A-158-13

FEDERAL COURT OF APPEAL

BETWEEN

ATTORNEY GENERAL OF CANADA

Appellant

-and-

PICTOU LANDING BAND COUNCIL
and MAURINA BEADLE

Respondents

MEMORANDUM OF FACT AND LAW
of the Appellant, the Attorney General of Canada

William F. Pentney
Deputy Attorney General of Canada

Per: Jonathan D.N. Tarlton and Melissa Chan
Department of Justice (Canada)
Atlantic Regional Office
Suite 1400 – 5251 Duke St.
Halifax NS B3J 1P3
Phone: (902) 426-5959/7916
Fax: (902) 426-8796

Counsel for the Appellant

Paul Champ
Champ & Associates
43 Florence Street
Ottawa, Ontario
K2P 0W6

Tel: (613) 237-4740
Fax: (613) 232-2680

Counsel for the Respondents

INDEX

OVERVIEW

1. At issue in this appeal is the interpretation and application of *Jordan's* Principle, a non-binding resolution of the House of Commons designed to resolve jurisdictional disputes between levels of government in cases involving the care of First Nations children living on-reserve. *Jordan's Principle* is procedural in nature and is not, and cannot be, engaged where there is no jurisdictional dispute between levels of government. The applications judge erred by using *Jordan's Principle* to support a finding there was a substantive right to funding, which is beyond its ambit and authority.

2. The decision on appeal before this Court arises from a judicial review of federal official who determined *Jordan's Principle* was not engaged by the request for funding to a severely disabled teenager living on-reserve with his mother. The decision-maker determined there no jurisdictional dispute and that the level of care requested well exceeds what is available to any resident of the province who does not live on a reserve.

3. Despite acknowledging that the standard of reasonableness should guide the review of the decision, the applications judge afforded the decision no deference. Instead, he engaged in re-weighing the evidence on factual issues, such as the determination of the "normative standard of care" in Nova Scotia and the contents of the request for funding made by the respondents.

4. The applications judge also erred in rendering the decision he felt the decision-maker should have made. This power of the Federal Court on judicial review should be used sparingly and only in cases where the record is clear and the result is inescapable. This is not such a case.

5. The appeal should be allowed and the application for judicial review should be dismissed.

PART I – FACTS

6. On judicial review, the applications judge overturned the May 25, 2011 decision of Barbara Robinson of Aboriginal Affairs and Northern Development Canada ("AANDC"). Ms. Robinson was tasked with determining whether *Jordan's Principle* applied in this case.

7. The May 25, 2011 decision denied the request of the Pictou Landing Band Council ("Pictou Landing") for AANDC to provide additional funding to cover the expenses for services to Jeremy Meawasige, a 17 year old severely disabled teenager and his mother, Maurina Beadle.[1]

8. Management of Jeremy's condition requires that assistance and care be available to him 24 hours a day.[2] Ms. Beadle was his sole caregiver until she suffered a stroke in May 2010 and was unable to continue to care for Jeremy without assistance.[3]

9. Pictou Landing determined it would provide the funding for Ms. Beadle and Jeremy's assistance.[4] Between May 27, 2010 and March 31, 2011, Pictou Landing spent $82,164.00 on in-home care services for Ms. Beadle and Jeremy.[5] Jeremy's in-home care expenses are estimated at $12,000 per month.[6]

10. Pictou Landing requested Canada cover the expenses for Ms. Beadle and Jeremy's care under the auspices of *Jordan's Principle*.[7] Canada denied this request in the May 27, 2011 decision, finding that *Jordan's Principle* was not engaged and that services exceeding the normative standard of care would not

---

1 *Reasons for Judgment and Judgment*, at para 24, Appeal Book, vol 1, tab 2, pg 11.

2 *Reasons for Judgment and Judgment*, at paras 6, 8-9, Appeal Book, v 1, tab 2, pgs 5-6.

3 *Reasons for Judgment and Judgment*, paras 7-8, Appeal Book, vol 1, tab 2, pg 6.

4 *Reasons for Judgment and Judgment*, at paras 8-9, Appeal Book, vol 1, tab 2, pg 6.

5 *Reasons for Judgment and Judgment*, at para 8, Appeal Book, vol 1, tab 2, pg 6.

6 *Affidavit of Pictou*, exh. K, Appeal Book, vol 2, tab 5, pg 597; *Affidavit of Robinson*, exh. A, Appeal Book, vol 3, tab 7, pgs 812-3.

7 *Reasons for Judgment and Judgment*, at para 22, Appeal Book, vol 1, tab 2, pg 10; also see *Pictou Landing request for funding,* Appeal Book, vol 2, tab 5, pgs 594 and 596-602.

be reimbursed through the AANDC Assisted Living Program or Health Canada's Home and Community Care Program.[8]

Jordan's Principle

11. *Jordan's Principle* is a non-binding resolution passed by the House of Commons.[9] It was developed in response to the case of a First Nation child with severe disabilities who remained in hospital for over two years due to jurisdictional disputes between the provincial and federal government over who was responsible for payment of his care.[10]

12. After *Jordan's Principle* was passed, Canada established four criteria to be satisfied in order for it to be engaged: 1) the First Nation's child is living on a reserve (or ordinarily resident on a reserve); 2) 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; 3) the case involves a jurisdictional dispute between a provincial government and the federal government as to who should pay for a service; and 4) the case involves services to a child that are comparable to the standard of care set by the province in a similar geographic location (known as "the normative standard of care.")[11]

13. Once these four criteria are met, Canada's response to *Jordan's Principle* ensures that financial support for the care of the First Nation's child will continue even if there is a dispute between the levels of government about who should pay.[12] The current service provider that is funding care for the child will continue to pay for necessary services until there is a resolution between the

---

8 *Reasons for Judgment and Judgment*, at paras 23 and 25, Appeal Book, vol 1, tab 2, pgs 10-11; also see *Decision of May 25, 2011,* Appeal Book, vol 3, pg 796.

