Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 15
Date: May 28, 2020
File No.: T1340/7008

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

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

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Compensation Process Ruling on Outstanding Issues in Order to Finalize the *Draft Compensation Framework*

I. Introduction

[1] This ruling follows this Tribunal's compensation decision and orders rendered on September 6, 2019 (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 [*Compensation Decision*]) and subsequent ruling on additional compensation requests emanating from some parties arising out of the compensation orders (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 7).

[2] In the *Compensation Decision*, Canada was ordered to pay compensation in the amount of $40,000 to victims of Canada's discriminatory practices under the First Nations Child and Family Services Program (FNCFS program) and Jordan's Principle. This Panel ordered Canada to enter into discussions with the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society of Canada (Caring Society) and to consult with the Canadian Human Rights Commission (Commission) and the interested parties, the Chiefs of Ontario (COO) and the Nishnawbe Aski Nation (NAN), to co-develop a culturally safe compensation process framework including a process to locate the victims/survivors identified in the Tribunal's decision, namely First Nations children and their parents or grandparents. The parties were given a mandate to explore possible options for the compensation process framework and return to the Tribunal. The AFN, the Caring Society and Canada have jointly indicated that many of the COO, the NAN and the Commission's suggestions were incorporated into the *Draft Compensation Framework* and *Draft Notice Plan*. The Panel believes that this is a positive outcome.

[3] However, some elements of the *Draft Compensation Framework* are not agreed upon by all parties and interested parties. In particular the two interested parties, the COO and the NAN, made additional requests to broaden the scope of the *Compensation Decision* orders with which the other parties did not agree, as it will be explained below. Further, the

COO and the NAN made a number of specific requests for amendments to the *Draft Compensation Framework.* The NAN's requests mainly focus on remote First Nations communities, some of which will be discussed below. This reflects the complexity of this case in many regards. The Panel is especially mindful that each First Nation is unique and has specific needs and expertise. The Panel's work is attentive to the inherent rights of self-determination and of self-governance of First Nations which are also important human rights. When First Nations parties and interested parties in this case present competing perspectives and ask this Tribunal to prefer their strategic views over those of their First Nations friends, it does add complexity in determining the matter. Nevertheless, the Panel believes that all the parties and interested parties' views are important, valuable and enrich the process. This being said, it is one thing for this Panel to make innovative decisions yet, it is another to choose between different First Nations' perspectives. However, a choice needs to be made and the Panel agrees with the joint Caring Society, AFN, and Canada submissions and the AFN's additional submissions on caregivers which will be explained below. At this point, the Panel's questions have now been answered and the Panel is satisfied with the proposed *Draft Compensation Framework* and *Draft Notice Plan* and will not address all of the interested parties' suggestions that were not accepted by the other parties (i.e. the Caring Society, the AFN and Canada) ordered to work on the *Draft Compensation Framework*. The Panel will address the contentious issue involving specific definitions including some suggestions from the NAN concerning remote First Nations communities and two substantial requests from the COO and the NAN to broaden the scope of compensation below. For the reasons set out below, the Panel agrees with the Caring Society, the AFN and Canada's position on the COO and the NAN's requests.

[4] Discussions between Canada, the AFN and the Caring Society on a compensation scheme commenced on January 7, 2020. The discussions resulting in the *Draft Compensation Framework* and *Draft Notice Plan* have been productive, and the parties have been able to agree on how to resolve most issues. At this point, there remains disagreement on three important definitions on which the parties cannot find common ground. These definitions are "essential service", "service gap" and "unreasonable delay". While the Panel is not imposing the specific wording for the definitions, the Panel provides

reasons and guidance to assist the parties in finalizing those definitions as it will be explained below.

[5] The Caring Society, the AFN and Canada wish to clarify the proposed process for the completion of the Tribunal's orders on compensation. As the AGC outlined in its April 30, 2020 letter, the Complainants and the Respondent are submitting the *Draft Compensation Framework* and *Draft Notice Plan* for the Tribunal's approval in principle. Once the Tribunal releases its decision on the outstanding Compensation Process matters, the *Draft Compensation Framework* will be adjusted to reflect said orders and will undergo a final copy edit to ensure consistency in terms. The Complainants and the Respondent will then consider the document final and will provide a copy to the Tribunal to be incorporated into its final order. The Panel agrees with this proposed process.

[6] The Panel wishes to thank the Caring Society, the AFN, Canada, the COO, the NAN and the Commission for their important contributions to the realization of the *Draft Compensation Framework*.

II. Reconciliation and Jordan River Anderson and his Family

[7] In its recent ruling dealing with three questions related to the compensation process (2020 CHRT 7), the Panel asked the parties to consider whether compensation to the estate of Jordan River Anderson and the estate of his deceased mother and also to his father and First Nations peoples in similar situations should be paid as part of this Tribunal's compensation process. While the Panel did not make a final determination on this issue, the Panel requested further submissions from the parties and interested parties on this point.

[8] While the AFN and the Caring Society agreed with the spirit of this possible amendment to the Tribunal's compensation orders, they feared this could jeopardize the compensation process as a whole given that Canada opposes it. Canada previously submitted that with respect to compensation under Jordan's Principle, the Panel was clear. At paragraph 251 of the *Compensation Decision*, compensation was granted for a defined period, Dec. 12, 2007- to November 2, 2017. These dates were also placed in bold in the judgment.

[9] Canada argues that their comments on the temporal scope above do not suggest a reopening of these compensation orders under Jordan's Principle. Additionally, Canada submits that the complaint mentioned Jordan's Principle and did not mention services prior to the adoption of Jordan's Principle in December 2007.

[10] The NAN also made submissions in favour of such broadened compensation orders as described above. However, upon consideration, the Panel does not want to jeopardize the compensation process as a whole.

[11] In light of the above, the Panel strongly encourages Canada to provide compensation to Jordan River Anderson's estate, his mother's estate, his father and siblings as a powerful symbol of reconciliation.

III. Framework for the Payment of Compensation under the *Compensation Decision* (*Draft Compensation Framework* and *Draft Notice Plan*)

[12] The Panel has studied the *Draft Compensation Framework* and *Draft Notice Plan* alongside all the parties', including interested parties', submissions and requests. The Panel approves the *Draft Compensation Framework* and *Draft Notice Plan* "in principle", with the exception of the issues addressed below. The "in principle" approval should be understood in the context that this framework is not yet finalized and that the parties will modify this *Draft Compensation Framework* and *Draft Notice Plan* to reflect the Panel's reasons and orders on the outstanding issues regarding compensation. The *Draft Compensation Framework, Draft Notice Plan* and the accompanying explanations in the joint Caring Society, AFN and Canada submissions provide the foundation for a Nation-wide compensation process. The opt-out provision in the *Draft Compensation Framework* addresses the right of any beneficiary to renounce compensation under this process and pursue other recourses should they opt to do so. The opt-out provision protects the rights of people who disagree with this process and who prefer to follow other paths. The Panel expects that the parties will file a final *Draft Compensation Framework* and final *Draft Notice Plan* seeking a consent order from this Tribunal.

[13] The reasons on the outstanding compensation issues are included below.

IV. The COO and the NAN Request for the *Compensation Decision* Order to Apply Equally to First Nations Persons On or Off Reserve in Ontario

[14] The Panel has considered all the parties and interested parties' submissions to determine this request. In the interest of brevity, the Panel has not reproduced all of those submissions. Rather it focuses on the COO's submissions on this point, summarized below, given that the Panel provides reasons to the COO explaining why it does not accept its request.

Key Positions of the Parties

[15] The COO submits that in Ontario, the *Compensation Decision* Order should apply equally to First Nations persons on or off reserve. From an Ontario-specific perspective, the COO urges the Panel to consider the scope of the definition of "beneficiary" for the purposes of First Nations people in Ontario who would benefit from the *Compensation Decision* Order. The NAN adopts the COO's submissions on this point.

[16] The COO advances that the Panel's findings with respect to the delivery of child and family services in Ontario pursuant to the *Memorandum of Agreement Respecting Welfare Programs for Indians* (*1965 Agreement*) at *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [*Merit Decision*] (found at paras. 217-246) rightly centre the locus of racial discrimination in the *1965 Agreement*[1]. The Panel held, at paragraph 392, that there was discrimination under the *1965 Agreement* because First Nations children did not receive all the services set out in the Ontario child welfare legislation, the *Child and Family Services Act,* RSO 1990, c C.11 [*CFSA*], and its predecessors (now replaced by the *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sch 1 [*CYFSA*]). Rather, Canada underfunded services to First Nations children under the *1965 Agreement* by funding only some of the

[1] In 1965, Canada entered into the agreement with the Province of Ontario to enable social services, including child and family services, to be extended to First Nations children and families on reserve (see *Merit Decision* at para. 49).

services set out in provincial legislation, and failed to keep up to date with Ontario legislation (*Merit Decision* at paras. 222-226).

