

# CALL TO ACTION #3 & CHILDREN'S RIGHTS



"Jordan's Principle is a **child-first principle** and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, **the government department of first contact pays for the service and can seek reimbursement** from the other government/department after the child has received the service. **It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them.**"

Canadian Human Rights Tribunal 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 (Merit Decision), at para 351, [original emphasis removed, emphasis added].

Jordan's Principle is a legal rule named after Jordan River Anderson, of the Norway House Cree Nation in Manitoba. Jordan was born with complex medical needs and after spending his first two years in the hospital, he was cleared to return home. However, the federal and provincial governments could not decide who was financially responsible for Jordan's home care. Jordan remained in the hospital as the dispute continued and in 2005, at the age of five, he passed away without ever setting foot in his family home. [1]

On December 12, 2007, the House of Commons unanimously passed Jordan's Principle in a motion:

“

That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

”

In 2015, the Truth and Reconciliation Commission of Canada published their 94 Calls to Action. This includes Call to Action #3, which relates to the implementation of Jordan's Principle:

**Call to Action #3: We call upon all levels of government to fully implement Jordan's Principle**

[1] *Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2021 FC 969, paras 12-13; First Nations Child & Family Caring Society, "Jordan's Principle," online: <<https://fncaringsociety.com/jordans-principle>>, (consulted 15 January 2022).

To date, the implementation of Jordan's Principle is lacking. Not only is this contrary to Truth and Reconciliation, but it is also contrary Canada's obligations under the *Convention on the Rights of the Child*.

## Jordan's Principle before the Canadian Human Rights Tribunal and the Federal Court

On February 23, 2007, the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society (Caring Society) filed a complaint with the Canadian Human Rights Commission (CHRC) alleging that Canada's underfunding of First Nations child welfare services constitutes racial discrimination. Following a protracted dispute regarding multiple preliminary matters, the issue was heard before the Canadian Human Rights Tribunal (CHRT) over a period of 72 days from February 2013 to October 2014.

On January 26, 2016, the Canadian Human Rights Tribunal (CHRT) ruled in favour of the AFN and the Caring Society:

AANDC [Aboriginal Affairs and Northern Development Canada] is ordered to cease its discriminatory practices [...] AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle. [2]

In its decision, the CHRT recognized that the failure to effectively implement Jordan's Principle is "relevant and often intertwined with the provision of child and family services to First Nations," [3] as the lack of proper social and health care on reserves often causes children to be removed from their homes and placed in care, as there is no other way for them to access the services they need. [4] As such, the CHRT held that Canada's overly narrow interpretation of Jordan's Principle (which, at the time, had led to a 100% refusal rate of applications under Jordan's Principle) "defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve." [5]

[2] 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, at para 481.

[3] Ibid., at para 362

[4] Ibid., at para 364

[5] Ibid., at para 381

Since this decision, the CHRT has heard additional submissions regarding who is eligible for services through Jordan's Principle and for compensation. Canada filed an application for judicial review regarding these decisions. **The application was denied on September 29, 2021 – the day before the first National Day for Truth and Reconciliation.**

On October 29, 2021, Canada appealed the decision. However, they explained that this was a "protective appeal" and that they are committed to reaching an out-of-court settlement.[6]

On January 4, 2022, the Canadian government unveiled a \$40-billion agreement in principle for First Nations children and their families who were harmed by the child welfare system and the overly narrow definition of Jordan's Principle. Half of this will be provided as compensation, while the other half will go towards reforming the First Nations Child and Family Services Program, to be spread out over five years.[7]

The federal government and First Nations leaders have until March 31, 2022 to finalize the details of the agreement, and it needs to be approved by the CHRT and the Federal Court.[8]

[6] CBC News, "Ottawa will appeal court ruling on Indigenous child welfare but says it's pursuing a compensation deal" (29 October 2021), online: <<https://www.cbc.ca/news/politics/ottawa-federal-court-ruling-appeal-decision-child-welfare-1.6229567>>; CBC News, "Ottawa releases early details of landmark \$40B First Nations child welfare agreement" (4 January 2022), online: <<https://www.cbc.ca/news/politics/first-nations-child-welfare-agreements-in-principle-1.6302636>>.

[7] First Nations Child & Family Caring Society, "Jan 4, 2022 response to the Agreement-in-Principle on long-term reform of the First Nations Child and Family Services Program and Jordan's Principle" (4 January 2022), online: <<https://fncaringsociety.com/publications/jan-4-2022-response-agreement-principle-long-term-reform-first-nations-child-and-family>>.

[8] Supra, note 6.





