Court File No. A-158-13

FEDERAL COURT OF APPEAL

B E T W E E N:

THE ATTORNEY GENERAL OF CANADA

Appellant

- and -

PICTOU LANDING BAND COUNCIL and MAURINA BEADLE

Respondents

MEMORANDUM OF FACT AND LAW OF THE INTERVENER FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

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PART I - OVERVIEW AND STATEMENT OF FACT

A. Overview

1. The Intervener, First Nations Child and Family Caring Society (the "Caring Society") is the only national organization with the specific mandate to promote the welfare of First Nations children and families, providing research, public education and policy development in the field of First Nations child welfare and child rights. The Caring Society files this factum to address a single issue raised on this appeal: the interpretation and application of Jordan's Principle.

2. On judicial review to the Federal Court, the Honourable Mr. Justice Mandamin determined that the decision of Aboriginal Affairs and Northern Development Canada ("AANDC") to deny Pictou Landing Band Council ("PLBC") reimbursement for in-home health care for one of its members was unreasonable, contrary to Jordan's Principle. The Caring Society respectfully submits that Mandamin J. did not err in his decision and that Jordan's Principle ought to be interpreted and applied as it was intended: to ensure that all First Nations children living on reserve have access to the same public benefits, services and funding as all Canadian children. To determine otherwise would not only deny First Nations children in need of government services, it would deny First Nations children equality before and under the law, contrary to the goals and purposes of human rights legislation and the values enshrined under the *Charter of Rights and Freedoms*.

3. Jordan's Principle is a child first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and the province/ territory, or between departments in the same government regarding services to a First Nations child, the government of first contact pays for the service and can seek reimbursement from the other level of government/ department after the child has received the service.

4. Jordan's Principle is a procedural mechanism by which First Nations children living on reserve can exercise and validate their rights to substantive equality. Given the unique constitutional and historical status of First Nations peoples, many services ordinarily provided to Canadians by the provinces and territories are provided to First Nations peoples by the federal government, through agencies funded and controlled by AANDC. In theory, services

provided to First Nations peoples are meant to be, at the very least, comparable with the services afforded to all other Canadians. In practice, however, oftentimes services provided by AANDC are not comparable and fall below the standard of services provided to other Canadians, to the detriment of First Nations peoples.[1]

5. One such example of this often detrimental jurisdictional divide is the case of Jordan River Anderson. In 2005, Jordan died in hospital at the age of five, never having the opportunity to live in a family environment. Although cleared by doctors to be discharged from the hospital, Jordan's illness meant that he was unable to live in a family home without in-home care. The governments of Canada and Manitoba could not agree on who should pay for Jordan's in-home care, given his on-reserve status. Sadly, Jordan remained in hospital and died there before the dispute was resolved, never having lived in a family home.

6. Jordan's Principle is named in memory of Jordan and reflects the reality that a child living off reserve would have received the services they needed in order to return home. As a child first principle, Jordan's Principle requires that the needs and rights of the child are the first priority and that the government or department of first contact must ensure that a child's well-being and safety come before any consideration of how a jurisdictional dispute will be resolved. In practice, Jordan's Principle is the procedural mechanism by which on-reserve First Nations children can exercise their right to substantive equality.

7. Conversely, the Attorney General's approach to Jordan's Principle advocates for an arbitrary and limited restriction on the equality rights of First Nations children, by arguing that Jordan's Principle is only applicable when narrow criteria are met and when a monetary dispute arises. This approach not only ignores the goals and purposes of Jordan's Principle, it risks perpetuating the very disadvantages that it sought to address when Motion 296 was unanimously adopted by the House of Commons on December 12, 2007.

8. If the Attorney General's approach is adopted, the equality safeguard provisions of Jordan's Principle would be muted, allowing for adverse service differentiation or service

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[1] Status Report of the Auditor General of Canada to the House of Commons, Matters of Special Importance (Ottawa, 2011) at p. 6

denials to on-reserve First Nations children attempting to access government services compared to those received by all other Canadian children. This resulting denial runs counter to the purposes underlying human rights legislation, the principle of substantive equality, and the basic values guiding the *Charter*.

