in only including children on reserve or ordinarily resident on reserve (paras. 50, 52-54, 67). The Panel again confirmed in its order that Jordan's Principle "applies equally to all First Nations children, whether resident on or off reserve." (para. 135, 1.B.i.). This point was confirmed in the amendment to the order issued in 2017 CHRT 35.

[8] The parties sought explicit clarification on who constituted a First Nations child in 2019 CHRT 7 (para. 20). The parties had been unable to resolve the question without the Tribunal's assistance (para. 21). The Tribunal directed the issue to be determined at a full hearing and, in the meantime, provided an interim decision (paras. 22 and 80). The Tribunal determined that a final order on this issue would consider "international law including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the recent UN Human Rights Committee's ("UNHRC") *McIvor Decision*" (para. 22). The Tribunal anticipated discrepancies between UNDRIP and the *Indian Act*, RSC 1985, c I-5 (para. 22). The Tribunal also anticipated issues relating to discriminatory definitions within the *Indian Act*, in particular in relation to sex (para. 22). The Tribunal stated its commitment to providing a remedy that would respect First Nations rights to self-determination and self-government, in particular as they relate to determining membership (para. 23).

[9] In 2019 CHRT 7, the Tribunal found that there was a disagreement over what constituted an urgent medical need, that First Nations children without status were not receiving necessary services, and that Jordan's Principle decisions were not adequately considering the best interests of the child (paras. 79, 84 and 85). Accordingly, the Tribunal ordered that "Canada shall provide First Nations children living off-reserve who have urgent and/or life-threatening needs, but do not have (and are not eligible for) Indian Act status, with the services required to meet those urgent and/or life-threatening service needs, pursuant to Jordan's Principle." (para. 87). The order also identified the following principles that guide its interpretation (emphasis in original):

> [89] This interim relief order applies to: 1. First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and 2. who have urgent and/or life-threatening needs. <u>In evaluating urgent and/or life-threatening needs due consideration must be given to the</u>

> seriousness of the child's condition and the evaluation of the child made by a physician, a health professional or other professionals involved in the child's assessment. Canada should ensure that the need to address gaps in services, the need to eliminate all forms of discrimination, the principle of substantive equality and human rights including Indigenous rights, the best interests of the child, the UNDRIP and the Convention on the Rights of the Child guide all decisions concerning First Nations children.
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> …
>
> [91] The Panel stresses the importance of the First Nations' self-determination and citizenship issues, and **this interim relief order or any other orders is not intended to override or prejudice First Nations' rights.**

B. Ruling on Jordan's Principle Eligibility Criteria: 2020 CHRT 20

[10] In 2020 CHRT 20, the Tribunal considered eligibility of First Nations children for Jordan's Principle on the merits. The Tribunal aimed to rely on its previous orders in 2017 CHRT 14 and 2017 CHRT 35, as well as the findings in its previous decisions, and provide additional clarity around the scope of Jordan's Principle (para. 88).

[11] The Tribunal emphasized its commitment to respecting First Nations self-government and that its consideration of a First Nations child was only in the context of Jordan's Principle eligibility. Furthermore, the Tribunal concluded that recognizing this right to self-determination was recognized and consistent with the UNDRIP; section 35 of the *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982 c 11; and the *Canadian Human Rights Act,* RSC 1985, c H-6 (*CHRA* or the Act). It recognized that some of the First Nations participants in the hearing were concerned that the question of who was a First Nations child for the purposes of Jordan's Principle could not be entirely separated from the question of First Nation membership and citizenship. The Tribunal committed to crafting a ruling that would address these concerns (2020 CHRT 20, paras. 84-87, 130-135).

[12] The Tribunal reiterated its finding that Jordan's Principle is a human rights principle grounded in substantive equality. Jordan's Principle focuses on the specific needs of First Nations children which include experiences of intergenerational trauma and other disadvantages resulting from the discrimination found in the *Merit Decision*. It is part of the solution for remedying the discrimination found in this case (2020 CHRT 20, para. 89).