9 *Reasons for Judgment and Judgment*, at para 82, Appeal Book, vol 1, tab 2, pg 29.

10 *Reasons for Judgment and Judgment*, at para 17, Appeal Book, vol 1, tab 2, pg 9.

11 *Reasons for Judgment and Judgment*, at para 84, Appeal Book, vol 1, tab 2, pg 31.

12 *Reasons for Judgment and Judgment*, at para 84, Appeal Book, vol 1, tab 2, pg 31.

levels of government.[13]

14. If a matter potentially raises *Jordan's Principle*, federal employees from AANDC and Health Canada known as "focal points" examine the case to determine if *Jordan's Principle* applies. Focal points gather the facts relevant to the situation and meet with the affected parties, provincial government officials and service providers. The focal points determine whether there is a genuine jurisdictional dispute and whether or not the services being requested or received meet the provincial normative standard of care provided to children in similar geographic locations off reserve.[14]

Funding to the Pictou Landing First Nation

15. Canada enters into contribution agreements with band councils representing First Nations in order to fund a variety of services, programs, and infrastructure development for people living on reserves.[15] These funding allocations under the contribution agreements provide particular designated programs that are based on a community needs assessment.[16]

16. The initial base level of funding is usually increased each year. However, if a community's needs significantly change and the level of funding is inadequate, that First Nation may, at any time, ask to conduct an updated community needs assessment. The First Nation may also re-negotiate the entire contribution agreement if it is consistently in an underfunded position.[17]

17. The AANDC Assisted Living Program ("ALP") and Health Canada's Home and Community Care Program ("HCCP") are designated programs included in the contribution agreements with the Pictou Landing First Nation and are designed to provide continuing care services in the home for people who live

---

13 *Reasons for Judgment and Judgment*, at para 18, Appeal Book, vol 1, tab 2, pg 9.
14 *Affidavit of Robinson*, para. 8-10, Appeal Book, vol 3, tab 7, pg 655.
15 *Reasons for Judgment and Judgment*, at para 5, Appeal Book, vol 1, tab 2, pg 5.
16 *Reasons for Judgment and Judgment*, at para 79, Appeal Book, vol 1, tab 2, pg 28; also see *Affidavit of Pictou*, paras. 3-7, Appeal Book, vol 1, tab 5, pgs 68-69.
17 *Affidavit of Philippa Pictou*, exh. B and C, Appeal Book, vol 1, tab 5, pgs 84-156, 158-202; *Cross-examination of Robinson*, Appeal Book, vol 4, tab 11, pgs 1311-1315; *Cross-examination of Ross,* Appeal Book, vol 4, tab 12, pgs 1387-1389.

on reserves.[18] Both are funded by Canada and administered by the First Nation.[19]

18. The ALP is funded by AANDC and provides funding for non-medical, social support services to seniors, adults with chronic illness, and children and adults with disabilities (mental & physical) living on reserve, and includes items such as attendant care, housekeeping, laundry, meal preparation, and non-medical transportation.[20]

19. The HCCP is funded by Health Canada and provides funding to assist with delivery of basic in-home health care services which require a licensed/certified health practitioner or the supervision of such a person.

20. The level of funding in both the ALP and the HCCP is designed to provide for eligible services within the federal funding authority that are reasonably comparable to those provided by the province for people who do not live on a reserve ("the normative standard of care").[21]

21. Pictou Landing provided funds to Jeremy and his mother through the ALP and HCCP.[22]

Case conferences between Canada, Nova Scotia and Pictou Landing

22. After Jeremy's situation was brought to Canada's attention, case conferences were held with provincial authorities, representatives from Pictou Landing and Canada's officials, beginning in February 2011.[23]

23. At the February 2011 case conference, Jeremy's care needs were discussed and, in particular, employees of the Nova Scotia Department of Health and Wellness prepared an assessment of his needs. The provincial care assessors confirmed that the level of care required in Jeremy's needs assessment would not be

---

18 *Reasons for Judgment and Judgment*, at paras 12-13, Appeal Book, vol 1, tab 2, pgs 7-8.

19 *Reasons for Judgment and Judgment*, at paras 12-13 and 15, Appeal Book, vol 1, tab 2, pgs 7-8.

20 *Reasons for Judgment and Judgment*, at para 12, Appeal Book, vol 1, tab 2, pg 7.

21 *Reasons for Judgment and Judgment*, at para 13, Appeal Book, vol 1, tab 2, pg 8.

22 *Reasons for Judgment and Judgment*, at para 11 and 15, Appeal Book, vol 1, tab 2, pgs 7-8.

23 *Reasons for Judgment and Judgment*, at para 19, Appeal Book, vol 1, tab 2, pg 9.

funded in the home for any Nova Scotian living off reserve.[24] They stated that institutional long term care would be the appropriate option for a person living off reserve.[25]

24. In April 2011, a second case conference took place to discuss Jeremy's needs. Because the Band requested that Jeremy's situation be considered a *Jordan's Principle* case, Barbara Robinson, the AANDC focal point for *Jordan's Principle*, became involved and participated in the case conference.[26]

25. At the April 2011 case conference, Troy Lees, a civil servant with the Nova Scotia Department of Community Services, described the services that the province would provide to a child with similar needs and circumstances off reserve. He said that a family living off reserve could receive a maximum of $2,200 per month in respite services.[27] Mr. Lees also stated that the province would not provide 24 hour care in the home or funding equivalent to the costs of institutional care.[28]

Pictou Landing's request for additional funding

26. On May 12, 2011, Pictou Landing submitted the request for additional funding to pay for Jeremy's care, based on the view that there were jurisdictional disputes with this case. The request also stated that "even if it is not a Jordan's Principle case, I would like either the Federal or Provincial Government to reimburse us up to the level that he would qualify for if institutionalized (estimated by Community Services to be $350 per day)."[29]

27. The Briefing Note drafted in support of the request for funding stated "Jeremy

---

[24] *Affidavit of Ross*, para. 22, Appeal Book, vol 4, tab 8, pg 1082.

