Court File Number: T-1045 -11

FEDERAL COURT

B E T W E E N:

PICTOU LANDING BAND COUNCIL
and MAURINA BEADLE

Applicants

-and-

ATTORNEY GENERAL OF CANADA

Respondent

APPLICANTS' MEMORANDUM OF FACT AND LAW

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PART I - FACTS

> *I am profoundly disappointed to note in Chapter 4 of this Status Report that despite federal action in response to our recommendations over the years, a disproportionate number of First Nations people still lack the most basic services that other Canadians take for granted.*[1]

Overview

1. Across Canada, many children with disabilities and their families rely on continuing care services in the home. These public services are generally provided by provincial governments according to local legislation. Provincial governments refuse to extend those same services to First Nations children who live on reserves, arguing it is a matter of federal jurisdiction. While not conceding the jurisdictional issue, the Government of Canada has assumed responsibility for funding the delivery of continuing care programs and services on reserves at levels "reasonably comparable" to those offered by the province of residence.

2. Jeremy Meawasige is a teen-ager with multiple disabilities and high care needs. He and his mother Maurina Beadle – one of the Applicants in this matter – are Mi'kmaq and live on the Pictou Landing reserve in Nova Scotia. Until 2010, Maurina was able to care for her son without government support or assistance. When Maurina suffered a stroke in May 2010, the Pictou Landing Band Council ("PLBC") – the other Applicant - began providing in-home support to her and Jeremy.

3. The Government of Canada funds the PLBC to deliver continuing care services to people in need on the reserve. On May 12, 2011, the PLBC asked the Government of

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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

Canada for additional funding to ensure the Beadles received the same level of care and services available to those living off reserve. On May 27, 2011, Canada refused this request, claiming that the PLBC was asking to fund services in excess of the "normative standard of care" in the province of Nova Scotia.

4. First Nations children like Jeremy should have the same right to public services, care and support as every other child in Canada. According to Jordan's Principle, a concept adopted by the Government of Canada, no First Nations child should be denied services due to a jurisdictional dispute between governments. In this case, the Applicants submit that the Respondent's decision to deny additional funding was based on a flawed understanding of the benefits and services available to people with disabilities living off reserve through the provincial *Social Assistance Act.* Moreover, the Government of Canada's decision violates the Beadles' rights to equal benefit of the law, and constitutes discrimination contrary to section 15 of the *Canadian Charter of Rights and Freedoms*.

Background of Jeremy and Maurina

5. Jeremy Meawasige is a 16-year old with severe and complex disabilities. He has been diagnosed with hydrocephalus, cerebral palsy, spinal curvature and autism. He can only speak a few words and cannot walk unassisted. He is incontinent and needs total personal care including showering, diapering, dressing, spoon feeding, and all personal hygiene needs. He can become self-abusive at times, and needs to be restrained for his own safety. [2]

[2] Affidavit of Maurina Beadle, sworn August 2, 3011 ("Beadle Affidavit"), paras. 3-5 [Applicants' Application Record ("AAR"), Vol. I, Tab 2, pp. 12-13]

6. Jeremy lives on the Pictou Landing reserve with his mother, the Applicant Maurina Beadle, and his older brother Jonavan. They are Mi'kmaq and members of the Pictou Landing First Nation. Until Maurina suffered a stroke in May 2010, she was Jeremy's primary caregiver and was able to care for her son in the family home without government support or assistance.[3]

7. Jeremy and Maurina have a deep bond with each other, and she is often the only person who can understand his communication and needs. In raising Jeremy, Maurina spent countless hours training him to walk and uncross his eyes with special exercises. She also discovered and fostered Jeremy's love of music. She sings to him when he is upset or does not want to cooperate. Her voice calms Jeremy and makes him feel at ease. When Jeremy engages in self-abusive behavior, Maurina's singing can soothe him and make him stop. [4] The family spends every summer on the "Pow-Wow Trail", travelling to communities in the Maritimes where Pow-Wows are held. Maurina says Jeremy is happiest when he is dancing with other First Nations Peoples and singing to traditional music. Jeremy has never engaged in self-abusive behavior while at a Pow-Wow. [5]

Continuing Care Services on Reserves

8. Continuing care services, such as assisted living and home care services for people with disabilities, are generally considered a provincial responsibility under s. 92 of the *Constitution Act, 1867*. However, provinces have refused to provide these services on First Nations reserves due to disagreements with the federal government over constitutional

[3] Beadle Affidavit, paras. 1-4 and 9 [AAR, Vol. I, Tab 2, pp. 12-13 and 15]
[4] Beadle Affidavit, para.6 [AAR, Vol. I, Tab 2, p. 13-14]; Cross Examination of Maurina Beadle, dated October 6, 2011, ("Beadle Cross-Examination"), p. 32
[5] Beadle Affidavit, para. 7 [AAR, Vol. I, Tab 2, p. 14]; Beadle Cross-Examination, p. 7

responsibility. Consequently, such services have historically been funded and provided by the Government of Canada through Health Canada and the Department of Indian and Northern Affairs of Canada "as a matter of policy, not as a matter of legal or other obligation." [6]

