Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

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

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and NISHNAWBE ASKI NATION

Interested Parties

Affidavit of Valerie Gideon

I, Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada, SWEAR THAT:

1. I am the Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch ("FNIHB") at the Department of Indigenous Services Canada ("ISC"). I have been in this position since 2017. Prior to that I was the Assistant Deputy Minister of Regional Operations at FNIHB for five years. I report directly to the Deputy Minister of ISC on all

matters of First Nations and Inuit health. I am Mi'kmaq from the Gesgapegiag First Nation and have spent my entire career dedicated to First Nations and Inuit health and wellness.

Essential Services

2. Government services are meant to address essential services to protect the health and safety of the population, as well as provide supplementary assistance to individuals who face particular challenges in achieving comparable levels of access or state of health and socioeconomic outcomes. Provinces, territories and various federal departments and programs either do not have definitions of what constitute essential services or definitions would vary. The Non-Insured Health Benefits (NIHB) Program, for example, is a supplementary health benefits program that provides publicly insured services that are not provided by provinces or territories to status First Nations and recognized Inuit individuals. Health benefits coverage is determined on the basis of medical evidence-based, independent reviews such as conducted by the federal/provincial/territorial Common Drug Review process and the Canadian Agency for Drugs and Technologies in Health. Decisions on what to cover is based on this rigorous study and recommendations from registered health professionals, regulated by provincial or territorial colleges. Individual requests are reviewed in line with that evidence by licensed health professionals consistent with their scope of practice.

3. Generally, governments fund or provide services based on common policy or program criteria and operational procedures with mostly fixed funding envelopes. This applies federally, provincially and territorially across various populations based on universal or targeted coverage set by specific population characteristics (e.g. geographic location, age or other demographics, and/or income-based).

4. While it is likely that when government programs have fixed budgets, it can result in some individuals lacking access to the program or service, governments generally do not provide customized and complete access to all services needed by each specific individual in order for them to fully participate in their culture and society.

5. For example, many government programs are not universally available across all communities or populations. Examples within Indigenous Services Canada would be the Maternal Child Health and Aboriginal Head Start programs. Most Indigenous Services Canada programs are available on-reserve. Some services are provided through aggregate First Nations organizations where access may vary among communities. An example is the 63 First Nations mental wellness teams which are available to 344 communities.[1] Some community-based programs, such as the First Nations Home and Community Care Program and the Assisted Living Program On-Reserve require communities to prioritize service delivery to individuals on the basis of their overall assessment of needs within the community's population. Some government program funding is allocated based on requests for proposals. In such cases, criteria is set to evaluate proposals in such a way as to prioritize need, assess the state of readiness of the community or organization to deliver the program, and ability to achieve successful outcomes. In these contexts, the selection of proposals would not be based on discriminatory grounds but can lead to inequities in access to funds.

6. Attached as Exhibit A to my affidavit is a chart that gives examples of the sorts of products, supports and services that have typically been approved under Jordan's Principle. Requests are approved when a professional recommended that they would have a favourable impact on the child's life. But the professional is not asked for an opinion as to whether the service is "essential" to the child's safety, security or development. In some cases, it would be obvious that it is essential, as when the professional applies on an emergency basis, but in other cases, it may not be clear that harm would result in the absence of the service.

7. Federal, provincial and territorial governments offer various mechanisms to provide public information on the nature of their policies, programs, services or products for which they provide coverage or directly administer. For instance, Indigenous Services Canada has several mechanisms available to First Nations to reach out and make a request for funds or services. The Non-Insured Health Benefits Program has funded navigators across First Nations organizations in every province and territory for several years. There are over 30,000 service providers who are registered with the Program and have familiarity with the availability of

[1] Affidavit of Valerie Gideon, April 30, 2020, para.

supports. These navigators and providers will assist First Nations individuals living on and off-reserve. First Nations communities are funded for home and community care services, early childhood development and mental health and addictions programs. This translates to multiple community-based workers per community who have the ability to support families and advance requests to federal or provincial/territorial departments. Federal departments also have toll-free client information or inquiry lines.

