Tribunal File: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants (Moving Party)

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA (representing the Minister of Indigenous and Northern Affairs Canada)

Respondent (Responding Party)

- and -

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

WRITTEN SUBMISSIONS OF THE ASSEMBLY OF FIRST NATIONS REGARDING THE COMPENSATION PROCESS

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Contents

I. OVERVIEW

1. The Respondent, Attorney General of Canada (representing the Minister of Indian and Northern Development Canada), was Ordered[1] to pay compensation in the amount of $40,000 to victims of Canada's discriminatory practices under the First Nations Child and Family Services Program (FNCFS program) and Jordan's Principle. This Panel Ordered Canada to enter into discussions with the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society of Canada (Caring Society) to co-develop a culturally safe process to locate the victims/survivors identified in its decision namely, First Nations children and their parents or grand-parents.[2] The Parties were given a mandate to explore possible options and return to the Panel.

2. This Panel issued an additional ruling[3] where three aspects of eligibility were clarified. The Panel held that; (1) the appropriate age one can be paid compensation is the age majority in the jurisdiction they reside; (2) individuals who were apprehended prior to January 1, 2006 and were in care after this date are entitled to compensation; and (3) qualified individuals who became deceased are entitled to compensation which will be paid to their estates.

3. Discussions between Canada, the AFN and the Caring Society on a compensation scheme commenced on January 7, 2020. The discussions to date have been productive, and the Parties have been able to come to agreement on how to resolve most issues. At this point, there remains disagreement on three important definitions that the parties cannot find common ground. These issues are: "essential service", "service gap" and "unreasonable delay".

4. Additional considerations were raised by the Panel which posed various questions to the Parties and requested that submissions be provided by the Parties in reply. These questions are summarized as follows:

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[1] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 (hereafter Compensation Entitlement Order).
[2] Ibid, at para 269.
[3] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 7.

a) Consideration of whether additional supports are required for beneficiaries in "emerging adulthood", currently 18/19 up to 24 years old.

b) What actions are required if an estate has been closed under Provincial statutes?

c) Should guidelines be developed where a First Nations child was adopted in a non-First Nations family and lost status or if a First Nations child was not registered?

d) If there is a need to petition the Superior Court for the appointment of an administrator of the estate in case of intestacy (absence of a will), should Canada fund or provide assistance to avoid placing burdens on beneficiaries?

e) Should compensation be paid to the estate of Jordan River Anderson and to the estate of his deceased mother, despite their circumstances occurring before the compensation timeframe?

f) Should First Nations children who experienced a gap/delay/denial of essential services prior to December 12, 2007 receive compensation?

g) Follow-Up Questions from COO and NAN's Request to Broaden Orders.

The AFN's response to questions (a) through (d) are included in a joint submission by the AFN, Canada and the First Nations Child and Family Caring Society of Canada (Caring Society).

II. FACTS

5. Beginning in January 2020, the AFN, Caring Society and Canada engaged in discussions on a draft compensation framework. The draft framework is based on the Caring Society's taxonomy described in the Affidavit of Dr. Blackstock filed with the Canadian Human Rights Tribunal on Dec. 8, 2019. The compensation framework also reflects discussions between the parties over the last four months.

6. The parties were cognizant of the Panel's direction that the process for distributing compensation be an independent one. The parties also focused on ensuring that claimants are not revictimized in applying for compensation and that the necessary mental health supports will be available throughout the compensation process.

7. The Parties have also consulted the Interested Parties and the Commission and incorporated suggestions from all three into the latest draft of the proposed framework.

8. Beginning in October 2019, the AFN took the lead in developing a draft notice plan for the Parties' consideration, as the AFN recognized that claimants will require information and a degree of notice that they are entitled to compensation. The overall objective of the Notice Plan is to advise all First Nations children, youth and their families who were harmed through the child welfare system about their option to request compensation pursuant to this Panel's Orders. The intent of the Notice Program is to advise eligible recipients of their ability to request compensation and of their legal right to opt-out of the compensation.

9. Over the last four months, Canada, the Caring Society and the AFN have been revising the Notice Plan and notice products. We have sought the views with the Interested Parties and the Commission and have incorporated some of their recommended revisions.