9. The Caring Society therefore respectfully asks this Court to consider the purpose of Jordan's Principle, as a child first principle, and the potential impact of its interpretation on the uniquely situated position of on-reserve First Nations children.

B. Statement of Facts

10. The Caring Society takes no position with respect to the facts as advanced by the parties or with respect to the factual aspects of this appeal. The Caring Society defers to the parties on the factual record.

PART II - POINTS IN ISSUE

11. The Caring Society takes a position only on Issue (i) raised by the Appellant: whether the application judge erred in the interpretation and application of Jordan's Principle. The Caring Society submits that the application judge did not err and that Jordan's Principle was interpreted and applied in this case as it was intended: to ensure that on-reserve First Nations children have access to the same public services available to all other Canadian children.

PART III - SUBMISSIONS

A. Jordan's Principle is a Mechanism for Promoting and Protecting Substantive Equality

12. The overarching purpose of Jordan's Principle is to prevent First Nations children from being denied prompt and equal access to benefits and services available to other Canadian children as a result of their Aboriginal status.[2] Jordan's Principle is built upon the fundamental premise that all children, including First Nations children living on reserve, are entitled to be

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[2] Reasons for Judgment and Judgment of Justice Mandamin, dated April 4, 2013 ("Reasons for Judgment") at paras. 17 and 18 [Appeal Book, Vol. 1, Tab 2, p. 9]

equal before and under the law and are fully entitled to the protections and benefits of the rights and freedoms afforded in our democratic society.[3]

13. Substantive equality, while often understood and discussed in the context of a claim of discrimination, is the centrepiece of our democratic values: "the quest for equality expresses some of humanity's highest ideals and aspirations", seeking to protect human dignity and to "promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration".[4]

14. The goal of human rights legislation and the *Charter* is to promote and safeguard substantive equality, achieved by preventing and remedying discriminatory practices based on legislated enumerated grounds. In order to fulfill this purpose, the impact and the result of the impugned activity is examined. The Supreme Court of Canada in *Withler v. Canada (Attorney General)* described substantive equality as follows:

> Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the façade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned laws, taking full account of social, political, economic and historical factors concerning the group.[5]

15. Jordan's Principle strives to achieve substantive equality for on-reserve First Nations children and prevent discrimination before it occurs, by recognizing the social, political, economic and historical factors facing the First Nations community. First, it acknowledges the lived experiences of First Nations peoples resident on reserve, including the political, economic, and social parameters created by the *Indian Act* and section 91(24) of the *Constitution Act, 1987.* Because of their unique status under section 91(24) of the *Constitution Act, 1867*, First Nations

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[3] *Taypotat v. Kahkewistahaw First Nation*, 2013 FCA 192, at para. 38 and *Canadian Foundation of Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 ("*Canadian Foundation*") at para. 71 (per Binnie J. in dissent, but not on this point).

[4] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at paras. 2 and 51.

[5] *Withler v. Canada (Attorney General)*, 2011 SCC 12, at para. 39

peoples living on reserve receive services, such as child welfare, education, and healthcare services from AANDC and other federal departments such as Health Canada. [6] In addition, First Nations peoples are engaged in a *sui generis* relationship governed by the federal Crown's obligation to act in a fiduciary capacity towards First Nations peoples, including those living on reserve.[7] The "recognition and affirmation" of First Nations rights under section 35(1) of the *Constitution Act, 1982* incorporates this fiduciary duty, giving it constitutional force as a "restraint on the exercise of sovereign power".[8]

16. Second, Jordan's Principle recognizes that children are a highly vulnerable group and that on-reserve First Nations children, and their families, face a legacy of stereotyping and prejudice and are amongst the most disadvantaged and marginalized members of our society.[9] Indeed, "living conditions are poorer" on First Nations reserves than elsewhere in Canada and services available on reserve are often not comparable to those provided off reserves by the provinces and territories. [10]

17. These social and political realities were experienced by a young boy named Jordan River Anderson. Jordan was a First Nations child with significant health issues who unnecessarily remained in a hospital for more than two years due to a jurisdictional dispute between the governments of Canada and Manitoba over the payment of his in-home care. Jordan died at the age of five before the dispute could be resolved, never having had the opportunity to live in a family environment.[11]