[17] The COO submits the resulting discrimination runs through Ontario's programs and funding formulas, which apply equally to First Nations children receiving services from First Nations child welfare agencies and those receiving services from provincial "mainstream" child welfare agencies, as noted by the Panel in the *Merit Decision* at para. 222. The programs and funding formulas apply equally whether on or off reserve.

[18] The COO contends that it is helpful to remember that the *1965 Agreement* does two main things. One, it requires Canada to pay a cost-share to Ontario, and that cost-share is indeed based on a calculation that uses the population of registered Indians mainly (though not exclusively) on reserve. Two, it requires Ontario to make the listed services available to "Indians" throughout the province, and not merely to those on reserve. The very nature of the *1965 Agreement* is that service provision extends, via the Government of Ontario, both on and off reserve.

[19] The COO submits that from the perspective of a First Nations child, parent, or grandparent as a service recipient, the service they received was discriminatory both on and off reserve. The system of service provision under the *1965 Agreement* does not draw a reserve-based distinction at the service delivery level.

[20] The NAN's Chiefs Committee on Children, Youth, and Families has highlighted that NAN First Nations have members who live off-reserve in Ontario who have also experienced discrimination in child and family services. The NAN submits these individuals should not be excluded from eligibility for compensation solely for reasons of off-reserve residency.

[21] The NAN adopts and relies upon the submissions of the COO on the topic of eligibility for off-reserve First Nations children and their caregivers in relation to the *1965 Agreement*.

Reasons on Compensation Off-Reserve in Ontario

[22] The Panel understands the COO's comment on First Nations children, parents or grandparents' perspective as service recipients and it is true to say that the Panel found the

1965 Agreement discriminatory. Given this important perspective, the Panel reviewed the record, its own findings, the complaint, the parties' and the interested parties' Statements of Particulars and amended Statements of Particulars, the parties' and interested parties' final arguments, the remedies requested in 2014, 2019 and 2020 and the Tribunal's own findings in the *Merits Decision*. After a thorough review of the documents referred to above, the Panel finds it does not support the COO's position of a broadened compensation under the *Compensation Decision* to include those children who were removed off-reserves. The COO's own Statement of Particulars mentions on-reserve First Nations and adopts the Commission's theory of the case and requested remedies contained in its amended Statement of Particulars which refer to on-reserve First Nations. The Commission and the COO's final arguments, while addressing the *1965 Agreement's* discriminatory impacts, did not adduce sufficient evidence and arguments on off-reserve children and families. Rather, they focused towards on-reserve First Nations in Ontario and, in so doing, were able to meet their onus. The Tribunal's findings were made after having carefully considered the COO and the Commission's positions, the evidence, the submissions and the final arguments. Moreover, the Panel crafted its *Compensation Decision* orders based on the above. The Panel posed compensation questions to the parties prior to the compensation hearing held in 2019. The COO did not make written submissions on the issue of compensation. In their oral submissions, the COO advised it is content with the other parties' requests for compensation.

[23] The Panel did invite parties to propose categories of children that could be added so the COO and the NAN's request is completely understandable, however, the requests need to be connected to the claim and supported by the evidence and the findings. The Panel to arrive at its *Merit Decision* and rulings, did not consider if First Nations children in Ontario were unnecessarily removed from their homes off-reserves under the *1965 Agreement* because it was not argued, proven or requested until now. The Panel believes that doing so now would require additional evidence and submissions and that it would be unfair to authorize this to take place at this late stage. In fact, in its ruling granting the NAN interested party status, the Tribunal wrote:

> However, given we are at the remedial stage of these proceedings, the NAN's written submissions should only address the outstanding remedies and not

> re-open matters already determined. The hearing of the merits of the complaint is completed and any further evidence on those issues is now closed. The Panel's role at this stage of the proceedings is to craft an order that addresses the circumstances of the case and the findings already made in the [*Merit*] *Decision* (see 2016 CHRT 11, at para.14).

[24] Additionally, reopening matters to adduce new evidence and arguments could jeopardize the compensation process entirely as it may be viewed as unfair by some parties and this could significantly delay compensation to the victims identified in this case. The new evidence that the Panel accepts is geared towards the effectiveness and implementation of the Panel's orders for immediate, mid-term and long-term reform including the order to cease and desist from the discriminatory practices identified in the *Merit Decision* and in its subsequent rulings. The off-reserve discriminatory impacts of the *1965 Agreement* towards First Nations children off-reserve can be addressed by reform of the *1965 Agreement* and Jordan's Principle but unfortunately not under the Tribunal's *Compensation Decision* orders outside of Jordan's Principle orders.

[25] Nonetheless, in the *Merit Decision*, the Panel found the *1965 Agreement* discriminatory and found:

> AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively, the main adverse impacts found by the Panel are:
>
> […]
>
> - The application of the *1965 Agreement* in Ontario that has not been updated to ensure on-reserve communities can comply fully with Ontario's *Child and Family Services Act* (see *Merit Decision* at para. 458, emphasis added).
>
> Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the *1965 Agreement* in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the

> FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve (see *Merit Decision* at para. 461, emphasis added).
>
> Pursuant to these sections of the *CHRA*, the Complainants and Commission request immediate relief for First Nations children. In their view, this can be accomplished by ordering AANDC to remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program and child and family services in Ontario under the *1965 Agreement*; and, requiring AANDC to properly implement Jordan's Principle. Moving forward in the long term, the Complainants and Commission request other orders that AANDC reform the FNCFS Program and the *1965 Agreement* to ensure equitable levels of service, including funding thereof, for First Nations child and family services on-reserve (see *Merit Decision* at, para. 475, emphasis added).
>
> The AFN requests similar reform, including commissioning a study to determine the most effective means of providing care for First Nations children and families and greater performance measurements and evaluations of AANDC employees related to the provision of First Nations child and family services. Similarly, in Ontario, the COO requests that an independent study of funding and service levels for First Nations child welfare in Ontario based on the *1965 Agreement* be conducted (see *Merit Decision* at para. 478, emphasis added).
>
> The Panel is generally supportive of the requests for immediate relief and the methodologies for reforming the provision of child and family services to First Nations living on reserve, but also recognizes the need for balance espoused by AANDC. AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's principle and to take measures to immediately implement the full meaning and scope of Jordan's principle (see *Merit Decision* at para. 481).

[26] The *1965 Agreement* is discriminatory and needs to be entirely reformed and the Ontario Special study of the *1965 Agreement* may be a helpful tool to achieve this goal for the benefit of First Nations children in Ontario.

[27] For those reasons, the Panel denies the COO and the NAN's request to broaden the scope of compensation to include First Nations children who were not resident on reserves

or ordinarily resident on reserves and who were unnecessarily removed from their off-reserve homes.

V. The COO and the NAN Request that the Category of Eligible Caregivers Be Expanded from Parents or Grandparents to Other Caregivers

Key Positions of the Parties

[28] In sum, the COO believes that the reality of families in First Nations communities means that aunts, uncles and other family members may well have been caring for children at the time of removal, and submits that such people should not be precluded from entitlement to compensation.

[29] In sum, the NAN submits it is not unusual in NAN First Nations for individuals other than parents or grandparents to act in a primary caregiving capacity. This reality is not reflected in the *Compensation Decision* Order. The NAN requests the category of eligible caregivers be expanded from parents or grandparents to include aunts, uncles, cousins, older siblings, or other family members and kin who were acting in a primary caregiving role.

[30] While the Panel issued the *Compensation Decision* after thoughtful deliberations, the Panel still reconsidered its decision based on the NAN and the COO's suggestions. However, for the reasons explained below, the Panel denies their request.

Reasons on Compensation Eligibility for Additional Caregivers

[31] The COO and the NAN made extensive suggestions on how this compensation process could potentially work to include an expanded category of caregivers. Many suggestions have merit, however, the approach proposed by the NAN and the COO significantly departs from the approach the Tribunal adopted in the Compensation Decision where it agreed with the Caring Society and the AFN that children should not be retraumatized by being forced to testify about their circumstances and the trauma of being removed from their homes. This approach is paramount and is reflected in the Compensation Decision.