9. Since the early 1980s, the departments of Health Canada and Indian and Northern Affairs (now known as Aboriginal Affairs and Northern Development Canada, or "AANDC") have worked together to provide personal care and home care services on reserves. While the federal government's objective was to provide services "reasonably comparable" to those available off reserve, internal studies in 1989 and 1997 concluded that this standard was not being met. The 1997 study found that First Nations individuals living on reserves "did not have access to the same scope and quality of in-home care services as those offered by provincial or territorial programs" and "funding levels were inadequate to meet the existing needs". [7]

10. Today, AANDC's Assisted Living Program ("ALP") and Health Canada's First Nations and Inuit Home and Community Care Program ("HCCP") form the basis of continuing care services offered on reserves. The ALP funds services to people with disabilities for items such as non-medical personal care, food preparation, housekeeping and laundry. Its objective is to help people with disabilities and the elderly remain in their homes and communities wherever possible.[8] The HCCP provides home support, medical equipment and nursing services to the elderly, people with disabilities, the chronically ill and those

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[6] Assisted Living Program: National Manual, Indian and Northern Affairs Canada, February 2005 ("Assisted Living Program Manual"), paras. 1.1.5, 1.2.2, 1.4.2, 1.6.2, 1.6.3 and 1.7.1 for quote [AAR, Vol. I, Tab 3, pp. 178-185]

[7] Assisted Living Program Manual, paras. 1.2.1 to 1.2.4 and 1.2.7 to 1.2.10, paras. 1.2.3 and 1.2.10 for quotes [AAR, Vol. I, Tab 3, pp. 178-180]

[8] Assisted Living Program Manual, paras. 1.1.2, and 1.3.4 [AAR, Vol. I, Tab 3, p. 178 and 181]

requiring short-term acute care services. According to Health Canada's policy, the services provided through the HCCP must be "culturally sensitive, effective and equitable to those provided off reserve". [9]

11. While the ALP and HCCP are funded by different government departments, they provide similar services along a continuum of care. One of the Respondent's witnesses, a manager from AANDC, described the relationship between these two programs this way:

> The ALP and Health Canada's Home and Community Care Program are intended to compose two parts of a single continuing program. It is possible that the services provided by these programs may contain some overlap. For example, both programs have some provision for respite care. These two programs are designed to complement each other, but not to duplicate funding for identical services. An individual can receive services from both programs, but cannot receive additional funding from one or the other program for a service already provided and paid for by the other program.[10]

Funding Levels and Agreements with the Pictou Landing Band Council

12. AANDC and Health Canada enter into funding agreements with First Nations band councils to deliver the services offered under the Assisted Living and Home and Community Care Programs. First Nations band councils are required to administer the programs "according to provincial legislation and standards" and must submit financial and performance reports to the government departments. [11]

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[9] Assisted Living Program Manual, paras. 1.3.1 and 1.3.4 [AAR, Vol. I, Tab 3, pp. 180-181]; Summative Evaluation of the First Nations and Inuit Home and Community Care Program, *Health Canada*, March 2009, ("HCCP Evaluation") p. 2 [AAR, Vol. III, Tab 3, p. 321]

[10] Affidavit of Barbara Robinson, para. 22 [AAR, Vol. III, Tab 6, p. 629]

[11] Assisted Living Program Manual, paras. 1.2.1, 1.9.3 and 1.9.4 for quote, and Chapters 3 and 5

13. For the ALP, funding is allocated through block contribution agreements between AANDC and band councils. Although these agreements also include funding allocations for other services and programs such as education, income assistance, community development and community infrastructure, a particular amount of funding is designated specifically for the ALP. [12]

14. The Pictou Landing Band Council's initial agreement with AANDC for the ALP dates back to the 1990s. The funding level was set based on the Band's population at the time, which was approximately 342.[13] Over the years, the agreement has been renewed, but funding has generally only increased according to inflation. The funding level also does not take into account the complexity of the medical condition of those in need, nor is it adjusted to reflect changes in provincial legislation or the level care offered off-reserve. Currently, the Band Council receives $50,892 annually for services covered by the ALP. In 2010-2011, nineteen members of the Band require assisted living services as a result of their medical condition.[14]

15. The PLBC and Health Canada entered into an agreement to deliver services under the HCCP in 1999. The initial level of funding was determined following a needs assessment and estimates based on the Band's 1997 population. The funding formula did not take into account provincial legislative requirements or the normative standard of care available off reserve. [15]

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generally [AAR, Vol. I, Tab 3, pp. 178, 186 and 187]

[12] Pictou Affidavit, para. 7 [AAR, Vol. I, Tab 3, p. 27]

[13] Needs Assessment of the Pictou Landing Band, 1999, p. 2 [AAR, Vol. III, Tab 8, p. 795];

[14] Pictou Affidavit, paras. 6-7 [AAR, Vol. I, Tab 3, p. 27]; Briefing Note regarding Home Care/Assisted Living for Maurina Beadle and Jeremy Meawasige ("Briefing Note"), p. 2 [AAR, Vol. II, Tab 3, pp. 559]; Robinson Cross-Examination, p. 44 [AAR, Vol. III, Tab 7, p. 679]

[15] Pictou Affidavit, para. 5 [AAR, Vol. I, Tab 3, p. 27]

16. While the PLBC's HCCP agreement has been renewed over the years, the level of funding has only increased according to inflation. There has been no adjustment to reflect the increase in Band population from 342 to over 600. There has also been no consideration of changes to provincial home care services available to people with disabilities living off reserve. According to a Health Canada official, even if there were "massive changes" to disability services provided to people living off reserve in Nova Scotia, the level of funding under the HCCP would remain the same. The PLBC currently receives $75,364 annually from Health Canada under the program.[16]

