Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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 and Northern Affairs Canada)

Respondent

-and-

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL, and NISHNAWBE ASKI NATION

Interested Parties

SUBMISSIONS OF THE INTERESTED PARTY NISHNAWBE ASKI NATION re Compensation Process

April 30, 2020

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SUBMISSIONS OF THE INTERESTED PARTY NISHNAWBE ASKI NATION
re Compensation Process

April 30, 2020

I. Overview

1. These are the written submissions of Nishnawbe Aski Nation ("NAN") made in a second round of submissions in response to this honourable Tribunal's order of September 6, 2019, regarding

compensation entitlement for victims of Canada's discriminatory conduct[1] ("the Compensation Entitlement Order").

2. An initial version of a Draft Framework for compensation was filed with the Tribunal on behalf of Canada, the AFN, and the Caring Society ("the Parties") on February 21, 2020. All parties had the opportunity to make initial submissions at that point in time. In its subsequent ruling, 2020 CHRT 7, this honourable Tribunal invited further submissions regarding the timeframe for Jordan's Principle-related claims for compensation.

3. NAN understands that the Parties are filing an updated Draft Framework on April 30, 2020. NAN understands that the intention is for discussions to continue between all parties before Canada, the AFN, and the Caring Society finalize the Framework for the compensation process, the Schedules referenced in it, and related details. NAN reserves the right to return before this honourable Tribunal at a future point should an issue of concern arise that cannot be dealt with satisfactorily through discussion with other parties.

4. On April 20, 2020, the Parties sent a version of the Draft Framework and Schedule B to the Commission and interested parties requesting feedback. Comments and questions were provided by the Commission on April 23, by COO on April 24, and by NAN the morning of April 25. Counsel for the Caring Society replied by email the evening of April 27 following a meeting amongst the Parties. As of noon on April 30, 2020, a revised Draft Framework had not been circulated for consideration.

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[1] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2019 CHRT 39 [Compensation Entitlement Order].

II. Issues and Argument

5. NAN's submissions focus on the following issues:

   a) Ensuring the compensation process is responsive to the unique needs and realities of NAN First Nations and citizens due to the relative remoteness of NAN First Nations;

   b) Jordan's Principle-related compensation.[2]

A. Ensuring the Compensation Process is Responsive to the Unique Circumstances of Remote First Nations

6. In this Honourable Tribunal's decision granting NAN interested party status, the Tribunal emphasized NAN's unique ability to bring the voices of remote First Nation communities to these proceedings.[3] It is important to NAN that the compensation process be responsive to the unique needs and circumstances of remote First Nations, specifically of NAN First Nations, and individuals who live in them. Based on the last version of the Draft Framework that NAN reviewed, NAN believes the Framework is *capable* of being implemented in a way that is responsive to the unique needs and circumstances of remote First Nations, but that this is not sufficiently *guaranteed*.

7. NAN understands and accepts the Framework is national in scope. It also knows, however, that a standardized, one-size-fits-all approach to processes and decision-making has consistently failed its children and families.[4] In order for the compensation process to be conducted in a substantively equal and least harmful way, the process must be attuned to the

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[2] i.e. the compensation outlined at paragraphs 250-251, and the end of paragraph 254, of the Compensation Entitlement Order.

[3] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 11 [2016 CHRT 11].

[4] E.g. see *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 16 at para 81 [2016 CHRT 16].

diverging regional needs of different First Nations. NAN believes that an affirmation of this principle will strengthen the Framework.

8. It is NAN's submission that such a guiding principle would ensure that, at every stage of the implementation of the Framework, regional specificities are taken into account to ensure that services are being provided in a manner consistent with substantive equality to all First Nations. In addition to the delivery of services, this may also be reflected in the setting of timelines, taking into account the potential infrastructural needs of remote First Nations, the selection of second-level committee members, and the development of training and communication materials.

9. As such, NAN asks this Tribunal to amend the Draft Framework to include the following guiding principle:

    - 2.8 The compensation process is intended to be responsive to the diversity (linguistic, historical, cultural, geographic) of beneficiaries and of First Nations, who will play an important role at all stages of the implementation process.