[32] The Panel entirely agrees with the AFN's compelling submissions, summarized below, and believes those submissions are a full answer to the COO and the NAN's request on this issue. Moreover, the AFN's submissions convey the Panel's findings, goal and approach to compensation and reasons why it chose to adopt such an approach. The Panel's decision was carefully crafted to shield children from additional trauma and to account for the need to adopt a culturally safe and appropriate process.

[33] Moreover, unless the parties in this case agree in a settlement to create an adjudicative function outside the Tribunal, the Tribunal has no jurisdiction to order the creation of another Tribunal to delegate its functions under the *Canadian Human Rights Act,* RSC 1985, c H-6 in order to adjudicate compensation arising out of its compensation orders. The AFN, the Caring Society and Canada reject this approach and the Panel agrees with them. This is consistent with the Panel's *Compensation Decision*.

[34] Furthermore, the AFN submits it is deeply concerned about the COO and the NAN's request to expand the definition of "caregiver" to other individuals. Both the COO and the NAN's proposals would greatly complicate the compensation process and give rise to competing claims of who was the rightful caregiver. The Panel believes this to be true.

[35] The AFN notes that this Panel's *Compensation Decision* Order was modeled after the Indian Residential Schools Settlement Agreement's Common Experience Payment. The trigger that would entitle an individual to compensation is the apprehension of a child or the denial or delay of a service under Jordan's Principle. There would be no reason for a person to justify any individual harm, nor would it require an individual to provide evidence to justify why they are entitled to compensation. This Panel opted to adopt a similar approach to the Common Experience Payment in determining eligibility for compensation to victims to avoid the burdensome and potentially harmful task of scaling the suffering per individual in remedies that are capped. A simple administrative process of verification is all that is required to make the payments as the government is in possession of the relevant documentation. Both the COO's and the NAN's recommendations would mark a significant departure from the Common Experience Payment model. Currently, one must demonstrate that they or their child/grandchild was apprehended/removed or impacted by the misapplication of Jordan's Principle. Upon verification they would be paid compensation.

However, both the COO and the NAN suggest that the compensation process now include an adjudicative function whereby a parent or grandparent must participate in contested proceedings along with the child's uncles, aunts, cousins or other relatives. Under this proposed process, the parent/grandparent may have to prove: (1) they were the relevant caregiver; (2) they were financially responsible or paid more to support the child; (3) they loved the child more than others; and (4) they maintained a parental role or bond. They may also be expected to obtain the child's written testimony that they believed their parents/grandparents were the primary caregivers. Again, the Panel believes this to be exact.

[36] The AFN submits that this proposed process is not in the best interests of the beneficiaries. This process will be traumatic for all involved, especially the child who might face pressure, coercion, bullying and stress in stating who stood in their life as the parental figure.

[37] Much like the COO and the NAN, the AFN agrees that every child is very important to the extended family. It is often recognized in First Nations that "it takes a community to raise a child". As such, every member of the child's family, the Chief and Council, educators, health professionals and others all owe a sacred duty to the child. Children are the most precious resource of a First Nations community.

[38] Building on the importance of family that both the COO and the NAN identify, the AFN acknowledges that other factors also play a significant role in how First Nations children are raised. For instance, this Panel has accepted evidence that housing shortages in First Nations communities exist. Typically, this results in more than two families living in a single housing unit. Often members of the same family would occupy such a residence. It therefore would not be unusual for a child to live with their parents, grandparents, uncles, aunts or older cousins. Strong family bonds are created in such a setting and a child may rely on more than one adult figure for things such as getting food to eat, seeking assistance in homework, etc.

[39] According to the AFN, despite the close kinship, the biological parents or grandparents of the child remain the most important figures in the child's life, followed by the child's siblings.

[40] Additionally, the AFN submits this Panel took notice of the widespread poverty many First Nations individuals suffer. Poverty related issues, systemic discrimination in the criminal justice system, and pursuit of economic opportunities can result in one or both parents leaving the community for a short period of time. During the brief period of a parent's absence, a grandparent or other family member may care for the child.

[41] Under the COO and the NAN's proposal, any of these adults living in the same dwelling as the child, and those who temporarily are looking after a child while their parents are away working or temporarily incarcerated would be able to contest an application for compensation filed by a parent. The AFN submits that the compensation plan has to be practical and very clear on who is eligible for compensation.

[42] Both the COO and the NAN assert that guidelines can be developed by the parties to address these types of competing claims. However, determining what types of caregiving was provided and the length of time associated therewith would require intrusive and in-depth investigation into potential beneficiary's history. It is clear that this form of compensation process would be ripe for abuse. There is the potential that people could be compensated whom the apprehended child may not even know or remember. In the circumstance of a child who was apprehended, this system raises the specter that individuals who cared for the child on and off for a few months could become entitled to compensation. In addition, situations may arise where a family member filed and obtained compensation prior to and without the knowledge of the parents or grandparents applying for compensation. The Panel agrees with the AFN's position.

[43] The AFN submits that both the COO and the NAN appear to focus on those individuals who were willing to assist in caregiving and/or contributing financially towards the care of a child as a determining element of compensation. The AFN submits that this may not be the best approach. The purpose of compensation is not meant to repay expenses or address the inconveniencing of family members. Rather, compensation is meant to

compensate for the trauma of losing a family member who was apprehended as a result of Canada's discrimination.

[44] The AFN adds that when compensation is expanded to other caregivers, the compensation is no longer for the loss of a biological child or grandchild by apprehension or misapplication of Jordan's Principle. The nature and purpose of the compensation changes to that of compensating people for their time, expense and love for the child. The AFN submits that the purpose of the compensation awarded by the Panel is to compensate a biological parent or grandparent for the loss of their child to a system that targeted them because they were First Nations.

[45] The AFN submits the compensation scheme is meant to be objective, not subjective. To investigate the relationship between an adult and child removes the objective element and replaces it with an interrogatory process, which goes against AFN's strong position that children in care not be subjected to the same traumatic process as Residential School survivors in the Independent Assessment Process. The Panel finds this to be the correct interpretation of the approach taken by the Panel in the *Compensation Decision.*

[46] Additionally, the COO asserts that caregivers beyond parents and grandparents aligns more closely with the family structures and practices experienced in many First Nations communities.

[47] However, the AFN contends that the COO references Canadian case law and legislation to suggest principles such as physical care, presentation of a parent-like relationship, financial contributions and intention to treat a child like their own should be determinative in this assessment. Likewise, while the NAN asserts First Nations laws, practices and traditions should be the guiding factors in determining who may be a potential caregiver, the NAN also seeks to avail to Canadian jurisprudence and legislation to compel the Central Administrator to make a subjective consideration on who is the most appropriate caregiver. This would import an adjudicative function into the compensation process that would likely require the creation of an industry that employs third party adjudicators and lawyers.

[48] The AFN strongly disagrees with the suggestion that a child's perspective on who the appropriate caregiver is should be taken into account. The NAN does not propose a method on how the child's perspective will be recorded. The only viable mechanism to adduce this information would be to question current or former children in care or Jordan's Principle candidates about which caregiver, parent or grandparent they loved more, or who is more deserving of compensation. This approach would be traumatic as it effectively puts the relationship between a child and their family members on trial, which would certainly stress and potentially harm the emotional bonds between a child and their family members.

[49] Finally, the AFN does not support the COO's proposal on how to address Ontario's *CYFSA* and under-identification. The Ontario *CYFSA* was enacted in 2017. It replaced the former Ontario *CFSA* which was in place in Ontario from 1990-2017. The 1990 *CFSA* does not include an interpretation section which outlines the definition of "child in need of protection". Therefore, the COO's concerns would only capture children and youth beneficiaries from 2017 to 2020 and will not apply to the majority of beneficiaries in Ontario, much less the rest of Canada. The original taxonomy suggested by the Complainants and the Respondent would apply in almost all circumstances and cover those children impacted by the *CYSFA*. The Panel accepts this position.

[50] For those reasons, the Panel denies the COO and the NAN's request for additional orders to expand the category of caregivers in this compensation process.