17. The PLBC's funding agreements with the Government of Canada contain clauses that allow for increased funding where the continued effective delivery of services is threatened by special circumstances. The ALP funding agreement states that the Band can seek additional funding in "exceptional circumstances" which were "not reasonably foreseen" at the time the agreement was entered into.[17] The HCCP agreement has a similar clause which refers to necessary increases due to "unforeseen circumstances".[18]

Service Available Off Reserve in Nova Scotia

18. In Nova Scotia, the *Social Assistance Act* ("*SAA*") governs the funding of personal home care services for people with disabilities. Section 9(1) of the *SAA* provides that persons in need shall be furnished with "assistance", which is defined by regulation as including home care and home nursing services.[19] The Nova Scotia Department of

[16] Cross-Examination of Susan Ross, dated October 18, 2011 ("Ross Cross Examination") pp. 10-11 [ARR, Vol. III, Tab 8, pp. 770-771]; Pictou Affidavit, paras. 4-5 [AAR, Vol. I, Tab 3, p. 26]; HCCP Evaluation, p. 28 [AAR, Vol. II, Tab 3, p. 347]
[17] AANDC Funding Agreement. p. 3 [AAR, Vol. I, Tab 3, p. 119]
[18] Agreement between Health Canada and Pictou Landing Band, p. 12 [AAR, Vol. I, Tab 3, p. 57]
[19] *Social Assistance Act,* RSNS 1989, c 432, section 9; and *Municipal Assistance Regulation,* N.S. Reg. 76/81,

Community Services is responsible for implementing the *SAA* and funds home care for people with disabilities through the Direct Family Support Policy. [20]

19. While there is no legislative or regulatory maximum level of service that may be granted to a person in need under the *SAA*, the Direct Family Support Policy provides that the funding for home care "shall not normally exceed" $2,200 per month. However, the Policy states that additional funding may be granted in "exceptional circumstances". [21]

20. In 2006, the Nova Scotia Department of Community Services issued an internal directive stating that the maximum funding under the Direct Family Support Policy was to be limited to $2,200 only, and that the provision for "exceptional circumstances" should be ignored. [22]

21. On March 9, 2011, the Supreme Court of Nova Scotia ruled that the provincial department's "directive" limiting funding to $2,200 per month had no legal basis. In *Boudreau*, a single mother had applied for more funding to ensure adequate personal care services for her severely disabled son. While the Department acknowledged that the care needs requested by Boudreau were appropriate, it maintained that it simply could not provide more than $2,200 per month due to its own internal directive. The Court concluded that people with disabilities ought to be entitled to more than $2,200 per month for home care services when assistance "reasonably meets" the needs of the particular individual. The effect of the Court's ruling was that Boudreau was to receive additional

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section 1(e)

[20] Direct Family Support Policy, *Department of Community Services,* July 28, 2006 ("Direct Family Support Policy"), p. 2 [AAR, Vol. II, Tab 3, p. 392]

[21] Direct Family Support Policy, paras. 5.4.1 for quote and 6.3 [AAR, Vol. II, Tab 3, p. 408 and 411]

[22] Memorandum of Lorna MacPherson, Coordinator of Services for Person with Disabilities, dated October 13, 2006, p. 100 [RR]

funding to the level of approximately $4,000 per month.[23]

22. People with disabilities in Nova Scotia also have access to home care services provided through the Department of Health and Wellness. Through the province's Home Care Program, individuals receive up to 150 hours of home support services. This represents approximately $6,600 per month in home-care services.[24]

23. The Direct Family Support Policy recognizes that there are circumstances where an individual may require services from the Department of Health and Wellness and the Department of Community Services. There is no prohibition against individuals from receiving services from both programs at once. According to a provincial government official, the Department of Health and Wellness and the Department of Community Services will coordinate care when individuals require assistance from both programs.[25]

24. It is worth noting that the Direct Family Support Policy explicitly states that First Nations children living on reserve are not eligible to services from the province. The Home Care Policy Manual similarly indicates that services may only be provided on reserve to First Nations individuals who require acute care services which "might otherwise be provided in a hospital."[26]

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[23] *Nova Scotia (Community Services) v. Boudreau*, 2011 NSSC 126, at paras. 1, 8-9, 59, 61-63, 70-72 and 87 [RR]

[24] Home Care Policy Manual, Nova Scotia Department of Health and Wellness, June 1, 2011 ("Home Care Policy Manual"), p. 64 [AAR, Vol. II, Tab 3, p. 485]; Email from Susan Stevens to Wade Were, dated May 20, 2011, p. 188 [RR]

[25] Direct Family Support Policy, p. 19 [AAR, Vol. II, Tab 3, pp. 409-410]; Email from Carolyn Maxwell to Wade Were, dated May 25, 2011, p. 194 [RR]

[26] Direct Family Support Policy, para.5.3.1 [AAR, Vol. 2, Tab 3, p. 402]; Nova Scotia Home Care Policy Manual, pp. 59-60 [AAR, Vol. II, Tab 3, pp. 480-491]

