Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL and
NISHNAWBE ASKI NATION

Interested Parties

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA SUPPLEMENTARY WRITTEN SUBMISSION RE: COMPENSATION PROCESS

April 30, 2020

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I. Overview

1. As outlined in counsel for Canada's covering letter, the First Nations Child and Family Caring Society of Canada (the "Caring Society"), the Assembly of First Nations ("AFN") and Canada have made considerable progress in finalizing the Compensation Process Framework. Subject to a few points on which the Tribunal's direction is required, the parties have nearly reached a complete agreement.

2. The remaining points on which the Caring Society, the AFN and Canada require the Tribunal's direction are the definitions of the terms "service gap", "unreasonable delay", and "essential service" for the purposes of eligibility for Jordan's Principle compensation. These are important threshold terms in deciding the types of situations that qualify as a "worst case scenario" for the purposes of receiving compensation as set out in the Tribunal's September 6, 2019 order (2019 CHRT 39).

3. As the definitions provided by the Caring Society and Canada demonstrate, there are certain core elements on which there is agreement. However, Canada's definitions impose crucial and troubling limitations on the range of victims who would receive compensation for the pain and suffering caused by Canada's wilful and reckless discrimination.

4. Schedule "A" to this submission provides the Caring Society's markup of Canada's proposed definitions of "Essential Service", "Service Gap" and "Unreasonable Delay". Annex "B" is a "clean" version of the definition the Caring Society proposes the Tribunal adopt. Both documents will be provided in Microsoft Word format along with this submission, for the Tribunal's convenience. The "clean" version of the Caring Society's proposed definition also includes a schedule detailing various categories of potential essential services, to guide the Central Administrator.

II. The definition of a "Service Gap" for the purposes of Jordan's Principle compensation

5. The Caring Society strongly disagrees with three of the requirements that Canada would impose on the definition of a "service gap". Canada says that: (a) there must have been a "request" for a service; (b) there must have been a dispute between jurisdictions or departments

as to who should pay; and (c) the service must have been normally publicly funded for any child in Canada.

6. These three requirements impose restrictions arising from aspects of Canada's approach to Jordan's Principle that the Tribunal has already ruled to be discriminatory. The Caring Society's position is that a "service gap" should be defined with reference to a child's confirmed needs at the time and in keeping with the principles of a child's best interests, substantive equality, and consideration of distinct circumstances. The Caring Society's proposition is that needs that were not met due to the discriminatory definition and implementation of Jordan's Principle ought not to be equated to a frivolous request that was never made.

A. Canada's discrimination foreclosed "requests" for services and products pursuant to Jordan's Principle and ought not shield it from paying compensation

7. As demonstrated by Canada's witnesses and the documents it filed before the Tribunal, Canada's discrimination shaped both its definition of Jordan's Principle and the approach to implementing it. In particular, Canada did not publicize Jordan's Principle, did not have an application process for Jordan's Principle, did not have a systematic process for documenting requests, and the few cases that managed to surface as "requests" never met Canada's requirements to be termed a Jordan's Principle case.

8. Canada is relying on its "old mindset" to support its contention that compensation should only be awarded where an individual applied for a service or a product. As the record indicates, Canada's approach to Jordan's Principle until July 2016 ensured that First Nations children did not have a path to come forward with a service or product request when they had a need. Indeed, during the hearing on the merits, Canada's witness, Ms. Corinne Baggley (Senior Policy Manager at Aboriginal Affairs and Northern Development responsible for Jordan's Principle between 2007-2014)[1] provided important insight into how Canada's "old mindset" contributed to so few requests coming forward.

[1] Examination-in-Chief of Corinne Baggley, April 30, 2014 (Transcript Vol 57) at p 4 line 22 to p 5 line 3.

9. Canada's approach was constructed in such a manner that the public knew little to nothing about Jordan's Principle. During her testimony, Ms. Baggley spoke directly to Canada's decision to not "publicize" Jordan's Principle:

> […] that wasn't within our mandate when we implemented Jordan's Principle to publicize the approach. We had a communications strategy in place that was more reactive, so we weren't really permitted to publicize, you know, the – where to bring Jordan's Principle cases to.[2]

10. Indeed, Ms. Baggley also confirmed that federally appointed focal points, on whom Canada relied to manage Jordan's Principle cases,[3] were not identified to the public.[4] In fact, when the AFN requested a list of focal points in 2009, it was only furnished three years later.[5] This highlights a deep flaw in Canada's reliance on "requests" to identify compensable Jordan's Principle cases. It is entirely unclear why Canada would require a "request" to identify a compensable Jordan's Principle case when it specifically failed to establish any public mechanism for such requests to come forward.