Jordan's Principle is not limited to the child welfare program and instead addresses all inequalities and gaps in federal programs for First Nations children (2020 CHRT 20, para. 92).

[13] Jordan's Principle is not a program but a legal rule and a mechanism to provide First Nations children culturally appropriate and safe services. It aims to overcome barriers First Nations children face in accessing services because of jurisdictional disputes either between programs for First Nations within the federal government or arising from Canada's constitutional division of powers in relation to First Nations (2020 CHRT 20, para. 94). Jordan's Principle accordingly seeks to prevent service gaps, delays and denials to First Nations children that occur because of their race, national or ethnic origin (2020 CHRT 20, para. 100).

[14] The Tribunal recognized that the failure to provide appropriate services on-reserve drove families and children to move off-reserve to seek the services but that jurisdictional disputes often remained. The Tribunal also emphasized that, as a remedial provision aimed at providing substantive equality, Jordan's Principle required that Canada provide services that are above the normative provincial or territorial standard of care (2020 CHRT 20, paras. 97-100).

[15] In determining that Jordan's Principle applied to all First Nations children, the Tribunal relied on the House of Commons *Motion 296* in reference to First Nations children. The Tribunal did not rely on the *Indian Act* or residency on reserve to determine eligibility and reiterated that it had previously confirmed that fact. Further, the Tribunal reiterated its commitment to recognizing First Nations right to self-determination and current attempts by Parliament to refashion the historically colonial relationship Canada established with First Nations (2020 CHRT 20, paras. 105-109).

[16] The Tribunal noted that its earlier findings including the effects on First Nations children of intergenerational trauma from residential schools and disruptions to identity from moving off reserve required more than pecuniary redress (2020 CHRT 20, para. 111).

[17] The Tribunal confirmed that the following categories, in use at the time by Canada, are appropriately considered to be First Nations children for the purposes of Jordan's Principle (2020 CHRT 20, para. 112):

> a) First Nations children registered under the *Indian Act*, living on or off reserve;
>
> b) First Nations children eligible to be registered under the *Indian Act*, living on or off reserve; and
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> c) non-status First Nations children without *Indian Act* status who are ordinarily resident on reserve (the AFN appears to dispute this however, this forms part of the Tribunal's findings in 2016 CHRT 16 at para. 117, quoted above).
>
> d) First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and who have urgent and/or life-threatening needs as per the Tribunal's interim order in 2019 CHRT 7 at paras. 88-89.

[18] The Tribunal subsequently considered whether three contested categories of children constituted First Nations children for the purpose of Jordan's Principle eligibility. The first issue was eligibility of children residing on or off reserve who were recognized by a First Nations group, community or people as belonging to that group, community or people in accordance with the customs or traditions of that First Nations group, community or people. The second was eligibility of children residing on or off reserve who do not have, and are not eligible for, *Indian Act* status but who have a parent or guardian with, or eligible for, *Indian Act* status. The third was 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 First Nation Child and Family Services (FNCFS) Program (2020 CHRT 20, paras. 120-122).

[19] On the first issue of children recognized as citizens or members by a First Nation, the Tribunal found that these children were within the scope of Jordan's Principle (2020 CHRT 20, paras. 128, 211-212).

[20] The Tribunal relied on its analysis from the *Merit Decision* and subsequent rulings to conclude that these children suffered from the discriminatory conduct that was the subject of the complaint (paras. 123-128).

[21] In analysing the first issue, the Tribunal relied on its reasons in 2018 CHRT 4 and the *Merit Decision* to conclude that it could appropriately rely on UNDRIP and the Truth and Reconciliation Commission's (TRC) calls for action to inform its analysis. Articles 3–5, 9, 18, 19, 23, 34 and 37 emphasize rights of self-determination while article 33 in particular confirms that "Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions" (cited in 2020 CHRT 20, para. 144). The Tribunal recognized that removing First Nations children from their community destroyed the community's identity and was contrary to international legal norms. In order to prevent this, it was necessary to give First Nations an opportunity to govern their own child welfare services. The Tribunal relied on international legal norms to inform its interpretation of the *CHRA* (2020 CHRT 20, paras. 136-157).