10. The following provisions are those identified by NAN as contributing to the *potential* of the compensation process being implemented in a manner that is responsive to the unique needs and experiences of NAN First Nations[5]:

    - Section 5.1 (Under the heading "Locating Beneficiaries"): "… *Measures taken to identify beneficiaries should reflect any challenges particular to the area where the beneficiary resides*. *Special measures may be necessary to inform beneficiaries with special needs* (i.e. persons with disabilities, *those located in rural or remote communities*, incarcerated persons, homeless persons, or persons in domestic

[5] As of the time of drafting this, NAN has not had the benefit of seeing the version of the Draft Framework that the parties will be submitting to the Tribunal on April 30th. It is thus possible that the pinpoint citations may not be accurate, or even that the wording has changed (though it is NAN's understanding that it is unlikely that the wording of these provisions has changed), as NAN is working from an earlier draft.

violence shelters). Canada will work with First Nations to address the needs of beneficiaries in their communities."

- Section 5.2 (Under the heading "Locating Beneficiaries"): "…*Where appropriate, communications will be adapted to the particular cultural, historical and geographical (including rural and remote communities) circumstances of the communities* in question.

- Section 6.1(a) (Under the heading "Support to Beneficiaries Throughout the Compensation Process"): "*Operators of the toll-free phone line* and/or other toll-free means of communication *will be sensitive to* child and youth development, as well as *the cultural and contextual diversity of beneficiaries*. The line should also be accessible in some First Nations languages to reflect the linguistic diversity of beneficiaries."

- Section 6.2(b) (Under the heading "Support to Beneficiaries Throughout the Compensation Process"): "*Navigators' duties will vary across the country based on decisions by First Nations on how navigation services can be best provided*. … Where the duties of a Navigator are taken up by a First Nation or First Nations organization, Canada will ensure that … sufficient resources are provided to those Navigators so as not to impede the quality or range of services provided by these existing mechanisms. Canada will also ensure that the new resources are dedicated to the Compensation Process."

- Section 6.3 (Under the heading "Support to Beneficiaries Throughout the Compensation Process"): "First Nations will require adequate resources to provide support to beneficiaries. *Canada will assist First Nations where requested by providing reasonable financial or other supports*."
  - **NAN asks that this Tribunal modify this provision by adding the following sentence to the end of it**: "In providing these supports and determining what constitutes "reasonable financial or other supports" and what constitutes "sufficient resources" in section 6.2(b), consideration will be given to the particular needs and realities of remote First Nations with limited resources or infrastructure for providing support to beneficiaries, and who face increased costs in provision of services due to remoteness."

- Section 10.5 (Under the heading "Supports for Beneficiaries Relating to the Payment of Compensation"): "Upon being identified as an eligible recipient for compensation, ISC will ensure that the Central Administrator provides the beneficiary with financial literacy information in a form and content agreed to by the Parties, and at no cost to the beneficiary. *To the extent possible, these supports will be adapted to reflect beneficiaries' cultural, historical, geographical*

(including rural and remote communities) needs and circumstances."

11. NAN acknowledges that the Parties have not been blind to the need to be responsive to the unique needs and realities of remote First Nations. NAN is not satisfied, however, that this need is adequately guaranteed by the Draft Framework as it currently stands. NAN believes that a guiding principle affirming the need for the compensation process to be responsive to the diversity of beneficiaries and of First Nations is consistent with the above provisions and with this Tribunal's findings[6], and will help infuse this important principle throughout the compensation process. Specific recommendations about how this principle can be given life in the processing of claims for Jordan's Principle-related compensation is addressed starting at page 17 of these submissions, under the heading "Individuals involved in processing claims should be familiar with systemic gaps specific to the region in which the claimant lived."

B. Jordan's Principle-Related Compensation

12. NAN will address two questions relating to Jordan's Principle-related compensation. The first is whether the eligibility timeframe should be modified. The second relates to the process for determining eligibility for Jordan's Principle compensation.

1) Timeframe for Eligibility for Jordan's Principle-related Compensation

13. In the Compensation Entitlement Order, the Tribunal determined that the relevant timeframe for purposes of establishing eligibility for Jordan's Principle-related compensation was December 12, 2007 (the date the House of Commons adopted the motion on Jordan's Principle) and November 2, 2017 (the date of this Tribunal's ruling on Jordan's Principle in 2017 CHRT 35).[7] The Tribunal has requested submissions, in light of its reasons in 2020 CHRT 7, on

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[6] E.g. 2016 CHRT 16 at para 81; 2016 CHRT 11 at para 9 (citing to 2016 CHRT 2 at paras 231-235, 245 and 392).
[7] Compensation Entitlement Order, at paras 250-251.

whether the timeline for Jordan's-Principle related compensation should be modified so that children who experienced the same type of discrimination, but in an earlier timeframe, would also be eligible for compensation. The same would be true for the parents or caregiving grandparents of these children.

