



## Information Sheet

# ***Canadian Human Rights Tribunal Decisions on First Nations Child Welfare and Jordan's Principle***

## ***Case Reference CHRT 1340/7008***

*October 31, 2016*

### **Introduction**

The Federal Government of Canada funds First Nations child and family services on reserve through the Department of Indigenous and Northern Affairs [INAC] (previously the Department of Aboriginal Affairs and Northern Development Canada). INAC requires that First Nations child and family service agencies on reserve use provincial/territorial child welfare laws as a condition of funding. Within its First Nations Child and Family Services Program, INAC uses four child welfare funding approaches: 1) funding arrangements with provinces and territories; 2) Directive 20-1; 3) the Enhanced Prevention Focused Approach [EPFA]; and 4) the 1965 Indian Welfare Agreement in Ontario. It also funds provinces/territories to provide child welfare services to First Nations children on reserves where there are no agencies. Government of Canada records show INAC funds provinces/territories at approximately 2-4 times the amount it will pay First Nations to deliver the same service.

Jordan's Principle is named in memory of Jordan River Anderson who is a First Nations boy from Norway House Cree Nation who spent over 2 years unnecessarily in a hospital because Health Canada/INAC and the Province of Manitoba could not agree on payment for

his at home care due to his First Nations status. Jordan died in the hospital in 2005 never having spent a day in a family home. Jordan's Principle aims to ensure First Nations children can access ALL public services normally available to other children on the same terms. Parliament passed Motion 251 on December 12, 2016 in support of Jordan's Principle and then quickly crafted a definition for Jordan's Principle (children with complex medical needs and multiple service providers) that was so narrow that no child ever qualified despite prolific evidence in Government of Canada documents that First Nations children were routinely denied or delayed access to services. The Federal Court found Canada's approach to Jordan's Principle to be unlawful in 2013 and the Canadian Human Rights Tribunal found it to be discriminatory in 2016. For more information and to read the rulings go to [www.jordansprinciple.ca](http://www.jordansprinciple.ca)

In 2007, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations filed a complaint pursuant to the *Canadian Human Rights Act* alleging that INAC's provision of First Nations child and family services was discriminatory (CHRT 7008/1340). Canada fought the case on legal technicalities bringing at least 8 separate motions to get the case dismissed before the evidence could be heard. They were

unsuccessful and over 72 days of hearings were held between February of 2013 and October of 2014.

On January 26, 2016, the Canadian Human Rights Tribunal [CHRT or Tribunal] released its decision substantiating all aspects of the claim and ordering Canada to immediately cease its discriminatory conduct. The Tribunal retained jurisdiction and ordered Canada to provide compliance reports. Unsatisfied with Canada's progress, the CHRT has issued two compliance orders. The first compliance order was released in April of 2016 (2016 CHRT 10) and the second in September of 2016 (2016 CHRT 16). The CHRT has ordered a case conference on November 7-9, 2016 and further orders are possible.

## Overview of CHRT Decisions

### 2016 CHRT 2

On January 26, 2016 the CHRT issued the decision on the main case. The CHRT, consisting of a three-member panel, found that Canada's flawed and inequitable provision of First Nations child and family services is discriminatory pursuant to the *Canadian Human Rights Act* on the grounds of race and national ethnic origin. The Tribunal also found that Canada's failure to ensure First Nations children can access government services on the same terms as other children via a mechanism known as Jordan's Principle was also discriminatory and contrary to the law.

The Tribunal noted that Canada's discriminatory child welfare funding creates an incentive to bring children into care by denying families equitable prevention services that take full account of their needs, culture and the multi-generational impacts of Residential Schools. According to the Tribunal, Canada's ongoing discrimination

widens the harm wrought by residential schools instead of narrowing it.

The Tribunal also noted in para. 461 that "[N]otwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, INAC has sparingly implemented the findings of those reports. While efforts have been made to improve the FNCFS Program, including through the EPFA and other additional funding, those improvements still far short of addressing the service gaps, denials and adverse impacts outlined above and ultimately fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve."

Canada was ordered to immediately cease its discriminatory conduct. The Tribunal retained jurisdiction and set out a four phase remedy process: 1) immediate relief to address the most egregious impacts of the discrimination; 2) mid term reform to address some of the structural factors and 3) longer term reform and 4) compensation for children harmed by Canada's discriminatory conduct. The Tribunal also retained jurisdiction over an obstruction to justice matter related to Canada's conscience non-disclosure of documents highly prejudicial to its case.

The Ministers of Justice and Indigenous Affairs welcomed the ruling and did not appeal it. However compliance has been very problematic.

### 2016 CHRT 10

On April 26, 2016, the Tribunal issues the first compliance order against Canada (2016 CHRT 10) having considered submissions by the

Government of Canada that included Budget 2016. Specifically, the Tribunal recognized that longer term reform will take time but notes in para. 23 that **“[T]he Panel orders INAC to immediately take measures to address the items underlined above (in para 20) from the findings of the Decision.”** The Tribunal went on to order INAC to produce detailed information on the sufficiency of Budget 2016 in satisfying the order.