11. There was also no mechanism for requestors to apply for products or services under Jordan's Principle. Indeed, Ms. Baggley's evidence directly confirmed this point:

> **Ms. Arsenault**: Is it or was it possible to apply for Jordan's Principle funding?
>
> **Ms. Baggley:** No. It is -- as I explained earlier, it's not a program, so like the other programs we have across the federal family, there are no Terms and Conditions, there are no eligible beneficiaries, eligible recipients, eligible expenditures identified, it is very much a policy initiative and it is very much a process that is used to resolve cases."[6]

12. Furthermore, even if a request did come forward, focal points had no special training on how to handle Jordan's Principle cases, other than general periodic procedural discussions.[7]

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[2] Cross-examination of Corinne Baggley by Mr. Poulin, May 1, 2014 (Transcript Vol 58) at p 32 lines 8-14.
[3] Examination-in-Chief of Corinne Baggley, April 30, 2014 (Transcript Vol 57) at p 81 line 6 to p 82 line 3.
[4] Cross-examination of Corinne Baggley by Mr. Poulin, May 1, 2014 (Transcript Vol 58) at p 32 lines 6-10.
[5] Cross-examination of Corinne Baggley by Mr. Wuttke, May 1, 2014 (Transcript Vol 58) at p 111 line 8 to p 113 line 8.
[6] Examination-in-Chief of Corinne Baggley, April 30, 2014 (Transcript Vol 57) at p 128 lines 13-23.
[7] Cross-examination of Corinne Baggley by Mr. Poulin, May 1, 2014 (Transcript Vol 58) at p 34 line 19 to p 35 line 16.

13. However, Ms. Baggley's testimony also illuminated significant shortcomings in Canada's process for receiving and document those Jordan's Principle requests that did come forward despite the obstacles imposed by Canada.

14. According to Ms. Baggley, First Nations were not involved in the formulation of Canada's definition of Jordan's Principle:

> **Mr. Poulin:** But there is no First Nation -- my understanding is there is no First Nation agreement on the definition that is used by the federal government.
>
> **Ms. Baggley:** Well, it's a federal definition, as I have explained, and we didn't go out seeking agreement with our definition, and we certainly do acknowledge in any documents that we develop through the agreements for example, if there are other definitions that the parties are working with, we do acknowledge and reference those.[8]

It is important to acknowledge that Canada's definition shaped its approach to Jordan's Principle, including its system for receiving and documenting requests.

15. The focal point tracking tools that Canada filed before the Tribunal during the hearing on the merits demonstrate both that documentation of Jordan's Principle cases was limited by Canada's discriminatory definition and approach, and that there was no national systematic approach to documenting service and product requests.[9]

16. Even after the Tribunal's January 2016 Ruling, Canada's record-keeping regarding service and product requests was deficient as evidenced by the fact that it did not create a Jordan's Principle intake form until 2016, which was in any event based on a federal approach to Jordan's Principle that the Tribunal found discriminatory in its May 2017 Ruling.[10] Furthermore, Dr. Gideon testified during her October 2018 cross-examination that it was "highly unlikely" that ISC's records reflect the extent of unmet need existing prior to 2016.[11]

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[8] Cross-examination of Corinne Baggley by Mr. Poulin, May 1, 2014 (Transcript Vol 58) at p 11 lines 13-24.
[9] See Chart titled "Jordan's Principle Chart Documenting Cases", June 8, 2009, found in Volume 15 of the Commission's Book of Documents from the hearing on the merits, at Tab 422; See also Respondent's Book of Documents at Tabs 53, 54 and 55.
[10] Cross-examination of Robin Buckland by Mr. Taylor, February 6, 2017 at p 87 lines 2-16.
[11] Cross-examination of Valerie Gideon by Mr. Taylor, October 31, 2018 at p 149 lines 3-23.

17. Canada's documentation of service requests was clearly governed by its discriminatory definition and approach to Jordan's Principle. It applied a discriminatory definition, employed Jordan's Principle focal points who received no special training, did not publicize how to contact focal points to make a request, and even took three years to furnish the AFN with a list of who those focal points were. The documentation that Canada did produce is sparse, is often region-specific, and restricted to children with disabilities. Taken together, the record before the Tribunal shows that Canada crafted a system that blocked service and product requests from coming forward, and now seeks to benefit from that system to reduce the scope of victims entitled to compensation for their pain and suffering resulting from this wilful and reckless discrimination.