VI. The NAN Request Relating to Remote First Nations Communities

Key Positions of the Parties

[51] The NAN provided a reply to the responding joint submissions filed on behalf of the Caring Society, the AFN, and Canada and to the additional submissions filed on behalf of the AFN and on behalf of Canada. The NAN's reply submissions address two novel issues raised in the joint submissions and additional submissions: (1) conflicting messages regarding the Framework's responsiveness to remote First Nations; and (2) Canada's suggestion that it would be procedurally unfair for this Tribunal to consider the NAN and the

COO's submissions of May 1, 2020 regarding caregivers given that the round of submissions was closed on March 16, 2020.

[52] In sum, the NAN submits that the parties oppose the NAN's proposed modification to section 6.3 of the *Draft Compensation Framework*, a modification which would list considerations specific to remote First Nations, when determining resourcing requirements on the basis that such inclusion "risks excluding the unique needs of other First Nations communities." At the same time, the Caring Society, the AFN and Canada oppose affirmation of the unique needs of other First Nations through incorporation of a proposed guiding principle that would affirm that "the compensation process is intended to be responsive to the diversity (linguistic, historical, cultural, geographic) of beneficiaries and of First Nations." For the NAN, these are contradictory messages. In the context of proceedings in which substantive equality has been central, the NAN is surprised and confused by the opposition to the proposed guiding principle.

[53] The NAN argues that the concern regarding section 6.3 can be addressed by a simple drafting change indicating that the specific considerations listed by the NAN are not an exclusive or exhaustive list. The NAN provided the following copy of section 6.3, with the NAN's initial proposed modifications underlined, and the NAN's new proposed modification underlined and in bold:

> 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 support and determining what constitutes "reasonable financial or other supports" and what constitutes "sufficient resources" in section 6.2(b), consideration will be given to **all relevant factors, including** 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.

[54] The NAN contends that in its submission of May 6, 2020, the AFN opposes the NAN's position that the Compensation Framework needs to be implemented in a way that takes into account regional specificities. However, in the same submissions, the AFN states that "regional considerations are adequately incorporated into the *Draft Compensation Framework*."

[55] With respect to the NAN's submission, the Caring Society, the AFN and Canada submit the intention is not for "discussions to continue" on any substantive issues outlined in the *Draft Compensation Framework*, *Draft Notice Plan* and accompanying products prior to or after the final rulings. For greater clarity, the Complainants and the Respondent have not filed the *Draft Compensation Framework*, *Draft Notice Plan* and accompanying products subject to any right by the NAN to return before the Tribunal "should an issue of concern arise". It is the view of the Caring Society, the AFN and Canada that this was not the process envisioned by the Tribunal.

Reasons on the Proposed Modifications to Section 6.3

[56] The Panel is not privy to the Parties discussions on this *Draft Compensation Framework* and does not wish to rewrite the framework achieved by the Caring Society, the AFN and Canada in consultation with the Commission and the interested parties, the COO and the NAN. However, the Panel finds there is merit to the NAN's argument and finds the proposed amendments to section 6.3 above to be appropriate. This provision addresses resources to support beneficiaries financially or otherwise and while the *Compensation Decision* orders and process are Nation-wide support to beneficiaries should account for their specific needs including the particular needs and realities of remote First Nations. The Panel does not see why adding a precision such as this one poses a difficulty or risks excluding the unique needs of other First Nations communities. The Panel's substantive equality approach focuses on unique needs of First Nations including remote First Nations. Moreover, this reality has formed part of the Tribunal's findings since 2016.

[57] The Panel directs the Caring Society, the AFN and Canada to discuss this possible amendment further when they finalize the *Draft Compensation Framework*. If this poses a significant roadblock preventing the finalization of the *Draft Compensation Framework*, the parties should inform the Tribunal and provide sufficient information to assist the Panel in understanding the underlying issues. This is not an invitation for the interested parties to return to the Tribunal with other issues surrounding the *Draft Compensation Framework* given that the objective is to finalize it shortly. The Panel is satisfied that the interested parties were consulted, some of their suggestions were included, another one identified

above was found acceptable by this Panel and the other suggestions put before the Tribunal have been answered in the negative by the other parties and the Panel accepts this outcome.

Reasons on Procedural Fairness in Considering the NAN and the COO's May 1, 2020 Submissions regarding Caregivers

[58] This being said, on the issue of procedural unfairness raised by Canada, the Panel's response mirrors what it has mentioned in previous rulings to reject Canada's unfairness argument:

> Moreover, the Federal Court of Canada in regards to remedies stated in *Grover v. Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para. 40 [*Grover*], "[s]uch a task demands innovation and flexibility on the part of the Tribunal in fashioning effective remedies and the Act is structured so as to encourage this flexibility." (emphasis added) (see 2018 CHRT 4 at, para.39). Additionally, this intricate task necessarily requires some back and forth between the Tribunal and the parties (see 2018 CHRT 4 at para. 39).
>
> In this case, it is very different as the Tribunal has heard the merits of the case extensively and made findings and orders. It retained jurisdiction given the complexity of the remedies and the immediate, mid-term and long-term relief remedies and the necessity to assess if remedies are effective and implemented. This necessarily requires some back and forth between the parties and the Tribunal unless all parties agree and propose consent orders to the Tribunal (see 2019 CHRT 7 at para. 47).

[59] In another ruling the Tribunal's referred to *Grover* and to the notion that it is an intricate task to fashion effective remedies to a complex dispute:

> Consistent with this approach, and as this Panel has previously stated, the aim in making an order under section 53 of the *Act* is to eliminate and prevent discrimination. On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *Act* and meaningful in vindicating any loss suffered by the victim of discrimination. However, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task and may require ongoing supervision (see 2016 CHRT 10 at paras. 13-15 and 36).
>
> (see also 2017 CHRT 14 at para. 29).

[60] Furthermore, after the Panel's questions to the COO and the NAN, the Panel allowed the parties to respond to the COO and the NAN's submissions. Finally, the Panel rejected the COO and the NAN's requests. Additionally, the other parties' replies to the COO and the NAN's supplemental submissions were instrumental in assisting the Panel in determining the issues. In light of the above, the Panel rejects the AGC's procedural unfairness argument.

VII. Definitions for Essential Service, Service Gap, Unreasonable Delay

[61] 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. The parties submit 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 *Compensation Decision* order from September 6, 2019.

[62] In sum Canada submits the Tribunal has ordered compensation for Canada's failure to provide "essential services" to First Nations children. The word "essential" is thus a significant qualifier, and should be interpreted in a common-sense way. Canada proposes that it include those services considered necessary for the child's safety and security, while considering substantive equality, cultural appropriateness and best interests of the child. "Service gap" is a concept that the Tribunal has used to describe a failure to provide a necessary service for reasons such as incompatibility between government programs, or Canada's use of an unduly narrow definition of Jordan's Principle. The definition Canada proposes helps ensure that the "gap" was a circumstance that resulted in a serious need going unmet for discriminatory reasons. An "unreasonable delay" is one that could reasonably have had an adverse impact, there was no reasonable justification for the delay, and the delay was outside a normative standard.

[63] Canada argues that providing clear definitions to these terms will greatly facilitate the compensation process. The definitions will help identify First Nations children intended to be beneficiaries. The definitions should be succinct and clear, so as not to encourage

unreasonable expectations of receiving compensation, and not to discourage those who may be eligible from applying.

[64] Each of these three definitions is discussed in turn below. The Panel carefully reviewed all of the parties and interested parties' submissions, however, in the interest of brevity not all views will be discussed here. Rather, the Panel will focus its summaries and reasons on the contentious areas surrounding the definitions.

A. Service Gap

Key Positions of the Parties

[65] Canada's proposed definition is as follows:

> "Service gap" is a situation where a child requested 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 recommended by a professional with expertise directly related to the service; but the child did not receive the service due to the federal government's narrow definition of Jordan's Principle.

[66] Canada submits that the Tribunal's *Merit Decision* identified two types of service gap. One type of gap arises from the narrow definition of Jordan's Principle applied by Canada at certain points in the past. The second involves the lack of coordination among the various programs intended to address First Nations children's health. The Tribunal expressed the concept in the following paragraph:

> 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 (see *Merit Decision* at para. 381).

[67] According to Canada, the *Compensation Decision* itself also suggests that the reason for giving compensation for children experiencing service gaps in relation to Jordan's

Principle was that the service gaps led to some children being placed “outside of their homes, families, and communities in order to receive those services.” (see *Compensation Decision* at para. 250). Placing these children outside their families, homes and communities could itself be seen as a harm.

[68] There is substantial agreement between the parties as to how service gaps arose under the application of Jordan’s Principle when Canada was applying an unduly narrow definition. Canada also agrees that where a child did not receive a service simply because the lack of co-ordination of programs meant no payment was permitted, compensation is appropriate.