## Timeline Relating to: *(Attorney General) v First Nations Child and Family Caring Society of Canada, 2021 FC 969* <sup>[9]</sup>

### 01 FEBRUARY 23, 2007

The Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society (Caring Society) file a complaint with the Canadian Human Rights Commission (CHRC) alleging that Canada's underfunding of First Nations child welfare services constitutes racial discrimination.

### 02 OCTOBER 2008 TO 2015

Canada raises preliminary disputes relating to, for example, the jurisdiction of the Canadian Human Rights Tribunal (CHRT) to deal with the merits of the case.

### 03 JANUARY 26, 2016

The CHRT finds that Canada is racially discriminating against First Nations children and orders the implementation of Jordan's Principle (2016 CHRT 2).

### 04 APRIL 26, 2016

The CHRT issues its first non-compliance order, ordering Canada to fully implement Jordan's Principle by May 10, 2016.

To date, the CHRT has issued more than 15 additional orders, including nine non-compliance orders against Canada.<sup>[10]</sup>

### 05 APRIL 2020 TO NOVEMBER 2020

The CHRT issues decisions regarding the groups of children eligible for services through Jordan's Principle and for compensation due to Canada's discriminatory practices.

### 06 DECEMBER 22, 2020

Canada files an application for judicial review of the CHRT's eligibility and compensation decisions.

### 07 SEPTEMBER 29, 2021

The Federal Court denies the application for judicial review (*Canada (Attorney General) v First Nations Child and Family Caring Society of Canada, 2021 FC 969*).

### 08 OCTOBER 29, 2021

Canada files an appeal of the Federal Court's decision.

[9] First Nations Child & Family Caring Society, "I am a Witness: Tribunal Timeline and Documents", online: <<https://fncaringsociety.com/i-am-witness-tribunal-timeline-and-documents>> (consulted 16 January 2022).

[10] First Nations Child & Family Caring Society, "Non-Compliance Orders", online: <<https://fncaringsociety.com/fr/non-compliance-orders>> (consulted 16 January 2022).



## The National Inquiry into Missing and Murdered Indigenous Women and Girls

On June 3, 2019, the National Inquiry into Missing and Murdered Indigenous Women and Girls published its Final Report, in which one of the Calls to Justice is related to the implementation of Jordan's Principle:

12.10 We call upon the federal, provincial, and territorial governments to immediately adopt the Canadian Human Rights Tribunal, 2017 CHRT 14, standards regarding the implementation of Jordan's Principle in relation to all First Nations (Status and non-Status), Métis, and Inuit children. We call on governments to modify funding formulas for the provision of services on a needs basis, and to prioritize family support, reunification, and prevention of harms. Funding levels must represent the principle of substantive equity.



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## *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), 2017 CHRT 14*

In January 2017, two twelve-year-old children took their own lives in Wapekaka First Nation (Wapekaka). Prior to this, Wapekaka had informed the Canadian government of concerns regarding a suicide pact among a group of children. The Canadian Human Rights Tribunal found that this tragedy was, in part, caused by the Canadian government's failure to implement Jordan's Principle:

While Canada provided assistance once the Wapekaka suicides occurred, the flaws in the Jordan's Principle process left any chance of preventing the Wapekaka tragedy unaddressed and the tragic events only triggered a reactive response to then provide services [...] the tragic events in Wapekaka highlight the need for a shift in process coordination around Jordan's Principle.[11]

[11] At para 90. The summary of this case is in paras 88-90.

### Relevant Provision in the CRC

#### Article 2: No discrimination

**General Comment No. 11 (2009) on Indigenous Children and their rights under the Convention** recognizes that Indigenous children continue to experience “serious discrimination,” and states are urged “to take special measures to ensure that indigenous children are not discriminated against enjoying the highest attainable standard of health.” (paras 5 and 50)

**General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art.24)** provides that states have an obligation to “ensure that children’s health is not undermined as a result of discrimination.” (para 8)

#### Article 3: Best interests of the child

**General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para 1)** recognizes that children perceive the passing of time differently and thus, “delays in or prolonged decision-making have particularly adverse effects on children as they evolve.” (paras 72, 93)

**General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art.24)** states that “All States, regardless of their level of development, are required to take immediate action to implement these obligations as a matter of priority and without discrimination of any kind.” (para 72)

**General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art.24)** urges States to “place children’s best interests at the centre of all decisions affecting their health and development” (para 13)

#### Article 24: Health, water, food, environment

**General Comment No. 11, Indigenous Children and their rights under the Convention** recognizes that Indigenous children frequently suffer poorer health compared to non-Indigenous children, including for reasons due to “inferior or inaccessible health services.” (para 49)

In its interpretation of Article 24, Paragraph 1 of the CRC, the **General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art.24)** “imposes a strong duty of action by States parties to ensure that health and other relevant services are available and accessible to all children, with special attention to under-served areas and populations.” (paras 28, 73) [emphasis added]

### Application to Call to Action #3 and the Implementation Status of Jordan’s Principle

On January 26, 2016, the CHRT found that Canada’s underfunding of First Nations child welfare services constitutes racial discrimination. This is “intertwined” with the failure to effectively implement Jordan’s Principle, as it impacts the availability and quality of services received by First Nations children on reserve. To date, Jordan’s Principle has not been properly implemented and First Nations children continue to be discriminated against.