18. The result of Canada's proposed approach would limit compensation to those who received direct denials prior to 2016 as, even when cases came to Canada's attention, they employed an approach that failed to yield a single Jordan's Principle cases prior to the Tribunal's 2016 decision. As the Tribunal noted in its May 2017 Ruling, "it was Health Canada's and INAC's narrow interpretation of Jordan's Principle that resulted in there being no cases meeting the criteria for Jordan's Principle".[12]

19. Even after the Tribunal's January 2016 Ruling, Canada failed to apply a non-discriminatory definition and approach to Jordan's Principle and failed to properly advise the public of their right to services and products pursuant to Jordan's Principle. For example, as of April 6, 2016, Canada's public position regarding its response to the Tribunal's ruling regarding Jordan's Principle was to state on its website that "the federal response [to Jordan's Principle] is under review in light of the Tribunal decision."[13] As the Tribunal found, from July 2016 onward Canada "tailored its documentation, communications and resources to follow its broadened, but still overly narrow, definition and application of Jordan's Principle."[14] The Tribunal held that this was "especially problematic given the fact that Canada has admittedly encountered

[12] *FNCFCSC et al v AGC*, 2017 CHRT 14 at para 77, citing *FNCFCSC et al v AGC*, 2016 CHRT 2 at paras 379-382.
[13] Canada's April 6, 2016 Further Submissions on Remedy at para 13.
[14] *FNCFCSC et al v AGC*, 2017 CHRT 14 at para 75.

challenges in identifying children who meet the requirements of Jordan's Principle and in getting parents to come forward to identify children who have unmet needs".[15]

20. In the same way that the Caring Society argued in its February 21, 2020 submissions that Canada ought not profit by denying beneficiaries compensation because they died waiting for Canada to end its discrimination, the Caring Society contends that Canada ought not profit by restricting compensation to persons who "requested" compensation when it was Canada's discrimination that directly suppressed such requests from coming forward in the first place.

21. As such, the Caring Society's position is that a "request" is not required for a "service gap" to exist. Rather, the analysis should focus on the child's need(s) that arose during the period of Canada's discrimination. Such needs should be assessed based on the child's best interests, substantive equality and consideration of distinct circumstances – all guiding principles that the Tribunal has already made clear must apply in this case.

22. Indeed, the approach to Jordan's Principle ordered by the Tribunal's focuses on the ability of First Nations children to access services and products that were required, and not those that were requested. This is logical as, until 2017, processes did not exist for requests to come forward. As noted above, the Tribunal found in May 2017 that "Canada's previous definition of Jordan's Principle led to families <u>not coming forward</u> with potential cases and urgent cases <u>not being considered</u> as Jordan's Principle cases. Canada admittedly had difficulties identifying applicable children [emphasis added]."[16] In such circumstances, where the Tribunal has already reached an unchallenged conclusion that Canada's approach was so discriminatory that families did not know they could come forward, it defies logic to require a request to have been made in order to identify a service gap.

23. The Caring Society's position is supported by contrasting "service gaps" to "denials" and "unreasonable delays".

24. Unlike service gaps, denials and delays presume that requests have been made. Denials and delays have as their point of reference the request that was made for a service or product. In

[15] *FNCFCSC et al v AGC*, 2017 CHRT 14 at para 75.
[16] *FNCFCSC et al v AGC*, 2017 CHRT 14 at para 112.

the case of a denial, a specific "ask" was refused. For delays, the "clock" on unreasonable delay begins running when the request was made. Requiring a "request" in order to identify a service gap would be entirely redundant, as all "requests" result in approvals, denials, or delays and would be covered by those terms, such that there would be no "definitional work" left for a service gap.

25. Indeed, a gap is entirely different than a denial or a delay, as it references unmet needs that are not addressed by existing services. The Panel addressed "service gaps" most directly at paragraphs 381-382 of its January 2016 Ruling:

> In the Panel's view, it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need.
>
> More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made.[17]

26. Finally, as a practical matter, the Caring Society's proposal will be more workable for beneficiaries and the Central Administrator. The Caring Society's definition of "service gap" refers to an unmet need that was confirmed at the time by a professional with expertise directly related to the service need. Canada has already adopted processes such as personal attestations to support retroactive requests where professional records may no longer be available.[18] This flexibility in documentation is needed as Canada did not keep proper records of requests for services and/or products prior to and after the January 2016 Ruling. This practice also demonstrates that a balance can be struck between the need to validate claims and the reality that the nature of Canada's discrimination itself precluded the maintenance of proper records.

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[17] *FNCFCSC et al v AGC*, 2016 CHRT 2 at paras 381-382.
[18] Affidavit of Cindy Blackstock, affirmed April 30, 2020 at para 6 and at Exhibits "A" and "B".