III. SUBMISSIONS ON OUTSTANDING ISSUES

10. The Panel award compensation to First Nations children and their parents or grandparents (where the primary caregiver) who were adversely affected by the Canada's discriminatory and narrow application to Jordan's Principle. This Panel stated that Canada's systemic racial discrimination in relation to Jordan's Principle:

> resulted in harming First Nations children living on reserve or off-reserve who, as a result of a gap, delay and/or **denial of services** were deprived **of essential services** and placed in care outside of their homes, families and communities in order to receive those services or without being placed in out of home care were denied services and therefore did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35 (for example, mental health and suicide preventions services, special education, dental etc.). Finally, children who received services upon reconsideration ordered by this Tribunal and children who received services with **unreasonable delays** have also suffered during the time of the delays and denials.[4] [emphasis added]

11. As a result, First Nations children who did not receive "essential services," experienced "unreasonable delay" in receiving such services, or experienced a "service gap", as well as a

[4] Compensation Entitlement Order, at para. 250.

denial or services, are entitled to compensation. This Panel also ordered compensation for the parents or caregiving grandparents of these children.[5]

12. The Compensation Entitlement Order does not clearly define the terms "essential services," "unreasonable delay," and "service gap" to be applied to the compensation framework. Clarity on these matters is required to ensure those entitled to compensation are not denied an award due to a misunderstanding or a discretionary interpretation by the Central Claims Administrator. Any definitions of "essential services," "unreasonable delay" and "service gap" should be simple and clear as possible to assist those potential claimants who are seeking compensation.

A. Definition of an "Essential Service" for the purposes of Jordan's Principle

13. First Nations children face unique challenges in accessing services, and Jordan's Principle is an essential mechanism for ensuring their human, constitutional, and treaty rights.

14. Canada is proposing a definition of "essential service" as a product or service that was (i) requested from the federal government; and (ii) is necessary for the safety and security of the child, the interruption of which would adversely impact the child's ability to thrive, the child's health, or the child's personal safety.

15. The AFN submits that Canada's proposal is limited in scope. First, it would only cover those services requested from the federal government. This Panel has ruled that Jordan's Principle is to apply to all jurisdictional disputes.[6] Secondly, the services would have to be necessary and any interruption would adversely impact a child. This definition assumes that a child was able to secure a service and was already receiving treatment, and as a result, the operative element would focus on the interruption of existing servcies. Evidence was provided to this Panel illustrating that not all individuals were able to access services.

[5] Compensation Entitlement Order, at para. 251.
[6] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14 at para 135.

16. The AFN would support a definition of "essential services" that is consistent with the finding of this Panel. In this Panel's May 2017 ruling, this Panel noted that Jordan's Principle is designed to ensure substantive equality to First Nations children.[7]

17. Building on international standards, the AFN recommends that the definition for "essential services" incorporate some recognized international principles. Under international human rights law, defining what an essential medical service or treatment is for a child must follow components of the right to health for children. These components have been drafted and agreed upon by the international community and provide that children are entitled "to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health." This right is articulated in Article 24 of the 1989 *UN Convention on the Rights of the Child*, which is a widely ratified international human rights instrument and consolidates all previous treaties on the rights of children.[8]

18. Further, international human rights law provides that the right to health for children has long been understood to be an "inclusive" right, which extends beyond protection from immediately identifiable infringements, such as limitations on access to health care or services, and includes the wide range of rights and freedoms that are determinate to children's health, such the rights to non-discrimination, access to health-related education and information, and freedom from harmful traditional practices.[9]

19. Moreover, it is defined in international human rights law that the right to health, outlined in *Article 12 of the International Covenant on Economic, Social and Cultural Rights in General Comment 14 of the Committee on Economic, Social and Cultural Rights*, includes the following core components:

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[7] *Supra,* note 6 at paras 69-75.

[8] https://www.ohchr.org/en/professionalinterest/pages/crc.aspx also Fifth Edition of the Health and Human Rights Resource Guide (2013) online: https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2410/2014/03/HHRRG-master.pdf

[9] UN Office of the High Commissioner of Human Rights (OHCHR) and World Health Organization WHO), The Right to Health, Fact Sheet No. 31. www.ohchr.org/Documents/Publications/Factsheet31.pdf

a) Availability: Refers to the need for a sufficient quantity of functioning public health and health care facilities, goods and services, as well as programmes for all.

b) Accessibility: Requires that health facilities, goods, and services must be accessible to everyone. Accessibility has four overlapping dimensions:

- non-discrimination
- physical accessibility
- economical accessibility (affordability)
- information accessibility.

c) Acceptability: Relates to respect for medical ethics, culturally appropriate, and sensitivity to gender. Acceptability requires that health facilities, goods, services and programmes are people-centred and cater to the specific needs of diverse population groups and in accordance with international standards of medical ethics for confidentiality and informed consent.

d) Quality: Facilities, goods, and services must be scientifically and medically approved. Quality is a key component of Universal Health Coverage, and includes the experience as well as the perception of health care.[10] Quality health services should be:

- Safe – avoiding injuries to people for whom the care is intended;
- Effective – providing evidence-based healthcare services to those who need them;
- People-centred – providing care that responds to individual preferences, needs and values;
- Timely – reducing waiting times and sometimes harmful delays.
- Equitable – providing care that does not vary in quality on account of gender, ethnicity, geographic location, and socio-economic status;
- Integrated – providing care that makes available the full range of health services throughout the life course;
- Efficient – maximizing the benefit of available resources and avoiding waste.

