Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 14
Date: May 26, 2017
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 and Edward Lustig

Outline

I. Motions for immediate relief related to Jordan's Principle

[1] Jordan River Anderson of the Norway House Cree Nation was born with a serious medical condition. Because of a lack of available medical services in his community, Jordan's family turned to provincial child welfare care in order for him to get the medical treatment he needed. After spending the first two years of his life in hospital, Jordan could have gone to a specialized foster home close to his medical facilities in Winnipeg. However, for two years, Indigenous and Northern Affairs Canada ("INAC"), Health Canada and the Province of Manitoba argued over who should pay for Jordan's foster home costs. Ultimately, Jordan remained in hospital until he passed away, at the age of five, having spent his entire life in hospital.

[2] In recognition of Jordan, Jordan's Principle provides that where a government service is available to all other children, but a jurisdictional dispute regarding services to a First Nations child arises between Canada, a province, a territory, or between government departments, the government department of first contact pays for the service and can seek reimbursement from the other government or department after the child has received the service. It is a child-first principle meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them. On December 12, 2007, the House of Commons unanimously passed a motion that the government should immediately adopt a child-first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

[3] The Complainants and Interested Parties (with the exception of Amnesty International) have each brought motions challenging, among other things, Canada's implementation of Jordan's Principle in relation to this Panel's decision and orders in *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 ("the *Decision*"). Canada and the Commission filed submissions in response to the motions. The motions were heard from March 22 to 24, 2017 in Ottawa. As with the hearing on the merits, the hearing of these motions was broadcasted on the Aboriginal Peoples Television Network.

[4] This ruling deals specifically with allegations of non-compliance and related requests for further orders with respect to Jordan's Principle. Other aspects of the parties' motions not dealt with in this ruling will be determined as part of a separate ruling.

II. Findings and orders with respect to Jordan's Principle to date

[5] In the *Decision*, this Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Delays were inherently built into the process for dealing with potential Jordan's Principle cases. Furthermore, the Canada's approach to Jordan's Principle cases was aimed solely at inter-governmental disputes between the federal and provincial government in situations where a child had multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children (not just those with multiple disabilities). As a result, INAC was ordered to immediately implement the full meaning and scope of Jordan's Principle (see the *Decision* at paras. 379-382, 458 and 481). The *Decision* and related orders were not challenged by way of judicial review.

[6] Three months following the *Decision*, INAC and Health Canada indicated that they began discussions on the process for expanding the definition of Jordan's Principle, improving its implementation and identifying other partners who should be involved in this process. They anticipated it would take 12 months to engage First Nations, the provinces and territories in these discussions and develop options for changes to Jordan's Principle.

[7] In a subsequent ruling (2016 CHRT 10), this Panel specified that its order was to immediately implement the full meaning and scope of Jordan's Principle, not immediately start discussions to review the definition in the long-term. We noted there was already a workable definition of Jordan's Principle, which was adopted by the House of Commons, and saw no reason why that definition could not be implemented immediately. INAC was ordered to immediately consider Jordan's Principle as including all jurisdictional disputes (including disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). The Panel further

indicated that the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided (see 2016 CHRT 10 at paras. 30-34). Again, the ruling and related orders were not challenged by way of judicial review.

[8] Thereafter, INAC indicated that it took the following steps to implement the Panel's order:

- It corrected its interpretation of Jordan's Principle by eliminating the requirement that the First Nations child on reserve must have multiple disabilities that require multiple service providers;
- It corrected its interpretation of Jordan's Principle to apply to all jurisdictional disputes and now includes those between federal government departments;
- Services for any Jordan's Principle case will not be delayed due to case conferencing or policy review; and
- Working level committees comprised of Health Canada and INAC officials, Director Generals and Assistant Deputy Ministers will provide oversight and will guide the implementation of the new application of Jordan's Principle and provide for an appeals function.

[9] It also stated it would engage in discussions with First Nations, the provinces and the Yukon on a long-term strategy. Furthermore, INAC indicated it would provide an annual report on Jordan's Principle, including the number of cases tracked and the amount of funding spent to address specific cases. INAC also updated its website to reflect the changes above, including posting contact information for individuals encountering a Jordan's Principle case.

[10] While the Panel was pleased with these changes and investments in working towards enacting the full meaning and scope of Jordan's Principle, it still had some outstanding questions with respect to consultation and full implementation. In 2016 CHRT 16, the Panel requested further information from INAC with respect to its consultations on Jordan's Principle and the process for dealing with Jordan's Principle cases. Further, INAC

was ordered to provide all First Nations and First Nations Child and Family Services Agencies ("FNCFS Agencies") with the names and contact information of the Jordan's Principle focal points in all regions.

[11] Finally, the Panel noted that INAC's new formulation of Jordan's Principle once again appeared to be more restrictive than formulated by the House of Commons. That is, INAC was restricting the application of the principle to "First Nations children on reserve" (as opposed to all First Nations children) and to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports." The Panel ordered INAC to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve. In order for the Panel to assess the full impact of INAC's formulation of Jordan's Principle, it also ordered INAC to explain why it formulated its definition of the principle as only being applicable to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" (see 2016 CHRT 16 at paras. 107-120). This third ruling was also not challenged by way of judicial review.

III. Canada's further actions in relation to Jordan's Principle

[12] In response to the present motions, Canada states that its definition of Jordan's Principle now applies to all First Nations children and is not limited to those residing on reserve or normally resident on reserve. It also applies to all jurisdictional disputes, including those between federal government departments.

[13] According to Canada, its revised interpretation of Jordan's Principle aims to ensure that anytime a need for a publicly-funded health, education or social care service or support for a First Nations child is identified, it will be met. Any jurisdictional issues that might arise will be dealt with after ensuring the need is met. New processes have been created so that the services needed for any Jordan's Principle case are not delayed due to case conferencing or policy review. Urgent cases are addressed within 12 hours; other cases within 5 business days; and, complex cases which require follow-up or consultation with others within 7 business days.

[14] Canada states it has also taken the necessary steps to ensure the requisite funding and human resources are available to implement the expanded definition of Jordan's Principle. In this regard, it has undertaken new policy initiatives to improve health and social service needs for First Nations children. According to Canada, the Child-First Initiative (the "CFI") supports the expanded application of Jordan's Principle by providing mechanisms for Canada to prevent or resolve jurisdictional disputes and gaps, before they occur. Canada submits the CFI identifies First Nations children at risk, through enhanced service coordination, and provides a source of funds to meet children's needs in cases where those needs cannot be met through existing publically available programs. Canada also points to the 2016/17 First Nations and Inuit Health Branch regional operation plan as supporting the correct interpretation of the application of Jordan's Principle. That plan calls for $64 million for First Nations mental health programs and services in Ontario, in addition to regular mental health programs.

[15] In addition, Canada submits that it is also focusing on enhancing its communication efforts to ensure its First Nations partners are informed of the new approach, aware of new resources available and given an opportunity to get involved and share their views.

[16] Finally, Canada states that while Jordan's Principle cannot fund everything, firm lines regarding what is recoverable are not being drawn. Any publicly-funded service that is available to other Canadian children is eligible under Jordan's Principle and has been covered when brought forward.

IV. Analysis

[17] The Complainants and the Interested Parties believe Canada has failed to comply with the Panel's orders to date, or certain aspects of those orders. Generally, each of their respective submissions focused on a different aspect of the complaint and made requests for immediate relief orders related to that focus. Based on statements made in their submissions and at the hearing, the Complainants and the Interested Parties are generally supportive of each other's positions and requested orders.

[18] The Commission believes that, despite a number of positive and encouraging developments, Canada is not yet in full compliance with this Panel's orders and, therefore, it is open to the Panel to provide additional clarification and/or guidance with respect to its orders.

[19] With respect to Jordan's Principle, the First Nations Child and Family Caring Society of Canada (the "Caring Society") and the Commission request that additional orders be made in relation to the definition of the principle, the dissemination of that definition to the public and stakeholders, and the process for dealing with Jordan's Principle cases and the tracking of those cases.

[20] The Assembly of First Nations (the "AFN") was originally concerned about its lack of involvement in Health Canada's Jordan's Principle activities given it has an Engagement Protocol with the First Nations and Inuit Health Branch. Health Canada has since invited the AFN to co-chair a working group on Jordan's Principle, which the AFN accepted. The AFN's submissions echo many of the concerns raised by the Caring Society and the Commission in terms of the definition and process surrounding Jordan's Principle.

[21] The Chiefs of Ontario's (the "COO") and the Nishnawbe Aski Nation's (the "NAN") submissions with respect to Jordan's Principle focus mainly on the provision of mental health services under the *Memorandum of Agreement Respecting Welfare Programs for Indians* ("the *1965 Agreement*") in Ontario. While this ruling will deal with Jordan's Principle generally, specific issues with respect to the *1965 Agreement*, along with other requests, will be dealt with in a separate ruling.

[22] In addition, the Panel highlights that NAN's motion had also sought a "Choose Life" order that Jordan's Principle funding be granted to any Indigenous community that files a proposal identifying children and youth at risk of suicide. Health Canada has since committed to establishing a Choose Life Working Group with NAN aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. As such, and at NAN's request, the Panel adjourned the request for a "Choose Life" order (see 2017 CHRT 7).

A. Legal arguments

(i) Burden of proof and compliance

[23] In general, and in deciding all aspects of the motions now before the Panel, the Caring Society and the AFN submit that Canada bears the burden of demonstrating to the Tribunal that it has complied with the orders for immediate relief made to date. Canada is in possession of the necessary information to show whether the immediate relief ordered by the Tribunal has been provided. Furthermore, it would be unjust, having proved that Canada has discriminated against First Nations children and their families in a systemic way, to bear a "burden of proof" to show that discrimination is continuing in the absence of further orders.