B. Jurisdictional disputes are not required to identify service gaps

27. Even where a service request had been made, Canada would also require that the service "was not provided because of a dispute between jurisdictions or departments as to who should pay".[19] Adding such a requirement flies in the face of the Tribunal's May 2017 Ruling, which held that "[w]hile Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle."[20]

28. It is evident even in Canada's own briefing materials produced following the Tribunal's January 2016 Ruling that a dispute between governments should not be required in order for a service gap facing a First Nations child to constitute a "worst case scenario" of discrimination.

29. On February 11, 2016, a mere sixteen days after the January 2016 Ruling, Canada produced a document titled *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions*. In this document, which the Tribunal found "relevant and reliable",[21] Canada acknowledged that "[t]he focus on a dispute does not account for potential gaps in services where no jurisdiction is providing the required services [emphasis added]."[22] The Tribunal agreed.[23]

30. It is entirely unclear why Canada is attempting to reintroduce this definitional requirement more than four years after recognizing that disputes between or within governments do not account for service gaps. In essence, Canada is trying to get a "new decision" on previously adjudicated points that Canada lost and chose not to judicially review. This cannot be permitted.

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[19] Canada's April 28, 2020 definition of "service gap".
[20] *FNCFCSC et al v AGC*, 2017 CHRT 14 at para 135(1)(B)(v), see also *FNCFCSC et al v AGC*, 2017 CHRT 35 at para 10.
[21] *FNCFCSC et al v AGC*, 2017 CHRT 14 at para 51.
[22] *FNCFCSC et al v AGC*, 2017 CHRT 14 at para 50, citing "Option One".
[23] *FNCFCSC et al v AGC*, 2017 CHRT 14 at para 71.

C. Service gaps need not relate to services normally publicly funded for all Canadians

31. Finally, even if it can be shown that a First Nations child made a request for a service, and that the service was not provided due to a jurisdictional dispute, Canada would still require that the service in question be publicly funded for all Canadians. This is a throwback to Canada's discriminatory approach to Jordan's Principle and fails to account for the Tribunal's finding that:

> the emphasis on the "normative standard of care" or "comparable" services […] does not answer the findings in the *Decision* with respect to substantive equality and the need for culturally appropriate services […]. The normative standard of care should be used to establish the minimal level of service only.[24]

Once again, Canada's proposed definition ignores the Tribunal's prior rulings and the importance of substantive equality as the animating principle of the *Canadian Human Rights Act*.

32. It also fails to recognize that, as Mactavish J. (as she then was) held in re-instituting this complaint, "identical treatment may in some cases result in "serious inequality" […]. It is therefore sometimes necessary to treat people differently in order to achieve substantive equality".[25] Indeed, "[s]uch a "similarly situated approach to equality is one that harkens back to invidious 'separate but equal' regimes, and has long been rejected in Canadian law".[26] Program scoping decisions made with reference to the Canadian populace at large cannot be the metric of the needs of First Nations children.

33. The Caring Society relies on the submissions made regarding substantive equality with respect to the definition of "essential service" below. Additionally, the Caring Society recalls the Tribunal's important finding that "First Nations children may need additional services that other Canadians do not, as the Panel explained in the [January 2016 Ruling] at paragraphs 421-422".[27]

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[24] *FNCFCSC et al v AGC*, 2017 CHRT 14 at para 69.
[25] *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at para 293.
[26] *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at para 295.
[27] *FNCFCSC et al v AGC*, 2017 CHRT 14 at para 72.

III. The definition of a "Unreasonable Delay" for the purposes of Jordan's Principle compensation

34. A claimant who can show that a request was not evaluated and determined by Canada within 12 hours (urgent cases) or 48 hours (all other cases) should benefit from a rebuttable presumption of unreasonable delay. This rebuttable presumption rests on the Tribunal's conclusion in its January 2016 Ruling that delays were built into Canada's response to Jordan's Principle, as well as its conclusion that Canada failed to develop a defined process for dealing with Jordan's Principle cases until 2017. As such, Canada should bear the onus of demonstrating that delay was reasonable where the 12- and 48-hour timelines for evaluating and determining service requests were exceeded.

35. In its September 2019 Ruling regarding compensation, the Tribunal recalled a case that embodies the tragic human consequences of Canada's unreasonable delay in providing services and products to children in need:

> In another case, a child with Batten Disease, a fatal inherited disorder of the nervous system, had to wait sixteen months to obtain a hospital bed that could incline 30 degrees in order to alleviate the respiratory distress that resulted from her condition.[28]

36. Indeed, the Tribunal found as a fact in its January 2016 Ruling that delays were built into Canada's response to Jordan's Principle:

> The 2009 and 2013 Memorandums of Understanding have delays inherently built into them by including a review of policy and programs, case conferencing and approvals from the Assistant Deputy Minister, before interim funding is even provided. It should be noted that the case conferencing approach was what was used in Jordan's case, sadly, without success.[29]

37. This conclusion was restated in the Tribunal's summary of its findings and orders made with respect to Jordan's Principle in its May 2017 Ruling:

> In the *Decision*, this Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for

[28] *FNCFCSC et al v AGC*, 2019 CHRT 39 at para 224.
[29] *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 379.

