Role of Jordan's Principle in the Case on First Nations Child Welfare (www.fnwitness.ca)

First Nations Child & Family Caring Society of Canada

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What is the case on First Nations child welfare about?

The First Nations Child and Family Caring Society (Caring Society) and the Assembly of First Nations filed a complaint in 2007 alleging that the Federal Government's flawed and inequitable provision of First Nations child and family services and failure to implement Jordan's Principle (JP) is discriminatory pursuant to the Canadian Human Rights Act. The original complaint (2007) cites the broad support for and potential benefits of the proper implementation of JP, including that "this solution is cost neutral and would ensure that children's needs are met whilst still allowing for the resolution of the dispute." The case was referred to the Canadian Human Rights Tribunal (the Tribunal) in September of 2008 at which time the Canadian Human Rights Commission joined the proceedings acting in the public interest. The Tribunal granted Amnesty International Canada and the Chiefs of Ontario interested party status in 2009. The Tribunal has the authority to make a legally binding finding of discrimination and order a remedy.

What stage is the case at now?

Hearings at the Canadian Human Rights Tribunal began in February 2013 and concluded in May 2014. The Tribunal heard from 25 witnesses and over 500 documents were filed as evidence. The parties filed their final written submissions (factums) and closing oral arguments occurred from October 20-24, 2014. The ruling is expected in 2015. You can read the factums authored by all the parties on fnwitness.ca and look for the link to the APTN video archive of the witness testimony.

What is Jordan's Principle?

Jordan's Story:

Jordan's Principle was created in memory of Jordan River Anderson of Norway House Cree Nation in Manitoba by his family and First Nations community in an attempt to ensure that no more children would fall victim to similar circumstances. Jordan was born in 1999 with a complex set of genetic disorders, which due to the unavailability of adequate services on reserve, forced the decision to place him into the provincial child welfare system so that he could access the medical services he required (Factum of CHRC at para 300).

Jordan spent the next two years in hospital. The doctors eventually agreed that Jordan was able to leave and be cared for in a family home. This created a dispute between the two levels of government over who should pay for Jordan to be able to leave the hospital and live in a specialized foster home where he would receive the appropriate supports he needed. After more than two years of this jurisdictional dispute, where neither government took responsibility for his care, Jordan tragically died in 2005 at the age of five, having never left the hospital (Factum of CHRC at para 303). Jordan never spent a day in a family home (*Pictou Landing* at para 81).

History of Jordan's Principle:

Jordan's Principle was conceived as a child-first principle meant to facilitate the resolution of jurisdictional disputes involving services to First Nations children. JP states that where a jurisdictional dispute arises within or between governments over the care of First Nations children, that the government department of first contact be required to pay for services normally available to non-Aboriginal children in similar circumstances, without delay or disruption. Upon fulfilling this obligation to the child, the paying government party may then seek reimbursement if required through jurisdictional dispute resolution mechanisms with any other government or department involved (Jordan's Principle Working Group, 2015, p.4).

On December 12, 2007, Parliament unanimously approved Motion 296 in the House of Commons, stating that the government should adopt a child-first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving

the care of First Nations children (Canada, Parliament, 2007). Since then, despite statements of commitment to and full support of JP, the federal government's definition and implementation of JP has been criticized by child rights experts and First Nations for the narrowing of the applicability of the Principle.

What is ultimately clear is that the intended results of JP are not being attained, as evidenced by several reports including those from the Canadian Paediatric Society and the Assembly of First Nations. These reports acknowledge that "the current governmental response falls far short of realizing the vision of Jordan's Principle advanced by First Nations and endorsed by the House of Commons," (Jordan's Principle Working Group, 2015, p.5) and that "First Nations children continue to be the victims of administrative impasses." (CPS, 2012, p.28)

The proper interpretation of Motion 296 and the definition of JP continue to be debated and challenged. Recently, in the *Beadle and Pictou Landing v Canada* (2013) Federal Court case, the judge's decision found that JP applied and that it should not be narrowly interpreted upon implementation (para 86). This case addressed the covering of costs for the in-home care of Jeremy Meawasige, a teenager with multiple disabilities, after his mother suffered a stroke and could no longer provide the care he required (para 8). The judge granted the application for judicial review of the decision, ordering the federal government to reimburse the costs of the care provided by the Band Council that they had provided in accordance with JP.