Service Gaps

8. Canada has accepted that its previous applications of the definition of Jordan's Principle were unduly narrow. As the chart in Exhibit A demonstrates, Canada is now taking a much more expansive view, one that is consistent with the Tribunal's judgments.

9. The Caring Society uses the Tribunal's judgment in 2017 CHRT 35 as the basis for compensation. As defined by the Tribunal in that judgment, Jordan's Principle is intended to ensure that First Nations children's unmet needs are addressed promptly. Canada is obliged under that Order to determine whether a support, product or service should be funded by the Government of Canada within a prescribed 12 and 48-hour timeframe in non-urgent requests. This means that 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. Canada's determination is informed by many factors: the definition of a child's needs; a professional's recommendation that the product/service required; an assessment of whether the product/service is available to other children in similar circumstances (i.e., the normative standard); or whether it is required to enable the child to overcome specific historical, cultural or other challenges rooted in systemic discrimination by Canada.

10. In this process of determination, Canada is not asked to specifically consider whether the child will experience harm if the product or service is not approved or provided, nor whether or not harm will result if it is not determined within the prescribed timeframe. There are many

instances where supports, products and services are approved without knowing whether the absence of such a product or service would result in harm to the child.

11. Because of the Tribunal's Order preventing any administrative case conferencing, Canada is also unable to determine whether these requests could be met through federal, provincial or territorial programs. The Department has done an analysis shared with the Jordan's Principle Operations Committee that estimates approximately 71% percent of individual requests and 92% of group requests are within normative standards but likely would have been provided within a different timeframe, frequency or service provider. For example, many families are requesting hours of respite care that are much beyond what would be approved through First Nation community's home and community care program or provincial/territorial programs, and are also selecting specific respite care providers, such as extended members of their family. While these requests no doubt offer additional comfort and support for families, if respite care was aligned with provincial programs for instance, it is not clear that harm would result to the child.

12. Other examples are Jordan's Principle requests where professionals recommend a recreational or cultural activity for a child as part of their overall health and well-being. Even recognizing that many First Nations families experience more acute challenges in accessing these opportunities for their children, this type of activity is not a public or government service under a normative standard although they may be subsidized through the charitable/non-profit sector. Failing to provide funding for such an activity is unlikely to result in harm, nor would we regard it as discriminatory that funding not be provided. There is no "gap" between what federal funding provides, and what provincial/territorial programs allow, because neither provides the service outside of Jordan's Principle.

13. Some requests will also be submitted without a professional recommendation which can create a delay in determining the request. In these cases, requests are often submitted with support letters from a relative, service coordinator or a community worker who is acting as an advocate but is unable to conduct specific health, social or educational assessments. In these cases, the

Department will fund costs of the child accessing the required professional assessment and determine the request within the ordered timeframe as soon as it is received.

14. Canada has also agreed to fund group initiatives under Jordan's Principle that seek to maximize access to health, social and education services for children in First Nations communities. This funding is generally intended to respond to unmet needs due to existing program limitations. However, in the determination of these group requests, there is no assessment of individual harms that may be incurred by children included in the group request if the service is not provided. These group requests are often prevention-based, such as the Choose Life Initiative of the Nishnawbe Aski Nation, where the community has identified that the general socioeconomic conditions of families, as well as possibly other negative influences, are raising the risks to children of suicide ideation. Through Choose Life, over 20,000 First Nations children are estimated to have received services ranging from counselling to on-the-land cultural activities. These services are considered enhancements to existing programming and reflect application of the principle of substantive equality. The programs are not intended to respond specifically to identified service gaps relating to each child in the group.

Unreasonable Delay

15. The Caring Society's proposed definition of unreasonable delay goes beyond what federal programs would provide to any Canadian. For instance, it assumes that government programs would have responded to the non-urgent needs of non-First Nations children within 12-48 hours based on a recommendation of a service or product by a professional with relevant expertise, regardless of existing program coverage criteria or procedures. Outside of a medical or safety emergency, Canada is not aware of any federal, provincial or territorial program that responded to the non-urgent need of any child within the parameters specified under the umbrella of Essential Services, Service Gaps or Unreasonable Delay.