18. Jordan's Principle was developed to prevent other children from experiencing the hardship and inequality that Jordan experienced. It is a mechanism to prevent on-reserve First Nations children from being denied equal access to benefits, services and protections available to other Canadians. Jordan's Principle, while not enacted by legislation, is an ameliorative

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[6] *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2012 FC 445, at para. 335 ("*Caring Society*"), *Canadian Foundation*, at para.56, and Reasons for Judgment, at para. 78 [Appeal Book, Vol. 1, Tab 2, pp. 27-28]

[7] *Guerin v. Canada*, [1984] 2 S.C.R. 335, at paras. 104 and 108.

[8] *R. v. Sparrow*, [1990] 1 S.C.R. 1077, at para. 62

[9] See for example, *Lovelace v. Ontario*, 2000 SCC 37, at para. 69 and *Caring Society*, at para. 334

[10] Status report of the Auditor General of Canada to the House of Commons; Chapter 4: Programs for First Nations on Reserves, at p. 1 and 5

[11] Reasons for Judgement, at paras. 17 and 81 [Appeal Book, Vol. 1, Tab 2, pp. 9 and 28-29]

program and reflects the goal of substantive equality encompassed by human rights legislation and the values underpinning the *Charter*.[12]

B. The Meaning of a Child-First Principle

19. A child first principle is synonymous with the well-established legal principle of "best interests of the child". In the context of Canadian law, the best interests of the child is most often considered in the context of child protection, custody, and access issues.[13] In *Young v. Young*, while Justice L'Heureux-Dubé described the best interests of the child in relation to custody and access rights, her Honour's remarks are of general application:

> Indeed, as an objective, the legislative focus on the best interests of the child is completely consonant with the articulated values and concerns underlying the Charter, as it aims to protect a vulnerable segment of society by ensuring that the interests and needs of the child take precedence over any competing considerations in custody and access decisions.[14]

20. The best interests of the child is also a well-established legal principle in international law, and is a guiding principle of the United Nations Conventions of the Rights of the Child ("CRC"), to which Canada is a signatory. The principle of best interests is elaborated in Article 3 of the CRC:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.[15]

21. In the context of Jordan's Principle, the "child first" nature of the principle requires governments and governmental departments of first contact to make their primary consideration the needs of the child. Indeed, the needs of the child must supersede government

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[12] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, at para. 40 and *R. v. Kapp*, 2008 SCC 41 at paras. 41 and 49
[13] *Canadian Foundation*, at para. 9
[14] *Young v. Young*, [1993] 4 S.C.R. 3 at para. 83. See also P.(D.) v. S. (C.), [1993] 4 S.C.R. 141 at para. 132
[15] United Nations Convention on the Rights of the Child, Art. 3. See also Arts. 9(3), 18(1), 20(1), 21, 37(c), and 40(2)(b)(ii).

interests in the jurisdictional dispute.[16] In other words, when a First Nations child is in need of a service, the focus of the government must be on how to most efficiently provide the service, rather than attempting to find ways to deny it.

22. Excerpts from the debates clearly demonstrate the fundamental premise of the principle:

> The motion calls on all levels of government to place the interests of First Nations children above jurisdictional considerations. [...] A child first principle calls on all levels of government to work together and treat First Nations children with greater respect.[17]
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> ***
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> Jordan's Principle proposes a direct approach to ensuring that First Nations children get the care they need. By putting the needs of children first, it advances a straightforward solution which should ensure that services are delivered in a timely fashion.[18]
>
> ***
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> Jordan's Principle calls on all government agencies to provide the services first and resolve the paperwork later. This government supports Jordan's Principle and is committed to making improvements in the lives of First Nations and Inuit children, women and families.[19]
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> As we saw during the previous debate, the government must immediately adopt a child first principle for resolving jurisdictional disputes involving the care of First Nations children. This approach, known as Jordan's Principle, forces those involved to set aside any disagreements between two governments, two departments or organizations with respect to payment for services provided to First Nations children.
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> In other words, when a problem arises in a community regarding a child, we must ensure that the necessary services are provided and only afterwards should we worry about who will foot the bill. Thus, the first government or