20. Lastly, the World Health Organization has provided its definition of quality of care as "the extent to which health care services provided to individuals and patient populations improve desired health outcomes. In order to achieve this, health care must be safe, effective, timely,

[10] http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1AVC1NkPsgUedPlF1vfPMJ2c7ey6PAz2qaojTzDJmC0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL

efficient, equitable and people-centred." This is critical in how essential services within states are to operate and the degree of care needed for not only children, but all individuals in the state. [11]

B. Definition of a "Service Gap" for the purposes of Jordan's Principle

21. Canada proposes a definition of "service gap" where (a) a child "requested" a service; (b) the service was not provided due to a dispute between jurisdictions or departments as to who should pay; (c) the service would normally be publicly funded for any child in Canada; and (d) was recommended by a professional with expertise directly related to the service.

22. The AFN requests that this Panel reject the requirement that claimants must have made a request to Canada to receive a product or service. Canada's historical approach to Jordan's Principle and requests for products or services not normally funded under the First Nations Inuit Health Benefits Program would have dissuaded individuals from making a formal request. Put simply, if one knew their request would be declined or not even considered, why would one apply for the service at all. This Panel had noted that Canada's narrow definition of Jordan's Principle resulted in not a single application being approved.[12]

23. Secondly, Canada's proposed definition could be viewed as regressive, particularly in situations where one level of government was required to provide a specific service or product for all other children. The present definition of Jordan's Principle now enables Canada to fund goods and services not normally provided to other Canadians, based on the principle of substantive equality. Finally, the requirement that the service be recommended by a professional with expertise directly related to the services is too narrow. A medical or other certified professional should be able to direct a treatment and their assessment should not be subject to the verification or agreement of a specialist in a particular field.

24. One must be cognizant to the fact that parents were desperately seeking services for their sick, disabled, or special needs child after the House of Commons adopted Motion 296. In some

[11] https://www.who.int/maternal_child_adolescent/topics/quality-of-care/definition/en/

[12] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2016 CHRT 2 at paras 381

cases the First Nations government assisted, in other situations family members contributed or pooled funds. Unfortunately, there are examples where these vulnerable children not receive the service they required.

25. With respect to "service gaps", this Panel addressed "gaps" in its May 2017 ruling:

> the *Decision* found Canada's similarly narrow definition and approach to Jordan's Principle to have contributed to service gaps, delays and denials for First Nations children on reserve. Specifically, the evidence before the Panel in determining the *Decision* indicated Health Canada and INAC's approach to Jordan's Principle focused mainly on "inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers" (see *Decision* at paras. 350-382). Indeed, the Panel specifically highlighted gaps in services to children beyond those with multiples disabilities. For example, an INAC document referenced in the *Decision,* entitled *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region*, indicates that these gaps non-exhaustively include mental health services, medical equipment, travel for medical appointments, food replacement, addictions services, dental services and medications (see *Decision* at paras. 368-373). [13]

26. The AFN submits the definition for "service gaps" should focus on an unmet medical and other need(s) of a First Nations child. This would cover a product or service a medical or other professional who is licensed or who has the necessary expertise has recommended, based on the best interests of the child. It should also give consideration to overcoming historic disadvantages and address substantive equality.

C. Definition of an "Unreasonable Delay" for the purposes of Jordan's Principle

27. The AFN recognizes the fears and helplessness parents and children encounter when waiting for a service or product to be provided, especially in cases of medical treatments or services that can improve the quality of life of an individual. It is all too tragic where a delay in accessing services results in permanent disability, long-term adverse health impacts, or even death.

[13] 2017 CHRT 14, at para 47

28. The AFN agrees with the Commission's suggestion that the definition of "unreasonable delay" should incorporate the Jordan's Principle service standards that were agreed to by all Parties.[14] Urgent individual cases should generally be determined within 12 hours, and non-urgent individual cases within 48 hours. These timeframes should set the basis on which a common understanding should be built.