[24] In the absence of evidence clearly demonstrating that Canada has fully addressed the immediate relief items ordered by the Tribunal, the Complainants and the Interested Parties have, among other things, asked the Tribunal to find that Canada continues to discriminate, that it has not complied with the Panel's orders to date, and, in some cases, asked that the Tribunal issue an order declaring Canada non-compliant.

[25] The Commission submits that, where the Tribunal has retained jurisdiction to facilitate implementation of an order, and a dispute subsequently arises, it is open to the Tribunal to reconvene the hearing to: (i) make findings about whether a party has complied with the terms of the original order, and (ii) clarify and supplement the original order, if further direction is needed to address the discriminatory practice identified in the original order. In its view, despite a number of positive and encouraging developments, Canada has not yet brought itself into full compliance with the Tribunal's rulings regarding Jordan's Principle. It is therefore open to the Tribunal to provide additional clarification and/or guidance.

[26] Canada submits that there is no established legal test governing a motion for non-compliance before this Tribunal. The test to be met on this motion must accordingly be derived from the general principles that guide human rights law. According to Canada, the law is clear that the moving parties have the legal burden to prove their allegations on a

balance of probabilities: in this case, allegations of non-compliance. In Canada's view, the moving parties have not met their burden and, therefore, their motions should be dismissed. In any event, Canada states it has complied with the Tribunal's orders.

[27] Once it is established that discrimination or a loss has been suffered, the Tribunal must consider whether an order is appropriate (see s. 53(2) of the *Canadian Human Rights Act* ["the *Act*"]). In this regard, the Tribunal has the duty to assess the need for orders on the material before it; or, it can refer the issue back to the parties to prepare better evidence on what an appropriate order should be (see *Canadian Human Rights Commission v. Canada (Attorney General)*, 2010 FC 1135 at paras. 61 and 67, aff'd 2011 FCA 202 ["*Walden*"]). In determining the present motions, this is the situation in which the Panel finds itself.

[28] In the *Decision*, while the Panel made general orders to cease the discriminatory practice and take measures to redress and prevent it, it also explained that it required further clarification from the parties on the relief sought, including how immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis (see para. 483). Indeed, while the Panel was able to further elaborate upon its orders in its subsequent rulings based upon additional information provided by the parties, the Panel continued to retain jurisdiction over the matter pending further reporting from the parties, mainly from Canada (see 2016 CHRT 10 and 2016 CHRT 16). That is to say that, as opposed to determining the merits of a complaint, the Tribunal's determination of appropriate remedies is less about an onus being on a particular party to prove certain facts, and more about gathering the necessary information to craft meaningful and effective orders that address the discriminatory practices identified.

[29] 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).

[30] It is for these reasons that, absent a gap in the evidentiary record, the Panel does not consider the question of burden of proof to be a material issue in determining the present motions. As the Federal Court of Appeal stated in *Chopra v. Canada (Attorney General)*, 2007 FCA 268, at paragraph 42 ("*Chopra*"), "[t]he question of onus only arises when it is necessary to decide who should bear the consequence of a gap in the evidentiary record such that the trier of fact cannot make a particular finding." While discrete issues regarding the burden of proof may arise in the context of determining motions like the ones presently before the Panel, where the evidentiary record allows the Panel to draw conclusions of fact which are supported by the evidence, the question of who had the onus of proving a given fact is immaterial.

[31] In the same vein, the Panel's role in ruling upon the present motions is not to make declarations of compliance or non-compliance *per se*. Rather, in line with the remedial principles outlined above, the Panel's purpose in crafting orders for immediate relief and in retaining jurisdiction to oversee their implementation is to ensure that as many of the adverse impacts and denials of services identified in the *Decision* are temporarily addressed while INAC's First Nations child welfare programing is being reformed. That said, in crafting any further orders to immediately redress or prevent the discrimination identified in the *Decision*, it is necessary for the Panel to examine the actions Canada has taken to date in implementing the Panel's orders and it may make findings as to whether those actions are or are not in compliance with those orders.

[32] As the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para. 32, "[o]ften it may be more desirable for the Tribunal to provide guidelines in order to allow the parties to work out between themselves the details of the [order], rather than to have an unworkable order forced upon them by the Tribunal." This statement is in line with the Panel's approach to remedies to date in this matter. In order to facilitate the immediate implementation of the general remedies ordered in the *Decision*, the Panel has requested additional information from the parties, monitored Canada's implementation of its orders and, through its subsequent rulings, provided

additional guidance to the parties and issued a number of additional orders based on the detailed findings and reasoning already included in the *Decision*.

[33] While that approach has yielded some results, it has now been over a year since the *Decision* and these proceedings have yet to advance past the provision of immediate relief. The Complainants, the Commission and the Interested Parties want to see meaningful change for First Nations children and families and want to ensure Canada is implementing that change at the first reasonable occasion. The Panel shares their desire for meaningful and expeditious change. The present motions are a means to test Canada's assertion that it is doing so and, where necessary, to further assist the Panel in crafting effective and meaningful orders.

[34] This is the context in which the present motions have been filed. The Tribunal's remedial discretion must be exercised reasonably, in consideration of this particular context and the evidence presented through these motions. That evidence includes Canada's approach to compliance with respect to the Panel's orders to date, which evidence can be used by the Panel to make findings and to determine the motions of the parties.

(ii) Separation of powers

[35] In crafting further orders, Canada urges the Tribunal to bear in mind general principles regarding the appropriate separation of powers. That is, the Tribunal should leave the precise method of remedying the breach to the body charged with responsibility for implementing the order. According to Canada, the Tribunal would exceed its authority if it were to make orders resulting in it taking over the detailed management and coordination of the reform currently being undertaken.

[36] Canada submits deference must be afforded to allow it to exercise its role in the development and implementation of policy and the spending of public funds. Absent statutory authority or a challenge on constitutional grounds, courts and tribunals do not have the institutional jurisdiction to interfere with the allocation of public funds or the development of public policy. To the extent the Tribunal is being asked to make additional

remedial orders that would require it to dictate policies or authorize the spending of public funds, Canada contends those requests should be denied as they would exceed the Tribunal' s jurisdiction.

[37] Canada's separation of powers argument lacks specificity. Aside from one specific order requested by the Caring Society, which the Panel will address in a separate ruling, Canada has not pointed to any other orders requested by the other parties to which this argument would apply. For the purposes of this ruling, it has not identified any requested orders related to Jordan's Principle that may offend the separation of powers. In any event, as explained in the reasons below, any further orders made by the Panel are based on the findings and orders in the *Decision* and subsequent rulings, which Canada has accepted; the evidence presented on these motions; and, the Panel's powers under section 53(2) of the *Act*. In performing this analysis, Canada's generalized separation of powers argument is not particularly helpful.

B. Further orders requested

(i) Definition of Jordan's Principle

[38] Despite Canada's assurances that its definition of Jordan's Principle now applies to all First Nations children, regardless of their condition or place of residency, the Caring Society submits that government officials have been promulgating a restrictive definition of Jordan's Principle that still focuses on children with disabilities or with a critical short-term condition requiring heath or social services. The Caring Society adds that INAC has yet to undertake a review of past Jordan's Principle cases where services were denied. While Health Canada is engaged in a process of looking at past Jordan's Principle cases where services were denied, the Caring Society and the AFN are unclear about the number of years into the past this process is considering.

[39] Moreover, the Caring Society is concerned that the definition of Jordan's Principle is limited to children as defined by provincial legislation. In some provinces, a child is defined as being under the age of 16. Such an approach is unacceptable to the Caring Society because Jordan's Principle is not restricted to services provided under a

province's child and family services legislation. Similarly, the Caring Society submits that Jordan's Principle requires an outcome-based, and not process-based, approach to access to services. That is, the provincial/territorial normative standard of care is an inadequate measure when designing programs and initiatives to provide substantive equality to First Nations children.

[40] The Commission generally agrees with the Caring Society that the Tribunal should provide additional guidance by clarifying the exact definition of Jordan's Principle that is to be applied, going forward, to redress the discriminatory practices identified in the *Decision*. Considering the rulings already made by the Panel to date, the Commission suggested certain key principles that any definition of Jordan's Principle must include.

[41] While Canada has done some work to implement Jordan's Principle since the *Decision*, it still has not implemented its full meaning and scope. As mentioned above, in 2016 CHRT 16, the Panel indicated that a definition of Jordan's Principle that applies to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" appeared to be more restrictive than formulated by Parliament. Following the Panel's request for further information, and pursuant to the evidence presented in the course of these motions, the Panel can now confirm that Canada has indeed been applying a narrow definition of Jordan's Principle that is not in compliance with the Panel's previous orders.

[42] Canada put forward three witnesses in response to the motions of the Complainants and the Interested Parties:

- Ms. Robin Buckland, Executive Director of the Office of Primary Health Care within Health Canada's First Nations and Inuit Health Branch;
- Ms. Cassandra Lang, Director, Children and Families, in the Children and Families Branch at INAC; and,
- Ms. Lee Cranton, Director, Northern Operations in Ontario Region within Health Canada's First Nations and Inuit Health Branch.

[43] Each of these three witnesses swore an affidavit and was cross-examined thereon by the other parties, all of which was put before the Panel in the context of these motions. Generally, the three witnesses presented similar testimonial evidence in support of Canada's position. However, as the Panel will explain in the pages that follow and with a primary focus on the evidence of Ms. Buckland, their testimony in relation to Jordan's Principle was not corroborated by the bulk of the documentary evidence emanating from Canada and dated over the last year since the *Decision*.

[44] Ms. Buckland is the federal government official responsible for implementing Jordan's Principle. She has been involved in doing so since the *Decision*'s release (see Gillespie Reporting Services, transcript of Cross-Examination of Robin Buckland, Ottawa, Vol. I at p. 15, lines 21-23 [*Transcript of Cross-Examination of Ms. Buckland*]).

