

Federal Court



Cour fédérale

**Ottawa, September 29, 2021** – A decision was issued today by the Honourable Paul Favel in files T-1559-20 and T-1621-19:

**IN THE MATTER OF  
ATTORNEY GENERAL OF CANADA  
v.  
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF  
CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN  
RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY  
INTERNATIONAL AND NISHNAWBE ASKI NATION  
AND  
CONGRESS OF ABORIGINAL PEOPLES**

**Summary:** In this case, Canada asked the Federal Court to quash two sets of decisions made by the Canadian Human Rights Tribunal (the Tribunal). The first decision relates to a compensation order (the Compensation Decision) where the Tribunal awarded compensation to First Nations children, parents, or care-giving grandparents because of the effects of discriminatory funding of the First Nations Child and Family Services Program (FNCFS Program) and Jordan’s Principle. The second decision relates to who is eligible for Jordan’s Principle as a ‘First Nations child’, the term used throughout the various Tribunal decisions/rulings (Eligibility Decision). Ultimately, the Federal Court upheld the Tribunal’s decisions.

**Background context: the Merit Decision**

In 2007, the First Nations Child and Family Caring Society of Canada (Caring Society) and the Assembly of First Nations (AFN) filed a complaint against Canada at the Tribunal. On January 26, 2016, in a decision referred to as the Merit Decision, the Tribunal found that Canada was discriminating against First Nations children on reserve and in the Yukon pursuant to the Canadian Human Rights Act (the Act) for two reasons. First, Canada’s funding of the FNCFS Program as well as health services related to Jordan’s Principle was inadequate. Second, Canada was taking an overly narrow approach to eligibility for Jordan’s Principle. The Tribunal found that Canada knew about the negative effects of these actions, including that a lack of funding drives First Nations children into state care. The Tribunal ordered that Canada immediately cease its discriminatory practices and fully implement Jordan’s Principle. Canada did not ask the Federal Court to set the Merit Decision aside.

**The decisions currently under review**

Following the Merit Decision, the Tribunal released two more decisions: the Compensation Decision (September 6, 2019) and the Eligibility Decision (July 17, 2020).

In the Compensation Decision, the Tribunal decided that each child removed from their home because of Canada's discrimination should be compensated a total of \$40,000. The Tribunal also found that the parents or caregiving grandparents of those children are eligible for the same award.

In the Eligibility Decision, the Tribunal considered who should be eligible for Jordan's Principle. Jordan's Principle directs the government of first contact to provide services to First Nations children pending a decision by different governments or departments regarding which one should pay for the services. The Tribunal decided that two more categories\* of children (in addition to three existing categories) should be eligible for Jordan's Principle. Under this decision, each of the following groups are eligible to apply for Jordan's Principle whether they live on or off reserve:

1. A child with Indian Act status;
2. A child who is eligible for Indian Act status;
3. A child who is covered by a First Nation's self-government agreement or arrangement;
4. \*A child, without Indian Act status that is a citizen or member of a First Nation; and
5. \*A child that does not have Indian Act status and is not eligible for status, but has a parent/guardian with, or who is eligible for status.

### **The parties' positions**

Canada, the Applicant, asked the Federal Court to set aside the Compensation and Eligibility Decisions and send them back to the Tribunal for redetermination. Canada submitted that the Compensation Decision should be set aside because the Tribunal misapplied the law and exceeded its power when giving individual awards. The Tribunal, according to Canada, effectively turned the proceedings into a class action. Canada insisted that individual awards require proof of individual harm and that there was no basis to order financial awards for wilful and reckless conduct.

The Respondents in this case are the Caring Society, the AFN, the Canadian Human Rights Commission, Chiefs of Ontario, Amnesty International, and Nishnawbe Aski Nation. They submitted that the Tribunal did not exceed its power when ordering compensation because the Act permits the Tribunal to make awards up to \$20,000 for pain and suffering and \$20,000 for wilful and reckless discriminatory practices. Also, victims of systemic discrimination are entitled to individual compensation without having to prove individual harm. In their view, the Tribunal's awards are justified in light of the fact that First Nations children have suffered and Canada had knowledge of that suffering.

With respect to the Eligibility Decision, Canada stated that the Tribunal acted outside its authority and unreasonably expanded the scope of Jordan's Principle. The original complaint filed in 2007 only concerned First Nations children on reserve and in the Yukon. Additionally, the Tribunal did not hear evidence about the two new categories of children eligible for Jordan's principle. Accordingly, the Tribunal improperly created two new categories.

The Respondents, supported by the Intervener, Congress of Aboriginal Peoples, submitted that expanding the scope of Jordan's Principle was reasonable because it prevents further discrimination that has resulted from the status system. It also respects First Nations' jurisdiction over citizenship and membership. In their view, the Tribunal properly considered issues of First Nations identity, self-determination, international legal obligations, federal legislation, section 35 rights, and the scope of the original complaint.

Finally, Canada claimed that the Tribunal process was procedurally unfair. For example, by not providing sufficient reasons, failing to provide notice of the issues, and by failing to provide notice that it was considering a finding that the discrimination was "ongoing". The Respondents stated that all parties were treated fairly and that the Tribunal always provided notice of the issues.

### **The Federal Court's decision**

The Court dismissed both of Canada's applications for judicial review and upheld the Tribunal's decisions.

The Court concluded that the Compensation Decision is reasonable because the Act provides the Tribunal with broad discretion to fashion appropriate remedies to fit the circumstances. To receive an award, the victims did not need to testify to establish individual harm. The Tribunal already had extensive evidence of Canada's discrimination; the resulting harm experienced by First Nations children and their families (the removal of First Nations children from their homes); and Canada's knowledge of that harm. Further, it found that the Tribunal did not turn the proceedings into a class action because the nature and rationale behind the awards are different from those ordered in a class action. The Court also noted that, 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.

The Court also concluded that the Eligibility Decision is reasonable. It found that in expanding the scope of eligibility for Jordan's Principle, the Tribunal was trying to prevent further discrimination. Furthermore, the Tribunal only added two additional categories, rather than three additional categories, which is what the Caring Society requested. This demonstrates that the Tribunal was aware of the limits of its jurisdiction. In the circumstances, the Tribunal did not exceed its powers. The Court found that the Tribunal did not determine issues of status, identity, or citizenship, and that it respected the confines of the Indian Act and the jurisdiction of First Nations communities to determine these issues. Additionally, it found that Canada is not obligated to provide Jordan's Principle services to the two additional categories, only to let them "through the door" for the purposes of eligibility. The Tribunal also ordered the parties consult to generate potential eligibility criteria for Jordan's Principle. The parties were to consider the Tribunal's rulings and establish a mechanism to identify citizens/members of First Nations as well as funding sources. The Tribunal clearly sought to foster dialogue between the parties, which is apt in the context of reconciliation.

Finally, the Court held that Canada was not denied procedural fairness. At every stage of the proceedings, Canada was given the opportunity to make submissions. Canada also had numerous chances to challenge various decisions but it chose not to. Throughout the entire process, the Tribunal kept Canada and the other parties informed about what the issues were and what the next steps would be.

For all of these reasons, the Court dismissed Canada's applications for judicial review.

The decision is available in English only. A French language summary is available, and a certified translation of the decision will be provided at the earliest possible time. A copy of the decision can be obtained via the [website](#) of the Federal Court:

<https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/513674/index.do>