[25] *Affidavit of Robinson*, exh. A, Appeal Book, vol 3, tab 7, pgs 712 and 770; *Affidavit of Ross*, at para. 24; Appeal Book, vol 4, tab 8, pg 1083.

[26] *Reasons for Judgment and Judgment*, at para 20, Appeal Book, vol 1, tab 2, pg 9.

[27] *Reasons for Judgment and Judgment*, at para 21, Appeal Book, vol 1, tab 2, pg 10.

[28] *Reasons for Judgment and Judgment*, at para 21, Appeal Book, vol 1, tab 2, pg 10.

[29] *Reasons for Judgment and Judgment*, at paras 22 and 62, Appeal Book, vol 1, tab 2, pgs 10 and 23; *Pictou Landing request for funding,* Appeal Book, vol 2, tab 5, pgs 594.

Meawasige's reasonable 'need' for 'homecare' is 24 hours a day, 7 days a week (less the time his family can reasonably attend to his care), but which department is obligated to meet his care needs?"[30]

28. The funding provided by Pictou Landing covered 492 hours of in-home respite services to Jeremy and his mother per 28 day period, leaving only a 9 hour period during each week-night for family contributions.[31]

29. On judicial review, the evidence from Ms. Beadle was that her older son cannot help her with Jeremy's care between May and November because he is away fishing, and other family members on the reserve are unable to help out because they also work.[32]

30. Ms. Beadle also testified that if she hadn't had any workers come to her house after her stroke in May 2010, she would have been "alone"; if possible, she would have a care worker stay with her and Jeremy throughout the entire night on weekdays; and, if the current level of care was reduced (either by hours or the number of care workers), she would manage "terribly".[33]

31. Ms. Robinson found the request for funding being advanced by Pictou Landing was to reimburse care that was essentially 24 hours per day, 7 days a week.[34]

Canada's determination on normative standard of care

32. As the *Jordan's Principle* focal point, Ms. Robinson was designated as the federal decision-maker tasked with responding to the request on behalf of both Health Canada and AANDC.

33. Ms. Robinson contacted provincial authorities to verify the provincial normative standard of care for children with similar disabilities and care needs

---

30 *Pictou Landing request for funding,* Appeal Book, vol 2, tab 5, pgs 601; also see *Reasons for Judgment and Judgment*, at para 22, Appeal Book, vol 1, tab 2, pg 10.

31 *Affidavit of Robinson, exh. A*, Appeal Book, vol 3, tab 7, pgs 973-5.

32 *Cross-examination of Beadle*, Appeal Book, v 4, tab 9, pgs 1090-2.

33 *Cross-examination of Beadle*, Appeal Book, v 4, tab 9, pgs 1090, 1132-4 and 1142.

34 *Reasons for Judgment and Judgment*, at para 24, Appeal Book, vol 1, tab 2, p 11.

residing in Nova Scotia who do not live on reserves.[35]

34. The provincial authorities were clear that neither the Nova Scotia Department of Community Services nor Nova Scotia Department of Health and Wellness would provide funding for services at the level Jeremy required if he was living off reserve.

35. The information provincial authorities provided to Ms. Robinson indicated that Nova Scotia's Direct Family Support Program provided the allowable cost of $2,200 per month for respite in-home care, with the possibility of a greater amount for exceptional circumstances. However, the Directive from the Department of Community Services dated October 2006 indicated that the maximum for respite in-home care was $2,200 per month, with no exceptions.[36] The Department of Health and Wellness also indicated that existing policies had a cap of $2,200, and new policies were to be implemented by December 2011 that would fund in home care for up to 5 hours a day, and only if that care did not require a trained nurse.[37]

36. The provincial authorities indicated that, if Jeremy were residing off reserve, the option they would support would be long term care in a nursing home.[38] They identified an appropriate facility for children, located in Kentville, Nova Scotia that had availability to accommodate him.[39] This option was rejected by Jeremy's family, as their choice was not to place him in long term care.[40]

37. As stated by the provincial officials, respite care is not intended to provide care for around the clock support.[41] Any home care required that is beyond the hours

---

35 *Reasons for Judgment and Judgment*, at paras 21, 24, 26, 56 and 92 Appeal Book, vol 1, tab 2, pgs 10-11, 21 and 32.

36 *Reasons for Judgment and Judgment*, at paras 21and 92, Appeal Book, vol 1, tab 2, pgs 10 and 32-3; also see *Affidavit of Robinson*, at paras 34-36, Appeal Book, vol 3, tab 7, pgs 662-3.

37 *Affidavit of Robinson*, exh A, Appeal Book, vol 3, tab 7, pgs 1071-2

38 *Reasons for Judgment and Judgment*, at para 26, Appeal Book, vol 1, tab 2, pg 11

39 *Affidavit of Robinson*, exh. A, Appeal Book, vol 3, tab 7, pgs 1069.

40 *Reasons for Judgment and Judgment*, at para 26, Appeal Book, vol 1, tab 2, pg 11.