[22] The Tribunal considered the support *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 that reflects Parliament's intent to uphold First Nations inherent rights of self-determination and self-governance and First Nations right to substantial equality in relation to child welfare, which is the very issue that Jordan's Principle addresses (2020 CHRT 20, paras. 158-164).

[23] The Tribunal determined that it was inappropriate to rely on the *Indian Act* to determine who is considered a First Nations child for the purpose of Jordan's Principle. The Tribunal reviewed evidence that the *Indian Act* was designed to assimilate First Nations such that they would lose *Indian Act* status over a few generations. The *Indian Act* accordingly cannot be the only means of determining First Nations identity (2020 CHRT 20, paras. 165-172).

[24] The Tribunal considered First Nation treaty rights, including as recognized by Canada's written and unwritten constitution. The Tribunal found that First Nations right to determine citizenship was constitutionally recognized as an Aboriginal right and treaty right and reflected in prior jurisprudence affirming a general principle that a people have a right

to self-determination. The Tribunal reviewed various treaties such as the Treaty of 1752 between the Mi'kmaq and the Crown and the Treaty of Niagara of 1764 to conclude treaties recognized First Nations right to self-government (2020 CHRT 20, paras. 173-196).

[25] The Tribunal identified sections 1.1 and 1.2 of *An Act to amend the Canadian Human Rights Act*, SC 2008, c 30 that confirmed that the *CHRA* was not intended to derogate any Aboriginal or treaty rights. Further, provisions were made to recognize First Nation laws (para. 197).

[26] The Tribunal relied on its earlier analysis to conclude that Jordan's Principle eligibility for First Nations children recognized by their community and children who are not eligible for *Indian Act* status despite having a parent who is eligible are within the scope of the complaint (2020 CHRT 20, paras. 199-210). Further, the Tribunal relied on *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 to dispose of the argument that First Nations children living off reserve were subject to provincial jurisdiction to the exclusion of federal jurisdiction (2020 HRT 20, paras. 227-228).

[27] The Tribunal recognized the concerns First Nations raised that requiring First Nations to confirm that a child is recognized by a First Nation places an additional administrative burden on such nations. The Tribunal directed the parties to negotiate appropriate supports, including funding, for First Nations in order for them to confirm whether individuals are a member of the First Nation (2020 CHRT 20, paras. 220-226).

[28] The second issue was whether First Nations children who are not eligible for *Indian Act* status but who have a parent that is eligible are within the scope of Jordan's Principle. The Tribunal confirmed that they are.

[29] The Tribunal concluded that it had not previously considered whether this category of First Nations children was included within Jordan's Principle and applied the test for discrimination to the evidence in the case to determine that these First Nations children suffered from the discrimination Jordan's Principle aimed to remedy. In particular, these First Nations children had actual needs that went beyond the normative standard of care and are rooted in the historical and contemporary disadvantage that informs a substantive equality analysis. These First Nations children share the same legacy of stereotyping, prejudice,

colonialism, displacement and intergenerational trauma relating to the Indian Residential Schools System and the Sixties Scoop as those First Nations children with *Indian Act* status. Accordingly, they are denied equivalent services based on the prohibited ground of race or national or ethnic origin (2020 CHRT 20, paras. 231-252).

[30] The Tribunal distinguished this case from *Matson et al. v. Indian and Northern Affairs Canada,* 2013 CHRT 13 and *Roger William Andrews and Roger William Andrews on behalf of Michelle Dominique Andrews v. Indian and Northern Affairs Canada*, 2013 CHRT 21, confirmed in *Canadian Human Rights Commission v. Canada (Attorney General),* 2018 SCC 31, on the basis that this case is not a challenge to the *Indian Act* legislation. Instead, this case considers whether the *Indian Act* is the appropriate method to determine which First Nations children experience discrimination in the receipt of services. The Tribunal found that, as in *Beattie v. Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 1, this was a case where the government used discretion in determining eligibility for services it offered (2020 CHRT 20, paras. 253-268).

