

Happy New Year to Everyone but Non-Status Kids: Jordan's Principle & Canada's Persistent Discrimination

By Damien Lee

JUST THREE DAYS before Christmas 2020, with the holiday break as a convenient distraction, Canada filed an application in Federal Court to narrow an earlier Canadian Human Rights Tribunal decision that would ensure non-status Indian children could benefit from Jordan's Principle so long as they are recognized as citizens or members of their respective First Nations.

Should it withstand judicial review, the Tribunal's decision would be a win for First Nations jurisdiction in determining who belongs with their communities — a salient point considering that fewer and fewer people will qualify for Indian status over time (despite on-going population growth).

However, should Canada succeed in narrowing the scope of Jordan's Principle — i.e. making it based on Indian registration (or status) alone — a whole host of issues and contradictions arise that amount to not just marginalizing kids who need care, but undermining Indigenous peoples' citizenship governance systems altogether.

This brief provides context on some of the complexities at play.

Three Contradictions in Canadian Policy

Back in July of 2020, the Tribunal found that entitlement to Jordan's Principle should not be restricted to Indian registration as defined in the *Indian Act*¹, a finding that was based on the recognition of First Nations' jurisdiction to determine their own citizenships. Canada has taken issue with the scope of this decision, apparently believing that only those children that it recognizes as Indians should make the cut.

But to see why Canada's Christmas court application is more than the routine targeting of Indigenous children, it is helpful to understand that narrowing the entitlement scope would only be the latest iteration of a very long practice of undermining Indigenous citizenship laws more generally.

Such a position makes little sense for at least three reasons, listed here as contradictions:

Contradiction #1:

The research has shown that, aside from any immediate impacts of Bill S-3², the population of non-status Indians will only continue to increase as time goes on. For example, in research conducted before Bill S-3 was contemplated, it was expected that the number of individuals entitled to band membership *but not entitled to Indian status* would increase from 3,000 individuals in 2002, to 56,200 by the year 2077.³ This number is based on communities that control their membership under section 10 of the *Indian Act*, and thus does not account for the total expected growth of non-status Indians in Canada.

In other words, it would be only a matter of time before Jordan's Principle becomes irrelevant to the extent that there are no more status Indian children to support (even though Indigenous children will continue to exist).

Contradiction #2:

As recently as 2019, Minister Carolyn Bennet told Parliament that Crown-Indigenous Relations will continue to work with First Nations on "how to move towards First Nations controlling membership and citizenship."⁴ This pledge falls in line with a longer commitment stemming back to 1985, when Canada created the opportunity for First Nations to control their own membership lists. First Nations interested in doing so could use the newly established s.10 of the *Indian Act* to write membership codes in ways that separated Indian status from membership — effectively claiming non-status Indians as members. This is crucial *especially* for those bands with high rates of mixed status/non-status families, or where a band wanted to align its membership with its respective inherent citizenship or kinship laws.

While s.10 is at best a distortion of citizenship self-governance, it at least created the opportunity for communities to turn down the volume on the importance of Indian status when it comes to accessing some programs and services or regarding treaty discussions. Thus, while on the one hand, the federal government has re-committed itself to working with bands interested in determining their own membership, its lawyers are effectively trying to undermine the meaning of band-controlled membership by narrowing who is entitled to benefit from Jordan's Principle. This leads me to contradiction 3.

Contradiction #3:

Canada committing to support First Nation control over membership while actively undermining what membership means is an age-old practice in settler Indian policy. The thinking goes something like this: "Those Indians can claim whomever they want, but that doesn't mean we're on the hook financially." An early example of such thinking can be found in late 19th century correspondence between Ontario lawyers and bureaucrats trying to figure out how to save money on treaty annuities. Essentially, they argued that Anishinaabeg could adopt whomever they want, but such adoptees could not claim treaty annuities against the Crown, *but rather "against the band itself."*⁵

In other words, First Nations were (and are) put in the impossible position of having to choose between following their own kinship laws – which are based on responsibilities to care for one's relations – or jumping through the hoop of colonial recognition in the name of accessing benefits, which ultimately leaves kin behind.

Telling First Nations that they can claim whom they want, but then not resourcing such decisions weaponizes First Nation self-determination against children who don't meet the state's distorted definition of who is an Indian. This is colonial violence.

Making and Breaking *Indian Act* Precedent

The thing is, there is already federal precedent for non-status First Nation band members to access certain entitlements. Section 4.1 of the *Indian Act* (not to be confused with s.4(1) of the same) allows non-status band members to enjoy the vast majority of rights otherwise reserved for status Indians, including being a formal part of a band, receiving "Indian monies," compensation for loss of reserve land, owning land on reserve, among others.⁶

Yet it seems that Canada's latest court application in this matter would not only place Jordan's Principle beyond the scope of sections 4.1 and 10 of the *Indian Act*, but beyond Indigenous kinship laws altogether. In other words: *Happy New Year to everyone but non-status kids!*

END NOTES

¹First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada) CHRT 2020, No. T1340/7008, accessed December 24, 2020 at 145.

²See: Canada, Office of the Parliamentary Budget Officer, “Bill S-3: Addressing Sex Based Inequities in Indian Registration” (Ottawa, December 5, 2017), http://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Bill%20S-3/Bill%20S-3_EN.pdf. It is expected that http://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/Bill%20S-3/Bill%20S-3_EN.pdf. It is expected that Bill S-3 will dramatically increase the number of individuals entitled to registration as a Indian. However, despite any S-3 population bump, s.6 of the Indian Act imagines Indian status in such a way that diminishes the population of status Indians over time.

³Stewart Clatworthy, “Indian Registration, Membership and Population Change in First Nations Communities” (Winnipeg: Four Directions Project Consultants, 2005), 26, <http://publications.gc.ca/collections/Collection/R2-430-2005E.pdf>.

⁴Canada, Crown-Indigenous Relations and Northern Affairs, “Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship: Report to Parliament June 2019,” June 18, 2019, 20, <http://publications.gc.ca/pub?id=9.891160&sl=0>.

⁵E.B. Borron, “Supplementary Report On the Right of Half Breeds to Participate in the Benefits of the Robinson Treaties,” October 27, 1894, 5, Irving Fonds, F 1027-1-2, MS 1780, Archives of Ontario, <http://bit.ly/211tew2>. Emphasis added.

⁶“Indian Act,” § c. I-5 (1985), <http://laws-lois.justice.gc.ca/eng/acts/i-5/FullText.html> s.4.1; Jack Woodward, *Native Law* [Online Copy] (Toronto: Carswell, 1989), 1750. However, as Woodward clarifies, non-status band members are not entitled to other status-based rights, such as exemption from personal property taxes and education funding.

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