41 *Affidavit of Robinson*, exh A, Appeal Book, vol 3, tab 7, pg 1074.

covered by respite care must be augmented by family support.[42]

The May 25, 2011 decision

38. As a result of the information received from the provincial authorities, Ms. Robinson concluded there was no jurisdictional dispute in this matter.[43] The level of funding requested was also determined to exceed the provincial normative standard of care and would not be reimbursed through the ALP or the HCCP.[44]

Decision on judicial review

39. The applications judge overturned the May 25, 2011 decision on judicial review, finding it was unreasonable to determine *Jordan's Principle* was not engaged in this case and that the funding request was not properly assessed.[45]

40. Instead of remitting the matter back for reconsideration, the applications judge quashed the decision and ordered that Pictou Landing is entitled to reimbursement beyond the normal maximum of $2,200 as it relates to Jeremy's needs for assistance.[46]

---

42 *Affidavit of Robinson*, exh A, Appeal Book, vol 3, tab 7, pg 1074.

43 *Reasons for Judgment and Judgment*, at para 23, Appeal Book, vol 1, tab 2, pg 10.

44 *Reasons for Judgment and Judgment*, at para 25, Appeal Book, vol 1, tab 2, pg 10.

45 *Reasons for Judgment and Judgment*, at paras 3, 124-5, Appeal Book, vol 1, tab 2, pgs 5 and 41.

46 *Reasons for Judgment and Judgment*, at para 127, Appeal Book, vol 1, tab 2, pg 41.

PART II – ISSUES

41. Canada's position on the issues in this appeal is:

    i) The applications judge erred in the interpretation and application of *Jordan's Principle*;

    ii) The applications judge erred by failing to show deference to the decision; and

    iii) The applications judge erred in the remedy granted.

PART III – LAW AND ARGUMENT

I. The applications judge erred in his interpretation and application of *Jordan's Principle*

42. The applications judge erred in law by finding *Jordan's Principle* created a legal obligation that could be used for determining a substantive right to funding, instead of recognizing its purpose is to resolve jurisdictional disputes between levels of government.

Jordan's Principle does not create legal obligations

43. In interpreting *Jordan's Principle* as creating a legal obligation on Canada to approve the request for funding in excess of $2,200, the applications judge erred.

44. *Jordan's Principle* is a non-binding resolution of the House of Commons. It is not a statute, regulation, or policy which provides legal authority to act and it has no independent normative effect.

45. Motions agreed by the House of Commons in order to make a declaration of opinion or purpose are called resolutions. Expressions of will are called orders. In *Stockdale v Hansard* the English Court of Queen's Bench held that a

resolution by the House declaratory of its own privileges was beyond the control of the law and could not be questioned in any court.[47]

46. Further authority for the proposition that a resolution is not legally binding can be found in the wording of the *Constitution Act, 1867*, which provides that Parliament is composed of the Queen, Senate and the House of Commons. The Queen makes laws by and with the advice and consent of the Senate and House of Commons. There is a distinction drawn between "Bills" and "Resolutions", wherein only the former are passed by both Houses of Parliament, assented to by the Governor General in the name of the Queen and thereby enacted as law.[48]

47. The Federal Court considered whether a resolution creates legal obligations in *Kelso v. Canada.*[49] The plaintiff, a unilingual public servant, claimed that he had a legal right to remain in his position (now designated bilingual) by virtue of a Joint Resolution of the Senate and the House of Commons. The Court rejected his claim and said that the legislative power in Canada is vested in a Parliament consisting of the Queen, the Senate and the House of Commons. The action of only two of the constituent elements does not make law.[50]

48. On further appeal, the Supreme Court endorsed this view and stated that the Joint Resolution, although it is indicative of legislative intent, is not legally binding in the sense of creating enforceable legal rights and obligations.[51]

49. Similarly, in *Michaud v Bissonnette*, the Quebec Court of Appeal also upheld this principle and found that a resolution of the provincial assembly of Quebec cannot independently create legal obligations or consequences. The Court held "[c]ontrary to a law, a resolution is merely a means of expressing an opinion of the MNAs and has no normative effect."[52]

---

47 House of Commons Procedure and Practice, 2nd Ed. 2009; A.V.Dicey, *Introduction to the Study of the Law of the Constitution,* 3rd Ed. (London: MacMillan and Co., 1889), pp. 52-55; *Stockdale v Hansard* (1839), 112 Eng Rep 1112, at 1153-54.

48 *Constitution Act, 1867*, ss. 17, 54, 55 and 91.

49 *Kelso v. Canada* , [1979] 2 F.C. 726, [1979] F.C.J. No. 85(T.D.).

50 *Kelso v. Canada* , *supra*, at para. 12.

51 *Kelso v. Canada* 1981] S.C.R. 199.

52 *Michaud v Bissonnette,* 2006 QCCA 775, para 41.

50. No federal legislation is engaged in this case, and *Jordan's Principle* is not legally binding in the sense of creating an enforceable obligation on AANDC to fund services that are in excess of the normative standard of care.

Jordan's Principle exists to resolve jurisdictional disputes

51. Alleviating any hardship that results from a jurisdictional dispute between levels of government is the driving force behind *Jordan's Principle*. This is evident from the motion introducing *Jordan's Principle* into the House of Commons, which was quoted by the applications judge:

> 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.[53]

52. The applications judge appeared to recognize that *Jordan's Principle* is focused on resolving jurisdictional disputes :

> Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdictional disputes between different levels of government.[54]

53. Subsequently, however, the applications judge directed his focus from determining there was a true jurisdictional error by concentrating on whether there was an underlying entitlement to funding for a service:

> I do not think the principle in a Jordan's Principle case is to be read narrowly. The absence of a monetary dispute cannot be determinative where officials of 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.[55]

54. In making this finding, the applications judge erred by equating a jurisdictional dispute with a dispute about the level of funding.