14. In its submissions of February 21, 2020, NAN submitted that compensation should be awarded to First Nations children who, due to a gap, delay and/or denial of services, were removed from their homes prior to December 12, 2007 to access essential services and who remained in care as of December 12, 2007, because the gap or denial persisted.[8]

15. NAN welcomes the opportunity to revisit the relevant timeframe for Jordan's Principle-related compensation. NAN agrees with the Tribunal's suggestion that the record and previous decisions of the Tribunal might support a finding that Jordan River Anderson's estate, that of this mother, and Jordan's father should all be eligible for Jordan's Principle-related compensation. NAN believes that they do support such a finding.

16. The discrimination which Jordan's Principle is supposed to remedy was undeniably experienced by Jordan River Anderson: he was deprived of services and equipment that would have been available to him had he been a non-First Nations child. Canada knew that by denying him the needed services and equipment, Canada was depriving Jordan of services and equipment that would be publicly provided if he were a non-First Nations child.[9]

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[8] Submissions of Nishnawbe Aski Nation re Compensation Process, February 21, 2020, at para 9.
[9] *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 para 352 [2016 CHRT 2]; Exhibit HR-13, Tab 302 at p. 2: Aboriginal Affairs and Northern Development Canada, Terms of Reference Officials Working Group, *Jordan's Principle Dispute Resolution: Preliminary Report*, (May 2009).

17. Jordan was far from the first child to experience such discrimination. For example, in 1996 the *Royal Commission on Aboriginal Peoples* highlighted how jurisdictional ambiguity was resulting in underfunding and under-provision of services to First Nations and Metis peoples:

> As with other social services, child care also suffers from a lack of jurisdictional clarity and a consequent avoidance of funding responsibility:
>
> Under the Constitution Act, 1867 section 91(24), the federal government has jurisdiction for reserve lands and all Indians… Meanwhile, the provincial and territorial governments have jurisdiction over child welfare and child care services. This situation has created a continuing jurisdictional ambiguity over Aboriginal child care in some parts of the country. The federal government has argued that provincial governments should be responsible for funding child care, while some provincial governments argue that the federal government should fund child care services that are directed to reserves or status Indians.
>
> …
>
> The result of these jurisdictional and funding disputes is that many Aboriginal people are left without the child care services they need. On reserves, there is insufficient provision of child care. Metis people do not qualify for Indian affairs funding. And in urban areas, except where Aboriginal children make up a substantial proportion of the local population, there is little commitment by provincial agencies to fund the development of Aboriginal-specific child care that departs from mainstream models.[10]

18. NAN recognizes, however, that Jordan River Anderson is the specific child who inspired Jordan's Principle and a movement to name and remedy this type of discrimination. Jordan has been a central part of this claim and case. NAN submits that the date of Jordan River Anderson's second birthday, i.e. October 22, 2001, is a logical and principled date, supported by the record and nature of the claim, to use for the timeframe for Jordan's Principle-related claims. This is because the record indicates that it is when Jordan turned two years old that health professionals recommended his discharge from hospital, and that Canada and

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[10] Ex. HR-2, Tab 7: *Royal Commission on Aboriginal Peoples Report*, Vol. 2., pp. 916-917.

Manitoba's squabbling prevented this from happening because neither would pay for the services and supports he required to live in a home environment.[11]

19. NAN further submits that a change in the timeframe for Jordan's Principle-related compensation should logically be accompanied by a change in the timeframe for the removal-related compensation. The removal-related compensation is based on the discriminatory funding/provision of on-reserve child and family services, which deprived First Nations children and families of the benefit of prevention services which would have been available to them had they been non-First Nations children and families.

20. NAN thus submits that the timeframe for both types of compensation should start October 22, 2001. Any child removed from their home prior to this date but still in care as of this date, as well as their caregiver(s), should also be eligible for compensation.

