

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

- and -

**PICTOU LANDING BAND COUNCIL
and MAURINA BEADLE**

Respondents

**AFFIDAVIT OF MARCEL LUKE HERTLEIN BALFOUR
AFFIRMED THIS 24th DAY OF JANUARY, 2014
(Motion for Leave to Intervene)**

I, MARCEL LUKE HERTLEIN BALFOUR, of the City of Winnipeg, in the Province of Manitoba, SOLEMNLY AFFIRM THAT:

1. I am the Acting Executive Director of the Assembly of Manitoba Chiefs Secretariat Inc. ("AMC Secretariat"), and as such have personal knowledge of the facts and matters herein deposed to, except where same are stated to be based upon information and belief.

2. On July 26, 2013 I was appointed as Acting Executive Director of the AMC Secretariat. From April 1, 2012 to July, 2013, I was the Special Advisor to the former Executive Director of the AMC Secretariat.

3. I am a member of the Norway House Cree Nation, the same First Nation of which Jordan River Anderson was a member. From March 2002 to March 2006, I was elected Councillor on the Council of the Norway House Cree Nation. From March 2006 to March 2010, I was the elected Chief of the Norway House Cree Nation.

4. During the time I was elected Norway House Cree Nation Chief, I was also a member of the Assembly of Manitoba Chiefs Task Force on Health and Social Development, which is the Chiefs Committee responsible for the implementation of Jordan's Principle.

The AMC Secretariat's General Expertise

5. The Assembly of Manitoba Chiefs was established to devise collective and common political strategies and mechanisms for coordinated action by First Nations and their organizations. Those common strategies and mechanisms relate to several policy areas, including education, the environment, health and social development, housing, and women, children and families.

6. The Constitution of the Assembly of Manitoba Chiefs identifies the mandate of the Assembly of Manitoba Chiefs that is carried out through the Chiefs-in Assembly and includes:

- promoting, preserving and protecting Aboriginal and Treaty rights for First Nation people in Manitoba;
- preserving and enhancing the rights and freedoms of First Nations in Manitoba as distinct peoples;
- strengthening and restoring the foundations of First Nations cultures, traditions, languages, economies and societies;

- affirming First Nation rights as peoples to exercise and practice self-determination and self-government; and
- protecting the integrity and authority of each First Nation's customs, laws, and practices.

Attached hereto and marked Exhibit "A" is a copy of the Constitution of the Assembly of Manitoba Chiefs adopted in September 1994.

7. The Constitution of the Assembly of Manitoba Chiefs also identifies that it is governed by the Chiefs of its member First Nations, who meet in assembly several times per year. The Grand Chief is elected by the Chiefs-in-Assembly for a three year term. The Executive Council of Chiefs is composed of the Grand Chief, five Chiefs selected by northern First Nations and five Chiefs selected by southern First Nations. Several Chiefs Committees have been established to facilitate the implementation of decisions made by the Chiefs-in-Assemblies or the Executive Council of Chiefs.

8. To better address and facilitate their unified political action, the Chiefs-in-Assembly established the AMC Secretariat, a provincially incorporated entity which is composed of technical advisors and support staff. The AMC Secretariat is the administrative and logistical arm charged with providing information and support to the Chiefs-in-Assembly and implementing their directions and decisions. The AMC Secretariat was provincially incorporated in 1988 as a not-for-profit corporation. Attached hereto and marked Exhibit "B" is a copy of By-Law No. 1 relating to the AMC Secretariat.

9. At the time the Assembly of Manitoba Chiefs was established there were 61 recognized First Nations in Manitoba consisting of 64,315 First Nation citizens. Today there are 63 First Nations, and 6 of the 20 largest bands in Canada are in Manitoba. According to Aboriginal Affairs and Northern Development Canada ("AANDC"), as of March, 2012 there were 140,975 registered Manitoba First Nations members. Out of that population, 59.8% are under the age of 30 and 60.2% live on reserves in Manitoba. Out of the 63 First Nations communities, 23 are not accessible by all-weather roads.

