

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Citation: 2017 CHRT 35

Date: November 2, 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

[1] On May 26, 2017, the Panel rendered its ruling on immediate relief concerning Jordan's Principle, cited as 2017 CHRT 14 ("the May 26th Orders").

[2] On June 23, 2017, Canada filed an application for judicial review of certain aspects of the May 26th Orders, seeking to quash paragraphs thereof prohibiting Canada from engaging in case conferencing and requiring Canada to complete the initial evaluation and determination of requests within 12-48 hours of receipt.

[3] The Caring Society, the AFN, Health Canada and INAC officials reached an agreement in October 2017. This agreement was based on the following principles:

- a. Where professionals with clinical expertise have recommended a service for a First Nations child, it is the recommended service that should be considered for approval, and not an alternate service;
- b. Case conferencing:
 - i. There is a legitimate role for clinical case conferencing (discussions related to a service recipient's needs with professionals with relevant expertise involved in his or her case), where more information is reasonably necessary to understanding a First Nations child's clinical needs;
 - ii. Where clinical case conferencing is reasonably necessary to understand a First Nation's child's clinical needs, and where professionals with relevant expertise are already involved in the First Nations child's case, those are the professionals that must be consulted;
 - iii. When clinical case conferencing takes place, the determination of the service request will be made within 12 hours of obtaining all necessary information in urgent individual cases and within 48 hours of obtaining all necessary information in non-urgent individual cases;

- iv. Administrative case conferencing (intragovernmental or intergovernmental discussions related to the mechanics of service delivery) must not delay the receipt of services by a First Nations child;
 - v. In cases where a service is available, Canada can consult, within the specified timeline for the type of case involved, with a First Nation's child's family, with a First Nation community, or with service providers, in order to fund the service;
 - vi. In cases where a recommended service that is approved is unavailable, Canada will make every reasonable effort to ensure funding is provided as close to the specified timeline for the type of case involved.
- c. Timelines:
- i. In certain cases, making service determinations within 48 hours, when a First Nations child's service needs are unclear, may not be in that child's best interest;
 - ii. In urgent cases where irremediable harm is reasonably foreseeable, immediate action should be taken to put crisis intervention supports in place until an extended response can be developed and implemented;
 - iii. Group cases (which address service gaps affecting large numbers of children) should be treated distinctly from individual cases and it is reasonable for group determinations to be made within one week in non-urgent cases, and within 48-hours urgent cases in which irremediable harm is not reasonably foreseeable;
- d. Service delays arising due to a lack of information regarding a First Nation's child's clinical needs should be tracked and reported on as part of the Tribunal reporting process;

[4] On October 31, 2017, the Caring Society made a motion in writing for an order varying certain provisions of the May 26th Orders, as proposed in Exhibit "A" to the Affidavit of Doreen Navarro, ("the Proposed Amendments"). The Proposed Amendments give effect to an agreement reached between the Complainant Caring Society, the

Complainant Assembly of First Nations, and the Respondent Canada in this regard. The Caring Society's motion materials assert that the Proposed Amendments would resolve the questions that are before the Federal Court in Canada's application for judicial review.

[5] The Respondent Canada, the Assembly of First Nations, the Commission, the Chiefs of Ontario, the Nishnawbe Aski Nation and Amnesty international have all confirmed in writing that they consent to the relief sought in the Caring Society's motion.

[6] According to the motion materials, the Proposed Amendments would help ensure that Canada is able to comply with the May 26th Orders that would address Canada's concerns in a way that would ensure substantive equality for First Nations children, bearing in mind the need to provide culturally appropriate services to First Nations children and to safeguard the best interests of First Nations children.

[7] Upon consideration of the motion materials, and the consents filed by the AFN, Canada, the Commission, the COO, the NAN and Amnesty International, the Panel has decided to vary the May 26th Orders in accordance with the Proposed Amendments. In paragraph 4A of the May 26th Orders, the Panel retained jurisdiction to ensure that the terms thereof are effectively and meaningfully implemented and to further refine or clarify them if necessary. The Panel finds that the Proposed Amendments serve to refine or clarify the May 26th Order, and as such fall within the scope of its retained jurisdiction.

[8] The Panel is encouraged to learn that all parties and Interested Parties involved in this case consent to the relief sought in the motion, and that they arrived to a resolution in the hopes of moving forward collaboratively without the need for judicial review proceedings. The present ruling incorporates that resolution and the agreed upon wording variations contained in the Proposed Amendments to the May 26th Orders of this Panel. The Panel adopts the Proposed Amendments as set out in the order below, and pursuant to section 53(2)(a) of the *Act*. The amendments to the May 26th Orders are indicated below in struck out text and underlined text. For ease of reference, a clean copy of the amended May 26th Orders is appended to this ruling.

[9] Finally, the Panel wishes to clearly state that its acceptance of the parties' Proposed Amendments to the May 26th Orders should not be construed as otherwise modifying or changing any of the remedial measures previously ordered by the Panel.