2) Process Relating to Jordan's Principle-related Compensation

21. NAN wants to ensure that the realities of the various barriers that NAN children have experienced in accessing services, many of which are related to the relative remoteness of NAN First Nations, are adequately reflected and taken into account in the process developed for determining claims for Jordan's Principle-related compensation.

22. In its decision on the merits, this honourable Tribunal noted the absence of health and social services in remote and isolated communities in Ontario:

> [233] Other challenges for remote and isolated communities [include] …the lack of other health and social programs, which impacts the performance and quality of child and family services (see *CPSCW Discussion Paper* at pp. 28-29). On this last point, the *CPSCW Discussion Paper* emphasizes that "[p]romoting positive

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[11] 2016 CHRT 2, at para 352; Exhibit HR-13, Tab 302 at p. 2: Aboriginal Affairs and Northern Development Canada, Terms of Reference Officials Working Group, *Jordan's Principle Dispute Resolution: Preliminary Report*, (May 2009).

> outcomes for children, families and communities, requires a full range of services related to the health, social, and economic conditions of the community: child welfare services alone are not nearly enough" (at p. 29).[12]

23. Jordan's Principle is intended to fill the gaps left by this lack of other health and social programs:

> Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy.[13]

24. NAN submits that the systemic service gaps experienced by remote First Nations, and the consequences flowing from them, need to inform any process for determining eligibility for Jordan's Principle-related compensation. Currently, the Draft Framework appears to focus primarily on removal-related compensation and not on Jordan's Principle-related compensation. NAN understands that the Parties intend to adapt the taxonomy found at Exhibit 12 to the December 8, 2019 affidavit of Dr. Cindy Blackstock (Schedule C to the Draft Framework) to be used for claims for Jordan's Principle-related compensation. It is not clear to NAN what this would look like or how it would be applied.

25. Additionally, NAN understands that the Parties have been unable to come to agreement regarding the definition of some key terms relating to Jordan's Principle-related compensation.

26. In any process developed to process claims for Jordan's Principle-related compensation, NAN believes the following principles should apply in order to be responsive to the unique reality experienced by children and families in remote and isolated First Nations:

    a) Canada should not benefit from its discriminatory conduct.

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[12] 2016 CHRT 2, at para 233; see also 2016 CHRT 11, at para 9.
[13] *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.

i. A claimant should not automatically be denied eligibility for being unable to demonstrate that a request for a service/support was made; and

ii. A claimant should not automatically be denied eligibility for being unable to establish that the service/support was, historically, recommended by a professional.

b) Individuals involved in processing claims should be familiar with systemic gaps specific to the region in which the claimant lived.

a) Canada Should Not Benefit from Its Discriminatory Conduct

27. It is a firmly-established principle of equity that a wrongdoer should not benefit from their wrongdoing.[14] This is a relevant principle for decision-makers to consider when applying the *Canadian Human Rights Act* ("*CHRA*").[15] NAN believes it is important to ensure that Canada does not benefit from its own discriminatory conduct by setting compensation eligibility requirements that its own discriminatory conduct prevented some individuals from meeting. NAN submits that for the compensation remedy to be effective in promoting the rights protected by the *CHRA* and meaningful in vindicating any loss suffered by the victim of discrimination,[16] the principle that Canada should not benefit from its discrimination needs to infuse the compensation process.

28. This has at least two implications for determining the process for Jordan's Principle-related compensation. In an ideal world, the process would be simple because in every instance of a

[14] *Lac Minerals Ltd.v International Corona Resources Ltd*, [1989] 2 SCR 574, at para 92.
[15] *Kirby v Treasury Board (Correctional Service of Canada*) 2015 PSLREB 41, at para 95.
[16] E.g. 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 10 at para 14, citing to *Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras. 25 and 55; and *Action Travail des Femmes* at p. 1134

need for a service/support there would be both (i) a documented referral for the service/support and (ii) a documented request for the service/support. In many instances, however, the reality will be far-removed from the ideal because Canada's discriminatory conduct, as found by this Tribunal, prevented or discouraged a referral and/or a request from being made in the first place. As a result, the process for determining eligibility must not require proof of a request for a service from Canada, nor proof of a recommendation/referral from a professional. While both of these can help establish a successful claim, their absence should not automatically disentitle a claimant.

i. Request for Service Should Not Be a Pre-Requisite to Being Eligible for Compensation