[31] The Tribunal recognized that there were upcoming changes to the *Indian Act* that would result in more individuals being eligible for registration. The Tribunal concluded that those individuals who would become eligible for *Indian Act* status be treated as though they had it for the purposes of Jordan's Principle (2020 CHRT 20, paras. 269-270).

[32] While the Tribunal recognized that Canada may raise a defense that broad eligibility criteria for Jordan's Principle would cause undue hardship due to the resulting costs, the Tribunal found Canada did not lead sufficient evidence to support its assertion (2020 CHRT 20, para. 271).

[33] On the third issue, the Tribunal considered First Nations children who had lost their connection to their First Nations community due to the operation of the Indian Residential Schools System, the Sixties Scoop, discrimination within the FNCFS Program, or other reasons. The Tribunal found that First Nations children who had lost their connection to their community for reasons other than the identified ones fell outside the scope of the claim. While the Tribunal considered the tragedies experienced by Residential School survivors and victims of the Sixties Scoop and the intergenerational trauma they may have passed on

to their children, the Tribunal was not presented with sufficient evidence of the provincial and territorial services that may or may not be available to these children and the needs they may have. Accordingly, the Tribunal was not in a position to find that they fell within the scope of Jordan's Principle. There was a similar lack of evidence on the experiences of individuals who self-identified as First Nations. In the absence of adequate evidence, the Tribunal is unable to make a finding that discrimination occurred and that remediation is required (2020 CHRT 20, paras. 274-290).

[34] Despite not making orders on this issue, the Tribunal issued guidance based on the evidence it had and the case law to which it was referred. The Tribunal recognized the "jurisdictional wasteland" considered in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 and the Supreme Court's conclusion that Canada had a responsibility to First Nations without *Indian Act* status. In this case, the Tribunal identified the particular obligation Canada had for First Nations who lost their *Indian Act* status and connection to their community as a result of the Indian Residential Schools System, the Sixties Scoop or the FNCFS Program (2020 CHRT 20, paras. 291-307).

[35] In its guidance, the Tribunal noted that Canada had an obligation to all First Nations children, regardless of whether they were eligible for *Indian Act* status or where they lived in Canada. While these children will presumptively receive provincial and territorial services, the Tribunal highlighted that discrimination such as in the Indian Residential Schools System, the Sixties Scoop, or the FNCFS Program may have created higher needs above provincial and territorial normative standards. Further, the TRC and the *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* both support that Jordan's Principle should be interpreted broadly to include the needs of First Nations who do not have *Indian Act* status. Accordingly, it is appropriate for Canada to recognize that First Nations children who lost their connection to their communities as a result of policies such as the Indian Residential Schools System, the Sixties Scoop, or the FNCFS Program should not be excluded from Jordan's Principle (2020 CHRT 20, paras. 308-320).

[36] The Tribunal issues its orders in light of its analysis and findings. In recognition of First Nations right to self-determination, the Tribunal directed the AFN, the Caring Society,

the Nishnawbe Aski Nation (NAN), the Chiefs of Ontario (COO), the Commission and Canada to consult to generate potential eligibility criteria for Jordan's Principle in light of the Tribunal's analysis. The specific orders were as follows:

> 1. to consult in order to generate potential eligibility criteria for First Nations children under Jordan's Principle and in considering the Panel's previous orders and clarification explained above in sections I and II and
>
> 2. to establish a mechanism to identify citizens and/or members of First Nations that is timely, effective and considers the implementation concerns raised by all parties. In considering the identification mechanism, discussions should also include the need for First Nations to receive additional funds to respond and, in some cases build capacity, to answer Canada's identification requests for First Nations children. The mechanism should also include provision for additional and sustainable funding to account for the children who will now be included under Jordan's Principle.
>
> (2020 CHRT 20, para. 321)

[37] Separately, Canada was ordered "to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for Indian Act registration/status under S-3 implementation" (2020 CHRT 20, para. 323).