> First Nations children. Delays were inherently built into the process for dealing with potential Jordan's Principle cases."[30]

38. The Tribunal found that these problems were not cured by the January 2016 Ruling, as Canada's implementation of Jordan's Principle operated without timelines until sometime in February 2017:

> While Canada has provided detailed timelines for how it is addressing Jordan's Principle requests, the evidence shows these processes were newly created shortly after Ms. Buckland's cross-examination. There is no indication that these timelines existed prior to February 2017. Rather, the evidence suggests a built-in delay was part of the process, as there was no clarity around what the process actually way.[31]

39. Given that Canada's system for considering Jordan's Principle cases was rife with built-in delays, claimants should not bear the onus of proving that their delay was unreasonable if it exceeded the 12- or 48-hour standards for evaluating and determining requests.

40. However, the Caring Society recognizes that not all delays in excess of 12-hours in urgent cases or 48-hours in non-urgent cases will be unreasonable. As such, the Caring Society suggests that the factors outlined in its proposed definition afford Canada with a fair opportunity to rebut the presumption of unreasonable delay by providing the Central Administrator with particular details related to the child's case. Much like the other processes laid out in the Compensation Process Framework, this mechanism's operation will be spelled out in further discussions between the Canada, the AFN and the Caring Society.

IV. The definition of an "Essential Service" for the purposes of Jordan's Principle compensation

41. Canada has proposed a definition for "essential service" that is too narrow to capture the "worst case scenarios" of discrimination found by the Tribunal. Canada's definition unduly requires that an individual somehow was able to make a service request from the federal

[30] *FNCFCSC et al v AGC*, 2017 CHRT 15 at para 5.
[31] *FNCFCSC et al v AGC*, 2017 CHRT 14 at para 92.

government despite the fact that Canada was using a discriminatory approach to Jordan's Principle that effectively foreclosed such requests.

42. Canada also proposes to narrow "essential services" to consider only the safety and security of children, or their "ability to thrive". The Caring Society views safety and security as part of a child's best interests, but not limited thereto.

43. The Caring Society understands that Canada takes the position that the existence of a "request" having been made of the federal government is an important limitation that it would like to impose on compensation under the Tribunal's order. However, for the reasons outlined above in the Caring Society's submissions regarding "service gaps", this would not be appropriate due to Canada's discriminatory approach to Jordan's Principle having foreclosed those with need from coming forward.

44. In any event, the notion of a "request" is inherent in situations where an essential service was "denied" (as denials can only follow requests) or "unreasonably delayed" (as, once again, delays can only be calculated with respect to the time of the request). Accordingly, any requirement for a "request" should be dealt within relation to the definition of a "service gap", such that the matter of a request need not be dealt with when defining the words "essential service". Services are essential, whether requested or not.

45. As noted above, Canada's definition of "essential service" also limits the eligible range of services, supports or products to those "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."[32] However, this definition appears to roll back Jordan's Principle to Canada's definition in place from July 5, 2016 to May 26, 2017, which focused on disabilities and critical needs for health and social supports. The Tribunal ruled that that definition was discriminatory in the May 2017 Ruling, confirmed with amendments approved by the Tribunal following the consent of the parties in 2017 CHRT 35. Canada discontinued its judicial review of the May 2017 Ruling on November 30, 2017.

[32] Canada's April 28, 2020 definition of "Essential service".

46. Jordan's Principle is designed to ensure substantive equality to First Nations children.[33] In keeping with the purpose of the *Canadian Human Rights Act*, Jordan's Principle is a particular tool to provide First Nations children "an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices".[34]

47. The Tribunal provided a very clear metric of the importance of substantive equality to this analysis in its January 2016 Ruling. Speaking in the context of the FNCFS Program, the Tribunal said that Canada "is obliged to ensure that its involvement […] does not perpetuate the historical disadvantage endured by Aboriginal peoples. If AANDC's conduct widens the gap between First Nations and the rest of Canadian society rather than narrowing it, then it is discriminatory".[35] This is the harm that the Tribunal has sought to eradicate through its remedial orders. It is also the harm that should be compensated. As the Tribunal held in its September 2019 Ruling:

> […] the Tribunal's orders are aimed at improving the lives of First Nations children and that the First Nations children and Families are the ones who suffer from the discrimination. The Tribunal made findings of systemic racial discrimination and agrees this case is a case of systemic racial discrimination. The Panel also made numerous findings of adverse impacts toward First Nations children and families, adverse impacts that cause serious harm and suffering to the children the two are interconnected. While a finding of discrimination and of adverse impacts may not always lead to findings of pain and suffering, in these proceedings it is clearly the case. A review of the 2016 CHRT 2 and subsequent rulings demonstrates this. There is no reason not to accept that both coexist in this case. The individual rights that were infringed upon by systemic racial discrimination warrant remedies alongside systemic reform already ordered by the Tribunal [references omitted].[36]

48. As such, the metric of an "essential service" should be whether the service in question was necessary to ensure substantive equality in the provision of services, products and/or supports to the First Nations child. Effectively, wilful and reckless conduct that widened the gap between First Nations children and the rest of Canadian society and caused pain and suffering

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[33] *FNCFCSC et al v AGC*, 2017 CHRT 14 at paras 69-75.
[34] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 2. See also *FNCFCSC et al v AGC*, 2016 CHRT 2 at paras 399-404.
[35] *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 403.
[36] *FNCFCSC et al v AGC*, 2019 CHRT 39 at para 154.

should be compensable whenever it occurred, and not only when it had an adverse impact on the health or safety of a First Nations child.

49. Canada ought not be permitted to shield itself from compensation for its discriminatory conduct by recirculating arguments that the Tribunal has already rejected.

V. Compensation for victims of Jordan's Principle discrimination prior to December 12, 2007, including to the estates of Jordan River Anderson and his mother

50. Etched in Jordan River Anderson's memorial stone at the cemetery at Norway House Cree Nation are the phrases "Jordan River Anderson… founder of Jordan's Principle" and "A sad loss for Norway House who never had the chance to know him."[37] Canada's decision not to pay for the at-home services Jordan needed meant that he never left the hospital and he only went to Norway House after he passed. His family and community wanted to ensure no other child suffered unnecessarily like Jordan did and that no other First Nations family had to fight with the Canadian government to get the services their child needed when they needed them. The pain and suffering experienced by Jordan and his family cannot be questioned. The strength and resilience the Anderson Family has shown in championing substantively equality in the provision of services and products to First Nations children over the past fifteen years is a legacy that will echo for generations to come.

51. Jordan passed away on February 2, 2005 and his mother passed away on December 20, 2005. The Caring Society and the AFN filed the complaint in February 2007. However, there is ample evidence in the record before the Tribunal regarding Jordan's circumstances and those of his family. Additionally, Canada's public communications around Jordan's Principle make it clear that the federal government sees the denials, delays and gaps Jordan faced as being a "worst case scenario" of discrimination. Regardless of any legislative authority, Tribunal order, or court order, Canada should pay at least $40,000 in compensation to each of Jordan's and his mother's estates and to his father as an act of reconciliation. The Caring Society would further encourage Canada to consider compensating Jordan's surviving siblings, who also experienced pain and suffering as a result of Canada's discriminatory conduct towards Jordan.

[37] Affidavit of Cindy Blackstock affirmed April 30, 2020 at para 9.

52. The Tribunal also raised questions with respect to compensation related to Canada's discriminatory definition and approach to Jordan's Principle prior to December 12, 2007.

53. In paragraph 27 of its April 3, 2019 submission, the Caring Society submitted "that from the moment that the House of Commons unanimously passed Motion 296, Canada knew that failing to implement Jordan's Principle would cause harm and adverse impacts for First Nations children."[38] In *Pictou Landing Band Council v Canada (Attorney General)*, Justice Mandamin also noted both the House of Commons' unanimous approval of Jordan's Principle alongside the federal government's undertaking to implement it in his ruling.[39] As such, December 12, 2007 is the last possible day on which there could be any doubt as to the federal government's acknowledgment that it had obligations pursuant to Jordan's Principle.

54. However, as the Caring Society outlined at paragraph 29 of its April 3, 2019 submission, the Tribunal made findings in its January 2016 ruling that "demonstrate that Canada had long known that First Nations children and families were suffering the effects of discrimination owing to its failure to implement Jordan's Principle",[40] including preceding December 12, 2007, such as the *Wen:De* reports and the 2007 Evaluation of the FNCFS Program.[41]

55. There is no question that, as an act of reconciliation, Canada should make payments to the estates of all First Nations children who passed away between January 1, 2006 and December 11, 2007 in circumstances linked to Canada's failure to implement Jordan's Principle, as well as their parents (or caregiving grandparents).