29. Requiring a claimant to prove that a request was made to the federal government for a required service would allow Canada to benefit from its own discriminatory conduct in two related ways. Firstly, when systemic service gaps in remote First Nations create a normative on-reserve standard in which there is no expectation that a given service will be provided, individuals are discouraged from making requests for that service because they know the service is not available. This is true even when the remote on-reserve normative standard departs markedly from the off-reserve standard.[17] Sometimes, on-reserve individuals in remote First Nations may not know what services are normatively available off-reserve.[18]

[17] And this honourable Tribunal has made it clear that the normative off-reserve standard "establish[es] the minimal level of service" that should be available to First Nations children.": 2017 CHRT 14, at para 69.

[18] Exhibit "A" to the Affidavit of Bobby Narcisse affirmed February 21, 2020: *Nishnawbe Aski Nation Children and Youth with Special Needs Preliminary Engagement Report: The Forgotten People*, March 31 2016, at p. 41 [*Forgotten People*]: "Parents don't know what services are 'out there.'"

30. The reality of disparate normative standards and the feeling that requesting services is a wasted exercise was touched upon by a physician who participated in a focus group held by NAN in early 2016 to discuss services for children with special needs:

> "I know urban parents, if a child is not talking in sentences they worry, but up north if the child is even five and not talking it's not a huge concern. There are different expectations of what is normal because even if there was a way to get a child identified there's no follow up because there are no programs anyway. And if a three year old has zero speech NIHB [Non-Insured Health Benefits] won't pay for travel so **it's like you're identifying something you can't do anything about anyway**."
>
> – Physician Participant, Service Provider Focus Groups[19]

31. In other words, why request or refer for a service when you know it cannot be accessed?

32. Jordan's Principle signals that the disparate normative standards are not acceptable and that services *should* be able to be accessed in situations such as the one discussed by the physician above. Jordan's Principle should encourage requests for services to address these long-standing and entrenched inequities. However, this brings us to the second related point. Canada's discriminatory implementation of Jordan's Principle likely discouraged individuals from making direct requests for services that should have been available to them under proper implementation of Jordan's Principle.

33. By espousing its narrow, discriminatory definition of Jordan's Principle[20], Canada likely discouraged requests on behalf of children who fell outside the narrow definition being advertised and implemented by Canada. It is the rare parent and First Nation who would be

[19] *Forgotten People, supra* note 18, at p. 48 (emphasis added).
[20] E.g. Exhibit HR-13, Tab 302 at p. 15: Aboriginal Affairs and Northern Development Canada, Terms of Reference Officials Working Group, *Jordan's Principle Dispute Resolution: Preliminary Report*, (May 2009); 2016 CHRT 2, at paras 341-382; 2017 CHRT 14, at para 38-81, 135.

able to put up the sustained emotional and financial battle that seemed to be required to access services under Jordan's Principle while Canada was applying its narrow definitions.[21]

34. A discriminatory normative standard of service gaps for on-reserve individuals in remote First Nations, coupled with an improperly narrow definition of Jordan's Principle, means that many First Nations children who were deprived of services may not have had a specific request for services made to Canada on their behalf. The absence of a specific request should not automatically render an individual ineligible for compensation.

35. Where it can be established that a First Nations child required a service/product to respond to its needs and promote healthy development, and that the First Nations child did not receive the service/product due to a gap in services, that individual should be eligible for compensation even where no request was made directly to the federal government. This starting point could be departed from only if there is a clear record of successful requests having been made on behalf of other First Nations children in similar circumstances for the same service/support around the same time period.

ii. Historical Recommendation by a Professional Should Not Be a Pre-Requisite to Being Eligible for Compensation

36. In an ideal world, First Nations children who require services will have access to a professional who can recommend the required service to them. The reality for many children in NAN First Nations, however, has been that they have not had access to professionals. It would be contrary

[21] *Pictou Landing Band Council v. Canada (Attorney General),* 2013 FC 342. NAN is discouraged that this "old mindset" of discouraging claims has reared its ugly head recently in the claims-at-actuals process: Canada has actively discouraged submission of some claims that were eventually submitted and approved, and the process has become so cumbersome and time-consuming that some potential claimants feel they should give up: Exhibits L, M, N and H of Affidavit of Odi Dashsambuu filed April 9, 2020.

to the intention of Jordan's Principle and the *Canadian Human Rights Act* to bar from compensation those First Nations children who experienced systemic barriers/gaps to accessing professionals. To exclude such individuals from compensation would further compound the discrimination they have experienced due to barriers/gaps in services that others may take for granted.