---

53 *Reasons for Judgment*, at para. 83, Appeal Book, vol 1, tab, pg 29.

54 *Reasons for Judgment and Judgment*, at para 81, Appeal Book, vol 1, tab 2, pgs 28-9.

55 *Reasons for Judgment and Judgment*, at para 86, Appeal Book, vol 1, tab 2, pg 31.

55. *Jordan's Principle* comes into play when there is a dispute about who should fund the requested service. That was not the dispute in this case; the dispute in this case is about what should be funded. *Jordan's Principle* does not address this type of dispute. The funding amount provided to First Nations will depend on the Province's normative standard of care for a resident living off-reserve.

56. The applications judge failed to recognize that *Jordan's Principle* concerns which level of government pays for a given service; it does not determine entitlement to specific substantive standards of care. The applications judge further erred in using *Jordan's Principle* as a mechanism for determining underlying funding and not recognizing that any requests for additional funding should be determined through the various funding agreements between Canada and the First Nation.

Jordan's Principle is not applicable to the determination of entitlement to funding

57. Determination of the normative standard of care for the purpose of entitlement to funding is a separate and distinct issue that is not determinative of whether there is a jurisdictional dispute. In the context of *Jordan's Principle*, the determination of normative standard of care arises as one criterion to satisfy in determining if there is a jurisdictional dispute.

58. This is different that the determination of the normative standard of care required through contribution agreements and various specified programs, such as the ALP and HCCP. In this context, the provincial normative standard of care is used as a measure of determining what level of funding is required by Canada. This process is not the same as a request to find *Jordan's Principle* is engaged. This is the difference between the two concepts of a procedural issue (resolution of a jurisdictional dispute under *Jordan's Principle*) and a substantive issue (determination of the underlying entitlement to under the contribution agreements and programs).

59. The request before the decision-maker was not clear. It confused the two concepts by implying it was the engagement of *Jordan's Principle* that provided the substantive right to funding. The applications judge erred by

accepting this erroneousness merging of the two concepts. This is evident in comments that use *Jordan's Principle* and the requirements for comparable services under the contribution agreement interchangeably:

> I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As a result, I come to much the same conclusion as the Court in *Boudreau*. The federal government contribution agreement required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy.
>
> [...]
>
> The PLBC has met its obligations under its funding agreement with AANDC and Health Canada. The participating federal department, particularly AANDC, have adopted Jordan's Principle. In my view, they are now required by their adoption of Jordan's Principle to fulfill this assumed obligation and adequately reimburse the PLBC for carrying out the terms of the funding agreements and in accordance with Jordan's Principle.
>
> [...]
>
> Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve.[56]

60. These comments fail to recognize that the two concepts – resolution of a jurisdictional dispute under *Jordan's Principle* and determination of the underlying entitlement to under the contribution agreements and programs – are two distinct and separate concepts and demonstrates an overarching misunderstanding of how funding is determined.

61. The applications judge erred in law when he erroneously interpreted and applied *Jordan's Principle* and substituted his findings for those of the decision-maker.

---

[56] *Reasons for Judgment and Judgment*, at paras 111, 113 and 116, Appeal Book, vol 1, tab 2.

II. The applications judge erred by failing to show deference to the decision

62. Although the applications judge identified reasonableness as the appropriate standard, he erred failing to show the deference required when reviewing the substance of the May 25, 2011 decision. Specifically, he erred by failing to show any deference to the findings on whether *Jordan's Principle* was engaged, what the normative standard of care was in Nova Scotia and what level of care was being requested.

The standard of review

63. The role of this Court in reviewing the decision of a lower court in a judicial review context is to determine whether the applications judge identified the appropriate standard of review and applied it correctly.[57] As the question of the right standard for the applications judge to select and apply is one of law, this Court reviews the selection and application of the standard of review on the standard of correctness.[58]

64. If, as in this case, the applications judge has not applied the correct standard of review, then this Court should assess Canada's decision in light of the correct standard.[59]

65. A decision will be unreasonable only where "there is no line of analysis within the given reasons that could reasonably lead the [decision-maker] from the evidence before it to the conclusion at which it arrived." [60] But if any of the reasons in the decision being reviewed are sufficient to support the conclusion, even if the explanation is not one that the reviewing court finds compelling, the

---

[57] *Canada (Canada Revenue Agency) v Telfer*, 2009 FCA 23, at para.18.

[58] *Dr. Q. v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, at paras. 43-44.

[59] *Dr. Q., supra*, at para. 43; see also *Starson v Swayze*, 2003 SCC 32, at para. 89, and *Henthorne v British Columbia Ferry Services Inc.*, 2011 BCCA 476, at para. 49; but see Evans J.M., " The Role of Appellate Court in Administrative Law", (2007) 20 Can. J. Admin L. & Prac. 1.

[60] *Voice Construction Ltd. v Construction and General Workers' Union Local 92,* 2004 SCC 23, at para. 31; *Law Society of New Brunswick v Ryan,* 2003 SCC 20, at para. 55.

decision should still be found to be reasonable. [61]

66. As noted by the Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, "[r]eviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fatal.[62]

67. In this case, the applications judge did not adhere to these principles of deference but instead substituted his own opinion, despite the evidence that supported the conclusions reached by the decision-maker.

The decision that *Jordan's Principle* was not engaged was reasonable

68. There was no jurisdictional dispute in this matter; *Jordan's Principle* was not engaged. Canada's decision in this regard is justified, transparent, and intelligible. It falls within a range of possible and acceptable outcomes, which are defensible in respect of the law and the facts. Therefore, the applications judge should not have intervened based on a review on the standard of reasonableness.