16. Canada has done a preliminary review of normative service standard responses according to the list of essential services provided by the Caring Society. There is no example outside of emergency ambulatory care or hospital services and certain benefits within the Non-Insured

Health Benefits Program where the 12-48 hour timeline applies. There is also no evidence of the harm that would be incurred by a child or children for utilizing a different standard, such as 72 hours or 10 days. There are multiple, publicly available examples of provincial wait times for services that demonstrate this:

- according to the Alberta Health Services website, the approximate waiting period to access services (https://www.albertahealthservices.ca/assets/programs/ps-5789-assess-interv-serv-children.pdf;
- according to the Government of Saskatchewan's website, benefits for respite is issued within 60 business days after a completed application is received through the Community Living- Family Respite Program (Source: https://publications.saskatchewan.ca/#/products/85515).

17. With respect to the payment of pharmaceuticals, the NIHB Program meets or exceeds the standards of other public drug plans. On average, 82% of paid pharmacy claims were approved automatically by the system upon submission. For pharmacy claims that do require prior approval, 90% of forms are returned and reviewed in a 24 hour period. NIHB lists many over-the-counter medications that would not necessarily be listed by provincial public plans and could often be used by children or youth. As well, NIHB lists many medications without prior approval criteria whenever possible, in contrast to many provincial public drug plans.

18. In terms of provincial service standards compared to those provided by NIHB above, the following are available on provincial government sites:
    a) Nova Scotia Pharmacare: https://novascotia.ca/dhw/pharmacare/benefits-and-reimbursement.asp. Usual response time is within 7 days. Urgent request are completed more quickly. Requests that do not meet defined criteria but warrant further review may take longer.
    b) Manitoba Pharmacare: https://www.gov.mb.ca/health/pharmacare/profdocs/eds_changes.pdf . Usual processing time is one to two business days. They triage all requests and prioritize urgent requests. Urgent requests received during regular business hours will usually be processed within 24 hours.

c) Ontario Public Drug Plans (see chart below this table*): http://www.health.gov.on.ca/en/pro/programs/drugs/eap_mn.aspx#6

d) Newfoundland Prescription Drug Program:http://www.nlma.nl.ca/FileManager/Notices_and_Advisories/docs/2016/2016.11.25_NLPDP_Special_Authorization_Process.pdf. Depending on the complexity of the request and the work load at the time, it could take anywhere from a few weeks to a couple of months to assess an Exceptional Review Request.

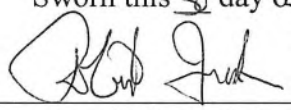
e) British Columbia Pharmacare: https://www2.gov.bc.ca/gov/content/health/practitioner-professional-resources/pharmacare/prescribers/special-authority. The usual turnaround time for **non-urgent** Special Authority requests is ten business days. The usual turnaround time for **urgent** Special Authority requests is one business day. Special Authority requests can be deemed urgent depending on medication required (this could include anticoagulants, oral antifungals, antibiotics, psychiatric and chemotherapy drugs, or for substance use disorder) and circumstances (e.g. hospital discharge, palliative treatment, medical assistance in dying, acute mental health or life-threatening conditions.

SWORN before me at the City of Ottawa, Province of Ontario, on April 30, 2020.

A Commissioner for Taking Affidavits
Barrister & Solicitor

Valerie Gideon

This is Exhibit "**A**" to the
Affidavit of Valerie Gideon
Sworn this 30 day of ~~May~~ April, 2020.



A Commissioner, etc.

Exhibit A- List of Jordan's Principle Services

The list below is intended for guidance only. Whether a service is approved for any particular child depends on the child's circumstances.

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

Oral surgery services, including general
Restorative services, including caries and crowns
Endodontic services, including root canals Dental treatment required to restore damage resulting from unmet dental needs
9. RESPITE
Respite care (if recommended by a social worker, a worker with a child and family services agency, or a medical professional)
10. VISION CARE
Examinations and corrective eyewear