[45] In her affidavit, Ms. Buckland states that the previous restrictions found in the definition of Jordan's Principle have now been eliminated, including the requirement that First Nations children must have multiple disabilities that require multiple service providers or that they must reside on reserve. Despite this, she states that families are often not coming forward to request support. In this regard, she indicates proactive efforts in partnership with service delivery organizations on the ground will need to continue and that Canada has commenced various engagement activities to help facilitate the broader application of Jordan's Principle (see *affidavit of Ms. Robin Buckland*, January 25, 2017, at paras. 3, 16-17).

[46] Ms. Buckland further explained that the current definition of Jordan's Principle, which applies to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports", was to focus efforts on the most vulnerable children:

> [I]t's more about looking for the highest area of need and, and trying to focus our efforts.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 17, lines 12-13.

> [A] child living on reserve with an interim, a condition or short-term condition or a disability affecting their activities of daily living was a focus of our efforts, was and is a focus of our efforts in terms of Jordan's Principle.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 39 lines, 17-21.
>
> Whenever you're working on a complex health issue, you always take a multi-modal approach to it. There's always different angles from which you need to be able to address the problem if you are going to make a difference. The focus on First Nations children on reserve with a disability or a short-term condition with -- that affects their activities of daily living is an effort, is our effort to try to get at a segment of the population, a subset of the population where we feel there is an opportunity to make -- where we feel there is the greatest need and where we feel there is an opportunity to make the greatest difference.
> So I think as I said earlier, we were -- it was unfortunate that our communications in the beginning did not -- were not properly prefaced, indicating that Jordan's Principle applies to all First Nations children.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 40, lines 10-25.
>
> We're trying to focus, we're trying to start somewhere and trying to -- where are we likely to find the greatest number of jurisdictional disputes.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 41, lines 4-6.
>
> Children with disability or critical interim need is, is a particular focus. Jordan`s Principle, as I mentioned just moments ago, applies to all first nations kids and who have an unmet need in terms of health and social needs.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 275, lines 19-23.

[47] As the Caring Society points out at paragraph 24 of its December 16, 2016 submissions, the *Decision* found Canada's similarly narrow definition and approach to Jordan's Principle to have contributed to service gaps, delays and denials for First Nations children on reserve. Specifically, the evidence before the Panel in determining the *Decision* indicated Health Canada and INAC's approach to Jordan's Principle focused mainly on "inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers" (see *Decision* at paras. 350-382). Indeed, the Panel specifically highlighted gaps in services to children beyond those with multiples disabilities. For example, an INAC document referenced in the *Decision,* entitled

INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region, indicates that these gaps non-exhaustively include mental health services, medical equipment, travel for medical appointments, food replacement, addictions services, dental services and medications (see *Decision* at paras. 368-373).

[48] As the Panel also highlighted in the *Decision*, the Federal Court likewise found Health Canada and INAC's focused approach to Jordan's Principle to be narrow and the finding that the principle was not engaged with respect to Jeremy Meawasige, a teenager with multiple disabilities and high care needs, to be unreasonable (see *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342 ["*Pictou Landing*"]).

[49] The justification advanced by Ms. Buckland for the focused approach to Jordan's Principle is the same one advanced by Canada in the past and underscored by the Panel in the *Decision* (see paras. 359 and 368-369). Specifically, in a Health Canada PowerPoint presentation from 2011, entitled *Update on Jordan's Principle: The Federal Government Response* (Exhibit R-14, Tab 39 at p. 6), Canada indicated:

> This slide presents an overview of the federal response to Jordan's Principle. We acknowledge that there are differing views regarding Jordan's Principle. The federal response endeavors to ensure that the needs of the most vulnerable children at risk of having services disrupted as a result of jurisdictional disputes are met.
>
> […]
>
> The Government of Canada's focus is on children with multiple disabilities requiring services from multiple service providers whose quality of life will be negatively impacted by jurisdictional disputes. These are children who are the most vulnerable – children like Jordan.

[50] Despite the findings in the *Decision*, Canada has repeated its pattern of conduct and narrow focus with respect to Jordan's Principle. In February 2016, a few weeks after the release of the *Decision*, Canada considered various new definitions of Jordan's Principle. Those new definitions and their implications are found in a document entitled *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions*,

dated February 11, 2016 (*Exhibits to the Cross-Examination of Ms. Cassandra Lang on her affidavit dated January 25, 2017*, February 7-8, 2017, at tab 4):

Proposed Definition Options	Key Elements and Considerations
Option One: Jordan's Principle is a child-first approach to address the needs of First Nation children assessed as having disabilities/special needs by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, in the event that there is a dispute over payment of services between or within governments, First Nation children living on reserve (or ordinarily on reserve) will receive required social and health supports comparable to the standard of care set by the province (normative standard). The agency of first contact will pay for the services until there is a resolution.	**Key Elements** Similar to the criteria and scope as original JP response but broader than original definition (which was limited to "children with multiple disabilities requiring services from multiple service providers), this approach maintains a focus on children with special needs. Broadens the definition of jurisdictional dispute to include intergovernmental disputes (not just federal/provincial) this responds **Considerations:** • May draw criticism due the continued focus on special needs (while broader) as the original JP response. • Maintaining the notion of comparability to provincial resources may not address the criticism of the Tribunal regarding the need to ensure substantive equality in the provision of services. • The focus on a dispute does not account for potential gaps in services where no jurisdiction is providing the required services.
Option Two: Jordan's Principle is a child-first approach to address the assessed needs of First Nation children by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, in the event that there is a dispute over payment of services between or within governments, First Nation children living on reserve (or ordinarily on reserve) will receive required social and health supports comparable to the standard of care set by the province (normative standard). The agency of first contact will pay for the services until there is a resolution.	**Key Elements:** Similar to Option One with the exception of broadening the scope to include all First Nation children on reserve rather than limited to special needs. Maintains original focus on: • jurisdictional disputes • normative standards set by province (with a modification to move away from specific reference to geographical comparability **Considerations:** • Responds to the key direction of the Tribunal by broadening the scope beyond children with special needs. However, the broader scope may also dilute the focus on some of the most vulnerable children. • May have significant resources implications

Proposed Definition Options	Key Elements and Considerations
	and may go beyond current policy authorities and/or program mandates.
Option Three: Jordan's Principle is a child-first approach to address the assessed needs of First Nation c children by ensuring cross jurisdictional issues to not disrupt delay or prevent a child from accessing services. In the event that there is a dispute over payment of services between or within governments, First Nation children will receive required social and health supports. The agency of first contact will pay for the services until there is a resolution.	**Key Elements:** • Broader scope – does not limit the response to First Nation children living on reserve. • A dispute between governments or within government is still required in order to trigger JP. **Considerations:** • The inclusion of all First Nation children may have far reaching resource implications and will require additional policy and program mandates. • The continued focus on instances where there is a dispute may limit the ability for JP to respond to gaps in service (where no jurisdiction is providing the required service).
Option Four: Jordan's Principle is a child-first approach to address the assessed needs of First Nation children by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, First Nation children will receive required social and health supports. The issue of payment will be resolved by the government involved, the agency of first contact will pay for the services until there is a resolution.	**Key Elements:** A very broad application of the principle that includes all First Nation children and does not require an identified jurisdictional dispute in order to trigger JP. **Considerations:** • Considerable resource and policy and program implications • Goes beyond the Tribunal recommendations and has implications for federal mandate given that there are gaps in services that are not currently funded by any level of government. • Provinces may react to federal definition as it may put additional financial pressures on partners involved

[51] The Panel finds *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document relevant and reliable. Not only is it an internal government document filed into evidence but, similar to the August 2012 presentation entitled *First Nations Child and Family Services Program (FNCFS) The Way Forward* discussed in the *Decision* (see at paras. 292-302), it presents options that inform government decision making. As *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document specifies:

> The definitions and/or principles described above represent a menu of possible options (not mutually exclusive) that the federal government could draw from to meet the Tribunal's order to cease applying a narrow definition of Jordan's Principle and take measures to implement its full meaning and scope.

[52] Ultimately, it was "option one" that was selected for implementation, an option that *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document considers to not be fully responsive to the Tribunal's order. As the Caring Society and the Commission highlight in their submissions and the Panel confirmed in its review of the documents on record, including those referenced at pages 59-60 of the Caring Society's February 28, 2017 submissions, this definition and approach to Jordan's Principle was recently presented internally and externally to a number of organizations and First Nations in the following terms:

- First Nations children living on reserve with a disability or a short-term condition.
- First Nations children living on reserve with a disability or a short-term condition requiring health or social services.
- First Nations children with a disability or a critical short-term health or social service need living on reserve, or who ordinarily reside on reserve.
- First Nation child with a disability or a discrete condition that requires services or supports that cannot be addressed within existing authorities.
- First Nation children living on reserve with an ongoing disability affecting their activities of daily living, as well as those who have a short term issue for which there is a critical need for health or social supports.
- First Nations children living on reserve and in the Yukon who have a disability or an interim critical condition affecting their activities of daily living have access to health and social services comparable to children living off reserve.
- First Nations children with a disability or interim critical condition living on reserve have access to needed health and social services within the normative standard of care in their province/territory of residence.

[53] These iterations of Jordan's Principle do not capture all First Nations children. Instead, as stated by the Caring Society at paragraph 15 of its December 16, 2016

submissions, they capture "…varying subsets of First Nations children with disabilities or short-term conditions." Notwithstanding the above, Ms. Buckland indicates that Canada still meant for Jordan's Principle to apply to all First Nations children and that the fact the definition does not reflect all First Nations children is a communications issue and not a narrow application of the principle.