69. The decision-maker's conclusion that *Jordan's Principle* was not engaged was well established by the supporting evidence. The information received from the provincial officials was clear that they would not provide the level of care requested by the Band Council if this was a situation dealing with a child who lived off-reserve. There was no evidence that either Nova Scotia or Canada believed there was an entitlement to the level of funding requested but thought the other jurisdiction should pay for it.

70. The evidence before the applications judge clearly and unequivocally demonstrated there was no jurisdictional dispute.

71. Essentially, instead of looking at whether a jurisdictional dispute existed, the applications judge disagreed with the province's statement of what was

---

61 *Voice Construction Ltd.*, *supra*, at para. 31.

62 *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 ("*Nurses Union*") at para. 17. Also see: *PharmaScience Inc. v. Attorney General of Canada,* 2008 FCA 258, at para. 4.

encompassed within its normative standard of care and used these conclusions to transform the situation into one where a jurisdictional dispute existed. To do so not only re-enforces Canada's position that the applications judge misinterpreted *Jordan's Principle*; it demonstrates a disregard for the evidence before the Court.

The normative standard of care was properly determined

72. The applications judge inappropriately revisited and reweighed the evidence before the decision-maker with respect to the normative standard of care. In particular, he gave no weight to the statements of the provincial representatives that their current policy regarding 'exceptional circumstances' funding off-reserve does not exceed $2200 and substituted his own conclusion that a child living off-reserve would receive such funding. In doing so, he usurped the role of the decision-maker.

73. Canada's decision-maker determined the normative standard of care for in-home services in Nova Scotia was $2200 per month. She arrived at this conclusion after several discussions with provincial authorities.

74. The decision-maker consulted with a range of provincial officials to determine whether, if Jeremy lived off reserve, the level of care sought would be available. She consulted with provincial officials from multiple departments, and raised with them the applicability of the *Social Assistance Act,* the Direct Family Support Policy, the Health and Wellness Program, and the recent decision of the Nova Scotia Supreme Court in the *Boudreau* case.

75. The decision-maker also considered a Directive from the Department of Community Services dated October 2006 indicating the maximum for respite in-home care was $2,200 per month.[63] She brought all of the respondents' concerns and arguments before the provincial officials.[64]

76. The provincial representatives were very clear in their response. They unequivocally stated that the level of care Jeremy required, and had received

---

[63] *Reasons for Judgment and Judgment*, at paras 21and 92, Appeal Book, vol 1, tab 2, pgs 10 and 32-3.

[64] *Affidavit of Robinson*, paras. 25-42, Appeal Book, vol 3, tab 7, pgs 660-4.

from the Band Council, was not available under any provincial program in Nova Scotia for in-home care. They informed Canada's representatives that the maximum Jeremy would receive for respite care if he lived off reserve would be $2,200 per month under the Direct Family Support Policy. Alternative, they would have approved up to 5 hours of home support services per day in a 28 day period under the Home Care Policy or they would have supported his admission into long-term care in a residential facility. [65]

77. The information Canada provided to the provincial officials was accurate and thorough. Therefore, the provincial authorities had the complete picture before them when providing their input on the normative standard of care and the level of funding Jeremy would receive if he lived off-reserve.

78. These provincial officials are in the best position to say what services are available to residents of the province living off reserve. It is those officials who craft the applicable policy, who daily interpret provincial social assistance legislation and who make determinations on eligibility for services for people living off reserve. The decision-maker acted reasonably in relying on this information.

The decision to deny additional funding was reasonable

79. The decision-maker had sufficient evidence to find the requested funding exceeded the normative standard of care. Any request for additional funding could only be provided through the contribution agreements. In order to determine a request for additional funding under these contribution agreements, it had to be determined if the request was within the provincial normative standard of care. When determining the normative standard of care in this respect, *Jordan's Principle* is an irrelevant consideration. It does not form any part of the contribution agreements that form the basis for funding from Canada to the First Nation.

80. In making the decision to deny funding, the decision-maker reasonably

---

[65] *Affidavit of Robinson*, exh A, Appeal Book, vol 3, tab 7, pgs 1071-4; *Reasons for Judgment and Judgment*, at para 26, Appeal Book, vol 1, tab 2, pg 11.

concluded that the normative standard of care was exceeded and therefore, the expenses incurred should not be reimbursed under the Assisted Living Program or the Home and Community Care Program. The applications judge owed deference to these findings but instead substituted his own decision, based on his re-weighing of the evidence from the provincial officials and a misapprehension of how funding is provided under the contribution agreements.

The *Boudreau* decision did not alter the normative standard of care

81. The applications judge's reliance on the *Boudreau* decision with respect to determining the normative standard of care is misplaced and ignores the factual findings that the decision-maker made regarding that case and the one before her.[66]

82. *Boudreau* is a case about circumstances exceptional to the provincial standard of care and does not change the normative standard of care itself.

83. In *Boudreau*, the Nova Scotia Supreme Court decided that a policy could not limit a funding obligation prescribed by legislation. That is not the case here.

84. The program at issue is a contribution funding program that is an exercise of the federal spending power dealing with a subject matter that is within federal jurisdiction under s. 91(24). The exercise of the federal spending power does not involve compulsion and consequently, is not treated the same as making a law.[67]

85. The applications judge overlooked the distinction between compulsory regulation of assistance for residents living off reserve, which can only be accomplished by legislation enacted within the limits of legislative authority, and the exercise of spending and contracting with PL, which imposes voluntary obligations. Parliament may be free to offer grants subject to whatever restrictions it sees fit and its decision to make a grant of money in any particular area should not be construed as an intention to regulate all related aspects of that

---

[66] *Nova Scotia (Department of Community Services) v. Boudreau*, 2011 NSSC 126.