Jordan's Principle and Equality in Public Services for Children

25. First Nations People living on reserve sometimes face barriers when trying to access public services that are normally regulated and funded by provincial governments. In some cases, jurisdictional disputes arise between different levels of government regarding who should pay for services to First Nations Peoples living on reserves. As a result of these disputes, First Nations Peoples living on reserves are at times denied or experience significant delays when seeking access to basic services otherwise available to individuals living off reserve.[27]

26. One tragic example of this situation involved Jordan River Anderson, a young child with disabilities from Norway House Cree Nation in Manitoba. He unnecessarily remained in hospital for over two years due to jurisdictional disputes between different government departments over the payment of home care. Jordan passed away before the dispute could be resolved. He never had a chance to live in a family environment and the only home he ever knew was a hospital. This would not have happened to a non-aboriginal child living off reserve in similar circumstances as the province would have covered the costs immediately.[28]

27. In honour of Jordan's legacy, "Jordan's Principle" was developed. 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. According Jordan's Principle, the government department that is first contacted for a service regularly available

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[27] Jordan's Principles Fact Sheet, First Nations Child and Family Caring Society of Canada ("Jordan's Principles Fact Sheet"), pp. 1-2 [AAR, Vol. II, Tab 3, pp. 573-574]; Assisted Living Program Manual, para. 1.1.5 [AAR, Vol. I, Tab 3, p. 178]

[28] Jordan's Principles Fact Sheet, p. 1-2 [AAR, Vol. II, Tab 3, p. 573-574]

off reserve must pay for it without delay or disruption. The paying government can pursue repayment of expenses afterwards, but services cannot be disrupted during negotiations. Put simply, Jordan's Principle is a mechanism to prevent First Nations children from being denied equal access to benefits or protections available to other Canadians as a result of Aboriginal status.[29]

28. On December 12, 2007, the Parliament of Canada unanimously voted in favor of Jordan's Principle. The motion states that the "government should immediately adopt a child-first principle, based on Jordon's Principle, to resolve jurisdictional disputes involving care of First Nations children". [30]

Home Care Services for Maurina and Jeremy

29. In May 2010, Maurina was hospitalized for several weeks after she suffered a stroke. When she was released, she required a wheelchair and assistance with her own personal care. As a result of her condition, she was also unable to provide care for Jeremy.[31] The Pictou Landing Band Council immediately started providing 24-hour care for both Maurina and Jeremy in their home.

30. As months passed, Maurina's condition improved. She became stronger and gained the ability to walk on her own by using a cane, to do her own groceries and to read and sing to Jeremy. In spite of her progress, Maurina continued to require assistance with some

[29] Jordan's Principles Fact Sheet, p. 1-2 [AAR, Vol. II, Tab 3, p. 573-574]
[30] Parliament of Canada, House of Commons, Journals, No.36 (39th Parliament, 2nd Session), December 12, 2007 (Hansard) [Applicants' Book of Authorities, Tab 18]
[31] Beadle Affidavit, paras. 9-12 [AAR, Vol. I, Tab 2, p. 15]; Briefing Note, p. 2 [AAR, Vol. II, Tab 3, p. 588]; Pictou Affidavit, para. 14-16 [AAR, Vol. I, Tab 3, pp. 29-30]

activities, such as preparing meals and washing dishes. Her older son Jonavan provided some support, but could not do so at all times.[32]

31. The PLBC continued to provide home care support to the Beadles. In October 2010, the Pictou Landing Health Centre arranged for another assessment of Maurina and Jeremy's needs. Since that time, the Health Centre has provided the family with in-home services as recommended by the assessment. From Monday to Friday, a personal care worker is present from 8:30 a.m. to 11:30 p.m. Over the weekends, there is 24 hour care. This level of care met Jeremy's need for 24-hour care, less what his family could provide.[33]

PLBC's request for additional funding for Jeremy and Maurina

32. Philippa Pictou, the PLBC's Health Director, began to make various inquiries with federal and provincial government officials in hopes of obtaining additional funding to provide the Beadle family with the services they required. By February 2011, the costs associated with caring for Jeremy and Maurina were approximately $8,200 per month. This represented nearly 80% of the Band Council's total monthly HCCP and Assisted Living budget for personal and home care services. [34]

33. On February 16, 2011, Ms. Pictou contacted Susan Ross, Atlantic Regional Home and Community Care Coordinator for Health Canada, to discuss Jeremy and Maurina's situation. Ms. Ross arranged for representatives of Health Canada and AANDC to attend a

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[32] Home Care Assessment of Maurina Beadle, pp. 9, 11-13 [AAR, Vol. II, Tab 3, pp. 531, 533-535]
[33] Pictou Affidavit, para. 16 [AAR, Vol. I, Tab 3, p. 30]; Home Care Assessments of Maurina Beadle and Jeremy Meawasige, pp. 10 and 12 [AAR, Vol. II, Tab 3, pp. 517 and 519]; and Progress Notes regarding Maurina Beadle and Jeremy Meawasige, p. 1 [AAR, Vol. II, Tab 3, p.521]
[34] Pictou Affidavit, paras. 18-20 [AAR, Vol. I, Tab 3, pp. 30-30]; Briefing Note, p. 2 [AAR, Vol. II, Tab 3, p. 558]

February 28, 2011 case conference with provincial officials regarding the family's need. No final decision was taken during this meeting regarding the funding of Jeremy and Maurina's home care services. [35]