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[16] Jordan's Principle Fact Sheet, First Nations Child and Family Caring Society, pp.1-2 [Appeal Book, Volume 2, Tab 5, pp. 611-612]; Update on Jordan's Principle: The Federal Government's Response, January 12, 2011, [Supplementary Appeal Book, Tab 1].
[17] Parliament of Canada, House of Commons Debates, Vol. 141, No. 157 (39th Parliament, 1st Session) May 18, 2007 ("May 18, 2007 Hansard"), Conservative Member of Parliament, Joy Smith
[18] May 18, 2007 Hansard, Conservative Member of Parliament, Harold Albrecht
[19] Parliament of Canada, House of Commons Debates, Vol. 142, No. 12 (39th Parliament, 2nd Session) October 31, 2007, Conservative Member of Parliament, Steven Fletcher

department to receive a bill for services is responsible for paying, without disruption or delay.[20]

23. In the context of Jordan's Principle, the child first nature of the principle requires that no matter what the parameters of a jurisdictional dispute may be, the needs of the on-reserve child must be the paramount consideration by the government or department of first contact.

C. A Narrow Interpretation of Jordan's Principle will Exclude First Nations Children from Human Rights Protections

24. In the decision below, Mandamin J. held that Jordan's Principle requires that the first government contacted must respond with "child-first decisions", leaving jurisdictional and funding decisions to be dealt with later.[21] The Court found that Jordan's Principle is not to be narrowly construed and that the absence of a monetary dispute will not be determinative where both levels of government "maintain an erroneous position on what is available to persons in need of such services in the province and both then assert there is no jurisdictional dispute."[22]

25. The Caring Society respectfully submits that Mandamin J. correctly interpreted and applied Jordan's Principle in this case, as his approach reasonably reflects the goals and purposes of Jordan's Principle, of ensuring that on-reserve First Nations children have access to public services on the same terms as other Canadian children.

26. Conversely, the Appellant, the Attorney General of Canada argues that Jordan's Principle is not legally binding on the government in the sense of creating an enforceable right, and does not determine entitlement to specific substantive standards of care.[23]

27. In addition, the Attorney General, takes the position that Jordan's Principle ought to be narrowly construed and engaged only when the following four criteria are met: (i) the First Nation's child is living on a reserve (or ordinarily resident on reserve); (ii) the First Nation's child has been assessed by health and social service professionals and has been found to have multiple disabilities requiring services from multiple service providers; (iii) the case involves a

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[20] Parliament of Canada, House of Commons Debates, Vol. 142, No. 31 (39th Parliament, 2nd Session) December 5, 2007, Conservative Member of Parliament, Steven Blaney
[21] Reasons for Judgment, at para. 106 [Appeal Book, Vol. 1, Tab 2, p. 36]
[22] Reasons for Judgment, at para. 86 [Appeal Book, Vol. 1, Tab 2, p. 31]
[23] Appellant's Memorandum of Fact and Law, at paras. 44 sand 56

jurisdictional dispute between a provincial government and the federal government as to who should pay for a service; and (iv) the case involves services to a child that are comparable to the standard of care set by the province in a similar geographic area (known as "the normative standard of care").[24]

28. The Caring Society disagrees with the Attorney General on both the legality and scope of Jordan's Principle. With respect to the legality and enforceability of Jordan's Principle, the Caring Society is in agreement with the position articulated by the Respondents, as outlined in their Memorandum of Fact and Law, at paragraphs 56 to 60. Moreover, as made clear throughout these submissions, the Caring Society is of the view that Jordan's Principle is not restricted to the narrow criteria advanced by the Attorney General.

29. If accepted, the positions advanced by the Attorney General would affect the rights of on-reserve First Nations children in two significant ways. First, on-reserve First Nations children would not entitled to equality before and under the law and would be denied the right to receive the same services provided to all other Canadian children. Indeed, the arguments put forward by the Attorney General lead to the conclusion that because of their on-reserve status, First Nations children will not be guaranteed the same rights, benefits, and protections afforded to other Canadian children.