15 years ago, on February 23, 2007, the AFC and the Caring Society filed their complaint regarding the underfunding of First Nations child welfare services with the CHRC, but this was soon followed by a protracted dispute on preliminary issues.

On January 26, 2016, the CHRT ordered Canada to fully implement Jordan’s Principle. Nine non-compliance orders have since been issued.

In January 2022, an agreement in principle regarding funding for compensation and reform was reached between Canada and First Nations leaders, but it still needs to be approved and implemented.

If the children’s best interests were prioritized as set out under the CRC, Jordan’s Principle would have been implemented by now.

The continual failure to implement Jordan’s Principle is a direct contradiction of Canada’s obligation to ensure that quality health services are available and accessible to all children.

**Canada is currently in its V-VI Reporting Cycle before the Committee on the Rights of the Child. Canada's position, as well as civil society's recommendations, regarding Jordan's Principle are as follows:**

**State Party's Report, submitted on January 28, 2019**

52. In July 2016, the Government of Canada committed new funding to help improve First Nations children's access to needed services. The bulk of this funding will pay for services for First Nations children when there is an unmet health, educational or social support need, pursuant to Jordan's Principle.

53. [Federal, provincial, and territorial] governments are working towards the equal application of Jordan's Principle to all First Nations children, on and off reserve [...]

**Civil Society's Recommendations to the Committee: To not engage in further legal proceedings with regard to the implementation of Jordan's Principle**

**Amnesty International**

Immediately withdraw its judicial review before the Federal Court, and undertake not to engage in further protracted legal proceedings.

**Civil Society's Recommendations to the Committee: To implement Jordan's Principle and cease discrimination against Indigenous children**

**First Nations Child and Family Caring Society of Canada**

Implement the full scope and meaning of Jordan's Principle throughout all government departments and in all services provided to First Nations children, youth and their families so that access to these services is never delayed or denied including because of disputes between the federal, provincial and territorial governments over their respective responsibilities.

Fully implement the Spirit Bear Plan [a proposed series of actions which would end inequalities in public services for First Nations children, youth and families] and cease discrimination in other services to First Nations children such as health care, clean water and housing. Ensure that all children, on and off reserve, have equal access to all services available to other children in Canada.

**Children First**

Children First Canada commends the First Nations Caring Society for its efforts to persistently advocate for the rights of First Nations children and we call upon the federal government to implement the Spirit Bear Plan and ensure the full protection of the rights of First Nations, Métis and Inuit children as enshrined in the UN CRC and UNDRIP.

**Colour of Poverty**

Canada must ensure the full implementation of Jordan's Principle such that access to supports and services is never denied or delayed as a result of jurisdictional disputes, and honour the repeated rulings of the Canadian Human Rights Tribunal by providing adequate funding for child welfare services on reserve, and compensation to the children and parents and grandparents of children who were unnecessarily placed in care because of discrimination.

**Canadian Coalition for the Rights of the Children**

Recommended Question #5: Please provide details of the steps being taken to ensure that services for Indigenous children and their families are equitable, adequate and appropriate. What steps are being taken by Canada to implement the recommendations made by the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, including in relation to the provision of services?

**Native Women's Association of Canada**

Recommended question 1: Please provide information to the UN Committee on the Rights of the Child of the concrete steps taken to address the TRC's Calls to Actions in the areas outlined above and detailed in Annex 1 of this report?

Recommended question 6: In view of the recommendations of the UN Special Rapporteur on the rights of indigenous peoples please provide information to the UN Committee on the Rights of the Child on the concrete steps which are being taken to address the aforementioned recommendations?

Recommended question 7: In view of the UN Special Rapporteur on the right to health's findings and recommendations please provide information to the UN Committee on the Rights of the Child about the steps being taken to ensure that Indigenous families and children have access to adequate mental and physical health services?

Recommended question 10: Please provide information to the UN Committee on the Rights of the Child about how the Government of Canada is responding to the above highlighted concerns of the UN Special Rapporteur on the rights of persons with disabilities and, more specifically, how it intends to act on the aforementioned recommendations?

**Civil Society's Recommendations to the Committee: To provide information regarding the status of implementation**