56. Given Canada's persistence with its judicial review of the Compensation Entitlement Order and their lack of agreement to extending eligibility for Jordan's Principle compensation back to January 1, 2006, the Caring Society fears that, if the eligibility range is changed at this point, Canada may allege procedural unfairness or substantive unreasonableness in the Federal Court proceedings that will follow the finalization of the Tribunal's order on compensation.

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[38] Caring Society April 3, 2019 written submissions regarding compensation at para 27.
[39] *Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342 at paras 82-83, 106 and 111.
[40] Caring Society April 3, 2019 written submissions regarding compensation at para 29.
[41] *FNCFCSC et al v AGC*, 2016 CHRT 2 at paras 362-363 (re Wen:De) and 374 (re 2007 Evaluation of the FNCFS Program). See also the National Policy Review, found in Volume 1 of the Commission's Book of Documents from the hearing on the merits, at Tab 3.

57. Accordingly, in the circumstances, the Caring Society is left to urge Canada to make payments to the estates of children who died in circumstances linked to Canada's failure to implement Jordan's Principle between January 1, 2006 and December 11, 2007 as acts of reconciliation.

All of which is respectfully submitted this 30th day of April, 2020.

David P. Taylor
Sarah Clarke

Counsel for the Caring Society

Annex A – Caring Society Markup of Canada's definitions

Definitions[42]

"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~~.

In considering what is essential for each child, the focus will remain on the principles of substantive equality (taking into account historical disadvantage, geographic circumstances, and the need for culturally appropriate services, products and/or supports) 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 ~~requested~~needed a service that

- ~~was not provided because of a dispute between jurisdictions or departments as to who should pay;~~
- ~~would normally have been publicly funded for any child in Canada~~was necessary to ensure substantive equality in the provision of services, products and/or supports to the child;
- was recommended by a professional with expertise directly related to the service need;

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

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

a) Between December 12, 2007 and July 4, 2016

[42] These definitions are intended to provide guidance for applying paragraphs 250 and 251 of the CHRT's ruling on compensation, 2019 CHRT 39, which deal with compensating individuals under Jordan's Principle.

- 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 presumed where a request was not determined 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 and/or service sought;
- the reason for the delay;
- the potential ~~of~~for the delay to adversely impact the child's needs;
- whether the child's need was addressed by a different service, product and/or support of equal or greater quality, duration and quantity, otherwise provided in a reasonable time;
- the normative ~~ranges~~standards for providing the ~~category or mode of~~ support, product and/or service~~s~~ across Canada by provinces and territories, that were in force at the time of the child's need; and
- the timelines established on November 2, 2017 by the CHRT[43] for Canada to determine requests under Jordan's Principle: 12 hours for urgent cases, 48 hours for other cases.

As part of the Guide, the parties will agree on a process for Canada to provide the Central Administrator with information on the factors noted above in order to rebut the presumption.

[43] See the decision of the CHRT in 2017 CHRT 35.

General Principles

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

2. Seeing as the principle of substantive equality involves consideration of a First Nations child's needs and circumstances in relation to cultural, linguistic, historical and geographic factors, Canada will provide the Central Administrator with access to the information its possession regarding the historical and socio-economic circumstances of First Nations communities. The Central Administrator will make use of the information to inform the determination of what was an "essential service", a "service gap" or "unreasonable delay".

3. Individual claims are required in all cases, even where more than one child in a community faced similar unmet needs due to the lack of access to the same or similar essential services.

4. [**Only if a specific request is required to meet the definition of a "service gap"**] Working together with Canada and the network of professionals with which ISC has relationships and relying on the evidence before the Tribunal (e.g. CHRC Tabs 78 and 302), the Central Administrator will compile a "service gap list" of communities for which specific requests for services, supports and/or products were made of Indian Northern Affairs Canada / Aboriginal Affairs and Northern Development Canada / Health Canada / Indigenous Services Canada

Annex B – Clean version of Caring Society's definitions (with essential services schedule)

Definitions[44]

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

- necessary to ensure substantive equality in the provision of services, products and/or supports to the child.

In considering what is essential for each child, the focus will remain on the principles of substantive equality (taking into account historical disadvantage, geographic circumstances, and the need for culturally appropriate services, products and/or supports) and the best interests of the child.

"Service gap" is a situation where a child needed a service that

- was necessary to ensure substantive equality in the provision of services, products and/or supports to the child;
- was recommended by a professional with expertise directly related to the service need;

but the child's needs were not met due to the federal government's discriminatory definition of and approach to Jordan's Principle.

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

c) 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);

[44] These definitions are intended to provide guidance for applying paragraphs 250 and 251 of the CHRT's ruling on compensation, 2019 CHRT 39, which deal with compensating individuals under Jordan's Principle.