30. Second, the limited and narrow qualifying criteria advanced by the Attorney General under the rubric of Jordan's Principle reinforces a concerning approach to "dealing with" First Nations peoples, as articulated by the Supreme Court in *Wewaykum Indian Band v. Canada*:

> the degree of economic, social and proprietary control and discretion asserted by the Crown [...] left aboriginal populations vulnerable to the risks of government misconduct and ineptitude. The importance of such discretionary control as a basic ingredient in a fiduciary relationship was underscored in Professor E. J. Weinrib's statement, [...] that: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion".[25]

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[24] Appellant's Memorandum of Fact and Law, at para. 12

[25] *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, at paras. 79-80.

31. The effect of the Attorney General's position suggests that while the government has no obligation to provide on-reserve First Nations children with the services that are available to other children, the government will nonetheless provide some services to some children in some limited circumstances.

32. It is the Caring Society's position that narrowly construing Jordan's Principle, as suggested by the Appellant, will not only directly affect the Respondents' rights, it will deny all First Nations children living primarily on reserve from a procedural mechanism designed specifically to ensure that these children have equitable access to every public service and benefit available to all other Canadian children.

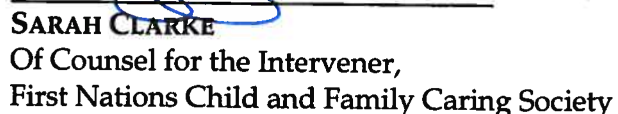
33. It could not have been Parliament's intention to exclude First Nations children living primarily on reserve from human rights and equality protections when it unanimously passed Jordan's Principle in the House of Commons. It is the Caring Society's position that Jordan's Principle ought to be interpreted as it was intended: to ensure that primarily on-reserve First Nations children have access to public services on the same terms as all other Canadian children.

34. Failing to protect the value of substantive equality and afford human rights protections to all on-reserve First Nations children would further marginalize a community that has already been affected by a legacy of stereotyping and prejudice, and who already face serious social disadvantages. Conversely, protecting and promoting a procedural mechanism designed to safeguard the rights of on-reserve First Nations children is consistent with and promotes *Charter* values.

PART IV - ORDER SOUGHT

35. The Caring Society submits that the appeal ought to be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of February, 2014.



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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37
2. *Canadian Foundation of Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76
3. *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2012 FC 445
4. *Guerin v. Canada*, [1984] 2 S.C.R. 335
5. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497
6. *Lovelace v. Ontario*, 2000 SCC 37
7. *R. v. Kapp*, 2008 SCC 41
8. *R. v. Sparrow*, [1990] 1 S.C.R. 1077
9. *Taypotat v. Kahkewistahaw First Nation*, 2013 FCA 192
10. *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245
11. *Withler v. Canada (Attorney General)*, 2011 SCC 12
12. *Young v. Young*, [1993] 4 S.C.R. 3

SCHEDULE "B"
RELEVANT STATUTES

1. *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), c. 11, ss. 1 and 15

2. *Canadian Human Rights Act,* R.S.C., 1985, c. H-6

3. *United Nations Convention on the Rights of the Child*

SCHEDULE "C"
SECONDARY SOURCES

1. Parliament of Canada, House of Commons Debates, Vol. 141, No. 157 (39th Parliament, 1st Session), May 18, 2007 (Hansard)

2. Parliament of Canada, House of Commons Debates, Vol. 142, No. 12 (39th Parliament, 2nd Session), October 31, 2007 (Hansard)

3. Parliament of Canada, House of Commons Debates, Vol. 142, No. 31 (39th Parliament, 1st Session), December 5, 2007 (Hansard)

4. Parliament of Canada, House of Commons Debates, Vol. 142, No. 36 (39th Parliament, 2nd Session), December 12, 2007 (Hansard)

5. Status Report of the Auditor General of Canada to the House of Commons, Matters of Special Importance (Ottawa, 2011)

6. Status Report of the Auditor General of Canada to the House of Commons, Chapter 4 – Programs for First Nations on Reserve (Ottawa, 2011)