29. Nevertheless, the AFN recognizes that not all delays past 12 hours in urgent cases or 48 hours in non-urgent cases will be unreasonable in every circumstance. However, claimants should not have to bear the onus of proving that a delay was unreasonable. That burden should rest solely on Canada. In these circumstances, Canada should be required to rebut the presumption of unreasonable delay by providing the Central Administrator with the particulars related to an individual's compensation application. The process for this rebuttal can be further explored in the ongoing discussions between Canada, the AFN and the Caring Society.

D. Should compensation be paid to the estate of Jordan River Anderson and to the estate of his deceased mother?

30. Canada knew jurisdictional disputes existed prior to December 12, 2007 and that First Nations children and adults were experiencing gaps, delays and denials of services and medical supplies. The adverse impacts of jurisdictional disputes were explored in the Wen:de Reports.[15] The experiences of Jordan River Anderson and his family were also important elements in the Tribunal's determination of the merits of this case.

31. The AFN agrees that Canada should be encouraged to pay compensation to the estates of Jordan River Anderson and his deceased mother. It would serve as an important expression of reconciliation and as a tribute to the contributions made by these individuals in the establishment of Jordan's Principle, their legacy which will positively impact First Nations children for generations to come.

[14] Written Submissions of the Canadian Human Rights Tribunal at para 11.
[15] Supra note 12, at para 183.

32. However, for the reasons stated below, the AFN does not believe an Order compelling compensation to the estates is required at this time.

E. Should First Nations children who experienced a gap/delay/denial of essential services prior to December 12, 2007 receive compensation?

33. This Panel has requested that the Parties to the matter provide submissions on the temporal scope for the compensation order under Jordan's Principle, particularly with respect to whether First Nations children living on reserve or off-reserve who, as a result of Canada's racial discrimination found in this case, experienced a gap, delay and/or denial of services, were deprived of essential services and were removed and placed in out-of-home care in order to access services prior to December 12, 2007 or on December 12, 2007 and their parents or caregiving grandparents living on reserve or off-reserve should receive compensation. The panel has also requested whether those First Nations children who were not removed but experienced the aforementioned discrimination on or before said dates, and their parents or caregiving grandparents living on or off-reserve, should be compensated as well.

34. The AFN submits that expanding the existing class of beneficiaries as described in the Compensation Entitlement Order to those children who experienced the discriminatory conduct referred to by this Panel prior to December 12, 2007, (the "Expanded Class") could have serious and unintended consequences which could jeopardize the entire Compensation Order. While the AFN firmly supports that Canada provide compensation for the Expanded Class, it is of the view that this compensation is best left to other processes and not the proceeding before this Panel.

35. With respect the existing class of beneficiaries, the Parties' tailored their initial submissions on the topic of compensation to those who were subjected to Canada's discriminatory practices in its delivery of services pursuant to Jordan's Principle as of December 12, 2007, as it was the date that Motion 296 was passed in the House of Commons, and Jordan's Principle was formally and irrefutably to be given effect by Canada in its delivery of First Nations child and family services. While some evidence was tendered to the Tribunal on discriminatory practices before this date, most notably with respect to Jordan River Anderson and his experience with

discriminatory practices in Canada's delivery of child and family services which birthed Jordan's Principle, the evidentiary record was strongly geared towards the discrimination faced by First Nations children following Canada's adoption of Jordan's Principle.

36. The Panel accepted this date as defining the temporal scope of the proceedings before it, which ultimately culminated in the Compensation Order, providing compensation for the class of beneficiaries as described therein who were subjected to Canada's discriminatory practices after Jordan's Principle took effect. This Panel accepted the date of the implementation of Jordan's Principle as the definitive point in time in which Canada owed certain duties in the delivery of child and family services to First Nations children arising from Jordan's Principle, the breach of which was the basis for the Panel's ultimate finding of discriminatory conduct by Canada.

37. To now attempt to expand compensation under the Compensation Order to the Expanded Class without a comparable evidentiary basis and associated processes to assess and challenge evidence, the Tribunal could potentially expose the Compensation Order to judicial review by Canada on the basis that it has been deprived of procedural fairness. As noted by the Supreme Court of Canada in the seminal case on procedural fairness in administrative decisions, *Baker v. Canada (Minister of Citizenship and Immigration),* the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected. Underlying all the factors that should be used to determine what procedural rights the duty of fairness requires in a given set of circumstances is the notion that:

> the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence **fully** and have them considered by the decision maker.[16] [emphasis added]

38. The AFN again reiterates that it firmly supports compensation for those subjected to Canada's discriminatory practices in its provision of child and family services to First Nations children prior to December 12, 2007, but that in the interest of preserving compensation for the

[16] *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at para. 22.

current class of beneficiaries as described in the Compensation Order, it is best left to other processes, such as the AFN's proposed Class-Action seeking compensation for the victims of Canada's discriminatory conduct in the provision of child welfare services which are not necessarily included in the proceeding currently before the Panel. A carriage motion is currently scheduled to be heard on the AFN's Proposed-Class action in September of 2020.