[38] The parties were directed to present their proposed eligibility criteria and mechanism for Jordan's Principle (2020 CHRT 20, para. 322). This current ruling reviews the proposal the parties have now presented to the Tribunal.

II. Joint Position of the Parties

[39] The parties provided a joint submission on a proposed eligibility process for Jordan's Principle. The parties request that the Tribunal approves the proposed eligibility criteria on the basis that they appropriately reflect the Tribunal's direction in 2020 CHRT 20. They submit that the document is timely, effective and considers the implementation concerns raised by all parties.

A. Proposed Jordan's Principle Eligibility Criteria

[40] The entirety of the proposed eligibility criteria is attached as Annex A. The key components are summarized here.

[41] Cases meeting any one of four criteria are eligible for consideration under Jordan's Principle. Those criteria are the following:

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

[42] The provisions establish a default process to confirm eligibility that is intended to facilitate substantive equality for First Nations children and not create a barrier. Individual First Nations and Provincial-Territorial Organizations are able to agree to a different process.

[43] Applicants relying on the criteria of recognition by their First Nation may obtain confirmation from the First Nation, through an appropriate individual, or provide Indigenous Services Canada (ISC) consent to seek the confirmation. While the process provides for a Confirmation of Recognition form to facilitate confirmation, it contemplates alternative processes such that failure to complete the form does not act as a barrier in accessing services. Similarly, there is a Consent to Communicate form designed to facilitate ISC seeking confirmation but there are processes to ensure that failure to complete that form is not a barrier to accessing services.

[44] For urgent cases relying on recognition by a First Nation, provisions are made for verbal confirmation of eligibility and for cases where a designated official is not able to be contacted. The determination of eligibility will not delay a substantive review of the request and an inability to confirm recognition will not delay measures to provide the child with urgent assistance or to address the reasonably foreseeable risk of irremediable harm. Requests related to children in end-of-life and palliative care are urgent.

[45] Once a First Nation confirms a child is eligible for Jordan's Principle, this recognition will be retained and used for subsequent Jordan's Principle requests.

[46] Cases will be examined and approved by Jordan's Principle Focal Points. If the Focal Point recommends denying a request based on eligibility, the case will be immediately escalated for review and determined by an official with the ADM delegated authority to deny requests. For urgent requests, this will occur as soon as the child's needs require it and no later than a 12-hour timeframe.

B. Proposal Regarding Funding

[47] The proposal regarding funding is attached to this ruling in Annex B.

[48] Canada will provide funding for First Nations communities for expenses incurred to recognize Jordan's Principle claimants as members of that community. These expenses include Jordan's Principle service coordination and navigation to carry out recognition functions. The list contemplates a non-exhaustive list of expenses and that an additional 10% administration fee can be added to the expenses:

- additional human resources costs (e.g. salary and benefits) specifically in association with confirming recognition of First Nations children for the purpose of Jordan's Principle;
- First Nation policy development and updating;
- internal First Nation governance/determination meetings
- communications - internal and external (social media; community newsletters; website development and maintenance; marketing)
- coordination processes – bringing multiple community sectors together;
- professional fees, including seeking advice and development of the recognition approach.

[49] The process contemplates working with a requester to address any outstanding issues before a request would be denied. In the event that a request is denied in full or in part, there would remain an opportunity to present new information and to have the decision reviewed. The criteria used to make a determination to deny a funding request are:

- whether the funding requested is aligned with the objective of the confirmation of recognition process;
- whether the request is a clear duplication of previously provided funding for the same purpose, such as an existing salary budget;
- whether the funding request is significantly disproportionate to the level of activity proposed;
- whether the funding was requested by organizations that do not have a mandate from any First Nation to work on confirmation of recognition.

[50] First Nations or First Nations organizations that engage in confirmation of recognition work may be eligible for funding regardless of whether they currently receive funding for Jordan's Principle service coordination or navigation.