10. Over the years, the AMC Secretariat has been granted intervener status in other proceedings in order to represent the interests of Manitoba First Nations. Recently, the AMC Secretariat was granted standing to participate in the inquiry into the death of Phoenix Sinclair, a 5-year old First Nations child who lived on the Fisher River Cree Nation reserve. The focus of the inquiry was on how Manitoba's child welfare system failed to protect Phoenix Sinclair, who had been in foster care or in the care of others for much of her life. More recently, the AMC Secretariat was granted standing to participate in the inquest into the death of Brian Sinclair, an Aboriginal man who died after spending 34 hours in the waiting room of a Winnipeg hospital's emergency room without ever receiving treatment.

11. In addition to representing the common interests of Manitoba First Nations, the Assembly of Manitoba Chiefs works closely with the Assembly of First Nations on a national level. The Assembly of First Nations collectively represents the political interests of 633 First Nations across Canada.

The AMC Secretariat's Special Knowledge and Expertise regarding Jordan River Anderson and Jordan's Principle

12. During the period of time that Jordan River Anderson was alive and I was a Norway House Cree Nation Council member, the Norway House Cree Nation repeatedly requested that the provincial and federal governments resolve their disputes so that he could be discharged from the hospital and live in a medically assisted family home. At that time, the AMC Secretariat also assisted Jordan, his family and the Norway House Cree Nation in trying to access the services he needed. Those disputes were not resolved before Jordan passed away on February 5, 2005.

13. In 2004, the Norway House Cree Nation identified the jurisdictional disputes that caused a lack of services for children with disabilities as a high priority issue. With funding from the Keenanaow Trust Fund, a Children's Special Services pilot project was developed ("the CSS NHCN Pilot Project") and services were delivered by the Kinosao Sipi Minisowin Agency ("KSMA"). During the three years the CSS NHCN Pilot Project operated, approximately 40 children with a range of medical conditions and disabilities living on the Norway House Cree Nation reserve received services through KSMA. Those services were community-based, voluntary and family-centered and included respite, homemaking services, educational activities, occupational therapy, and speech and language therapy.

14. The funding for the NHCN CSS Pilot Project expired in December 2006. Additional funding from the federal and provincial governments could not be obtained so the KSMA could only provide the children who were in the NHCN CSS Pilot Project with a minimum level of services.

15. In a Resolution adopted at an Assembly of Manitoba Chiefs General Chiefs Assembly held on January 24 and 25, 2006, a copy of which is attached as Exhibit "C", the Chiefs-in-Assembly resolved to:

- direct the federal and provincial governments to implement a "Child First Principle" to resolve inter-governmental jurisdictional disputes;
- meet with federal and provincial governments to establish a jurisdictional dispute resolution table with fair and effective First Nation representation; and
- refer to the Child First Principle as "Jordan's Principle" in honour of the memory of Jordan River Anderson and to respect his family and community.

16. On December 12, 2007, the House of Commons unanimously voted in favour of a private member's motion supporting Jordan's Principle. That motion stated in part: "That, in the opinion of the House, 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".

17. In April 2008 a Federal/Provincial Working Group undertook a case review of the 29 children still receiving services from KSMA through the NHCN CSS Pilot Project. The findings of that case review were set out in a report prepared by the Federal/Provincial Technical Working Group in March 2009. A copy of the report was provided to the AMC Secretariat.

18. The Federal/Provincial Working Group's report revealed important information about the quality and level of services for children with disabilities living on the Norway House Cree Nation reserve, including that:

- the policies, practices and decision making at all levels of government impacted the availability and accessibility of services in Norway House Cree Nation;
- families of children with disabilities living on reserve face a number of additional challenges, for example overcrowding and homes that need modifications to be accessible;
- accessing services for children with disabilities who live on reserve is particularly difficult because of a fragmented service delivery system, gaps and inconsistencies in service delivery, and geographical location; and
- children with disabilities living on the Norway House Cree Nation reserve have to rely on a spectrum of services based on a principle of "last resort" and funding for essential program components only.