[69] The essence of the dispute between the parties in relation to this definition concerns whether some necessary limitations should apply to ensure that there was indeed a gap. Canada proposes that the service in question must be one that was ordinarily provided to other children in Canada under certain conditions: such conditions could include the need to travel to certain locations, eligibility criteria including specific age brackets, limited frequency, and within certain income thresholds. This is less a limitation than inherent in the understanding of the word “gap”: the need to compensate arises because there was a gap between the services a First Nations child was receiving and the services other Non-First Nations children received.

[70] The second part of Canada’s definition is aimed at ensuring that the service in question was recommended by a professional with the relevant expertise to determine that the service is essential to meet the child’s needs. As Valerie Gideon described, it is sometimes the case in considering Jordan’s principle cases that a service request is supported by a recommendation from someone who does not have the required professional expertise. In these cases, the Department will offer support for the child to access the needed professional referral. Such situations should not be compensable, since they do not provide evidence either of a service gap or of unreasonable delay. They are just a necessary step to ensure that the approved service will meet the assessed need of the child.

[71] Finally, Canada submits it is important to note that many programs are not universally available across communities. This may cause differences in the availability of supports, products or services, but this a common practice among governments to respond to specific needs where they arise; it is not based on discriminatory treatment of specific children.

[72] Governments must prioritize resources and will do so based on varying criteria: unmet needs, conditions for success of the initiative, demonstration of results for future implementation in other communities. A proper understanding of the existence of a service "gap" must recognize that the availability of programs to First Nations children must be assessed against programs that are generally available to most other children.

[73] Canada adds that there are a number of ameliorative programs that consider the specific needs of children, such as the Non-Insured Health Benefits program, the Home and Community Care and Assisted Living programs on-reserve.

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

[75] The AFN requests that this Panel reject the requirement that claimants must have made a request to Canada to receive a product or service. Canada's historical approach to Jordan's Principle and requests for products or services not normally funded under the First Nations Inuit Health Benefits Program would have dissuaded individuals from making a formal request. Put simply, if one knew their request would be declined or not even considered, why would one apply for the service at all? This Panel noted that Canada's narrow definition of Jordan's Principle resulted in not a single application being approved (see *Merit Decision* at para. 381).

[76] Secondly, the AFN submits that Canada's proposed definition could be viewed as regressive, particularly in situations where one level of government was required to provide a specific service or product for all other children. The present definition of Jordan's Principle now enables Canada to fund goods and services not normally provided to other Canadians, based on the principle of substantive equality. Finally, the requirement that the service be

recommended by a professional with expertise directly related to the services is too narrow. A medical or other certified professional should be able to direct a treatment and their assessment should not be subject to the verification or agreement of a specialist in a particular field.

[77] The AFN adds that one must be cognizant to the fact that parents were desperately seeking services for their sick, disabled, or special needs child after the House of Commons adopted *Motion 296* (Canada, Parliament, House of Commons Debates, 43rd Parl, 1st Sess, Vol 149, No 5 (December 11, 2019) at 279). In some cases, the First Nations government assisted, in other situations family members contributed or pooled funds.

[78] Unfortunately, there are examples where these vulnerable children did not receive the service they required. With respect to "service gaps", this Panel addressed "gaps" in its 2017 CHRT 14 ruling: The Decision found Canada's similarly narrow definition and approach to Jordan's Principle to have contributed to service gaps, delays and denials for First Nations children on reserve. Specifically, the evidence before the Panel in determining the *Merit Decision* indicated Health Canada and INAC's approach to Jordan's Principle focused mainly on "inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers" (see *Merit Decision* at para. 380 and more generally paras. 350-382).

> Indeed, the Panel specifically highlighted gaps in services to children beyond those with multiples disabilities. For example, an INAC document referenced in the Decision, entitled INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region, indicates that these gaps non-exhaustively include mental health services, medical equipment, travel for medical appointments, food replacement, addictions services, dental services and medications (see 2017 CHRT 14 at para. 47).

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

[80] The Caring Society proposes the following definition of a “service gap”:

> “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 the following criteria during the following time periods:
>
> a) Between December 12, 2007 and July 4, 2016
>
> • A child registered as an Indian per the Indian Act or eligible to be registered and resident on reserve;
>
> • Child with multiple disabilities requiring multiple service providers;
>
> • Limited to health and social services;
>
> • A jurisdictional dispute existed involving different levels of government (disputes between federal government departments and agencies were excluded);
>
> • The case must be confirmed to be a Jordan’s Principle case by both the federal and provincial Deputy Ministers; and
>
> • The service had to be consistent with normative standards
>
> b) Between July 5, 2016 and November 2, 2017
>
> • A child registered as an Indian per the Indian Act or eligible to be registered and resident on reserve (July 5, 2016 to September 14, 2016);
>
> • The child had a disability or critical short- term illness (July 5, 2016 to May 26, 2017);
>
> • The service was limited to health and social services (July 5, 2016 to May 26, 2017).

[81] 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.

[82] The Caring Society argues that 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.

[83] The Caring Society submits that 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.

[84] 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) provided important insight into how Canada's "old mindset" contributed to so few requests coming forward. 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. (Examination-in-Chief of Ms. Corinne Baggley, May 1, 2014 (Steno Tran Transcript Vol 58) at p 32 line 8 to line 14.)

[85] The Caring Society submits that Ms. Baggley also confirmed that federally appointed focal points, on whom Canada relied to manage Jordan's Principle cases, were not identified to the public. In fact, when the AFN requested a list of focal points in 2009, it was only furnished three years later. 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.

[86] 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. (See Examination-in-Chief of Ms. Corinne Baggley, April 30, 2014 (Transcript Vol 57) at p 128 line 13 to line 23).

[87] 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.

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

[89] 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. (See Cross-Examination of Ms. Corinne Baggley, May 1, 2014, (Steno Tran Transcript Vol 58) at p 11 line 13 to line 24).

[90] The Caring Society contends that it is important to acknowledge that Canada's definition shaped its approach to Jordan's Principle, including its system for receiving and documenting requests. 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.

[91] 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 case 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" (see 2017 CHRT 14 at para 77, citing *Merit Decision* at paras. 379-382).

[92] 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.

[93] 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.

[94] Furthermore, the Caring Society argues the approach to Jordan's Principle ordered by the Tribunal 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 not coming forward with potential cases and urgent cases not being considered as Jordan's Principle cases. Canada admittedly had difficulties identifying applicable children" (2017 CHRT 14 at para. 112). 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.

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

[96] 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 *Merit Decision*:

> *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* (see *Merit Decision* at paras. 381-382, italics added).

[97] 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". Adding such a requirement flies in the face of the Tribunal's 2017 CHRT 14 decision, 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." (see 2017 CHRT 14 at para. 135(1)(B)(v), see also 2017 CHRT 35 at para. 10).

[98] The Caring Society contends that it is evident even in Canada's own briefing materials produced following the Tribunal's *Merit Decision* 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.

[99] On February 11, 2016, sixteen days after the *Merit Decision*, 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", (2017 CHRT 14 at para. 51). 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" (see 2017 CHRT 14 at para. 50). The Tribunal agreed (see 2017 CHRT 14 at para. 71).

[100] The Caring Society submits 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.

[101] The NAN submits that in any process developed to process claims for Jordan’s Principle-related compensation, the 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;
>
> b) A claimant should not automatically be denied eligibility for being unable to demonstrate that a request for a service/support was made; and
>
> c) A claimant should not automatically be denied eligibility for being unable to establish that the service/support was, historically, recommended by a professional.

[102] Individuals involved in processing claims should be familiar with systemic gaps specific to the region in which the claimant lived.

[103] 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 or referral from a professional.

[104] The NAN’s concern about a requirement that an individual must establish historical proof of an assessment, referral and 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.

[105] While the proof of assessment, referral or recommendation for a service or product can help establish a successful claim, their absence should not automatically disentitle a claimant.

Reasons on the Definition of "Service Gap"

[106] The Panel agrees with the AFN and the Caring Society's positions, summarized above, and their characterisation of the Tribunal's past findings and approach to remedying discrimination by ensuring substantive equality. It is accurate to say that the Tribunal focuses on the ability of First Nations children to access services and products that were required, and not those that were requested. Moreover, a "service gap" should be defined with reference to a child's confirmed needs during the period of Canada's discrimination and such needs should be assessed based on the principles of a child's best interests, substantive equality, overcoming historic disadvantages and consideration of distinct circumstances. The AFN and the Caring Society are correct in affirming that those are all guiding principles that the Tribunal has already made clear apply in this case.