III. Analysis

[51] The first step for this consent order is to do the analysis under section 53 of the *CHRA* in order to determine if the consent order sought is within the Tribunal's authority under the *Act*. If the answer is negative, the analysis stops there and the Tribunal cannot make such an order. If the answer is affirmative, the Tribunal then determines if the consent order sought is appropriate and just in light of the specific facts of the case, the evidence presented, its previous orders and the specifics of the consent order sought.

[52] The Panel already considered the first step of the analysis and found it had the authority under section 53 (2) of the *CHRA* to make such an order in 2020 CHRT 20. Moreover, after careful consideration of the specifics of this consent order request, which is summarized above, the Panel finds it has the authority under section 53 of the *CHRA* and its previous rulings to make the consent order as detailed and attached as Annex A and Annex B.

[53] The Panel finds the consent order sought is thoughtful and in line with the spirit of the Tribunal's rulings and within the parameters established in 2020 CHRT 20. The consent order sought is a result of diligent work made by expert First Nations, who are parties in this case, in collaboration with Canada and also appears to account for many different situations that may be encountered by First Nations people under Jordan's Principle. The Panel is

mindful that the best eligibility criteria and mechanism must be designed by First Nations. This exercise was particularly positive given that all parties in this case came to an agreement. This carries hope. The Panel also agrees and makes a consent order as indicated below.

IV. Order

[54] Pursuant to section 53(2) of the *CHRA*, the Tribunal orders eligibility for Jordan's Principle to be determined in accordance with the "Jordan's Principle eligibility criteria following 2020 CHRT 20" as included in Annex A. Further, the Tribunal orders Canada to fund First Nations and First Nations organizations for confirmation of First Nations identity as outlined in "Jordan's Principle Eligibility – First Nations Citizenship Determination" as included in Annex B.

[55] For ease of reference, a few provisions of the order are summarized in the following paragraphs.

[56] Cases meeting any one of four criteria are eligible for consideration under Jordan's Principle. Those criteria are the following:

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

[57] The order contains default provisions to confirm that a child is recognized by a Nation for the purpose of Jordan's Principle. These provisions are designed to facilitate substantive equality, and not act as a barrier. The provisions contemplate a First Nation appointing appropriate individuals to confirm eligibility and officials who can be contacted should somebody else not be appointed or not be available. The provisions contemplate an expedited procedure in the case of urgency. The provisions contemplate forms that can assist in collecting information; however, failure to complete a form is not intended to be a

reason to delay or deny a request. ISC will maintain a record of confirmation to avoid the requirement to once again confirm eligibility should there be a subsequent request for that same child. The provisions stipulate a review process in the event a denial of eligibility is contemplated. The default provisions provide that a First Nation or Provincial-Territorial Organization may agree to a different process.

[58] Further, the funding provision sets out that eligible expenses for confirming Jordan's Principle eligibility will include human resources, policy development and updating, internal governance, communication, coordination, professional fees, and administrative fees. The funding provisions also stipulate the criteria that can be used to deny a request for funds and a review process for any denial.

V. Retention of Jurisdiction

[59] The Panel retains jurisdiction on all its Jordan's Principle orders including the order in this ruling and will revisit its retention of jurisdiction as the Panel sees fit in light of the upcoming evolution of this case or once the parties confirm the eligibility criteria and mechanism is implemented and effective. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
November 25, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: November 25, 2020

This part of the Motion was dealt with in writing without the appearances of the parties

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"Annex A"

Jordan's Principle eligibility criteria following 2020 CHRT 20

Cases meeting <u>any one</u> of the following criteria are eligible to be considered under Jordan's Principle:

1. The child is registered or eligible to be registered under the Indian Act, as amended from time to time1;

2. The child has one parent/guardian who is registered or eligible to be registered under the Indian Act;

3. The child is recognized by their Nation for the purposes of Jordan's Principle; or

4. The child is ordinarily resident on reserve.

The default process[2] **through which families and organizations can submit a request under the eligibility criterion of "a child recognized by their Nation for the purposes of Jordan's Principle" is set out below. The process is intended to facilitate, not act as a barrier to, substantive equality for First Nations children.**

1. Requirement for confirmation of recognition by a First Nation: Families and organizations who are preparing to submit a Jordan's Principle request under this eligibility criterion will be required to obtain confirmation of recognition from the First Nation (see point 3) – or the family may provide consent for Indigenous Services Canada ("ISC") to obtain confirmation of recognition (see point 4) – to ensure validation of recognition as an integral component of their request.