ORDER

[10] For the reasons given above the Panel hereby amends its Orders issued on May 26, 2017, contained in its ruling on immediate relief concerning Jordan's Principle (2017 CHRT 14), by replacing paragraph 135 of the ruling with the following :

[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, **including a service assessment**, 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 **administrative** case ~~conferring~~ **conferencing**, policy review, service navigation or any other similar administrative procedure before **the recommended service is approved and funding is provided. Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. Once After** the **recommended** service is **approved and funding is provided**, the government department of first contact can seek reimbursement from another department/government;
- iv. When a government service, **including a service assessment**, is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child. 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 **administrative** case ~~conferring~~ **conferencing**, policy review, service navigation or any other similar

- administrative procedure before the recommended service is approved and funding is provided. Clinical case conferencing may be undertaken only for the purpose described in paragraph 135(1)(B)(iii). Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. Once After the recommended 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 **requests by individuals** shall be made within 42-48 hours of its receipt **the initial contact for a service request. In a situation where irremediable harm is reasonably foreseeable, Canada will make all reasonable efforts to provide immediate crisis intervention supports until an extended response can be developed and implemented. In all other urgent cases, the evaluation and determination of the request shall be made within 12 hours of the initial contact for a service request. Where more information is reasonably necessary to the determination of a request by an individual, clinical case conferencing may be undertaken for the purpose described in paragraph 135(1)(B)(iii). For non-urgent cases in which this information cannot be obtained within the 48-hour time frame, representatives from the Government of Canada will work with the requestor in order to obtain the needed information so that the determination can be made as close to the 48-hour time frame as possible. In any event, once representatives from the Government of Canada have obtained the necessary information, a determination will be made within 12 hours for urgent cases, and 48 hours for non-urgent cases.**
 - ii.1 **The initial evaluation and determination of requests for groups shall be made within one week of the initial contact for a service request. In a situation where irremediable harm is reasonably foreseeable, Canada will make all reasonable efforts to provide immediate crisis intervention supports until an extended response can be developed and implemented.**

In all other urgent group cases, the evaluation and determination of the request shall be made within 48 hours.

- iii. Canada shall cease imposing service delays due ~~to administrative~~ case ~~conferring~~ **conferencing**, policy review, service navigation or any other similar administrative procedure before **the recommended service is approved and** funding is provided. **Canada will only engage in clinical case conferencing for the purpose described in paragraph 135(1)(B)(iii).**
 - iv. If the request is granted, the government department that is first contacted shall pay for the service without engaging in ~~administrative~~ case ~~conferring~~ **conferencing**, 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 **the time required for the Government of Canada to ask for and receive additional information necessary to understand the requestor's clinical needs, and a statement of** 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
November 2, 2017

Annex

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

1. Definition of Jordan's Principle

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- 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:
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 - 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, including a service assessment, 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 administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's

- case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is approved and funding is provided, the government department of first contact can seek reimbursement from another department/government;
- iv. When a government service, including a service assessment, is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child. 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 administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Clinical case conferencing may be undertaken only for the purpose described in paragraph 135(1)(B)(iii). Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended 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**.

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- 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 requests by individuals shall be made within 48 hours of the initial contact for a service request. In a situation where irremediable harm is reasonably foreseeable, Canada will make all reasonable efforts to provide immediate crisis intervention supports until an extended response can be developed and implemented. In all other urgent cases, the evaluation and determination of the request shall be made within 12 hours of the initial contact for a service request. Where more information is reasonably necessary to the determination of a request by an individual, clinical case conferencing may be undertaken for the purpose described in paragraph 135(1)(B)(iii). For non-urgent cases in which this information cannot be obtained

within the 48-hour time frame, representatives from the Government of Canada will work with the requestor in order to obtain the needed information so that the determination can be made as close to the 48-hour time frame as possible. In any event, once representatives from the Government of Canada have obtained the necessary information, a determination will be made within 12 hours for urgent cases, and 48 hours for non-urgent cases.

- ii.1 The initial evaluation and determination of requests for groups shall be made within one week of the initial contact for a service request. In a situation where irreparable harm is reasonably foreseeable, Canada will make all reasonable efforts to provide immediate crisis intervention supports until an extended response can be developed and implemented. In all other urgent group cases, the evaluation and determination of the request shall be made within 48 hours.
 - iii. Canada shall cease imposing service delays due to administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Canada will only engage in clinical case conferencing for the purpose described in paragraph 135(1)(B)(iii).
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 - 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.
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including those where the reporter does not know if the case is a Jordan's Principle case.

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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.

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- 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).

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: November 2, 2017

Motion dealt with in writing without appearance of parties

Written representations by:

David Taylor, Anne Levesque, Sarah Clarke, Sébastien Grammond, 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, counsel for the Canadian Human Rights Commission

Jonathan Tarlton, Patricia MacPhee and Robert Frater, counsel for the Respondent, Attorney General of Canada

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

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

Justin Safayeni, counsel for Amnesty International