[107] Therefore, the Panel rejects the following parameters proposed by Canada that there must have been a "request" for a service; there must have been a dispute between jurisdictions or departments as to who should pay; and the service must have been normally publicly funded for any child in Canada.

[108] Also, the Panel relies on its unchallenged *Merit Decision* and subsequent rulings especially the Panel's orders on Jordan's Principle definition (see 2017 CHRT 14 and 35) and believes they provide an answer to the dispute over this definition.

[109] This definitional exercise should focus on what the Tribunal meant in its ruling when it referred to essential services, service gaps and unreasonable delay. This is done in reference to the Tribunal's findings and evidence in the record.

[110] In terms of parties bringing suggestions and new perspectives, this is more appropriately directed to the efficiency of the compensation process than to the definitional exercise.

[111] The Panel finds that Canada is bringing forward some arguments that were raised and addressed in the *Merit Decision* and previous rulings. For example, the arguments in the two paragraphs below were advanced at the hearing on the merits, considered and rejected after weighing the evidence as a whole.

[112] Canada already argued at the merits hearing and again advances in this matter that governments must prioritize resources and will do so based on varying criteria including unmet needs, conditions for success of the initiative, and demonstration of results for future implementation in other communities. A proper understanding of the existence of a "service gap" must recognize that the availability of programs for First Nations children must be assessed against programs that are generally available to most other children.

[113] Similarly, Canada adds that there are a number of ameliorative programs that consider the specific needs of children, such as the Non-Insured Health Benefits program, the Home and Community Care and Assisted Living programs on-reserve.

[114] The above arguments were advanced by Canada in the hearing on the merits where an exhaustive list of programs on reserves was filed in evidence and tested. Canada's arguments on programs addressing needs of First Nations children were rejected and discussed at length. The Panel already found that Canada was unable to measure comparability with provincial services offered to children.

[115] Without repeating all the previous reasons found in multiple rulings, a few examples are reproduced below:

> *In another document dealing with AANDC's expenditures on Social Development Programs on reserves it states that, despite the federal government acting as a province in the provision of social development programs on reserve, federal policy for social programs has not kept pace with provincial proactive measures and thus perpetuates the cycle of dependency (see Annex, ex. 33 at pp. 1-2 [Explanations on Expenditures of Social Development Programs document]). The document describes AANDC's social programs as "…limited in scope and not designed to be as effective as they need to be to create positive social change or meet basic needs in some circumstances" (Explanations on Expenditures of Social Development Programs document at p. 2). It goes on to say that if its current social programs were administered by the provinces this would result in a*

significant increase in costs for AANDC (see *Merit Decision* at para. 267, italics added).

Correspondingly, a 2006 presentation regarding AANDC social programs on reserves, including the FNCFS Program, describes those programs as being remedial in focus, not always meeting provincial/territorial rates and standards, and not well-integrated across jurisdictions (see Annex, ex. 34 at p. 5 [Social Programs presentation] (see *Merit Decision* at para. 268, italics added).

The difficulties in performing this comparative analysis were also identified in a document entitled *Comparability of Provincial and INAC Social Programs Funding*, authored by AANDC employees and to be included in a Ministerial Briefing Binder (see Annex, ex. 44). The document explains that for a number of reasons, such as differences in the way social programs are delivered in the provinces in terms of types of services, the number of services and the allocation of funding, it is difficult to arrive at conclusive and comparable numbers (see Comparability of Provincial and INAC Social Programs Funding at p. 1). In addition, provincial data may not be directly comparable as it could include costs such as overhead or program costs not funded through the FNCFS Program (see *Comparability of Provincial and INAC Social Programs Funding* at p. 4). Where total expenditures per child in care are compared, there is some indication that AANDC funds child and family services at higher levels compared to some provinces. However, the *Comparability of Provincial and INAC Social Programs Funding* document, at page 4, notes that funding levels do not relate to the real needs of children and their families:

> this analysis is not able to recognize that disadvantaged groups may have higher levels of need for services (due to poverty, poor housing conditions, high levels of substance abuse, and exposure to family violence) or that the services or placement options they require may be at a substantially higher cost for services." (see *Merit Decision* at para. 336, underlining added).

MS CHAN: […] Can you tell, or is there a way for the Program to know if they are comparable in terms of the services that are being provided on-Reserve?

MS D'AMICO: I don't believe that we can.

[…]

Because we are talking about different types of communities, different types of systems and different types of services that are being administered by different service delivery agents. So what I mean by this is, one First Nation community off-Reserve who looks exactly the same as an off-Reserve community isn't actually going to get the same services as that other community, they are going to get culturally specific services that that Agency deems appropriate for the children and families that they are serving.

> (Transcript Vol. 51 at p. 183) (see *Merit Decision* at, para. 337, italics added. See also paras. 463-464).

[116] The Panel is concerned by those submissions contesting systemic discrimination already found in the *Merit Decision*. The Compensation process is focused on harms to individuals caused by the systemic discrimination found in the *Merit Decision*.

[117] This being said, the Panel agrees there is merit in Canada's argument that a service should have been recommended by a professional with the relevant expertise to determine that the service is essential to meet the child's needs. This criterion is consistent with the amendments agreed to by the parties in this case and the Tribunal in 2017 CHRT 35 at. paragraph 135: "[…] Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs […]". This could bring objectivity and efficiency to the compensation process as beneficiaries can indicate the service that was recommended but not obtained. However, the Panel agrees in part with the AFN that a medical or other certified professional should be able to direct a treatment and their assessment should not be subject to the verification or agreement of a specialist in a particular field. This being said, the Panel believes exceptions should be made when the treatment also contains risks to the child that require a specialist to determine if the treatment's benefits outweigh the risks. Ultimately, the decision concerning the child will belong to the parent or guardian. Those situations are not the norm and should not be used as a criterion to exclude children. Rather, it accounts for some situations that may arise in the treatment of children. This flexibility should be reflected in the compensation process. Moreover, the Panel recognizes the systemic barriers encountered by many First Nations peoples in accessing services and agrees with the NAN that the absence of proof of assessment, referral or recommendation should not <u>automatically</u> disentitle a claimant. This flexibility should also be reflected in the parameters of the compensation process.

[118] The next step to require that a request was made is to be entirely rejected given the accurate interpretation of the Tribunal's findings made by the AFN and the Caring Society,

mentioned above. As already mentioned, the Panel's past *Merit Decision*, rulings and findings are a full answer to this aspect of Canada's request.

[119] Moreover, the criteria that a jurisdictional dispute occurred is to be rejected as it would be less inclusive than what the Panel found in past unchallenged rulings and in the definition agreed to by the parties and the Tribunal in 2017 CHRT 35 at. paragraph 135: "[…] Canada's definition and application of Jordan's Principle shall be based on the following key principles […] While 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.". The Panel has no intention to reopen this matter. The parties who successfully proved their case in this matter disagree and understandably view this as regressive, trying to reopen matters that were previously decided and not challenged. Consequently, this request is denied.

[120] Similarly, the Panel rejects Canada's requirement that the service must normally have been publicly funded for any child in Canada given the Panel's substantive equality findings and its orders accepted by Canada in 2017 CHRT 14 and in 2017 CHRT 35 at paragraph 135: "[…] When a government service, including a service assessment, is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child […]".

B. Essential Service

Key Positions of the Parties

[121] Canada's proposed definition is as follows:

> "Essential service" is a support, product or service that was:
>
> > requested from the federal government;
> >
> > 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.
>
> In considering what is essential for each child the principles of substantive equality and the best interests of the child will be considered to ensure that the focus is on the individual child.

[122] Canada submits the term "essential service" appears nine times in the *Compensation Decision*, but is not specifically defined. However, in paragraph 226 of the *Compensation Decision*, the Tribunal gave considerable guidance as to its meaning:

> First Nations Children are denied essential services. The Tribunal heard extensive evidence that demonstrates that First Nations children were denied essential services after a significant and detrimental delay causing real harm to those children and their parents or grandparents caring for them. The Supreme Court of Canada discussed the objective component to dignity to mentally disabled people in the *Public Curator* case above mentioned and the Panel believes this principle is applicable to vulnerable children in determining their suffering of being denied essential services. Moreover, as demonstrated by examples above, some children and families have also experienced serious mental and physical pain as a result of delays in services.