[54] The Panel does not accept this explanation. Ms. Buckland's assertion is not supported by the preponderance of evidence presented on this motion, which includes various charts, communication documents, and even extracts from INAC's website.

[55] A significant example is *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document referred to above. The consideration of each of the four options indicates that the definition of Jordan's Principle adopted by Canada was a calculated, analyzed and informed policy choice based on financial impacts and potential risks rather than on the needs or the best interests of First Nations children, which Jordan's Principle is meant to protect and should be the goal of Canada's programming (see *Decision* at para. 482).

[56] Another example is a letter dated January 19, 2017, addressed to Ontario First Nation Chiefs and Council Members, entitled *Attention: Ontario First Nation Chiefs and Council Members, Subject: Update-Jordan's Principle- Responding to the needs of First Nations children* (*Answers to requests of Lee Cranton*, March 7, 2017, at tab 13). In the letter, the Ontario Regional Executive for the First Nations and Inuit Health Branch announces the implementation of a new initiative designed to address the health and social needs of First Nations children with "…an ongoing disability affecting their daily living, or for those with a short-term issue where there is a critical need for health or social services." The letter comes almost a year after the *Decision*, nearly 9 months after the April 2016 ruling and, more significantly, after the Panel indicated in its September 2016 ruling that Health Canada and INAC's definition of Jordan's Principle appeared to be overly narrow and not in line with the Panel's previous findings and orders.

[57] A Health Canada presentation entitled *Jordan's Principle – Child First Initiative* presented on September 15, 2016 to the Non-Insured Health Benefits Committee, and on

October 6, 2016 to the Innu Round Table, indicates that the new approach to Jordan's Principle, restricted to children with disabilities or critical interim conditions living on reserve, will continue up to 2019 (see September 15, 2016 presentation at *Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, tab 5, at pp. 4-5; and, October 6, 2016 presentation at A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I, at pp. 4-5). At page 5, the presentation provides a "Then and Now" table comparing Canada's approach to Jordan's Principle from 2008-2016 to that in 2016-2019:

2008-2016	**2016-2019**
Dispute-based, triggered after declaration of a dispute over payment for services within Canada, or between Canada and a province	*Needs-based*, child-first approach to ensure access to services without delay or disruption due to jurisdictional gaps.
First Nations child living on reserve or ordinarily resident on reserve	Still First Nations child on reserve or ordinarily resident on reserve
	Are within the age range of "children" as defined in their province/territory of residence
Child assessed with: • multiple disabilities requiring multiple providers	Children assessed with needing health and/or social supports because of: • a disability affecting activities of daily living; OR • an interim critical condition affecting activities of daily living
Child required services comparable to provincial normative standards of care for children off-reserve in a similar geographic location	Child requires services comparable to provincial normative standards of care, AND requests BEYOND the normative standard will be considered on a case-by-case basis

[58] The *Jordan's Principle – Child First Initiative* presentation specifies that the goal of the new approach to Jordan's Principle is "…to help ensure that children living on reserve with a disability or interim critical condition have equitable access to health and social services comparable to children living off reserve" (at p. 6). At page 8, the October 6, 2016 presentation goes on to provide a "JP Fund – Eligibility Determination Checklist" which asks questions such as: is the request for a child as defined by provincial law? Does the child live on reserve or ordinarily lives on reserve? Does the child have a disability that impacts his/her activities of daily living at home, school or within the community, or has an interim critical condition requiring health or social services or supports? Does the request fall within the normative standard of care of the province or territory of residence?

[59] These presentations are meant to inform and guide individuals on how Canada is implementing Jordan's Principle. In another similar example, in a letter dated August 8, 2016, addressed to all First Nations and Inuit Health Branch and Band employed nurses in Alberta, with the subject line "Government of Canada's New Approach to Implementing Jordan's Principle" (see A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I at p.2), the Director of Nursing for the First Nations and Inuit Health Branch, Alberta Region, writes:

> - Please read the information below/attached to orientate yourself to the new approach.
>
> - There will be further details coming to help guide your assistance with these clients.
>
> - As part of your regular work, if you see or are approached about a First Nations child with disabilities (short-term or long term) that may not be receiving the needed health or social services normally provided to a child off-reserve please contact FNIHB-AB.

[60] The letter attaches a guide illustrating the process to be followed in assessing a potential Jordan's Principle case. Despite the case-by-case analysis stated in other presentations for situations falling outside the eligibility criteria, the process indicated in the chart for nurses steers those cases away from the application of Jordan's Principle. The first question in the chart is: "Does the child have needs related to a disability or a short term health issue that are not being met?" If the answer is 'no', the chart indicates that the "Client/Family should access regular programming." If the answer to this first question is 'yes', then the next question is: "Are there programs on reserve, or easily accessed off reserve, that could meet those needs?" If the answer to this second question is 'no', the chart directs the nurses to: "Gather the related information and send to the JP focal point (JPFP) (See Contacts)." If the answer to the second question is 'yes', the nurse can "…make these referrals as they normally would i.e. Home Care, NIHB, PCN services."

[61] At the time of Ms. Buckland's cross-examination, in February 2017, INAC's website continued to espouse the narrow definition of Jordan's Principle:

> The Government of Canada's new approach to Jordan's Principle is a child-first approach that addresses in a timely manner the needs of First Nations children living on reserve with a disability or a short-term condition.
>
> "Fact Sheet: Jordan's Principle - Addressing the Needs of First Nations Children", Government of Canada (February 4, 2017), *Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, at tab 7; see also *Transcript of Cross-Examination of Ms. Buckland* at pp.43-45.

[62] Canada submits that it has now removed any restrictions in its definition of Jordan's Principle. However, only one document submitted prior to Ms. Buckland's cross-examination supports this point. A November 2016 presentation to the "ADM Oversight Steering Committee" states: "Jordan's Principle (JP) reflects a commitment to ensure all First Nations children receive access to services available to other Canadian children, in a timely manner" [Health Canada, *Jordan's Principle: Engaging with partners to design long-term approach*, presentation dated November 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H, at p. 2)]. It goes on to indicate that Health Canada and INAC are implementing a child-first approach, "addressing specific needs of children on a case-by-case basis." When compared to other presentations submitted into evidence, as outlined above, it does not appear that this presentation was widely communicated, within or outside government. It is also unclear that the principles enunciated therein have been implemented.

[63] Two other documents could be said to support Canada's assertion that it has now removed any restrictions in its definition of Jordan's Principle. Both those documents were submitted following Ms. Buckland's cross-examination and in answer to requests from the other parties.

[64] The first document is another presentation, dated December 21, 2016. It indicates, among other things, that Jordan's Principle applies to all First Nations children, that the Government of Canada recognizes that First Nations on reserve face greater difficulty in accessing Federal/Provincial/Territorial supports, and, that Canada is focused on the most

vulnerable children – those with a disability or critical short-term condition (see Health Canada, *Improving Access to Health and Social Services for First Nations Children*, presentation dated December 21, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, tab 3B, at pp. 2 and 5). The presentation does not specify who it was presented to and, again, when compared to other presentations submitted into evidence, it does not appear to have been widely distributed or communicated, if at all.

[65] The other document contains notes from a "February 10th" meeting with regional executives (see *Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A). It states:

> Update on JP
> - applies to all FN children, not just on reserve
> - JP not limited to short term needs and disabilities
> - all FN children, all disputes, all needs
> - each order from CHRT has clarified our responsibilities
> - focus was on disability because of greatest need and access issues and likelihood of jurisdictional disputes
> - comms tools and key messages – getting these out
> - will be asked to go back to all stakeholders and clarify our directions
>
> […]
>
> Next Steps
> - will follow up with written lines which will say:
> - all FN children, on and off reserve
> - all jurisdictional disputes e.g. between departments
> - not limited to children with disabilities or short term critical needs

[66] Based on the wording of the notes, it is clear that they came from a meeting in February 2017: "applies to all FN children, not just on reserve" (this requirement was clarified in September 2016 in 2016 CHRT 16); "each order from CHRT has clarified our responsibilities" (only one order in February 2016); and, "focus was on disability because of greatest need and access issues and likelihood of jurisdictional disputes" (this more detailed "focus" characterization only arises following Ms. Buckland's cross-examination). Again, when compared to the other evidence, the definition of Jordan's Principle discussed at this meeting does not appear to have been widely distributed or communicated, if at all, and it is also unclear that the principles enunciated therein have now been implemented.

[67] Accordingly, the Panel finds the evidence presented on this motion establishes that Canada's definition of Jordan's Principle does not fully address the findings in the *Decision* and is not sufficiently responsive to the previous orders of this Panel. While Canada has indeed broadened its application of Jordan's Principle since the *Decision* and removed some of the previous restrictions it had on the use of the principle, it nevertheless continues to narrow the application of the principle to certain First Nations children.

[68] Presumably, while Canada could have implemented the actual definition of Jordan's Principle, as ordered by the Panel, and at the same time implemented a method to focus on the urgent needs of certain children, that was not the course of action taken by Canada. Having a broad definition does not exclude the possibility of having a process to deal with some children on a more urgent basis. However, there is a distinction between, on the one hand, having an inclusive definition and then attributing priorities in terms of urgencies and, on the other hand, limiting the definition with the result of excluding individuals for the sake of focusing on more vulnerable cases.

[69] Furthermore, the emphasis on the "normative standard of care" or "comparable" services in many of the iterations of Jordan's Principle above does not answer the findings in the *Decision* with respect to substantive equality and the need for culturally appropriate services (see *Decision* at para. 465). The normative standard of care should be used to establish the minimal level of service only. To ensure substantive equality and the provision of culturally appropriate services, the needs of each individual child must be considered and evaluated, including taking into account any needs that stem from historical disadvantage and the lack of on-reserve and/or surrounding services (see *Decision* at paras. 399-427).