2. Identification of appropriate First Nation official: Confirmation of recognition must be obtained from an appropriate First Nation official.

Preferably, a First Nation will designate a person, or persons, as officials who can provide confirmation of recognition for the purposes of Jordan's Principle ("Designated Official") by passing a Band Council Resolution, or providing a letter on First Nation letterhead, or through another identified community governance mechanism.

The First Nation can designate a person or persons from the Chief and Council and/or from within the administration, or from another community entity, as its Designated Official.

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[1] This includes *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada*, S.C. 2017, c. 25, and any future amendments.

[2] This process does not preclude a First Nation or Provincial-Territorial Organization ("PTO") subsequently agreeing in writing to a different process with Indigenous Services Canada specific to that First Nation or PTO.

Alternately, the First Nation may also designate a person or persons from another organization, such as a First Nation Health Authority or a First Nations Child and Family Well Being Agency as the Designated Official.

Alternatively, for First Nations that have not named a Designated Official, the First Nation may confirm recognition by communication in writing from the First Nation's Chief (or designate), Council member with the child welfare or health portfolio, or the First Nation's most senior administrative official (or that official's designate) ("Deemed Official(s)"). Where recognition is confirmed by a Deemed Official who is not the Chief, the Chief will be copied on the communication providing that confirmation of recognition to ISC.

Where ISC is confirming recognition, it may be done in writing, including by fax or email. It does not need to be provided on the Confirmation of Recognition form.

3. Confirmation of Recognition (non-urgent cases) – Where a child, family or organization or Jordan's Principle navigator /service coordinator makes a request and has not submitted a Confirmation of Recognition form but can easily obtain confirmation of recognition by their First Nation, the family, child or organization or Jordan's Principle navigator /service coordinator will work with a Designated or Deemed Official, the Jordan's Principle navigator /service coordinator, and ISC if required to complete the Confirmation of Recognition form.

When families, children, organizations or a Jordan's Principle navigator /service coordinator make an application and do not submit a completed Confirmation of Recognition form, they may provide consent from the family for ISC to communicate with the First Nation to determine if a First Nation recognizes the child as being eligible for Jordan's Principle Services. This is done by submitting a completed Consent to Communicate form signed by the family or child. Where applicable, the family or child may also consent to ISC contacting the relevant Jordan's Principle Navigator or service coordinator to assist ISC in obtaining confirmation of recognition from the First Nation. ISC must explicitly communicate to the family/organization that the proposed Jordan's Principle request is incomplete until confirmation of recognition is determined.

If the First Nation provides confirmation of recognition to ISC and the other essential information to reasonably determine the request has been provided, the CHRT-mandated timelines apply.

4. Communication – Where ISC receives a Consent to Communicate form instead of a Confirmation of Recognition form, the Focal Point will immediately contact the community's Designated or Deemed Official. If the initial request is made by a Jordan's Principle service coordinator or navigator to ISC, or if the family has provided consent to communicate with the Jordan's Principle service coordinator or navigator, ISC may contact the Jordan's Principle service coordinator or navigator to assist in obtaining either a Consent to Communicate form or confirmation of recognition.

5. Application – Family, child, organization or Jordan's Principle navigator and service coordinator will send in a request for services, supports and products to the Jordan's Principle Focal Point. Confirmation of Recognition or Consent to Communicate must accompany the request. Where the First Nation Designated or Deemed Official/Organization has confirmed recognition, the case can be adjudicated and approved by the applicable Jordan's Principle Focal Points.