- 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

d) 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" will be presumed where a request was not determined 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 and/or service sought;
- the reason for the delay;
- the potential for the delay to adversely impact the child's needs;
- whether the child's need was addressed by a different service, product and/or support of equal or greater quality, duration and quantity, otherwise provided in a reasonable time;
- the normative standards for providing the ~~category or mode of~~ support, product and/or service~~s~~ across Canada by provinces and territories, that were in force at the time of the child's need; and
- the timelines established on November 2, 2017 by the CHRT[45] for Canada to determine requests under Jordan's Principle: 12 hours for urgent cases, 48 hours for other cases.

As part of the Guide, the parties will agree on a process for Canada to provide the Central Administrator with information on the factors noted above in order to rebut the presumption.

General Principles

1. For greater certainty, where a child was in palliative care with a terminal illness, and a professional with relevant expertise recommended a service, support and/or product to safeguard

[45] See the decision of the CHRT in 2017 CHRT 35.

the child's best interests that was not provided through Jordan's Principle or another program, delay will be considered unreasonable.

2. Seeing as the principle of substantive equality involves consideration of a First Nations child's needs and circumstances in relation to cultural, linguistic, historical and geographic factors, Canada will provide the Central Administrator with access to the information its possession regarding the historical and socio-economic circumstances of First Nations communities. The Central Administrator will make use of the information to inform the determination of what was an "essential service", a "service gap" or "unreasonable delay".

3. Individual claims are required in all cases, even where more than one child in a community faced similar unmet needs due to the lack of access to the same or similar essential services.

4. [**Only if a specific request is required to meet the definition of a "service gap"**] Working together with Canada and the network of professionals with which ISC has relationships and relying on the evidence before the Tribunal (e.g. CHRC Tabs 78 and 302), the Central Administrator will compile a "service gap list" of communities for which specific requests for services, supports and/or products were made of Indian Northern Affairs Canada / Aboriginal Affairs and Northern Development Canada / Health Canada / Indigenous Services Canada

Schedule A to Caring Society Definitions -- List of Potential Essential Services

The list below is intended for guidance only. Other services may be essential where they meet the definition above. For those services on the list, whether they were "essential" depends on the circumstances of the child's case.

1. ALLIED HEALTH
Assessments and screenings by allied health professionals
Services provided by allied health professionals including: (i) occupational therapy; (ii) speech language pathologists; (iii) physiotherapists; iv) audiologists; v) optometrists; vi) special needs education teachers; and vi) health and social infant and early childhood development registered professionals.
Therapy reviewed and monitored by a health care service professional or paraprofessional under the guidance and direction of an allied health professional (e.g. a physiotherapist assistant or nurse providing daily support to implement a program outlined by a physiotherapist or physician)
2. EDUCATION
Assistive educational technologies and electronics including hardware, software, apps and required protective cases as a component of a behavioural or cognitive assessment or individualized learning plan
Psycho-educational assessments
Tutoring Services, educative technologies and learning resources that are part of a cognitive assessment or individualized learning plan
First Nations language lessons if not available within the community and recommended by a professional as part of an individualized learning plan
3. INFRASTRUCTURE
Adaptive Furniture
Enhanced home or transportation-related security and safety equipment/systems, including car seats
4. MEDICAL EQUIPMENT AND SUPPLIES.
Environmental Aids, including lifts and transfer aids and professional installation thereof
Mobility aids, includes standing and positioning aids and wheelchairs
Hospital Beds
Assistive technologies based on individual assessed needs
Medical equipment related to diagnosed illnesses (e.g., percussion vests, oxygen, insulin pumps)
5. MEDICAL TRANSPORTATION
Travel costs (transportation, meals, accommodation) related to access to essential services, supports or products where the lack of transportation prevented access to the recommended service (i.e. remote/isolated, semi-isolated communities, or where travel is otherwise required to access the essential service)
Escort travel where needed to meet the best interests of the child
6. MEDICATIONS/NUTRITIONAL SUPPLEMENTS
Prescription medications
Infant Formula as part of an individualized health assessment and for the interim period while waiting for the individualized health assessment

Nutritional supplements or specialized dietary requirements as part of an individualized health assessment and for the interim period while waiting for the individualized health assessment
7. MENTAL WELLNESS
Assessments
Individual Therapy
Treatment for mental health and/or substance abuse, including residential
8. ORAL HEALTH (EXCLUDING ORTHODONTICS)
Diagnostic services, including examinations and x-rays
Oral surgery services, including general
Restorative services, including caries and crowns
Endodontic services, including root canals Dental treatment required to restore damage resulting from unmet dental needs
9. RESPITE
Respite care (if recommended by a social worker, a worker with a child and family services agency, or a medical professional)
10. VISION CARE
Examinations and corrective eyewear