[123] In considering Canada's proposed definition, the concepts of safety and security should be interpreted to capture situations in which the child's ability to thrive, health or personal safety would be compromised by failure to provide the support, product or service concerned. This approach encompasses the requirement that there be a prospect of real harm flowing from a failure to respond appropriately to a request for such support, service or product.

[124] The Tribunal's reference to "real harm" is a significant qualifier, one that accords with a common-sense understanding of what is truly "essential". Not all supports, products and services are equally necessary, and the failure to provide them, or the failure to provide them in a timely way, should not be compensable. Canada is not suggesting that the harm actually had to occur, since the child may have obtained a product or service by other means and avoided the harm. However, the potential harm for non-provision should have had to have been at least objectively foreseeable for compensation to be given.

[125] Canada submits the affidavit of Valerie Gideon includes as an exhibit a chart of the broad range of supports, products and services that have been provided under Jordan's Principle since the Tribunal set out its definition in 2017 CHRT 14 and 2017 CHRT 35. The chart demonstrates that Canada has not interpreted Jordan's Principle narrowly and has implemented child-centric decision-making. In particular, it has applied the principles of substantive equality and best interests of the child in a way that has resulted in the provision of hundreds of thousands of supports, products and services, as the Tribunal has approvingly noted (see *Compensation Decision*, at para. 222).

[126] But not every service on that chart is equally necessary. Ms. Gideon's affidavit also includes examples of services that the Caring Society definition of "essential services" would encompass, and demonstrates why an overly-expansive definition is unjustified.

[127] To be compensable, a product, support or service must accord with a reasonable interpretation of what is "essential". Canada's definition does that.

[128] Another difference between the parties is that Canada's definition requires that the child, or someone on the child's behalf, must have made a request. It need not be the case that the person applying used the term "Jordan's Principle," but they must have brought the service request to Canada's attention. While the Caring Society is correct that Canada did not make a significant effort to establish a simple mechanism for families or service providers to come forward with Jordan's Principle requests, Canada did provide a number of other mechanisms for families or service providers to reach out, including through the Non-Insured Health Benefits Program and other community-based programs, including navigators. Unless the definition includes the making of a request as a condition, the process risks becoming a search back in time for a service that might have been requested had the person chosen to do so. Canada cannot be accused of discrimination for failing to respond to requests that were never made. Compensation should not be provided in such cases.

[129] The AFN submits that First Nations children face unique challenges in accessing services, and Jordan's Principle is an essential mechanism for ensuring their human, constitutional, and treaty rights.

[130] The AFN argues that Canada is proposing a definition of “essential service” as a product or service that was (i) requested from the federal government; and (ii) is necessary for the safety and security of the child, the interruption of which would adversely impact the child’s ability to thrive, the child’s health, or the child’s personal safety.

[131] The AFN submits that Canada’s proposal is limited in scope. First, it would only cover those services requested from the federal government. This Panel has ruled that Jordan’s Principle is to apply to all jurisdictional disputes (see 2017 CHRT 14 at para. 135).

[132] Secondly, the AFN argues that Canada’s definition means that services would have to be necessary and any interruption would adversely impact a child. This definition assumes that a child was able to secure a service and was already receiving treatment, and as a result, the operative element would focus on the interruption of existing services. Evidence was provided to this Panel illustrating that not all individuals were able to access services. The AFN would support a definition of “essential services” that is consistent with the finding of this Panel. In this Panel’s 2017 CHRT 14 decision, this Panel noted that Jordan’s Principle is designed to ensure substantive equality for First Nations children (see 2017 CHRT 14 at paras. 69-75).

[133] Building on international standards, the AFN recommends that the definition for “essential services” incorporate some recognized international principles. Under international human rights law, defining what an essential medical service or treatment is for a child must follow components of the right to health for children. These components have been drafted and agreed upon by the international community and provide that children are entitled “to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.” (United Nations’ *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Article 24 [*CRC*]). This right is articulated in Article 24 of the *CRC*, which is a widely ratified international human rights instrument and consolidates all previous treaties on the rights of children. Further, international human rights law provides that the right to health for children has long been understood to be an “inclusive” right, which extends beyond protection from immediately identifiable infringements, such as limitations on access to health care or services, and includes the wide range of rights and freedoms

that are determinate to children's health, such as the rights to non-discrimination and access to health-related education and information.

[134] Moreover, it is defined in international human rights law that the right to health, outlined in Article 12 of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 in General Comment 14 of the Committee on Economic, Social and Cultural Rights, includes the following core components:

> a) Availability: Refers to the need for a sufficient quantity of functioning public health and health care facilities, goods and services, as well as programmes for all.
>
> b) Accessibility: Requires that health facilities, goods, and services must be accessible to everyone. Accessibility has four overlapping dimensions:
>
> - non-discrimination
> - physical accessibility
> - economical accessibility (affordability)
> - information accessibility.
>
> c) Acceptability: Relates to respect for medical ethics, culturally appropriate, and sensitivity to gender. Acceptability requires that health facilities, goods, services and programmes are people-centred and cater to the specific needs of diverse population groups and in accordance with international standards of medical ethics for confidentiality and informed consent.
>
> d) Quality: Facilities, goods, and services must be scientifically and medically approved. Quality is a key component of Universal Health Coverage, and includes the experience as well as the perception of health care. Quality health services should be:
>
> - Safe – avoiding injuries to people for whom the care is intended;
> - Effective – providing evidence-based healthcare services to those who need them;
> - People-centred – providing care that responds to individual preferences, needs and values;
> - Timely – reducing waiting times and sometimes harmful delays.

> • Equitable – providing care that does not vary in quality on account of gender, ethnicity, geographic location, and socio-economic status;
>
> • Integrated – providing care that makes available the full range of health services throughout the life course;
>
> • Efficient – maximizing the benefit of available resources and avoiding waste.

[135] Lastly, the World Health Organization has provided its definition of quality of care as "the extent to which health care services provided to individuals and patient populations improve desired health outcomes. In order to achieve this, health care must be safe, effective, timely efficient, equitable and people-centred."[2] This is critical in how essential services within states are to operate and the degree of care needed for not only children, but all individuals in the state.

[136] The Caring Society suggests the following definition of "essential service" is appropriate:

> "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.

[137] The Caring Society argues that 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.

[138] 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

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

be appropriate due to Canada's discriminatory approach to Jordan's Principle having foreclosed those with need from coming forward.

[139] The Caring Society submits 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. 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."

[140] However, the Caring Society argues 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 2017 CHRT 14 decision, confirmed with amendments approved by the Tribunal following the consent of the parties in 2017 CHRT 35. Canada discontinued its judicial review of the 2017 CHRT 14 decision on November 30, 2017.

[141] Moreover, Jordan's Principle is designed to ensure substantive equality to First Nations children. In keeping with the purpose of the *CHRA*, 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" (*CHRA*, s. 2, explained in 2017 CHRT 14 at paras. 69-75).

[142] The Caring Society contends the Tribunal provided a very clear metric of the importance of substantive equality to this analysis in its *Merit Decision*. 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 disadvantages 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" (see *Merit Decision* at paras. 399-404).

[143] The Caring Society submits 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 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.

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

[145] The Commission submits it would be inappropriate to effectively penalize the claimant for not having approached Canada in this context. First Nations children and families in vulnerable circumstances should not be expected to have made hopeless service requests in order to take the benefit of human rights protections.

Reasons on the Definition of an "Essential Service"

[146] The Panel already provided reasons above rejecting Canada's proposal that the definition include the requirement that a request was made. This same reasoning applies here in denying this aspect of Canada's proposed requirement. The Panel agrees with the AFN, the Caring Society and the Commission's positions above. Given the discrimination findings in this case, it is not appropriate to require that a request was made for beneficiaries to be eligible for compensation under this Tribunal process.

[147] The Panel also agrees with the AFN and the Caring Society's positions on the definition of what is an "essential service" mentioned above. The Panel agrees that 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. The Panel also agrees that a conduct that widened the gap between First Nations children and the rest of Canadian society and caused pain and suffering 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.