[70] In this regard, the normative standard of care in a particular province may help to identify some gaps in services to First Nations children. It is also a good indicator of the services that any child should receive, whether First Nations or not. For example, in the hearing on the merits, the Panel heard that Health Canada will only pay for one medical device out of three and, if it is a wheelchair, it is paid for once every five years. The normative standard of care generally provides for all three devices to be paid for (see *Decision* at para. 366 and *Jordan's Principle Dispute Resolution Preliminary Report*

(Terms of Reference Officials Working Group, May 2009), Exhibit HR-13, tab 302). This example highlights the gap and flawed rationale contributing to Health Canada's policy, which does not take into account a child's growth over five years.

[71] However, the normative standard may also fail to identify gaps in services to First Nations children, regardless of whether a particular service is offered to other Canadian children. As *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document identifies above, under the "Considerations" for "Option One": "The focus on a dispute [over payment of services between or within governments] does not account for potential gaps in services where no jurisdiction is providing the required services."

[72] This potential gap in services was highlighted in the *Pictou Landing* case mentioned above and in the *Decision*. Where a provincial policy excluded a severely handicapped First Nations teenager from receiving home care services simply because he lived on reserve, the Federal Court determined that Jordan's Principle existed precisely to address the situation (see *Pictou Landing* at paras. 96-97). Furthermore, First Nations children may need additional services that other Canadians do not, as the Panel explained in the *Decision* at paragraphs 421-422:

> [421] In her own recent comprehensive research assessing the health and well-being of First Nations people living on reserve, Dr. Bombay found that children of Residential School survivors reported greater adverse childhood experiences and greater traumas in adulthood, all of which appeared to contribute to greater depressive symptoms in Residential School offspring (see Annex, ex. 53 at p. 373; see also *Transcript* Vol. 40 at pp. 69, 71).
>
> [422] Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves. By focusing on bringing children into care, the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure - that exemplify the additional need of First Nations people to receive

> adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.

[73] Therefore, the fact that it is considered an "exception" to go beyond the normative standard of care is concerning given the findings in the *Decision*, which findings Canada accepted and did not challenge. The discrimination found in the *Decision* is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families. There should be better coordination between federal government departments to ensure that they address those needs and do not result in adverse impacts or service delays and denials for First Nations. Over the past year, the Panel has given Canada much flexibility in terms of remedying the discrimination found in the *Decision*. Reform was ordered. However, based on the evidence presented on this motion regarding Jordan's Principle, Canada seems to want to continue proffering similar policies and practices to those that were found to be discriminatory. Any new programs, policies, practices or funding implemented by Canada should be informed by previous shortfalls and should not simply be an expansion of previous practices that did not work and resulted in discrimination. They should be meaningful and effective in redressing and preventing discrimination.

[74] Canada's narrow interpretation of Jordan's Principle, coupled with a lack of coordination amongst its programs to First Nations children and families (as will be discussed in the next section), along with an emphasis on existing policies and avoiding the potential high costs of services, is not the approach that is required to remedy discrimination. Rather, decisions must be made in the best interest of the children. While the Ministers of Health and Indigenous Affairs have expressed their support for the best interest of children, the information emanating from Health Canada and INAC, as highlighted in this ruling, does not follow through on what the Ministers have expressed.

[75] Overall, the Panel finds that Canada is not in full compliance with the previous Jordan's Principle orders in this matter. It tailored its documentation, communications and resources to follow its broadened, but still overly narrow, definition and application of

Jordan's Principle. Presenting a criterion-based definition, without mentioning that it is solely a focus, does not capture all First Nations children under Jordan's Principle. Furthermore, emphasizing the normative standard of care does not ensure substantive equality for First Nations children and families. This is especially problematic given the fact that Canada has admittedly encountered challenges in identifying children who meet the requirements of Jordan's Principle and in getting parents to come forward to identify children who have unmet needs (see *Transcript of Cross-Examination of Ms. Buckland* at p. 43, lines 1-8).

[76] On this last point, the evidence indicates and the Panel wishes to highlight that any funding set aside to address Jordan's Principle cases that is not spent in a given year cannot be carried over into the next year. It is set and has to be spent on Jordan's Principle cases or it is returned to the consolidated revenue fund of Canada. In this regard, from July 2016 to February 2017, only approximately $12 million or a little over 15% of the $76.6 million budgeted for Jordan's Principle in 2016-2017 had been spent, $8 million of which was for respite care services in Manitoba [see "Jordan's Principle - Child First initiative", presentation to the Non-Insured Health Benefits Committee, September 15, 2016 (*Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, tab 5, at p. 10); "Jordan's Principle, Health Canada and INAC 2016-17 Dashboard, Service Access Resolution Funding", valid as of January 11, 2017 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit A); "Memorandum to Senior Assistant Deputy Minister, Requests for Funding for Respite Care and Allied Services under Jordan's Principle", October 3, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit B, at p. 2); "Memorandum to Senior Assistant Deputy Minister, Request for Funding in Manitoba Region for Specialized Therapy Services Under Jordan's Principle", December 9, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit B, at p. 2); and, "2016-17 JP-CFI Allocation by Region" (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 9)].

[77] Canada's current approach to Jordan's Principle is similar to the strategy it employed from 2009-2012 and as described in paragraph 356 of the *Decision*. During that time, Canada allocated $11 million to fund Jordan's Principle. The funds were provided

annually, in $3 million increments. No Jordan's Principle cases were identified and the funds were never accessed and lapsed. The Panel determined it was Health Canada and INAC's narrow interpretation of Jordan's Principle that resulted in there being no cases meeting the criteria for Jordan's Principle (see *Decision* at paras. 379-382).

[78] Despite Jordan's Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the *Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the *Decision*, especially with respect to allocating dedicated funds and resources to address some of these issues (see *Decision* at para. 356). In this sense, the evidence shows that Canada's funding of $382 million over three years for Jordan's Principle is not an investment that covers the broad definition ordered by the Panel in the *Decision* and subsequent rulings. Similar to Canada's past practice, it is a yearly pool of funding that expires if not accessed. Also, it is tailored to be responsive to the narrow definition Canada selected and, as specifically mentioned in Canada's own documents, this fund only covers First Nations children on reserve. Now, with a broadening of the definition of Jordan's Principle and the expiration of some of the funding, resources to address Jordan's Principle may become scarce [see "First Nations and Inuit Health Branch, Regional Executive Forum, Record of Discussion and Decisions", August 9, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A)].

[79] Again, the Panel recognizes that Canada made some efforts to implement Jordan's Principle and had a short time frame within which to do so following this Panel's ruling in April 2016. However, the same cannot be said for the numerous months following the April ruling, especially following the September 2016 ruling and up to the time of the hearing of these motions in March 2017. That said, the Panel believes Canada wants to comply with the *Decision* and related orders and has communicated as much [for example, see "Fact Sheet: Jordan's Principle - Addressing the Needs of First Nations Children" (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A); and, "FNIHB SMC-P&P, Record of Decisions", May 18, 2016 (*Answers to Requests of Robin Buckland*, March 7, 2017, at tab 5, p. 1)].

[80] Despite this, nearly one year since the April 2016 ruling and over a year since the *Decision*, Canada continues to restrict the full meaning and intent of Jordan's Principle. The Panel finds Canada is not in full compliance with the previous Jordan's Principle orders in this matter. There is a need for further orders from this Panel, pursuant to section 53(2)(a) and (b) of the *Act*, to ensure the full meaning and scope of Jordan's Principle is implemented by Canada. In this regard, to redress Canada's previous discriminatory practices, the Panel notes that there are no restrictions that it is aware of that would stop individuals who were previously denied funding under Jordan's Principle, or who would now be considered to fall within the application of Jordan's Principle, from now coming forward and submitting or resubmitting their request. In fact, as highlighted by the Caring Society, considering Canada's previously narrow application of Jordan's Principle from at least 2009 to present, it would be appropriate and reasonable for Canada to review previous requests for funding that were denied, whether made pursuant to Jordan's Principle or otherwise, to ensure compliance with the correct application of Jordan's Principle ordered in this ruling.

[81] All the Panel's orders with respect to the implementation of the full meaning and scope of Jordan's Principle are detailed in the "Order" section below, under "Definition of Jordan's Principle.

(ii) Changes to the processing and tracking of Jordan's Principle cases

[82] Canada believes its new processes ensure any Jordan's Principle case is not delayed due to case conferencing or policy review. As mentioned above, it alleges urgent cases are addressed within 12 hours, while other cases are addressed within 5 business days, and complex cases which require follow-up or consultation with others are addressed within 7 business days.

[83] The Caring Society submits that Canada's revised processes for dealing with Jordan's Principle cases still impose delays. The AFN shares the Caring Society's view that the arm of government first contacted still does not address the matter directly by funding the service and seeking reimbursement afterwards as is required by Jordan's

Principle. In this regard, Canada's service standards relate to the lapse of time for a decision to be made and not the time it takes for the services to be actually provided to a child. Therefore, Canada should be required to confirm to the Tribunal that its process has been modified so that the government organization that is first contacted pays for the service without the need for policy review or case conferencing before funding is provided.

[84] Also, the Caring Society points out that Canada lacks a transparent and independent mechanism for a family or service provider to appeal a Jordan's Principle case. While a family of a child can request an appeal, there are no appeal procedures described or provided, no timelines for the appeal process and no assurance that written reasons will be provided.

[85] Furthermore, the Caring Society submits that Canada is not formally tracking the number of Jordan's Principle cases that are denied or in progress. It is also not measuring its performance against its stated timelines for resolving Jordan's Principle cases. In this regard, the AFN highlights that Jordan's Principle is meant to cover gaps in federal funding to First Nations children; however, Canada has not yet developed an internal understanding of what those gaps are.

