



Tribunal Rules on Four Categories of Jordan's Principle Eligibility to Ensure Substantive Equality

2020 CHRT 36



"Jordan's Principle is a human rights principle grounded in substantive equality." [para 12]

Key points from the 2020 CHRT 36 ruling:

1. First Nations recognize children for the purposes of Jordan's Principle only. This recognition does not extend past Jordan's Principle.
2. Jordan's Principle is not a fixed budget program—it is a legal obligation of the Government of Canada, meaning as more children are eligible the funding pot expands. This means that recognizing a child for the purposes of Jordan's Principle does not mean another child gets less.
3. There is funding in the Tribunal order to assist First Nations in setting up a process for recognizing children who do not have status and are not eligible for status if the First Nation does not already have such a system.
4. In urgent cases where children are likely to experience irremediable harm if they do not get the help they need, Canada will try to contact the First Nation to determine recognition but if unable to reach the First Nation, the child will get the services needed to remedy the immediate risk.

On November 25, 2020, the Canadian Human Rights Tribunal (CHRT or the Tribunal) issued an order confirming four categories of eligibility for Jordan's Principle (2020 CHRT 36). These categories ensure that First Nations children living off-reserve without *Indian Act* status but who are recognized by their Nations can access Jordan's Principle.

First Nations children meeting any one of the following criteria are eligible for consideration under Jordan's Principle:

1. 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;

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

The Tribunal recognizes Indigenous Peoples' inherent rights of self-determination and self-governance, including the rights to determine citizenship and membership. Recognizing a child for the purposes of Jordan's Principle allows for substantive equality in accessing services and does not imply eligibility for band membership, etc. Jordan's Principle focuses on the specific needs of First Nations children and understands that these needs are often linked to intergenerational trauma and other disadvantages resulting from colonialism. Substantive equality in accessing services means that First Nations children may need and have a right to services and supports beyond the normative standard of care (beyond that ordinarily provided by the provinces and territories) as a way of remedying Canada's discrimination.

Recognizing a child for the purposes of Jordan's Principle does not mean that there will be less funds available for other eligible children. Jordan's Principle is a legal rule and a mechanism to provide First Nations children with needed services and supports. It is not a government program with a fixed funding pot. The Tribunal has also ordered funding for First Nations to set up recognition processes for the purposes of Jordan's Principle.

Update: On December 22, 2020, Canada filed for judicial review (like an appeal) of 2020 CHRT 20 and 2020 CHRT 36. Importantly, both 2020 CHRT 20 and 2020 CHRT 36 remain in place while the judicial review is underway. Canada must adhere to the Tribunal's orders and provide services to children eligible under one of the four criteria, including children recognized by their Nation for the purposes of Jordan's Principle, pending a decision from the Federal Court.

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 a family home. Jordan's Principle makes sure that First Nations children get the services and supports they need when they need them.

On January 26, 2016, the Tribunal found Canada to be 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, the Tribunal noted that the House of Commons had adopted a definition of Jordan's Principle in 2007. 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 [para. 14].

In February 2019, the CHRT issued an interim ruling (2019 CHRT 7) on the definition of a "First Nations child" for the purposes of Jordan's Principle. Pending a full hearing on the matter, the Tribunal ordered Canada to extend 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.

A full hearing on the matter was held March 27-28, 2019 and a ruling (2020 CHRT 20) was issued in July 2020. Canada was ordered to immediately recognize First Nations children who will become eligible for *Indian Act* registration/status under the S-3 implementation. The Tribunal found two further categories of First Nations children who would become eligible for Jordan's Principle following a further order: 1. First Nations children without *Indian Act* status who are recognized by their respective First Nations; and 2. 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. The Tribunal ordered the parties¹ to consult on a mechanism to identify these two categories.

Orders

In November 2020, the Tribunal approved the four categories of eligibility submitted by the parties, in keeping with the Tribunal's direction in 2020 CHRT 20. Cases meeting any one of the following criteria are eligible for consideration under Jordan's Principle:

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

The Tribunal also approved the default process submitted by the parties for recognizing a child for the purposes of Jordan's Principle and the parameters for funding First Nations for expenses incurred in recognition functions (see 2020 CHRT 36 "Annex A" and "Annex B").

Recognition for the Purposes of Jordan's Principle:

The order sets out a default process, as recommended by the parties, for confirming that a child is recognized by a First Nation for the purposes of Jordan's Principle. This default process is meant to facilitate substantive equality, not act as a barrier, and First Nations or Provincial Territorial Organizations (PTO) may agree to a different process with ISC.

Families and organizations who are preparing to submit a Jordan's Principle request under the eligibility category must obtain confirmation of recognition from the First Nation. Alternatively, families can give ISC consent to obtain confirmation.

To facilitate confirmation, First Nations are encouraged to designate a person or persons as officials who can provide confirmation of recognition for the purposes of Jordan's Principle (e.g. from Chief and

¹ Full parties to the case are the Assembly of First Nations, the First Nations Child and Family Caring Society of Canada (the complainants), the Canadian Human Rights Commission, and the Attorney General of Canada. Nishnawbe Aski Nation, the Chiefs of Ontario, and Amnesty International participate in the case as Interested Parties.

Council, from within the administration, or from another community entity). These persons are referred to as “Designated Officials.”

If the First Nation has not named a Designated Official, confirmation can be given by the Chief, Council member with the child welfare or health portfolio, the First Nation’s most senior administrative official, or any of these officials’ designate. These persons are referred to as “Deemed Officials.”

Forms have been developed to expediate the recognition process. First Nations, through the Designated or Deemed Officials outlined above, can confirm recognition in writing or by submitting a “Confirmation of Recognition” form. Families can consent to ISC communicating with the First Nation on their behalf to determine recognition for the purposes of Jordan’s Principle by signing a “Consent to Communicate” form. Where ISC receives a “Consent to Communicate” form, the Focal Point will immediately contact the community’s Designated or Deemed Official. These forms are intended to facilitate confirmation of recognition for the purposes of Jordan’s Principle but the process allows for other types of written and verbal (in the case of urgent requests) confirmation as well. If a Designated or Deemed Official has provided confirmation of recognition, ISC must not delay or deny the request by insisting that a form be completed.

In cases where a child needs urgent assistance or is at risk of irreparable harm, ISC is required to take positive measures to verbally confirm recognition with the First Nation’s Designated or Deemed Official(s). ISC is required to consider the request while awaiting confirmation. If recognition is not confirmed by the time ISC is ready to make a decision, ISC will decide on interim measures to provide the child with the urgent assistance required and confirm recognition afterwards. Requests related to children in end-of-life or palliative care are urgent.

Urgent cases must be considered within the 12-hour timeframe as ordered by the Tribunal.

ISC will keep a record of the confirmation on file in the event there are future Jordan’s Principle requests for the child.

List of Applicable Expenses for First Nations:

Canada will fund First Nations for recognition activities related to Jordan’s Principle. This can be done by advancing funding for eligible expenses (where expenses can be reasonably estimated) or by reimbursement.

First Nations or First Nations organizations can receive funding for recognition activities even if they are not currently funded for Jordan’s Principle service coordination or navigation.

Eligible expenses include:

- human resources costs (e.g. salary and benefits) specifically in association with confirming recognition of First Nations children for Jordan’s Principle;
- policy development and updating;
- internal 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.

The order sets out limited criteria that can be used to deny a First Nations’ request for funding for recognitions activities. In the event that a request for funding for recognition activities is denied in full or in part, First Nations will have the opportunity to present new information and to have the decision reviewed at multiple levels.

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