34. After this meeting, it was Ms. Ross' understanding that Jeremy and Maurina required funding for 24 hour a day home care services from a certified home care staff, working under the supervision of a registered nurse. Based on this assumption, Ms. Ross communicated with provincial officials to inquire whether 24-hour a day, 7 day a week care would be funded for any Nova Scotian living off reserve. Their answer was no.[36]

35. Ms. Pictou arranged for another meeting with federal and provincial government officials on April 19, 2011. During this meeting, Ms. Pictou explained in detail Jeremy and Maurina's home care needs, referring to individual medical assessments that had been conducted to evaluate their respective limitations. These assessments stated that Jonavan, Maurina's eldest son, was able to assist with Jeremy and Maurina's activities of daily living. Ms. Pictou also explained that the family generally required home care from 8:30 a.m. to 11:30 p.m. [37]

36. On May 12, 2011, Ms. Pictou wrote to Health Canada and AANDC officials to formally request additional funding so that the Band Council could continue to provide home care services to Maurina and Jeremy. Attached to her email was a briefing note describing Maurina and Jeremy's situation and their home care needs. In her briefing note, she wrote:

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[35] Ross Affidavit, paras. 25-26 [AAR, Vol. III, Tab 5, p. 621]
[36] Ross Affidavit, paras. 20-22 [AAR, Vol. II, Tab 5, p. 620]
[37] Notes of Barbara Robinson regarding April 19, 2011 case conference, p. 111 [RR]; Pictou Affidavit, para. 23 [AAR, Vol. I, Tab 3, p. 32]; Home Care Assessment of Jeremy Meawasige, dated February 2, 2011, pp. 2, 10 and 12 [AAR, Vol. II, Tab 3, pp. 509, 517 and 519]

> According to the Community Services vs Brian E. Boudreau case, the obligations of the Department pursuant to the SAA and Regulations are met when the "assistance" reasonably meets the "needs" in each specific case. Jeremy Meawasige's reasonable "need" [*sic*] for "homecare" is 24 hours a day, 7 days a week **(<u>less the time his family can reasonably attend to his care</u>).**[38]

37. Ms. Pictou attached a copy of the *Nova Scotia v. Boudreau* case and referred to the criteria for "exceptional circumstances" under the Nova Scotia Direct Family Support Policy. Her briefing note explained that the unexpected expenses for Jeremy and Maurina were consuming the majority of the Band's budget for both ALP and HCCP programs. She said that the Band continued to pay for the services out of respect for Jordan's Principle, but that the PLBC wanted reimbursement for some of its costs since May 2010 and more funding to meet Jeremy's ongoing care needs. [39]

38. AANDC officials understood that the refusal of additional discretionary funding to the Band Council could cause Jeremy to be removed from his home and community and taken into the child and family welfare system. Appropriate institutions were few, and Jeremy would likely end up living far away from his mother and his community.[40]

39. On May 25, 2011, Ms. Robinson prepared her decision to deny the Band's request for additional funding. After drafting the decision, she acknowledged that she had received conflicting information about the standard of care off-reserve and that further inquires were required to obtain clarification. Nevertheless, she recommended proceeding with the

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[38] Email from P. Pictou to W. Were, Health Canada, and B. Robinson, AANDC, dated May 12, 2011 [AAR, Vol. II, Tab 3, p. 556]; Briefing Note, p. 7 (emphasis added) [AAR, Vol. II, Tab 3, p. 564]

[39] Briefing Note [AAR, Vol. II, Tab 3, pp. 559-561 and 564]

[40] Briefing Note, p. 2 [AAR, Vol. II, Tab 3, p. 559]; Email from Wade Were to Jim Millar, dated May 19, 2011, p. 333 [RR] and Cross examination of P. Pictou, p. 121 [RR].

decision before additional information could be obtained. [41]

40. On May 27, 2011, Ms. Robinson sent her decision to Philippa Pictou, as drafted on May 25, 2011. The decision was delivered on behalf of both AANDC and Health Canada. The email stated that additional funding would not be granted because 24-hour home care is not available off reserve.[42] Ms Robinson's affidavit confirms that she relied on provincial government officials who stated that the normative standard of care off-reserve was $2,200 per month, with no exceptions. [43]

41. Under cross examination, Ms Robinson acknowledged that Jeremy met nearly all the "exceptional circumstances" criteria in the Direct Family Support Policy for additional funding over $2,200. [44] However, she stated that she did not follow the policy because the province's "practice" was different. [45] Ms Robinson also testified that the Supreme Court of Nova Scotia judgment in *Boudreau* was "not relevant" to her decision. She suggested it would be "conjecture" to say whether the province's practice would change to comply with the Court's ruling in *Boudreau*.[46] A media backgrounder for the Respondent noted the significance of *Boudreau*, but suggested the judgment was only reached recently and would be reviewed by Nova Scotia.[47] *Boudreau* was never appealed by the province.