[86] The Commission agrees with the Caring Society's request that Canada immediately: (i) cease imposing service delays due to policy review or case conferencing, and (ii) implement reliable systems to ensure the identification of Jordan's Principle cases. However, there are arguably multiple different methods of compliance. Therefore, the Tribunal should simply set a specific deadline by which the required procedures should be put in place, and require that Canada report to the parties at that time on the means chosen.

[87] Aside from some answers from its witnesses, Canada did not specifically address the submissions with respect to the first contact principle, appeal mechanisms or tracking.

[88] As highlighted in the Panel's last ruling in this matter (2017 CHRT 7), in January 2017, two twelve-year-old children tragically took their own lives in Wapekeka First Nation ("Wapekeka"), a NAN community. Before the loss of these children, Wapekeka had alerted the federal government, through Health Canada, to concerns about a suicide pact

amongst a group of young children and youth. This information was contained in a detailed July 2016 proposal aimed at seeking funding for an in-community mental health team as a preventative measure.

[89] The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle'' (see *affidavit of Dr. Michael Kirlew*, January 27, 2017, at para. 16).

[90] While Canada provided assistance once the Wapekeka suicides occurred, the flaws in the Jordan's Principle process left any chance of preventing the Wapekeka tragedy unaddressed and the tragic events only triggered a reactive response to then provide services. On a positive note, as mentioned above, Health Canada has since committed to establishing a Choose Life Working Group with the NAN, aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. Nevertheless, the tragic events in Wapekeka highlight the need for a shift in process coordination around Jordan's Principle.

[91] Ms. Buckland acknowledged that the Wapekeka proposal identified a gap in services and that Jordan's Principle funds could have been allocated to address that gap. Despite this, and the fact that it was a life or death situation, Ms. Buckland indicated that because it was a group request, it would be processed like any other group request and go forward for the Assistant Deputy Minister's signature. In the end, she suggested it would have likely taken a period of two weeks to address the Wapekeka proposal (see *Transcript of Cross-Examination of Ms. Buckland* at p. 174, lines 19-21; p. 175, lines 1-4; p. 180, lines 1-9; and, p. 182, lines 11-16).

[92] If a proposal such as Wapekeka's cannot be dealt with expeditiously, how are other requests being addressed? 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 surrounding what the process actually was [see "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit F, at p. 3); see also *Transcript of Cross-Examination of Ms. Buckland* at p. 82, lines 1-12].

[93] More significantly, Ms. Buckland's comments suggest the focus of Canada's Jordan's Principle processing remains on Canada's administrative needs rather than the seriousness of the requests, the need to act expeditiously and, most importantly, the needs and best interest of children. It is clear that the arm of the federal government first contacted still does not address the matter directly by funding the service and, thereafter, seeking reimbursement as is required by Jordan's Principle. The Panel finds Canada's new Jordan's Principle process to be very similar to the old one, except for a few additions. In developing this new process, there does not appear to have been much consideration given to the shortcomings of the previous process.

[94] The timelines imposed on First Nations children and families in attempting to access Jordan's Principle funding give the government time to navigate between its own services and programs similar to what the Panel found to be problematic in the *Decision*. According to Ms. Buckland, a Jordan's Principle case comes to Canada's attention through the local Jordan's Principle focal point, which receives the intake form and then sends it to headquarters. The case is then evaluated by staff at headquarters, who first evaluate the case to determine if an existing program within Health Canada or INAC will pay for the service requested. It is unclear how long this intake and initial evaluation can take.

[95] For example, the Panel was provided with an exchange of emails between Health Canada and a First Nations mother looking for assistance in busing her son with severe cerebral palsy to an off-reserve service centre with a program for special needs children (*Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, at tab 12). Following the initial request and an exchange of further information on January 19 and 20, 2017, Health Canada provided an update to the mother on January 27, 2017 indicating that it is working with INAC to determine if their education program could address the request. The mother wrote to Health Canada on

February 3, 2017 requesting a further update from Health Canada because she had yet to hear back for them. Two weeks after receiving the initial request, Canada was still trying to navigate between its own services and programs. When presented with this case under cross-examination, Ms. Buckland indicated "So I guess there's additional work to be done and, and I'm not sure that I have a better answer for it than that" (*Transcript of Cross-Examination of Ms. Buckland* at p. 82, lines 10-12).

[96] Where an existing program cannot resolve the service need, headquarters staff will then determine whether the case can be determined at the staff level, the Executive Director level, or the Assistant Deputy Minister level. It is only at this point that Canada's timelines come into play (urgent cases addressed within 12 hours, other cases within 5 business days, and complex cases within 7 business days). Even then, the evidence indicates these timelines were not fully implemented at the time of Ms. Buckland's cross-examination. A draft flow chart entitled "Jordan's Principle Approval Process", dated February 20, 2017, and provided following Ms. Buckland's cross-examination, is marked as being in draft format (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 11). As Ms. Buckland indicated in her cross-examination, the process is still being refined (see *Transcript of Cross-Examination of Ms. Buckland* at p. 119, lines 13-19).

[97] The evidence indicates, and Ms. Buckland testified as much, that access to Jordan's Principle funding is a last resort (see *Transcript of Cross-Examination of Ms. Buckland* at p. 51, lines 3-9; pp. 65-67; p. 72, lines 6-21; and, pp. 76-78). The new Jordan's Principle process outlined above is very similar to the one used in the past, which the Panel found to be contributing to delays, gaps and denials of essential health and social services to First Nations children and families. Ultimately, this process factored into the Panel's findings of discrimination (see *Decision* at paras. 356-358, 365, 379-382, and 391).

[98] The new process still imposes delays due to exchanges among federal government departments, whether it is called case conferencing, policy review or service navigation. As the Panel found in the *Decision*, this added layer of administration is counterintuitive to a principle designed to address exactly those issues, which result in delays, disruptions and/or denials of goods or services for First Nations children. Pursuant to Jordan's

Principle, once a service need is determined to exist, the government should pay for the service and determine reimbursement afterwards. In practical terms, this means that the delay in the process to evaluate the case to determine if an existing program within Health Canada or INAC will pay for the service should be eliminated. This administrative hurdle or delay, and the clear lack of coordination amongst federal programing to First Nations children and families, should be borne by Canada and not put on the shoulders of First Nations children and families in need of service.

[99] Jordan's Principle requires that there be a direct evaluation of need at the focal point or headquarters stage and that a decision be made expeditiously. Access to Jordan's Principle funding should be a priority, not a last resort. In this regard, no specific explanation was provided for why most cases will take an average of 5 business days to process. Given urgent cases can be processed within 12 hours, it is reasonable to assume that Canada can process most Jordan's Principle cases within a similar timeframe and shall be ordered to do so.

[100] For appeals, there is no formal process. In her affidavit, Ms. Buckland indicated that "Canada is implementing an approval and appeal process to review all requests in a timely manner" (*Affidavit of Robin Buckland*, January 25, 2017, at para. 11). Under cross-examination, she indicated that the appeals process is still being refined but currently consists of a family notifying the local Jordan's Principle focal point of the desire to appeal and that, thereafter, the case is referred to her for review at the Assistant Deputy Minister level (see *Transcript of Cross-Examination* of Ms. Buckland at p. 117, line 3, to p. 119, lines 3-19).

[101] In another draft flow chart entitled "Jordan's Principle Appeal Process", again in draft format and subject to further refinement, dated February 20, 2017 and provided following Ms. Buckland's cross-examination, a few additional details regarding the appeals process are elaborated upon (see *Answers to requests of Robin Buckland*, March 7, 2017, at tab 11; and, *Transcript of Cross-Examination of Ms. Buckland* at p. 117, line 3, to p. 119, line 19). Under "Guiding Principles" it mentions, among other things, that "[d]ecisions are consistently applied, and based on impartial judgement", that the "[p]rocess is open, available to the public, and easily understandable", and that "[d]ecisions are made within a

reasonable time period, without delay, and in keeping with established service standards of Jordan's Principle."

[102] However, it is unclear how these principles are incorporated into the actual appeals process. All that is described in the flow chart is that the regional Jordan's Principle focal point receives the request to appeal; the focal point then sends the request with any new or additional information for review to Health Canada's Senior Assistant Deputy Minister, First Nations and Inuit Health Branch and/or INAC's Assistant Deputy Minister, Education and Social Development Programs and Partnership. If the appeal is denied, the client is provided a rationale. No timelines are mentioned in the chart and no other information on the appeals process is found in the documentary record.

[103] In terms of the Jordan's Principle process overall, the Panel finds there is a clear need for improvement to ensure the principle is meeting the needs of First Nations children and addressing the discrimination found in the *Decision*. Pursuant to section 53(2)(a) of the *Act*, the Panel orders Canada to ensure its processes surrounding Jordan's Principle implement the standards detailed in the "Orders" section below, under "Processing and tracking of Jordan's Principle cases." In addition, Canada should turn its mind to the establishment of an independent appeals process with decision-makers who are Indigenous health professionals and social workers.

[104] In terms of tracking Jordan's Principle cases, there was little evidence to suggest Canada is formally doing so beyond a very basic level. As Ms. Buckland put it, tracking "…definitely needs to be augmented to further track with better detail" (*Transcript of Cross-Examination of Ms. Buckland* at p. 96, line 25, to p. 97, line; see also p. 72, line 22, to p. 73, line 22; p. 92, lines 12-15; and, p. 97, line 10, to p. 98, line 2). A November 2016 presentation to the Assistant Deputy Minister Oversight Steering Committee, entitled "Jordan's Principle: Engaging with partners to design long-term approach" (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H), indicates under "Activities & Timelines" at page 6 that from Fall 2016 to Winter 2017 a data collection tool will be rolled out for use by INAC and Health Canada Service Coordinators and Jordan's Principle focal points. However, in light of the narrow definition of Jordan's Principle that was being used by

Canada, as discussed above, it is likely that any current tracking of cases may not capture all potential Jordan's Principle case, gaps in services and all First Nations children.