Regarding Jordan’s Principle in para. 31 the Tribunal noted that INAC and Health Canada have met and will begin consulting with the provinces/territories and First Nations about Jordan’s Principle. In para. 32, the Tribunal then noted **“[T]he order is to “immediately implement” not immediately start discussions...”**

The Tribunal then orders INAC to immediately consider Jordan’s Principle as: 1) including all jurisdictional disputes including those between INAC and Health Canada; 2) the government body of first contact pays for the service without review or case conferencing before funding is provided. INAC was ordered to confirm its compliance on May 10, 2016.

INAC wrote to the Tribunal on May 10, 2016 and stated it landed on a definition of Jordan’s Principle restricting it to children with disabilities and short-term illnesses. INAC leaves unanswered why it feels First Nations children without a disability or short-term illness should not be guaranteed access to public services on the same terms as other children. It does not confirm that the child will access services on the same terms as other children as required by the Decision and the *Canadian Human Rights Act*. Instead, INAC says cases will be managed in a “timely manner.”

## 2016 CHRT 16

Following the filing of Canada’s compliance reports regarding 2016 CHRT 10 and submissions by the other parties, the Tribunal issued a second compliance order on September 16, 2016. The Tribunal described 2016 CHRT 10 in para. 3 stating that “[T]he Panel reiterated and emphasized certain findings and adverse impacts from the Decision and ordered INAC to take measures to address those findings and adverse impacts immediately. The Tribunal noted the lack of information sharing by INAC stating in para 9. that “the Panel fails to understand why much of the information provided in INAC’s most recent submissions could not have been delivered earlier, especially if this information formed part of the rationale for determining the budget for the FNCFS back in March 2016. ...It rests on INAC and the federal government to implement the Panel’s findings and orders and to clearly communicate how it is doing so, including providing a rationale for their actions and any supporting data and/or documentation.”

The Tribunal noted that “further orders, including additional information and reporting by INAC, are required to ensure the findings in the Decision with respect to the FNCFS Program have been or will be addressed in the short term.”

The Tribunal was concerned to read in INAC's submissions much of the same type of statements and reasoned that it has seen from the organization in the past. **"The fact that key items like determining funding for remote and small agencies were deferred to later is reflective of INAC's old mindset that spurred this complaint."** The Tribunal went on to say **"While the Panel understands that INAC is determined to reform its entire FNCFS and believes it intends to do so it is concerned that deferring immediate action in favour of consultation and reform at a later date will perpetuate the discrimination the FNCFS program has fostered for the past 15 years."**

On Jordan's Principle the Tribunal recognized the Government of Canada's new announcement but noted it is short on details as to how it complied with the Decision noting that Canada's new formulation appeared to be narrower than the one in the National Program Manual that was found to be discriminatory (para 117).

The Tribunal issued 7 new orders and required Canada to produce further detailed reports to be filed on September 30, 2016 and another on October 31, 2016.

The Government of Canada filing on September 30, 2016 stated **"The rationale for the five-year plan was developed in fall 2015 as part of the 2016 federal Budget process, prior to the January 26, 2016 Tribunal decision. As part of this annual process, departments usually prepare their proposals between September and November, after which time further deliberations are subject to Cabinet confidence..."**

Further information from INAC to demonstrate how its new formulation of Jordan's Principle as applying only to children with complex medical needs and children with disabilities as well as how Budget 2016 meets the requirements of the CHRT are to be filed on October 31, 2016. The Tribunal has called a case conference for November 7-9, 2016.

### **Reviews of INAC's CFS Program:**

- a) Joint National Policy Review (2000)\*. This review was jointly conducted by INAC and AFN with the participation of First Nations child welfare agencies. There were 17 recommendations for reform, including the provision of more prevention funding, resolution of jurisdictional disputes to ensure First Nations children could access services on the same terms as other children and the recognition of First Nations jurisdiction. None of the recommendations related to increasing funding for children and families were ever implemented.
- b) Wen:de Reports (2005)\*. The Wen:de reviews were jointly conducted by INAC and AFN with the participation of First Nations child welfare agencies and over 20 leading experts in fields such as child welfare, economics, community development, law, and information technology. It resulted in a series of three reports identifying the funding shortfalls in detail and proposing a new funding formula and policy reforms. Most of the substantial recommendations were not implemented or implemented improperly.
- c) Auditor General of Canada (2008\*, 2011). Found Canada's funding for the First Nations CFS program to be flawed and inequitable. The United Nations Committee on the Rights of the Child

(2012) expressed concern that the recommendations of the Auditor General of Canada had not been fully implemented.

- d) Standing Committee on Public Accounts (2009,\* 2012).

\*Full reports available at:  
<http://www.fncaringsociety.com/i-am-witness-first-nations-child-and-family-services-funding>

### **Information on the other INAC funding models?**

Refer to the information sheets on Directive 20-1, Enhanced Focused Prevention Approach, the 1965 Indian Welfare Agreement and INAC funding arrangements with Provinces and Territories available at [www.fnwitness.ca](http://www.fnwitness.ca)

Find more information on Jordan's Principle at [www.jordansprinciple.ca](http://www.jordansprinciple.ca)

**For more information on the case go to  
[www.fnwitness.ca](http://www.fnwitness.ca) or contact [info@fncaringsociety.com](mailto:info@fncaringsociety.com)**

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