Currently, the Caring Society, along with its allies, are awaiting a decision from the Canadian Human Rights Tribunal on whether the federal government's provision of First Nations Child and Family Services is discriminatory under section 5 of the Canadian Human Rights Act. Among the arguments made was that the federal government's interpretation and failed implementation of JP is discriminatory and results in the delay, disruption and/or ultimate denial of services to First Nations children that are normally available to non-Aboriginal children.

Positions on Jordan's Principle in the First Nations Child Welfare Case

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

1) Respondent claims to have successfully implemented Jordan's Principle, in partnership with Health Canada, stating that "criteria for what would be a Jordan's Principle case were formulated by both departments and approved by Cabinet." (Factum of Respondent at para 93)

2) The approach used to identify cases that meet their criteria for Jordan's Principle utilizes case conferencing, meant to "bring all involved parties together in order to find a solution to the underlying issue." (Factum of Respondent at para 100)

3) The respondent argues that the response to Jordan's Principle does not amount to discrimination and that Jordan's Principle is "not a child welfare concept that has bearing on this complaint, an assessment of the validity of the federal response is beyond the scope of this complaint." (Factum of Respondent at para 216)

4) Claims that Jordan's Principle is meant to assist in the operation of certain programs by aiding the resolution of jurisdictional disputes but that it is "not equipped to address or amend the parameters of the implicated, existing program." (Factum of Respondent at para 218)

5) Acknowledge that there is disagreement as to the definition and implementation of Jordan's Principle but that even if it were determined to be a relevant consideration for this complaint, this "does not mean it is invalid or discriminatory." (Factum of Respondent at para 223)

First Nations Child and Family Caring Society of Canada

1) Assert that the federal government's failure to fully implement Jordan's Principle amounts to discrimination under section 5 of the Canadian Human Rights Act, that "First Nations children are denied basic public services or experience detrimental delay in receiving such services for no reason other than their status as First Nations peoples." (Factum of Complainant at para 392)

2) That jurisdictional disputes continue to arise in the child welfare context, denying First Nations children

of required services, due to the ambiguity of the current federal funding formulas where "there will inevitably arise situations where Canada and provincial governments and their relevant departments and ministries cannot immediately agree on who has the responsibility to fund a particular service for a child." (Factum of Complainant at para 407)

3) Jordan's Principle also relates to First Nations child welfare because the federal funding formulas give rise to "the unfortunate reality that some First Nations children continue to be placed in care, not because they are in need of protection, but because this is the only way for them to access needed services," (Factum of Complainant at para 408)

4) Argue that Jordan's Principle is a means to substantive equality for First Nations children, that jurisdictional disputes leading to delay or denial of services are discriminatory in themselves, distinct from discriminatory underfunding, and "can only be prevented by full implementation of Jordan's Principle." (Factum of Complainant at para 425)

5) That the case conferencing approach as implemented makes delays an inherent part of the process, contrary to the purpose of Jordan's Principle, by first requiring an "evaluation process to determine whether the child's needs meet Canada's arbitrary eligibility requirements." (Factum of Complainant at para 429)

6) Canada's definition requiring a dispute occur between the federal and provincial governments is arbitrary and ignores the fact that interdepartmental disputes are involved in a large portion of the cases. (Factum of Complainant at paras 431-434)

7) Canada's medical requirement of a "complex medical issue" is ambiguous, doesn't provide a faster mechanism for urgent cases and has no clear rationale behind it. (Factum of Complainant at para 446)

8) The government's interpretation excludes "First Nations children living primarily on reserve from human rights and equality protection," contrary to the original intended meaning of Jordan's Principle and seemingly contrary to Parliament's intent in passing Motion 296. (Factum of Complainant at para 455)

9) That "Canada has provided no evidence as to why it has failed to take all of the steps necessary to ensure First Nations children do not experience discrimination." (Factum of Complainant at para 459)

Canadian Human Rights Commission

1) Notes that even after the adoption of Jordan's Principle by Parliament in 2007, that jurisdictional disputes continue to make victims out of First Nations children. (Factum of CHRC at para 592)