[105] With regard to the AFN's submission that Canada has not yet developed an internal understanding of what the gaps in federal funding to First Nations children are, the Panel notes that the *Jordan's Principle – Child First Initiative* presentation, presented to the Innu Round Table on October 6, 2016 (A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I), under "Implementation Points" at page 12, states: "Conducting a province by province gap analysis of health and social services for on-reserve children with disabilities" (see also Health Canada, *Jordan's Principle – Child First Initiative*, presentation dated October 12, 2016 (A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I, at p. 12).

[106] There are no timelines indicated for when this analysis will be completed and, based on the Panel's reasoning above regarding Canada's definition of Jordan's Principle, the analysis will need to be broadened beyond "on-reserve children with disabilities." The information that is collected must reflect the actual number of children in need of services and the actual gaps in those services in order to be reliable in informing future actions.

[107] Therefore, the Panel orders Canada to track and collect data on Jordan's Principle cases pursuant to the definition of Jordan's Principle ordered in this ruling. In order to ensure Jordan's Principle is being implemented correctly by Canada, the Panel agrees with the Caring Society that Canada should be formally tracking the number of Jordan's Principle cases that are approved, denied or in progress. Additionally, performance measures should be tracked in terms of stated timelines for resolving Jordan's Principle cases and in providing approved services. Consequently, pursuant to section 53(2)(a) of the *Act*, the Panel makes the remaining orders detailed in the "Order" section below, under "Processing and tracking of Jordan's Principle cases."

(iii) Publicizing the compliant definition and approach to Jordan's Principle

[108] Given Canada has disseminated a narrow definition of Jordan's Principle, the Caring Society requests that Canada be required to proactively, and in writing, correct the record with any person, organization or government who received, or could be in receipt of flawed material on Jordan's Principle. Relatedly, the Caring Society asks that Canada revisit any funding agreements or other arrangements already concluded to ensure that they reflect the full and proper scope and implementation of Jordan's Principle.

[109] The Caring Society is also concerned that Canada has failed to take any formal measures to ensure that all staff are aware, understand and have the tools and resources necessary to implement the findings in the *Decision* related to Jordan's Principle, along with the subsequent rulings and orders issued by the Panel in this regard.

[110] The Commission agrees that it would be appropriate for the Tribunal to supplement its initial order by directing Canada to take specific steps, within fixed timeframes, to adequately inform government officials, FNCFS Agencies and the general public about its compliant approach to Jordan's Principle. It adds that the Caring Society and the other parties to this complaint have invaluable expertise to contribute to any discussion about how best to educate the public about Jordan's Principle. Together, they can help to ensure that any public relations material contains up-to-date, reliable and first-hand information from those who work daily in delivering child welfare and other services to First Nations children. Therefore, the Commission asks that it, the Caring Society, the AFN and the Interested Parties be consulted by Canada on the distribution of any public education materials.

[111] Canada submits it is focusing on enhancing its communication efforts to ensure its First Nations partners are informed of the new approach, aware of new resources available to support First Nations children, and given an opportunity to get involved and share their views. It adds that, with Canada's initial work to reform its approach to Jordan's Principle complete, there is now greater room for engagement with the parties to this matter and other stakeholders regarding the impact of Canada's changes. According to

Canada, reform is an evolving process, and one that it acknowledges will benefit from engagement moving forward.

[112] In light of the evidence and findings with respect to the definition and processing of Jordan's Principle cases, the Panel finds there is a clear need for Canada to go back to its employees, the organizations it works with and its First Nation partners to inform them of the correct definition and processes surrounding Jordan's Principle. As stated previously, the multiple presentations made by Canada to date included a restricted definition of Jordan's Principle and its processes surrounding the principle have recently been changed and will continue to be changed following this ruling. 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. A corrected definition and process surrounding Jordan's Principle warrants new publicity and education to public, employees, applicable organizations and all First Nation partners. INAC and Health Canada's websites would be a prominent and reasonable place to begin this publicity. Also, given the hearing of this complaint and the present motions was broadcasted on APTN, the Panel's believes this would also be an important and reasonable place to publicize the corrected definition and process surrounding Jordan's Principle.

[113] In doing so, there is no doubt that the Commission should be consulted. It has been actively involved in pursuing this case for over a decade and played a central role in leading the majority of the evidence at the hearing of the merits of the complaint. Furthermore, section 53(2)(a) of the *Act* specifically provides that the Panel can order that "…the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures…" (emphasis added).

[114] However, aside from the Commission, the *Act* and applicable case law suggest the Tribunal does not have the power to order consultation with other parties (see *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at paras. 164-169 [*Johnstone*]). Nevertheless, in the circumstances of this case, the Panel agrees that the Caring Society and other parties to this complaint have invaluable expertise to contribute to any

discussion about how best to educate the public, especially First Nations peoples, about Jordan's Principle.

[115] A number of important considerations lead to this conclusion. Primarily, the *Act* must be interpreted in light of its purpose, which is to give effect to the principle that:

> [A]ll individuals should have 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.

[116] The individuals affected by the *Decision* and subsequent orders, and who are looking for an opportunity equal to other individuals to make for themselves the lives that they are able and wish to have, are First Nations children. This was not the situation in *Johnstone*. As canvassed in the *Decision*, the relationship between Canada and Aboriginal peoples is trust–like, rather than adversarial, and the contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship (see *Decision* at para. 93, citing *R. v. Sparrow*, [1990] 1 SCR 1075, at page 1108). It is well established that in all its dealings with Aboriginal peoples, the Crown must act honourably (see *Decision* at para. 89, citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 16). This requires Canada to treat Aboriginal peoples fairly and honourably, and there is a special fiduciary relationship between the Crown and Aboriginal peoples (see *Decision* at paras. 91-95). The Crown also has a constitutional duty to consult Indigenous peoples on decisions that affect them and those consultations must be meaningful (see 2016 CHRT 16 at para. 10). The unique position that Aboriginal peoples occupy in Canada is recognized in section 35 of the *Constitution Act, 1982* and section 25 of the *Canadian Charter of Rights and Freedoms*. With respect to the *Act*, when section 67 was repealed in 2008, Parliament confirmed in section 1.1 of *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30, that:

> For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

[117] This case is about the provision of child welfare services to First Nations children and families. This is an area that directly affects the fundamental rights of First Nations children, families and communities and is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at para. 9; and, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 75 [*Baker*]). As stated in the *Decision* at paragraph 346, in reference to Professor Nicholas Bala:

> [L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved in making decisions about children, not only for judges and lawyers, but for also assessors and mediators.

[118] To ensure Aboriginal rights and the best interests of First Nations children are respected in this case, the Panel believes the governance organizations representing those rights and interests, representing those children and families affected by the *Decision* and who are professionals in the area of First Nations child welfare, such as the Complainants and the Interested Parties, should be consulted on how best to educate the public, especially First Nations peoples, about Jordan's Principle. This consultation will also ensure a level of cultural appropriateness to the education plan and materials.

[119] This consultation is also reasonable based on Canada's submissions and actions in this matter. Canada has stressed consultation with First Nations peoples and organizations since the *Decision* (see for example *Respondent's Factum*, March 14, 2017, at paras. 36 and 39). It has also recognized the AFN and the Caring Society as key partners in the reform of its policies and programs. The AFN has been participating in the Executive Oversight Committee since July 2016. Dr. Cindy Blackstock, the Executive Director of the Caring Society, was also invited by the Minister of Health to participate in the Executive Oversight Committee [see *Affidavit of Robin Buckland*, January 25, 2017, at paras. 17-18; "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit F,

p. 2); Letter from The Honourable Jane Philpott, Minster of Health, to Dr. Cindy Blackstock, Executive Director, First Nations Child and Family Caring Society of Canada (December 22, 2016) (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit G); Health Canada, *Jordan's Principle: Engaging with partners to design long-term approach*, presentation dated November 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H, at pp. 3-7); "First Nations and Inuit Health Branch, Regional Executive Forum, Record of Discussion and Decisions", August 9, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A); and, "FNIHB SMC-P&P, Record of Decisions", September 14, 2016 (*Answers to Requests of Robin Buckland*, March 7, 2017, tab 5, p. 2)].

[120] Canada is committed to working with child and family services agencies, front-line service providers, First Nations organizations, leadership and communities, the Complainants, and the provinces and territories, on steps towards program reform and meaningful change for children and families (see 2016 CHRT 10 at para. 6). The Panel supports this commitment and an order to consult with the Complainants and the Interested Parties on how best to educate the public, especially First Nations peoples, about Jordan's Principle essentially reinforces what is already partially occurring in this matter. The Panel wants to ensure this commitment to partnership continues and is improved in a meaningful way by formalizing it in an order. Therefore, pursuant to section 53(2)(a) of the *Act*, the Panel makes the orders detailed in the "Order" section below, under "Publicizing the compliant definition and approach to Jordan's Principle."

(iv) Future reporting

[121] The Caring Society requests that, moving forward, Canada produce its compliance reports in the form of an affidavit and that a timeline be established very early on in the process to allow for cross-examination of the affiants, followed by the filing of written arguments and oral submissions. Exchanging evidence and having the opportunity to cross-examine makes the remedial process more transparent. The AFN is supportive of the Caring Society's request for future reporting, while the COO has made a similar request with respect to the orders it is requesting.

[122] The Commission takes no position on this request, other than to suggest that if such an order is to be granted, the Tribunal should include specifics about: (i) the metrics that are to be reported upon, (ii) the specific intervals at which reports are to be provided, and (iii) the length of time for which the reporting obligation is to continue.