42. Since Ms Robinson's decision in May 2011, the Band Council has continued to

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[41] Email from Barbara Robinson to Corinne Baggley, Nancy Thornton and Wade Were, dated May 25, 2010, p. 190 [AAR, Vol. III, Tab 4, p. 609]
[42] Email from Barbara Robinson to Philippa Pictou, dated May 27, 2010, p. 1 [AAR, Vol. II, Tab 3, p. 565]
[43] Affidavit of Barbara Robinson, paras. 32-36 and 38 [AAR, Vol. III, Tab 6, p.632-634]
[44] Cross examination of B. Robinson, pp. 93-94 [AAR, Vol. III, Tab 7, pp. 728-729]; and Direct Family Support Policy, para. 6.3.2 [AAR, Vol. II, Tab 3, p. 411]
[45] Cross examination of B. Robinson, p. 92: "Their policy says the can, but the practice is they can't." [AAR, Vol. III, Tab 7, p. 727]
[46] Cross examination of B. Robinson, p. 88-90 [AAR, Vol. III, Tab 7, p. 723-724]
[47] Indian and Northern Affairs Canada/Health Canada Media Lines [AAR, Vol. III, Tab 4, p. 600]

provide Jeremy and Maurina with the personal and home care services they require but are incurring a significant deficit by doing so. Eventually, the Band Council will likely have to cut core health services or programs to continue to provide care to the family and prevent Jeremy from being put into an institution.[48]

PART II – THE ISSUES

43. The Applicants submit that the following issues are raised by this judicial review:

a) What is the appropriate standard of review?

b) Did the decision-maker err in law in interpreting and applying the Nova Scotia Social Assistance Act?

c) Did the decision-maker exercise her discretion in a manner that violated section 15(1) of the Charter?

d) Was the decision based on a serious misunderstanding of the evidence?

[48] Pictou Affidavit, paras. 26-28 [AAR, Vol. I, Tab 3, p. 33]

PART III – ARGUMENT

ISSUE 1: Standard of review

44. The Supreme Court of Canada has held that, generally, most questions of law should be reviewed on a correctness standard. [49] The decision-maker in this case was not an adjudicative tribunal with a particular statutory mandate or expertise. Rather, she was a government official rendering an administrative decision. To the extent the decision-maker needed to properly consider questions of law, including questions of constitutional law, the decision must be reviewed on a standard of correctness. [50]

45. The central issue raised in this judicial review is whether the decision-maker ought to have exercised her discretion to provide additional funding to the PLBC for continuing care services. In the particular circumstances of this case, the Applicants submit that a positive decision was necessary to ensure Jeremy and Maurina continue to receive equal benefit under the law as guaranteed by section 15 of the *Charter*. The appropriate standard of review for issues involving the *Charter* is invariably one of correctness. [51]

46. The Applicants also submit that the Respondent erred in law by failing to properly interpret and apply the Nova Scotia *Social Assistance Act* in accordance with the jurisprudence of the Nova Scotia Supreme Court. As an error of law, the standard of review on this issue must also be correctness.

47. Finally, the Applicant alleges that the impugned decision was based on a serious

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[49] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 , at para. 51
[50] *Dunsmuir*, supra, paras. 55 and 58.
[51] *Dunsmuir*, *supra*, para. 58

misapprehension of the evidence following a gravely flawed fact finding process. This Court has held that the Government of Canada may be held to a reasonableness standard when exercising discretionary power pursuant to contribution funding agreements with First Nations Bands.[52]

ISSUE 2: Error of Law and the Normative Standard of Care under *Social Assistance Act*

48. The ALP Manual and the relevant funding agreement with the PLBC both state that funding is provided to bands to ensure individuals living on reserve receive services "reasonably comparable" to those provided by the province.[53] The Respondent denied additional funding to the PLBC on the grounds that Jeremy and Maurina would only be entitled to home care services to a maximum of $2,200 per month if they lived off reserve.[54] The Applicants submit that, in reaching this decision, the Respondent rendered an error of law.

49. In Nova Scotia, social services and assistance for people with disabilities are provided under the *Social Assistance Act* ("*SAA*"). Section 9 of the *SAA* states that, subject to regulations, the government "shall furnish assistance to all persons in need". Under s. 18 of the *Municipal Assistance Regulations*, "assistance" is defined to include "home care".

50. While the *SAA* gives the provincial Governor in Council authority to make regulations prescribing maximum amounts of assistance that may be granted to a person in

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[52] *Tobique Indian Band v. Canada*, 2010 FC 67 (CanLII), para. 66
[53] Assisted Living Program Manual, para. 1.8.1 [AAR, Vol. I, Tab 3, p. 185]; DIAND Funding Agreement, p. 25 of 45 [AAR, Vol. I, Tab 3, p. 141]
[54] Robinson Affidavit, paras. 32 and 38 [AAR, Vol. III, Tab 6, pp. 632 and 634]

need, no limit has been established.[55] Nova Scotia's Direct Family Support Policy from 2006 states that the funding for respite to people with disabilities "shall not normally exceed" $2,200 per month. [56] The Policy states that additional funding may granted in "exceptional circumstances", such as:

- an individual has extraordinary support needs to the extent that they are reliant on others for all aspects of their support;
- an individual has extreme behaviours;
- there is no appropriate day program for the individual; and
- a single care giver has sole responsibility for supporting the family member with a disability.[57]

51. The decision-maker Barbara Robinson conceded in cross examination that Jeremy and Maurina met all of the above criteria. However, she nevertheless concluded this Policy did not reflect Nova Scotia's normative standard of care because a provincial official had issued a separate directive that stated no funding in excess of $2,200 would ever be provided. Ms Robinson also indicated that she had read the judgment in *Boudreau*, where the Nova Scotia Supreme Court concluded that the $2,200 monthly cap was not lawful or binding in any way. [58] As explained by Justice Rosinski in *Boudreau*, the benefit conferred through the *SAA* is the right of persons in need to be furnished with the assistance they require. The Court stated:

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[55] *Social Assistance Act,* RSNS 1989, c 432, section 9; *Nova Scotia (Community Services) v. Boudreau,* 2011 NSSC 126 ("Boudreau"), at para. 61

[56] Direct Family Support Policy, para. 5.4.1[AAR, Vol. II, Tab 3, p. 408]

[57] Direct Family Support Policy, para. 6.3 [AAR, Vol. II, Tab 3, p. 411]

[58] Cross examination of B. Robinson, pp. 88-90 and 92-94 [AAR, Vol. III, Tab 7, pp. 723-725 and 727-729]; and Affidavit of Barbara Robinson, paras. 32-36 and 38 [AAR, Vol. III, Tab 6, p.632-634]

> What does the SAA obligate the Department to do in the case at Bar? I note s. 27 of the SAA permits regulations "prescribing the maximum amount of assistance that may be granted" but no regulations relevant to the case at Bar are in place. […] How much "assistance" as defined in the *Municipal Assistance Regulations* is the care obligations vis-à-vis Brian Boudreau? In my view, **the obligation of the Department pursuant to the SAA and Regulations are met when the "assistance" reasonably meets the "need" in each specific case.** [emphasis added][59]

52. Ms Robinson inexplicably concluded that the *Boudreau* judgment was "not relevant" to her decision. [60] The Applicants submit that this is an error of law and the decision must be quashed for this reason alone. It is recognized that, at the time Ms Robinson rendered her decision in May 2011, *Boudreau* was a very recent ruling. Indeed, it appears that Nova Scotia was contemplating an appeal and communicated that to the Respondent. [61] But this cannot justify the Respondent's complete disregard of a court judgment that sets out the normative standard of care under provincial legislation – i.e., assistance that "reasonably meets" the need in each specific case.

53. At a bare minimum, *Boudreau* was a relevant factor that should have informed the Respondent's decision.[62] The application should be allowed.

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[59] *Boudreau*, *supra*, paras. 60-62
[60] Cross examination of B. Robinson, p. 88-90 [AAR, Vol. III, Tab 7, p. 723-724]
[61] Indian and Northern Affairs Canada/Health Canada Media Lines [AAR, Vol. III, Tab 4, p. 600]
[62] *Maple Lodge Farms Ltd. v. Canada,* [1982] 2 S.C.R. 2 (QL version) at pp 4-5

ISSUE 3: Right to Equal Benefit of the Law under section 15(1) of the Charter

54. The Applicants claim that the decision to deny additional funding to the Band Council so it could continue providing Jeremy and Maurina with home care was discriminatory and contrary to s. 15(1) of the *Charter of Rights and Freedoms.* While the federal government may enter into contribution agreements with Band Councils to provide services, such agreements cannot supersede its obligations under the *Charter*.[63] Moreover, the government's exercise of discretionary powers must conform with the *Charter*.[64] In that regard, the Applicants submit that Ms Robinson had a duty to consider the requests for additional funding under the relevant agreements in a manner that respects the Beadles' rights to receive equal benefits compared to those residing off-reserve in their province of residence.

i. Section 15 and Jordan's Principle

55. Section 15 of the *Charter* confers on all individuals equality before and under the law. Its purpose is two-fold. Firstly, it expresses a commitment - deeply ingrained in our social, political and legal culture - to the equal worth and human dignity of all persons. As Justice McIntyre remarked in *Andrews*, section 15 "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings

[63] *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada,* [2008] S.C.J. No. 15 at paras. 23-24

[64] *Eldridge v. British Columbia,* [1997] 3 SCR 624, ("Eldridge"), para. 22; and *Little Sisters Book and Art Emporium v. Canada,* [2000] 2 SCR 1120, para. 133-130

equally deserving of concern, respect and consideration". [65] Secondly, it entrenches the societal goal of rectifying and preventing discrimination against particular groups who have suffered social, political and legal disadvantage in our society.[66]

56. For First Nations Peoples living on reserve, Jordan's Principle is a means by which the fundamental objectives of section 15 can be achieved. The overlapping responsibilities of the federal and provincial governments towards First Nations individuals living on reserves are unique in Canada's constitutional order. As a result, jurisdictional disputes sometimes arise between governments as to which level is responsible to deliver and pay for programs or services. The purpose of Jordan's Principle is to ensure that the most vulnerable segment of the First Nations population – children – are never denied access to services available to non-Aboriginals living off-reserve due to these jurisdictional disputes.[67]

57. The central purpose of Jordan's Principle is to promote and operationalize substantive equality for First Nations peoples. The failure to respect Jordan's Principle will very often trigger a breach of section 15. This is what is alleged in his Application.[68]

ii. Equal benefit of the law

58. Section 15 guarantees to all individuals equal benefit of the law. In this case, the Applicants claim that the decision-maker's failure to respect Jordan's Principle caused Jeremy and Maurina to be denied equal benefit of the *Social Assistance Act*. As explained by the Court in *Boudreau*, the benefit conferred through the *SAA* is the right of persons to