2) The resulting effects of these disputes are seen as the delay, disruption and/or denial of services to First Nations children on reserve, for which "the federal government has not adopted an overarching policy to address these gaps in jurisdiction." (Factum of CHRC at para 593)

3) Additionally, it is recognized that as a result of these jurisdictional disputes, First Nations children can be placed in care in order to receive the services children off reserve would normally have access to, despite a lack of child protection issues involved. (Factum of CHRC at para 589)

4) Concludes that "to the extent jurisdictional disputes continue to exist and remain unresolved by AANDC's implementation of Jordan's Principle, they constitute adverse differential treatment of First Nations on reserve by delaying, disrupting and or denying them meaningful access to necessary services." (Factum of CHRC at para 594)

How do the remedies sought reflect Jordan's Principle?

The Attorney General is seeking that the claim be dismissed as unfounded. In doing so, the remedies sought by the Complainants are characterized as being "not appropriate and should not be granted." (Factum of Respondent at para 228)

- The Respondent claims that "an order respecting programs or policies other than child welfare is beyond the scope of the complaint and the remedial powers of the Tribunal." (Factum of Respondent at

para 249)

The Caring Society is seeking an order declaring Canada's approach to Jordan's Principle as discriminatory and that the Principle be fully implemented. (Factum of Complainant at para 483)

- It further seeks an order requiring the federal government to publicly post its policies, directives and practices regarding First Nations Child and Family Services and Jordan's Principle. (Factum of Complainant at para 512)
- An order that Jordan's Principle be interpreted to include interdepartmental disputes, to apply to all services and have a designated payer of first resort. (Factum of Complainant at 208)
- The creation of a non-discriminatory and transparent process for reporting Jordan's Principle cases and the subsequent assessment process, and create an appeal process from the ultimate decisions. (Factum of Complainant at 211)
- The posting of up-to date information on the implementation of Jordan's Principle. (Factum of Complainant at 213)
- Development of a training program for Jordan's Principle focal points. (Factum of Complainant at 214)
- Order the monitoring of Canada's actions to ensure proper implementation of all of these measures. (Factum of Complainant at 216)

The Canadian Human Rights Commission is seeking a finding that the funding formulas and FNCFS program are discriminatory and inconsistent with section 5 of the *CHRA*, that orders to cease and desist this discrimination be made, and that steps be taken to redress and remedy the discrimination to prevent it from occurring in the future. (Factum of CHRC at para 628)

- No explicit reference to Jordan's Principle is made.

The Tribunal ultimately has the discretion to award what remedies, if any, it considers appropriate.

Where can I find more information about Jordan's Principle and this case?

Go to fnwitness.ca or email us at **info@fncaringsociety.com**.

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Sources:

Blackstock, C., Joseph, L. (2007). Human Rights Commission Complaint. Retrieved from http://www.fncaringsociety.com/sites/default/files/Caring%20Society_AFN%20HR%20complaint%202007.pdf

Canada, Parliament, House of Commons Debates, Vol.142, Issue 031 (December 5, 2007) at 1785 (Hon. Crowder). Retrieved from http://www.parl.gc.ca/content/hoc/House/392/Debates/031/HAN031-E.PDF

Canadian Paediatric Society. (2012). *Are We Doing Enough? A Status Report on Canadian Public Policy and Child and Youth Health*. Retrieved from http://www.cps.ca/advocacy/StatusReport2012.pdf

First Nations Child and Family Caring Society v Canada (AG). (2014). CHRT File No. T1340/7008 (Factum of the Canadian Human Rights Commission).

First Nations Child and Family Caring Society v Canada (AG). (2014). CHRT File No. T1340/7008 (Factum of the Complainant).

First Nations Child and Family Caring Society v Canada (AG). (2014). CHRT File No. T1340/7008 (Factum of the Respondent).

The Jordan's Principle Working Group. (2015). *Without denial, delay, or disruption: Ensuring First Nations children's access to equitable services through Jordan's Principle*. Ottawa, ON: Assembly of First Nations. Retrieved from http://www.afn.ca/uploads/files/jordans_principle-report.pdf

Pictou Landing v Canada, 2013 FC 342.