6. Urgent cases – Where the child requires urgent assistance or the risk of irremediable harm is reasonably foreseeable, ISC will take positive measures to verbally confirm recognition with the First Nation's Designated Official/Organization. Where applicable, ISC may work with the Jordan's Principle navigator or service coordinator that submitted the request. Where no designation has been made, or where the designated official or organization is unavailable, the First Nation's Deemed Official(s) may provide verbal confirmation to be followed with written confirmation.

In an urgent case, ISC will consider the substantive request for services and products related to the urgency while it confirms recognition. Where recognition is not confirmed before ISC is prepared to make a determination, ISC will confirm recognition subsequent to a determination being made on interim measures to provide the child with the urgent assistance required or to address the reasonably foreseeable risk of irremediable harm. Services and products not related to the need for urgent assistance or the reasonably foreseeable risk of irremediable harm will be considered subject to the usual recognition process.

For greater certainty, requests related to children in end-of-life or palliative care are considered urgent.

7. Retention – Where a First Nation confirms recognition of a child for purposes of Jordan's Principle, ISC will keep confirmation of recognition on file for the child for use in considering future requests.

Operational Guidelines

8. Escalated to Authorized ISC Official –If the Focal Point recommends a denial on the basis of eligibility, the case will be immediately escalated to authorized ISC official for review and a determination rendered within the CHRT timelines.

Review – If the Focal Point recommends a denial, a case reviewer will review all the information and create a Case Summary for the designated official with the ADM delegated authority to deny requests (see **Annex D**). For urgent cases, this work is done within the 12-hour time frame, or sooner if the child's needs require.

9. Delegated Authority for Denials – The senior official delegated with authority by the ADM to deny requests will determine the request.

10. Notification – The requestor is notified of the decision.

“Annex B”

Jordan’s Principle Eligibility – First Nations Recognition
List of Applicable Expenses for First Nations

Canada already has authority to fund First Nations for Jordan’s Principle service coordination and navigation. Canada will leverage this authority to fund communities who incur expenses to recognize children under a CHRT order (2020 CHRT 20). This can be done by advancing funding where requests are submitted for activities under eligible expenses and these expenses can be reasonably estimated, or by reimbursement of expenses. Under reimbursement, it is recommended that First Nations recipients consult with ISC beforehand on eligible expenses noted below.

Canada will amend eligible expenses under Jordan’s Principle service coordination and navigation to carry out recognition activities, including:

- additional human resources costs (e.g. salary and benefits) specifically in association with confirming recognition of First Nations children for the purpose of Jordan’s Principle;
- First Nation policy development and updating;
- internal First Nation governance/determination meetings
- communications - internal and external (social media; community newsletters; website development and maintenance; marketing)
- coordination processes – bringing multiple community sectors together;
- professional fees, including seeking advice and development of the recognition approach.

An administrative fee of 10% will be added to account for related overhead expenses.

ISC will work with the requester to clarify any questions that arise before making a decision on approval. If despite these efforts, a denial or partial denial is recommended, the criteria we would use to make such a decision would be the following:

- whether the funding requested is aligned with the objective of the confirmation of recognition process;

- whether the request is a clear duplication of previously provided funding for the same purpose, such as an existing salary budget11;

- whether the funding request is significantly disproportionate to the level of activity proposed;

- whether the funding was requested by organizations that do not have a mandate from any First Nation to work on confirmation of recognition.[2]

In all cases involving a denial or partial denial of reimbursement of funding related to confirmation of recognition, the request would be brought for a decision to the Regional Executive. If new information was provided, it could be considered by the Regional Executive. If the denial is sustained, a second level review would be available with the ADM of Regional Operations.

Those who perform Jordan's Principle service coordination and navigation functions will be eligible for this funding. More specifically, this can include First Nations or First Nations organizations mandated by First Nations leaders to undertake support services under service coordination and/or navigation which would include confirmation of recognition. First Nations or First Nations organizations can receive funding for confirmation of recognition activities even if they are not currently funded for Jordan's Principle service coordination or navigation.

[1] To be clear, where the person's workload increases as a result of having to deal with these requests, additional funding may be provided.
[2] It is understood that the assistance of other organizations may be necessary in some circumstances.