[67] See: Hogg, *Constitutional Law of Canada,* 5th ed., loose-leaf at pp. 6-18 to 6-20, 33.1.

area.[68]

86. In overlooking that distinction, the applications judge erred in law. Legislation and contract are entirely different methods of creating rights and liabilities and it is essential to keep them distinct.[69]

87. The situation in *Boudreau* was also different from Jeremy's because Boudreau was receiving exceptional circumstances funding prior to the October 2006 Directive from the Department of Community Services that indicated the maximum for respite in-home care was $2,200 per month, with no exceptions. The $2,200 limit was never applied in Boudreau's case because he had been "grandfathered".[70] Moreover, Nova Scotia indicated that the normative standard of care for a person's in Jeremy's situation would be institutional, not respite care.

88. The conversations the decision-maker had with the provincial authorities took place after the *Boudreau* decision had been issued. Therefore, they were fully aware of the reasoning of the decision when they maintained the normative standard of care in Nova Scotia would not provide the level of requested funding. They also advised the decision-maker that, at that time, they had not changed their policy in response to the *Boudreau* decision and that they had not made any decisions with respect to whether to appeal the decision.

89. The decision-maker did not err by determining, based on the advice provided by provincial program administrators, that *Boudreau* did not alter the normative standard of care.

<u>The decision that the request was for continual care was reasonable</u>

90. The evidence before the decision-maker supports the finding that Pictou Landing requested funding for full time care was reasonable.

---

[68] *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown*, [1989] 1 S.C.R. 1532, at p. 21.

[69] *A-G B.C. v. E. & N. Railway Co.* [1950] A.C. 87 at p. 110 (P.C.).

[70] *Boudreau, supra*, para. 70.

91. The applications judge found the decision-maker failed to have consideration of the extent of the family support. Specifically, he refers to the contribution of Jeremy's older brother, and that Ms. Beadle helps Jeremy "as she can."[71]

92. The request from Pictou Landing indicated the amount of care requested was for "24 hours a day, 7 days a week (less the time his family can reasonably attend to his care)."[72]

93. In finding that this contribution of the older brother and Ms. Beadle reduced the amount of care requested, the applications judge ignored clear evidence on the limited amount Ms. Beadle and her older son were able to assist with Jeremy's care.

94. Ms. Beadle testified on cross-examination that if she hadn't had any workers come to her house after her stroke in May 2010, she would have been "alone"; if possible, she would have a care worker stay with her and Jeremy throughout the entire night on weekdays; and, if the current level of care was reduced (either by hours or the number of care workers), she would manage "terribly".[73] She also candidly admitted that she was not able to care for Jeremy by herself and provided specific details on the difficulties she faced after her stroke.

95. Furthermore, Ms. Beadle also testified that her older son cannot help her with care between May and November because he is away fishing[74], and other family members on the reserve are also unable to help out because of their own commitments.[75]

96. The applications judge also failed to consider the fact that, according to the service plan in effect since October 2010, the only time in-home respite services were not provided to Jeremy and Ms. Beadle was through the night when they were sleeping. The applications judge should have given consideration to the fact this

---

71 *Reasons for Judgment and Judgment*, at para 103, Appeal Book, vol 1, tab 2, pg 35.

72 *Reasons for Judgment and Judgment*, at para 22, Appeal Book, vol 1, tab 2, pg 10.

73 *Cross-examination of Beadle*, Appeal Book, vol 4, tab 9, pgs 1090, 1132, 1135 and 1142.

74 *Cross-examination of Beadle*, Appeal Book, vol 4, tab 9, pg 1090.

75 *Cross-examination of Beadle*, Appeal Book, vol 4, tab 9, pg 1092.

would far exceed the scope of respite care and essentially is a request for all waking hours.

97. Furthermore, the provincial assessment indicated that Jeremy required 24 hour care. The funding requested was also $350 per day, which was the equivalent of more than 24 hours worth of care at the rates paid for home support workers under AANDC's ALP.

98. The applications judge failed to reconcile this evidence about what was actually required by Jeremy and Ms. Beadle in making his findings. A reviewing court must not revisit the facts or reweigh the evidence. Only where the evidence viewed reasonably is incapable of supporting a decision-maker's findings will such findings of fact be unreasonable.[76]

99. The role of the applications judge when applying reasonableness was not to determine if he would have arrived at a different conclusion and substitute his own decision. Rather, it was to examine the evidence considered to determine if the decision falls within a range of acceptable outcomes. Here, there is no mistaking the clear evidence from the province's officials that was provided to the decision-maker on the normative standard of care – if Jeremy lived off-reserve, he would not receive the level of funding requested. There is also clear evidence on the high degree of care requested by the respondents and the limited contribution the family members could provide.

100. The evidence before the decision-maker and the applications judge is fully supportive of the conclusion reached by Canada. The applications judge erred in conducting what amounts to a *de novo* review of the evidence, rather than showing any deference to the decision-maker.

---

[76] *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, at para. 85.

IV. The applications judge erred in the remedy granted

This was not an appropriate situation for the applications judge to issue his own decision

101. If the applications judge was correct in finding the decision of May 25, 2011 was unreasonable, he erred in ordering the decision-maker to reimburse Jeremy's expenses, above the $2,200 limit.