19. After the Federal/Provincial Working Group case review, Health Canada and Indian and Northern Affairs Canada agreed to provide funding for the children who were still receiving services from KSMA through the NHCN CSS Pilot Program, but only from April 1, 2009 to March 31, 2010.

20. According to a press release issued by the provincial government on September 5, 2008, a copy of which is attached as Exhibit "D", Manitoba was the first province to begin working with the federal government on issues relating to Jordan's Principle.

21. The Manitoba/Canada Joint Committee on Jordan's Principle ("the Joint Committee") was established and to my knowledge began meeting in June, 2008. The Joint Committee was comprised of senior officials from Health Canada, AANDC, Manitoba Health, and Manitoba Family Services and Consumer Affairs. Despite requests from the AMC Secretariat to be a member, there was no First Nations representation on the Joint Committee at the time it was established.

22. The Joint Committee interpreted Jordan's Principle as applying only to disputes between the federal and provincial governments about which level of government will pay for services. In addition, Jordan's Principle will only apply if the child has multiple disabilities and requires services from multiple service providers.

23. The AMC Secretariat's position is that the Joint Committee narrowed the scope of Jordan's Principle in a way that does not accurately reflect its spirit and intent. Without any First Nations input or involvement, the Joint Committee restricted Jordan's Principle to disputes between the federal and provincial governments and to children with multiple disabilities who require services from multiple providers.

24. The AMC Secretariat's position is that Jordan's Principle, as originally and unanimously passed by the House of Commons in December 2007, has a much broader interpretation. The AMC Secretariat's position is that Jordan's Principle should encompass all jurisdictional disputes that involve the care of First Nations children with disabilities, whether they be between the provincial and federal governments, between federal government departments, or between service providers and a provincial or federal government department. Jordan's Principle should also apply to all children with disabilities, not only those with multiple disabilities who require services from multiple providers. In addition, Jordan's Principle should not be limited to only medical issues, but should have a broader application.

25. On January 19, 2011, the Chiefs-in-Assembly adopted a Declaration for the Implementation of Jordan's Principle, a copy of which is attached hereto as Exhibit "E". In that

Declaration, the First Nations governments of Manitoba called on the federal and provincial governments to “ensure that action is taken this year to fully, and without equivocation, implement in spirit, intent and practice Jordan's Principle, in his homeland of Manitoba, and across Canada”. The Declaration also noted that:

We recognize that, to date, no region or province in Canada has fully implemented the Child First principle. Regions where the provincial/territorial and federal government have announced intentions to act, have demonstrated their own definition of Jordan's Principle that is narrow in scope, exclusive to children who meet government-defined criteria rather than meeting the needs of children first, which disregards the fullest intent and meaning of Jordan's Principle – the Child First Principle;

26. It has only been since April, 2012 that a member of the Assembly of Manitoba Chiefs Task Force on Health and Social Development has been on the Joint Committee. The AMC Secretariat also now has representation on the Joint Committee's Terms of Reference Officials Working Group (TOROWG).

27. The AMC Secretariat has a Jordan's Principle Implementation Team, which is an internal team of staff responsible for such things as drafting resolutions, raising awareness about Jordan's Principle, and communicating with First Nations leadership and families when there is a potential Jordan's Principle situation.

Current status of Jordan's Principle Implementation in Manitoba

28. Currently the TOROWG continues to meet regularly to discuss implementation of Jordan's Principle in Manitoba. The TOROWG has been working on a case conferencing process, however to the AMC Secretariat's knowledge that process has not yet been formalized.

In addition, despite several offers to facilitate, the AMC Secretariat is not aware of any families that have gone through a formalized case conferencing process for a resolution.

29. The AMC Secretariat is currently in the process of arranging an independent evaluation of the TOROWG's proposed case conferencing process to determine if it is effective in resolving disputes, not only with respect to which government will pay for the services, but also with respect to determining the normative standard of care. In the AMC Secretariat's experience, it is often difficult to determine the normative standard of care because unlike non-First Nations communities, many First Nations communities in Manitoba are not accessible by all-weather roads.