[123] The Caring Society's proposed process for future reporting is similar to the process employed to hear and determine the present motions. The Panel found this process efficient and found the use of affidavit evidence, and having that evidence tested under cross-examination, was of great assistance to the Panel in determining the issues put before it.

[124] However, moving forward, the Panel would prefer that the cross-examination of affiants occur in a hearing before the Panel and be governed by the Tribunal process. In the present motions, the cross-examination occurred outside the Tribunal process, without the Panel present, and with a transcript of the evidence presented to the Panel afterwards for its consideration. This resulted in two issues. First, a dispute arose as to whether a party has an obligation, in the context of a cross-examination on an affidavit, to give undertakings to make inquiries and provide answers to which the affiant does not know the answers. Second, the Panel did not have the ability to ask its own questions to the witnesses.

[125] On the first issue, the NAN made requests for undertakings regarding Canada's refusal to fund the Wapekeka proposal for a mental health service team based within the community. Canada refused to provide undertakings because, in its view, the affiant answered the NAN's questions to the best of her ability, while other questions sought information that fell outside the scope of her employment. Furthermore, Canada states there is no legal obligation to provide undertakings during a cross-examination on an affidavit. The NAN submitted arguments and case law to the contrary and requested that the witness appear before the Panel to complete her evidence.

[126] The Panel refused this request because it was more akin to a discovery request in a civil action than to a cross-examination of a witness during a Tribunal hearing. While section 48.9(2) of the *Act* empowers the Chairperson to make rules governing discovery

proceedings before the Tribunal, no such rules have been made thus far. Rather, parties before the Tribunal have an obligation to disclose and produce arguably relevant documents throughout the Tribunal's proceedings [see Rules 6(1)(d) and (e); and, Rule 6(5) of the Tribunal's *Rules of Procedure (03-05-04)*]. The purpose of disclosure is to divulge the case a party intends to make, which in turn allows each party to effectively prepare and present its respective case. The question is whether the information sought is arguably relevant and necessary for the party to prepare its case before the Tribunal.

[127] While the information sought by the NAN is arguably relevant to the issues raised in its amended motion, and is highly important for the families and communities who lost their children, it did not prevent the NAN from making its case on its motion.

[128] The information was also not determinative for the Panel in order to make findings on the NAN's motion. The Tribunal was able to draw inferences from the affiant's inability to answer the NAN's questions. That is, with respect to the issues raised in the NAN's motion, the NAN's questioning was sufficient to shed light on the need for more rigorous processes surrounding access to Jordan's Principle funding to ensure the Wapekeka proposal situation is not repeated.

[129] In all fairness, while the Panel agreed to have the parties cross-examine affiants outside of the Tribunal's hearing process, no process with respect to undertakings was specifically agreed to by the parties or the Panel. Moving forward, if the Panel is present during cross-examinations, it can deal with these types of issues right away, without the need for further submissions or rulings.

[130] On the second issue, the Panel would like the opportunity to ask questions to the witnesses, should it have any. The advantage of having a cross-examination occur before the Panel is that it allows the Panel to efficiently ask its questions, without the need to recall a witness, while also allowing the parties the opportunity to ask additional questions arising out of those asked by the Panel.

[131] Therefore, future reporting by Canada in this matter will be supported by an affidavit or affidavits attesting to the information found in the report. Timelines will be established to allow for cross-examination of the affiants before the Panel, followed by the filing of written

arguments and, if necessary, oral submissions. In any future reporting in this matter, the Panel will keep in mind the Commission's suggestion that it include specifics about: (i) the metrics that are to be reported upon, (ii) the specific intervals at which reports are to be provided, and (iii) the length of time for which the reporting obligation is to continue.

[132] Pursuant to the above and to section 53(2)(a) of the *Act*, the Panel retains jurisdiction over the above orders until it is assured that they are fully implemented. Canada is ordered to serve and file a report and affidavit materials detailing its compliance with each of those orders, pursuant to the process outlined in the "Order" section below, under "Retention of jurisdiction and reporting."

V. Orders

[133] The orders made in this ruling are to be read in conjunction with the findings above, along with the findings and orders in the *Decision* and previous rulings (2016 CHRT 2, 2016 CHRT 10 and 2016 CHRT 16). Separating the orders from the reasoning leading to them will not assist in implementing the orders in an effective and meaningful way that ensures the essential needs of First Nations children are met and discrimination is eliminated.

[134] Specific timelines for the implementation of each of the Panel's orders are indicated below to ensure a clear understanding of the Panel's expectations and to avoid misinterpretation issues that have occurred previously in this matter (such as with the term "immediately").

[135] Pursuant to the above, the Panel's orders are:

1. Definition of Jordan's Principle

A. **As of the date of this ruling**, Canada shall cease relying upon and perpetuating definitions of Jordan's Principle that are not in compliance with the Panel's orders in 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16 and in this ruling.

B. **As of the date of this ruling**, Canada's definition and application of Jordan's Principle shall be based on the following key principles:

i. Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living.

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

iii. When a government service is available to all other children, the government department of first contact will pay for the service to a First Nations child, without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided. Once the service is provided, the government department of first contact can seek reimbursement from another department/government;

iv. When a government service 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. Where such services are to be provided, the government department of first contact will pay for the provision of the services to the First Nations child, without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided. Once the service is provided, the government department of first contact can seek reimbursement from another department/government.

v. 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.

C. Canada shall not use or distribute a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(b).

D. Canada shall review previous requests for funding that were denied, whether made pursuant to Jordan's Principle or otherwise, dating from **April 1st, 2009**, to ensure compliance with the above principles. Canada shall complete this review by **November 1st, 2017**.

2. Processing and tracking of Jordan's Principle cases

A. Canada shall develop or modify its processes surrounding Jordan's Principle to ensure the following standards are implemented by **June 28, 2017**:

i. The government department of first contact will evaluate the individual needs of a child requesting services under Jordan's Principle or that could be considered a case under Jordan's Principle.

ii. The initial evaluation and a determination of the request shall be made within 12-48 hours of its receipt.

iii. Canada shall cease imposing service delays due case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided.

iv. If the request is granted, the government department that is first contacted shall pay for the service without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided; and

v. If the request is denied, the government department of first contact shall inform the applicant, in writing, of his or her right to appeal the decision, the process for doing so, the information to be provided by the applicant, the timeline within which Canada will determine the appeal, and that a rationale will be provided in writing if the appeal is denied.

B. By **June 28, 2017** Canada shall implement reliable internal systems and processes to ensure that all possible Jordan's Principle cases are identified and addressed, including those where the reporter does not know if the case is a Jordan's Principle case.

C. By **July 27, 2017** Canada shall develop reliable internal systems to track: the number of Jordan's Principle applications it receives or that could be considered as a case under Jordan's Principle, the reason for the application and the service requested, the progression of each case, the result of the application (granted or denied) with applicable reasons, and the timelines for resolving each case, including when the service was actually provided.

D. Canada shall provide a report and affidavit materials to this Panel on **November 15, 2017** and every 6 months following the implementation of the internal systems outlined above, which details its tracking of Jordan's Principle cases. The need for any further reporting pursuant to this order shall be revisited on **May 25, 2018**.

3. Publicizing the compliant definition and approach to Jordan's Principle

A. By **June 09, 2017** Canada shall post a clear link to information on Jordan`s Principle, including the compliant definition, on the home pages of both INAC and Health Canada.

B. **By June 28, 2017**, Canada shall post a bilingual (French and English) televised announcement on the Aboriginal Peoples Television Network, providing details of the compliant definition and process for Jordan's Principle.

C. By **June 09, 2017**, Canada shall contact all stakeholders who received communications regarding Jordan's Principle since January 26, 2016 and advise them in writing of the findings and orders in this ruling.

D. By **July 27, 2017**, Canada shall revisit any agreements concluded with third-party organizations to provide services under the Child First Initiative's Service Coordination Function, and make any changes necessary to reflect the proper definition and scope of Jordan's Principle ordered in this ruling.

E. By **July 27, 2017**, Canada shall fund and consult with the Complainants, Commission and the Interested Parties to develop training and public education materials relating to Jordan's Principle (including on the *Decision* and subsequent rulings), and ensure their proper distribution to the public, Jordan's Principle focal points, members of the Executive Oversight Committee, managers involved in the application of Jordan's Principle/Child First Initiative, First Nations communities and child welfare agencies and any other applicable stakeholders.

4. Retention of jurisdiction and reporting

A. The Panel retains jurisdiction over the above orders to ensure that they are effectively and meaningfully implemented and to further refine or clarify its orders if necessary. The Panel will continue to retain jurisdiction over these orders until **May 25, 2018** when it will revisit the need to retain jurisdiction beyond that date.

B. Canada is ordered to serve and file a report and affidavit materials detailing its compliance with each of the above orders by **November 15, 2017**.

C. The Complainants and the Interested Parties shall provide a written response to Canada's report by **November 29, 2017**, and shall indicate: (1) whether they wish to cross-examine Canada's affiant(s), and (2) whether further orders are requested from the Panel.

D. Canada may provide a reply, if any, by **December 6, 2017**.

E. Any schedule for cross-examining Canada's affiant(s) and/or any future reporting shall be considered by the Panel following the parties' submissions with respect to Orders 4(C) and 4(D).

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
May 26, 2017

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 26, 2017

Date and Place of Hearing: March 22-24, 2017 at Ottawa, Ontario

Appearances:

David Taylor, Anne Levesque, Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and David Nahwegahbow, counsel for the Assembly of First Nations, the Complainant

Daniel Poulin, Samar Musallam and Brian Smith, counsel for the Canadian Human Rights Commission

Jonathan Tarlton and Melissa Chan, counsel for the Respondent

Maggie Wente and Krista Nerland, counsel for the Chiefs of Ontario, Interested Party

Julian N. Falconer and Akosua Matthews, counsel for the Nishnawbe Aski Nation, Interested Party