[148] Nevertheless, the Panel agrees with Canada that not all supports, products and services as currently approved by Canada since the Tribunal's rulings in 2017 CHRT 14 and 2017 CHRT 35 are equally necessary and lack thereof or delay cause harm to First Nations children. Therefore, some measure of reasonableness is acceptable. The examples provided in the *Merit Decision* and subsequent rulings and *Compensation Decision* refer to the clear examples of harm to children caused by Canada's discriminatory practices. However, as already explained in the *Merit Decision* and subsequent rulings, the adverse impacts experienced by First Nations children and their caregiving parents or grandparents as a result of Canada's discrimination amount to harm and the Panel opted for a compensation process that would avoid measuring the level of harm borne by each victim. However, some measure of reasonableness should be applied given that some examples recently brought forward by Canada may not be considered real harm by this Panel. The Panel is not privy to the parties' discussions and the full context surrounding those examples of services and is not in a position to make findings on an untested affidavit however, one example stands out. If a request for a laptop at school is made in July for the September start of the school year, Canada must make this determination within the prescribed timeframe despite the laptop not being required for two months (see Affidavit of Dr. Gideon of April 30, 2020, at para. 9). This is an example where it is difficult to see any harm to a child. A reasonableness analysis is particularly helpful in this case.

[149] The Panel also understands that Canada is bringing forward examples of supports, products and services that were approved by Canada after the Tribunal's rulings 2017 CHRT 14 and 2017 CHRT 35 showing the wide range of services to support this valid aspect of their argument.

[150] Moreover, the Panel agrees that Canada has not interpreted Jordan's Principle narrowly and has implemented child-centric decision-making and that it has applied the principles of substantive equality and best interests of the child in a way that has resulted in the provision of hundreds of thousands of supports, products and services after the Tribunal's 2017 CHRT 14 and 2017 CHRT 35 rulings. The Compensation period for

Jordan's Principle ends on the day the Tribunal released its ruling in 2017 CHRT 35. All the evidence showing compliance is helpful to inform the reasonableness interpretation.

[151] The Panel agrees with Canada that to be compensable, a product, support or service must accord with a reasonable interpretation of what is "essential" and that the definition should foresee this and should be finalised by the Caring Society, the AFN and Canada. However, the Panel disagrees that Canada's definition does that in an effective way given it is too narrow for the reasons mentioned above. This reasonable interpretation of what is essential must be done through an adequate substantive equality lens. The Panel agrees with the AFN and the Caring Society's arguments on this point.

[152] Furthermore, Canada already made the argument as part of the hearing on the merits of this case that it provided a number of other mechanisms for families or service providers to reach out, including through the Non-Insured Health Benefits Program and other community-based programs, including navigators. This was part of their defense and cannot be reopened here. This was rejected by the Panel as it reviewed the arguments and evidence. The Panel found that this was insufficient to meet the real needs of First Nations children and their families. The Panel need not reiterate all its reasons detailed in its *Merit Decision* and many rulings to reject this argument. The *Merit Decision* and those earlier rulings provide a full answer on this point.

C. Unreasonable Delay

Key Positions of the Parties

[153] Canada's proposed definition is as follows:

> "Unreasonable delay" is informed by:
>
> > the nature of the product, support or service sought;
> >
> > the reason for the delay;
> >
> > the potential of delay to adversely impact the child's needs;
> >
> > the normative ranges for providing the category or mode of support or services across Canada by provinces and territories.

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

[154] Canada argues that all Canadians understand that some amount of delay is endemic in our health care system. Few, however, would expect to receive compensation where they experienced some delay in getting the service. To be worthy of compensation, the delay must, in some objective sense, be unreasonable based on the harm (actualized or potential) experienced by the individual.

[155] Canada's definition would accept that if the reason for delay was jurisdictional wrangling over who should pay, the delay was unreasonable. That is a reality that First Nations children experienced that other Canadian children did not, or were much less likely to experience. Jordan's Principle is now in place to prevent these situations from occurring.

[156] As pointed out above, Canada submits the Tribunal was concerned in its compensation decision about the possibility of harm to children because of delay. Conversely, where there was no reasonable possibility of harm, that factor should weigh against the provision of compensation.

[157] The essence of the dispute between the parties under this definition is whether the Tribunal's judgment imposing 12- and 48-hour standards for the provision of services should be the touchstone for compensation. However, as the affidavit of Valerie Gideon sets out, those standards exceed the standards set by the federal government with respect to services to children and families, and those of provinces and territories.

[158] The fact that Canada is bound by the Tribunal's order to observe much higher standards is a mechanism to ensure the longstanding injustices experienced by First Nations children will cease. However, minor deviations from those high standards should not lead to compensation: it is simply not evidence of discrimination to fail to achieve standards that exceed those of other jurisdictions and experienced by other children.

[159] Instead, what Canada proposes is that the failure to achieve normative standards, that is, standards which other Canadian jurisdictions strive to achieve with respect to

services to children, should be the benchmark against which the reasonableness of delay is assessed. On that standard, the evidence is that Canada is achieving such standards.

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

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

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

[163] The Caring Society proposes the following definition of "unreasonable delay":

> "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 support, product and/or services 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 CHRT3 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.

[164] The Caring Society submits that in its *Compensation Decision*, 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 (see *Compensation Decision* at para. 224).

[165] The Caring Society argues that the Tribunal found as a fact in its *Merit Decision* 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 (see *Merit Decision* at para. 379).

[166] This conclusion was restated in the Tribunal's summary of its findings and orders made with respect to Jordan's Principle in its 2017 CHRT 14 decision:

> In the [*Merit*] *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 First Nations children. Delays were inherently built into the process for dealing with potential Jordan's Principle cases (see 2017 CHRT 14 at para. 5).

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

[167] The Tribunal found that these problems were not cured by the *Merit Decision*, 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 (see 2017 CHRT 14 at para. 92).

[168] The Caring Society submits 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.

[169] 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 Canada, the AFN and the Caring Society.

Reasons on the Definition of "Unreasonable Delay"

[170] Again, the Panel believes that the analysis of the term "unreasonable delay" should start by considering what the Tribunal meant by unreasonable delay.

[171] The Panel agrees that some delay in receiving services is acceptable in some circumstances. This is why the Panel used the words "unreasonable delay". The Panel believes that some reasonableness should form part of the analysis. The Panel agrees that minor deviations in some cases from those high standards ordered by the Tribunal and agreed to by all parties including Canada (see Consent order in 2017 CHRT 35) such as in the example outlined by Canada of providing a laptop to a child, mentioned above, should not lead to compensation. The opportunity for Canada to rebut the presumption of

unreasonable delay by providing the Central Administrator with the particulars related to an individual's compensation application is an acceptable suggestion in this compensation process framework to avoid having claimants bear the onus of proving that a delay was unreasonable. That burden should rest solely on Canada.

[172] The question here is fully answered when looking at the reference period for compensation which is from December 12, 2007 to November 2, 2017. This period coincides with Canada's systemic discriminatory practices adversely impacting children. The Panel discussed examples in the *Compensation Decision* and previous rulings and the *Merit Decision* of harm caused by delays. Again, this was discussed at length in the unchallenged *Merit Decision* and subsequent rulings. While Canada argues it complies with normative provincial standards for service provision this is not what the Tribunal found occurred in this case up to November 2, 2017. The Caring Society and the AFN's examples referred to in the Tribunal's previous unchallenged *Merit Decision* and rulings, summarized above, indicate that those delays were unreasonable and caused harm to children. There is abundant evidence in this case of unreasonable delays causing harm to children. The recognition that Canada was abiding by the Panel's specific orders is reflected in the compensation period ending in November 2017.

[173] Advancing arguments and evidence now to challenge the Tribunal's previous systemic discrimination findings for the same reasons already mentioned in the service gaps section cannot be permitted. Current compliance to the Tribunal's orders is not the appropriate lens to assess compensation for past discrimination. The Panel rejects this approach.

[174] This being said, the Panel believes that making the argument for exceptions to the "high standards" must be possible to avoid situations such as the "laptop situation" referred to above. As mentioned above, the rebuttal of the presumption of unreasonable delay is an adequate option to account for those exceptional situations.

[175] For the above reasons, the Panel agrees with many aspects of the Caring Society and the AFN's proposed definitions and with some aspects proposed by Canada. The Panel generally agrees with the Caring Society's first three proposed general principles (see

Annex 1). The Panel directs the parties to consider the Panel's reasons above mentioned and to adapt the three definitions to reflect the Panel's reasons in the finalization of the *Draft Compensation Framework*.

VIII. Retention of Jurisdiction

[176] The Panel retains jurisdiction until the process for compensation issue has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Annex 1: 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 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 in 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.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
May 28, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: May 28, 2020

Motion dealt with in writing without the appearances of the parties

Written representation by:

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