30. Despite the work done by the Joint Committee and the TOROWG, the AMC Secretariat is aware of many First Nations children in Manitoba who are still not receiving the services they need. In addition, to the AMC Secretariat's knowledge the only way First Nations children in Manitoba are able to access comparable services is if they are put into the child welfare system. It is the position of the AMC Secretariat that the lack of access to comparable services stems primarily from the narrow interpretation given to Jordan's Principle by the Joint Committee before there was First Nations input or involvement, and the lack of an effective case conferencing and resolution process.

31. In the AMC Secretariat's experience, jurisdictional disputes that arise regarding First Nations children with disabilities in Manitoba are not only those that occur between the provincial and federal governments. Rather, jurisdictional disputes that prevent First Nations children with disabilities in Manitoba from receiving comparable services also arise between

AANDC and Health Canada about which department will pay. The AMC Secretariat's position is that Jordan's Principle ought to apply to these cases as well because they result in the same situation that Jordan Anderson was in when the dispute was between the provincial and federal governments.

32. The AMC Secretariat is also aware of First Nations children with disabilities in Manitoba who are not receiving comparable services because they do not have multiple disabilities. The AMC Secretariat's position is that Jordan's Principle should apply to these children as well.

33. The AMC Secretariat has a direct interest in the outcome of this appeal because it raises legal issues relevant to the legal status and interpretation of Jordan's Principle, as well as the principles of equity of access to services and equity of outcome emphasized by the Royal Commission on Aboriginal Peoples. The AMC Secretariat is involved in the ongoing work of the Joint Committee and the TOROWG and is also the political body responsible for communicating with First Nations leadership, communities and families regarding the implementation of Jordan's Principle in Manitoba.

The AMC Secretariat's Intervention in this Appeal

34. The AMC Secretariat is seeking leave to intervene on the following legal issues:

- the legal status of Jordan's Principle;
- the interpretation of "jurisdictional disputes"; and
- the appropriate remedy in a Jordan's Principle case.

35. If leave to intervene is granted on the first issue, the AMC Secretariat intends to argue that Jordan's Principle is a legally binding obligation on the part of the federal and provincial governments. The AMC Secretariat's intent is to argue that the sources of this legal obligation are the fiduciary duty owed by the federal and provincial governments to Canada's First Nations, the Honour of the Crown and/or domestic customary law.

36. If leave to intervene is granted on the second issue, the AMC Secretariat intends to argue that Jordan's Principle ought to be given a broad interpretation that reflects its spirit and intent. More particularly, the AMC Secretariat intends to argue that the term "jurisdictional disputes" should not be restricted to disputes between the federal and provincial governments about who will pay for services. Rather, it should be interpreted to include disputes about the normative standard of care, disputes between federal government departments about which department will pay, and disputes between service providers and federal and/or provincial government departments.

37. If leave to intervene is granted on the third issue, the AMC Secretariat intends to argue that although deference is generally owed to a decision-maker by a reviewing court, Jordan's Principle disputes weigh in favour of the court exercising its discretion not to remit a matter back for reconsideration.

38. I have been advised by the AMC Secretariat's legal counsel and do believe that the lawyer for the Pictou Landing Band Council and Maurina Beadle consents to its motion for leave to intervene. I have also been advised by the AMC Secretariat's legal counsel and do believe that

the Attorney General of Canada does not consent to this motion for leave to intervene. Attached hereto and marked as Exhibit "F" is a copy of a letter dated December 18, 2013 from counsel for the Attorney General of Canada.

39. I make this Affidavit in support of the AMC Secretariat's motion for leave to intervene in this proceeding and for no other purpose.

AFFIRMED BEFORE ME)
at the City of Winnipeg, in the)
Province of Manitoba, this)
29th day of January, 2014)
Beverly Fries)
A Notary Public in and for)
the Province of Manitoba)


MARCEL LUKE HERTLEIN BALFOUR