39. Should this Panel decide to exercise its jurisdiction and expand compensation to the Expanded Class, the AFN submits that the Panel set a schedule for the Parties to exchange evidence on compensation for the Expanded Class, cross-examination affiants, exchange factums on this issue and set hearing dates. This will undoubtedly delay the payment of compensation, however, it will address any procedural fairness issues.

40. This will undoubtedly delay the payment of compensation. However, it will address any procedural fairness issues. The compensation process would thereafter be finalized after a determination by the Panel on this issue.

F. Follow-Up Questions From COO and NAN's Request to Broaden Orders

41. On April 22, 2020, the Panel asked certain follow-up questions stemming from the requests from two interested parties to this matter, COO and NAN, to award compensation to caregivers in the child's extended family; as well as concerns expressed by COO about the circumstances in which caregivers eligible for compensation would become disentitled due to abuse.

42. The AFN did make submissions during the hearing of this matter related to compensating siblings of those apprehended children to be granted compensation. This proposition was not accepted by the Panel at that time.

43. In this regard, the AFN makes no submissions in respect of the Tribunal's follow-up questions to COO and NAN.

IV. RELIEF REQUESTED

44. The AFN seeks a ruling on the three outstanding issues and requests that the parties be directed to continue discussions on the draft compensation framework and notice plan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 30, 2020

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Annex A – AFN's Markup of Canada's definitions

"Essential service" is a support, product or service that was:

- ~~requested from the federal government;~~
- necessary to ensure substantive equality in the provision of services, products and/or supports to the child ~~for the safety and security of the child, the interruption of which would adversely impact the child's ability to thrive, the child's health, or the child's personal safety~~.
- required delivered timely and avoids harmful delays.
- recommended by a professional that caters to the specific needs of a child.

In considering what is essential for each child, ~~the~~ principles of substantive equality (taking into account historical disadvantage, geographic circumstances, and the need for culturally appropriate services, products and/or supports), the right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health, and the best interests of the child will be considered to ensure that the focus is on the individual child.

"Service gap" is a situation where a child required ~~requested~~ a service that

- was not provided ~~because of a dispute between jurisdictions or departments as to who should pay~~;
- was not readily accessible to the child;
- ~~would normally have been publicly funded for any child in Canada;~~
- was recommended by a professional ~~with expertise directly related to the service;~~

but the child's needs were not provided ~~did not receive the service~~ due to the federal government's narrow definition and approach of Jordan's Principle.

For greater certainty, the narrow definitions and approach employed by the federal government demanded satisfaction of each of the following criteria during the following time periods:

a) Between December 12, 2007 and July 4, 2016
   - A child registered as an Indian per the *Indian Act* or eligible to be registered and resident on reserve;
   - Child with multiple disabilities requiring multiple service providers;

- Limited to health and social services;
- A jurisdictional dispute existed involving different levels of government (disputes between federal government departments and agencies were excluded);
- The case must be confirmed to be a Jordan's Principle case by both the federal and provincial Deputy Ministers); and
- The service had to be consistent with normative standards

b) Between July 5, 2016 and November 2, 2017
   - A child registered as an Indian per the *Indian Act* or eligible to be registered and resident on reserve (July 5, 2016 to September 14, 2016);
   - The child had a disability or critical short- term illness (July 5, 2016 to May 26, 2017);
   - The service was limited to health and social services (July 5, 2016 to May 26, 2017).

"Unreasonable delay" ~~is informed by:~~ will be recognized where a request was not decided within 12 hours for an urgent case, or 48 hours for other cases. Canada may rebut the presumption of unreasonable delay in any given case with reference to the following list of contextual factors, none of which is exclusively determinative

- the nature of the product, support or service sought;
- the reason for the delay;
- the potential of delay to adversely impact the child's needs;
- the delay did not cause further harm or discomfort to the child;
- whether the child's need was fully accommodated by an alternative service, treatment, product, device, or support of equal or greater quality, duration and quantity to that recommended by a professional;
- the normative ~~ranges~~ standards for providing the ~~category or mode of~~ support, treatment, device or services across Canada by provinces and territories.

For greater certainty, where a child was in palliative care with a terminal illness, and a professional with relevant expertise recommended a service that was not provided through Jordan's Principle or another federal program, delay resulting from administrative procedures or jurisdictional dispute will be considered unreasonable.