102. Paragraph 18.1(4) (d) of the *Federal Courts Act* strictly circumscribes the role of a reviewing Court with respect to a tribunal's findings of fact. In the absence of an error of law in a tribunal's fact-finding process, or a breach of the duty of fairness, the Court may only quash a decision of a federal tribunal for factual error if the finding was perverse or capricious or made without regard to the material before the tribunal.[77]

103. While the directions that the Court may issue when setting aside a decision include "directions in the nature of a directed verdict", this is an "exceptional power" that should be exercised only in the "clearest of circumstances".[78] This will rarely be the case when the dispute is essentially factual in nature.[79] The reviewing court cannot engage in an examination of the evidence "unless a particular result is so inevitable on the facts that any other conclusion would be perverse."[80]

104. In *El Alleti v. Canada (Minister of Citizenship and Immigration)*, the Court on judicial review declined to render a decision on the merits of the case stating:

> Although it can certainly set aside the visa officer's decision and refer it back for determination in accordance with certain directions, the Court cannot issue specific and conclusive directions as to the decision the

---

77 *Federal Courts Act*, RSC 1985, c. F-7, ss. 18.1(4) (d); *Canada (Minister of Human Resources Development) v. Rafuse*, 2002 FCA 31, at para. 13.

78 *Canada (Minister of Human Resources Development) v. Rafuse*, *supra*, at para. 14.

79 *Canada (Minister of Human Resources Development) v. Rafuse*, *supra*.

80 *Canada (Human Resources Development and Social Development) v. Layden*, 2009 FCA 14, at para. 10.

officer must make unless the conclusion is simple, obvious and inescapable.[81]

105. In this case, the conclusion that there is an entitlement to funding beyond the normative standard of care is not simple, obvious and inescapable when the contradictory evidence is considered. There is an abundance of evidence demonstrating the decision-maker did not err in finding there was no jurisdictional dispute and that the funding requested exceeded the normative standard of care for Nova Scotia.

106. As the dispute at issue in this case is essentially factual in nature, the appropriate remedy in this case, if the applications judge was to quash the May 25, 2011 decision, would have been to return the matter to the decision-maker for re-consideration.

There is no public duty to fund under *Jordan's Principle*

107. The applications judge erred in granting a remedy based on the mistaken conclusion that *Jordan's Principle* created a legally binding duty to act. As a result he granted a mandatory order that is based on a finding there is a public duty to fund as a result of *Jordan's Principle*.[82] That is not the case.

108. The remedy imposed by the applications judge has elevated a non-binding resolution of the House of Commons to the level of law, which has the effect of fettering discretion in the exercise of the government's general authority to spend, manage and administer public monies on behalf of all Canadians in the public interest.

109. The applications judge erred in granting a remedy based on what is, in essence, a political decision for which Parliament and the executive are accountable.

---

[81] *El Alleti v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7387, at para. 13.

[82] *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 at para 45, affirmed by the Supreme Court of Canada at [1994] 3 S.C.R. 1100.

IV. Conclusion

110. The applications judge erred in his interpretation and application of *Jordan's Principle*, in applying the wrong standard of review and failing to remit the matter for reconsideration.

111. The conclusions of the decision-maker were reached after conducting an in-depth analysis and review of the evidence before her. The evidence supports the decision, and, on a review based on reasonableness, these decisions should have been accorded deference by the applications judge.

112. In the absence of reviewable error, the applications judge had no proper basis to intervene.

PART IV – ORDER SOUGHT

113. The Attorney General requests that this appeal be allowed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the Halifax Regional Municipality, Province of Nova Scotia this 19th day of August, 2013.

William F. Pentney
Deputy Attorney General of Canada

Per: 

Jonathan D.N. Tarlton/Melissa Chan
Department of Justice Canada
Suite 1400, Duke Tower
5251 Duke Street
Halifax, Nova Scotia B3J 1P3
Tel: (902) 426-5959/7916
Fax: (902) 426-8796
Counsel for the Appellant

Part V – List of Authorities

Legislation

Constitution Act, 1867, ss. 17, 54, 55 and 91
Federal Courts Act, RSC 1985, c. F-7, s. 18.1 (4)

Jurisprudence

A-G B.C. v. E. & N. Railway Co. [1950] A.C. 87

Apotex Inc. v Canada (Attorney General), [1994] 1 F.C. 742 ; affirmed [1994] 3 S.C.R. 1100

Canada (Canada Revenue Agency) v Telfer, 2009 FCA 23

Canada (Human Resources Development and Social Development) v. Layden, 2009 FCA 14

Canada (Minister of Human Resources Development) v. Rafuse, 2002 FCA

Canadian Union of Public Employees, Local 301 v Montreal (City), [1997] 1 S.C.R. 793

Colistro v. BMO Bank of Montreal, 2008 CarswellNat 1252

Dunsmuir v New Brunswick, 2008 SCC 9

Dr. Q. v College of Physicians and Surgeons of British Columbia, 2003 SCC 19

El Alleti v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 7387 (FC)

Kelso v. Canada, [1979] 2 F.C. 726, [1979] F.C.J. No. 85(T.D.)

Kelso v. Canada, [1981] S.C.R. 199

Law Society of New Brunswick v Ryan, 2003 SCC 20

Michaud v Bissonnette, 2006 QCCA 775

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62

Nova Scotia (Department of Community Services) v. Boudreau, 2011 NSSC 126

PharmaScience Inc. v. Attorney General of Canada, 2008 FCA 258

Starson v Swayze, 2003 SCC 32

Henthorne v British Columbia Ferry Services Inc., 2011 BCCA 47.

Stockdale v Hansard (1839), 112 Eng Rep 1112

Voice Construction Ltd. v Construction and General Workers' Union Local 92, 2004 SCC 23

YMHA Jewish Community Centre of Winnipeg Inc. v. Brown, [1989] 1 S.C.R. 1532

Secondary Sources

House of Commons Procedure and Practice, 2nd Ed. 2009.
A.V. Dicey, *Introduction to the Study of the Law of the Constitution,* 3rd Ed. (London: MacMillan and Co., 1889)
Peter W. Hogg, *Constitutional Law of Canada,* 5th ed. (loose-leaf) Vol. 2 (Toronto: Carswell, 2007)