37. One week before this Tribunal issued its decision on the merits in this case, NAN facilitated a focus group in North Caribou Lake First Nation to gather information on services for children (and others) with special needs.[22] One of the key messages from this engagement was that there is a lack of assessment and identification services for kids with special needs. A logical implication of this gap is that children were not accessing professionals who could recommend needed services to them/their families. This in turn contributed to them not being able to access the services, including diagnostic services, they needed. Thus a gap in access to professionals resulted in no referrals/recommendations and no access to needed services.

38. The barriers to assessment and identification are explained in the report, *Forgotten People*:

> Children and youth are falling through the cracks…. They are not identified as being at risk or referred for assessment. In recent years the publicly funded service agency from Kenora area, Firefly or the publicly funded George Jeffries [*sic*] Children's Centre in Thunder Bay have held assessment clinics once a year. *They come to the school as [sic] do screening and assessment. Children who are identified as at risk are referred to the nursing station where they go on a wait list to see the doctor when he comes into the community, usually twice a month. The child usually dropped to the bottom of the wait list as are there medical situations deemed more urgent*.
>
> If a child does see the physician who recommends further assessment and treatment and refers them out of the community for further evaluation and/or service, the child or youth rarely goes out because there is no funding for travel out of North Caribou from Health Canada. Non-Insured Health Benefits does not cover travel for special needs.

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[22] *Forgotten People*, *supra* note 18, at pp. 7, 14 (emphasis added)

> *The assessment visit by the agency is not promoted so that all community members know about it. There are many special needs children not attending school and therefore do not get assessed or identified. These children are not attending school for various reasons, the most common being that there is a serious lack of support workers in the school for special needs*."[23]

39. When children are unable to access assessment and identification services, their specific needs remain unidentified and unmet. The gap in access to assessment and identification services for children in remote First Nations in Ontario has been observed by service providers working with adults with special needs:

> An organization that provides adult developmental services (including assessment) to First Nations in the Sioux Lookout area reported that out of fifty-one clients referred to them for assessment, thirty-one were referred by the Criminal Justice System. The clients were referred for a diagnoses of Developmental Disability through the Court Diversion Program. *It was the first time these individuals had undergone an assessment for a developmental disability*. The service provider stated that they provide service to the Greater Toronto District as well, and that *this situation of first referrals coming from the Criminal Justice System is unique to the remote First Nations*.[24]

40. NAN's concern about a requirement that an individual must establish historical proof of an assessment/referral/recommendation for a service or product to be eligible for compensation is this: the requirement will unfairly bar from compensation citizens of NAN First Nations who were never able to access assessment and identification services due to systemic barriers and gaps.

41. The process for determining eligibility for Jordan's Principle claims should take this reality of remote First Nations into account. It should include a process whereby an individual whose conditions and needs, due to systemic barriers and gaps, were not identified or assessed while the individual was a child can nonetheless establish their eligibility due to having been

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[23] *Forgotten People*, *supra* note 18, at p. 16 (emphasis added).
[24] *Ibid.,* at p. 47 (emphasis added).

deprived of needed services. This could involve a professional currently working with the claimant and/or medical and social service consultants hired as part of the compensation process. Such individual(s) could play a role in establishing that the First Nations individual in question has subsequently been assessed/identified/diagnosed, and providing an opinion on what services/supports should have been available to support that individual as a child.

b) Individuals involved in processing claims should be familiar with systemic gaps specific to the region in which the claimant lived

42. NAN believes that, for the compensation process regarding Jordan's Principle-related discrimination to be responsive to the unique reality of remote First Nations, it will be important for individuals involved in processing the claims to be familiar with systemic gaps specific to the region in which a claimant lived. This information sets important context for the processor/reviewer to properly understand a claim, particularly for more difficult claims where there might not be a clear record of a recommendation from a professional and/or a specific request on behalf of the child.

43. NAN believes one way this could be achieved is by following an approach similar to that taken in the Independent Assessment Process ("IAP") under the Indian Residential Schools Settlement Agreement. Specifically, Canada was required to produce a School Narrative for each of the Indian Residential Schools that outlined the history of the school, as well as information on any known incidents or allegations of abuse there.[25] This Narrative was

[25] *Fontaine v. Canada (Attorney General),* 2014 ONSC 4585, at para 190; Affidavit of Jeremy Kolodziej filed by the AFN April 4, 2019.

provided to adjudicators to assist them in determining the outcome of an individual's IAP claim.

44. NAN believes a similar process could be established for Jordan's Principle claims. Specifically, Canada could be responsible for compiling information on known gaps specific to each province, and also to specific regions within each province. The record before this Tribunal documents many of these gaps.[26] Canada could request that First Nations, Political Territorial Organizations ("PTOs"), provincial governments, and other relevant parties provide any further relevant reports they might have regarding gaps and barriers within the relevant timeframe for Jordan's Principle-related claims, such as NAN's *Forgotten People* report. This would of course be in addition to any relevant documents already in Canada's possession. This information could be used both for processing claims, and to inform the notice process/identification of potential beneficiaries.

45. As an added bonus, NAN believes that in addition to providing important contextual information for the processing of Jordan's Principle-related claims, the information gathered and consolidated in this exercise could be of assistance to Canada in determining how to eliminate the lack of coordination in federal programs and services adversely impacting First Nations children.

[26] E.g. Exhibit HR-6, Tab 77: 78. Indian and Northern Affairs Canada, *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region*, attachment to an email sent by Bill Zaharoff, Director of Intergovernmental Affairs, British Columbia Region (June 3, 2009); Exhibit HR-13, Tab 302 at p. 2: Aboriginal Affairs and Northern Development Canada, Terms of Reference Officials Working Group, *Jordan's Principle Dispute Resolution: Preliminary Report*, (May 2009).

III. Conclusion and Orders Requested

46. NAN has made these submissions without the benefit of seeing the version of the Draft Framework that NAN understands is being filed with the Tribunal on April 30, 2020, and so reserves its right to make further submissions in relation to the Framework and upon reading the Parties' respective submissions. Additionally, some important aspects of the Draft Framework remain unclear to NAN. For example, it remains unclear to NAN what role the Taxonomy document (Schedule C) is intended to play in the validation of claims, if at all, and it remains unclear to NAN how the Parties envision the document being used for Jordan's Principle claims, if at all. Furthermore, NAN understands that some central aspects of the compensation process – including what documents a claimant will be required to submit and how the documents will be assessed to come to a determination of eligibility – will be addressed in documents outside of the Framework. It is important to NAN that its participatory rights, guaranteed by this Tribunal in the Compensation Entitlement Order[27], are respected and given meaning as these separate documents are drafted. NAN reserves the right to return to the Tribunal on this matter.

47. NAN respectfully requests an order from the Tribunal that:
    1. The start of the timeframe for both Jordan's Principle-related compensation claims and for removal-related compensation claims be set at October 22, 2001, the second birthday of Jordan River Anderson.
    2. The Draft Framework be modified to ensure the compensation process is responsive to the diversity of beneficiaries and First Nations, including due to remoteness, by inserting the following edits:

[27] Compensation Entitlement Order at para 269.

a. [Guiding Principle] 2.8 The compensation process is intended to be responsive to the diversity (linguistic, historical, cultural, geographic) of beneficiaries and of First Nations, who will play an important role at all stages of the implementation process.

b. 6.3 First Nations will require adequate resources to provide support to beneficiaries. Canada will assist First Nations where requested by providing reasonable financial or other supports. In providing these supports and determining what constitutes "reasonable financial or other supports" and what constitutes "sufficient resources" in section 6.2(b), consideration will be given to the particular needs and realities of remote First Nations with limited resources or infrastructure for providing support to beneficiaries, and who face increased costs in provision of services due to remoteness.

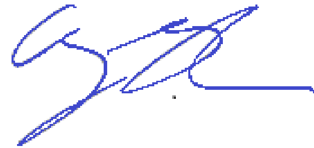
3. The process for Jordan's Principle-related compensation must not contain either of the following as strict eligibility requirements:

   a. Establishing that a specific request was made to Canada; and

   b. Providing a historical referral/recommendation for a needed service/support.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

THIS 30th DAY OF APRIL, 2020



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