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[65] *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, at p. 171, as quoted in *Eldridge,* at para. 54
[66] *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, at p. 171; and *Eldridge,* para. 54
[67] Jordan's Principles Fact Sheet, p. 1-3 [AAR, Vol. II, Tab 3, p.573-575]
[68] Jordan's Principles Fact Sheet, p. 1-3 [AAR, Vol. II, Tab 3, p.573-575]

assistance that "reasonably meets" the need in each specific case, without arbitrary financial caps. [69]

59. Nova Scotia will not provide home care services or benefits under the *SAA* to First Nations individuals living on reserve, and will only provide nursing home care in rare situations.[70] Nevertheless, there appears to be no dispute between the parties that First Nations peoples living on reserve in Nova Scotia should enjoy the same right to home care and other services available off reserve under the *SAA* and related policies. Since the Respondent has assumed full responsibility for funding the delivery of these services, the Applicants submit that the Respondent incurs a constitutional duty under s. 15 of the *Charter* to ensure First Nations peoples enjoy the same benefit of the law available under provincial statutes and programs.

iii. Discrimination on the basis of an enumerated or analogous ground

60. The Applicants submit that denying First Nations Peoples living on reserve with equal benefit of the law creates a distinction on the basis of their race and ethnic origin and, as such, is prohibited by section 15. While place of residence is generally not considered an analogous ground of discrimination under section 15, "Indian Reserves" as a place of residence are intrinsically linked with Aboriginal identity.

61. The profound attachment of First Nations peoples to ancestral lands and reserves are well recognized in Canada's constitutional order. As such, residence of First Nations individuals on reserve has been accepted by the Supreme Court of Canada as "a personal

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[69] *Boudreau*, paras. 60-62

[70] Direct Family Support Policy, para.5.3.1 [AAR, Vol. 2, Tab 3, p. 402]; Nova Scotia Home Care Policy Manual, pp. 59-60 [AAR, Vol. II, Tab 3, pp. 480-491]

characteristic that is immutable or changeable only at unacceptable cost to personal identity", and therefore an analogous ground under s. 15(1).[71]

iv. Discretionary decision constitutes discrimination

62. Regardless of the vehicle chosen by the government to fulfill its objectives, government programs must comply with the *Charter.* As explained by the Supreme Court of Canada in *Eldridge*, "The rationale for this principle is obvious: governments should not be permitted to evade their *Charter* responsibilities by implementing policy through the vehicle of private arrangements".[72] The fact that personal and home care services on reserve are funded by Canada through funding agreements ought not to prevent Jeremy and Maurina from receiving the equal benefit of the *SAA* and related programs. As explained by the Supreme Court in *Douglas/Kwantlen*:

> [T]he agreement was entered into by government pursuant to statutory power and so constituted government action. To permit government to pursue policies violating *Charter* rights by means of contracts and agreements with other persons or bodies cannot be tolerated.[73]

63. The Respondent has evidently conceded that the PLBC would need additional funding to ensure that Jeremy and Maurina receive a level of home care that exceeds $2,200 per month. In that regard, Ms Robinson's decision appeared to turn on whether the "normative standard of care" could, in exceptional circumstances, include home care services that cost more than $2,200.

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[71] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 (QL), at paras. 13-14, 13 for quote.
[72] *Eldridge, supra*, para. 40
[73] *Douglas/Kwantlen Faculty Association v Douglas College,* [1990] 3 SCR 570 at para. 18

64. It is important to note that, when the PLBC's Health Director made the request for more funding, she provided the Respondent with information that demonstrated the high needs of the Beadle family and the impact their services were having on the Band's overall budget for in-home services. [74] Ms Robinson did not take issue with the needs of Jeremy and Maurina, the exceptional circumstances of their situation, or the detrimental effect on the Band's budget. Indeed, she conceded in cross examination that Jeremy and Maurina would meet the criteria for "exceptional circumstances" under the provincial Direct Family Support Policy. [75]

65. Given that funding levels have not increased since the 1990s based on Band population growth or other factors, it is arguable that the agreements on their face are unconstitutional as failing to provide Pictou Landing First Nation members on reserve with the same level of home care services available off reserve. However, it is unnecessary in the present case for this Honourable Court to make that broader finding. It is simply enough to show that the exceptional and unanticipated health needs of the Beadle family jeopardized the Band's ability to provide the services the family reasonably requires and would likely be entitled to off reserve. In this narrower context, the Applicants submit that Ms Robinson had a duty to exercise her discretion under the relevant funding agreements in a manner that conforms with s. 15(1) of the *Charter*. [76]

66. Both the AANDC and Health Canada funding agreements contained clauses that allowed the Respondent to provide additional funding to the Band in "exceptional" or

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[74] Pictou Affidavit, paras. 18-20 [AAR, Vol. I, Tab 3, pp. 30-30]; Briefing Note, p. 2 [AAR, Vol. II, Tab 3, p. 558]
[75] Cross examination of B. Robinson, pp. 93-94 [AAR, Vol. III, Tab 7, pp. 728-729]; and Direct Family Support Policy, para. 6.3.2 [AAR, Vol. II, Tab 3, p. 411]
[76] *Eldridge, supra,* at paras. 29-30; and *Little Sisters Book and Art Emporium, supra,* at paras. 125 and 133

"unforeseen" circumstances.[77] In the present case, the Respondent was aware that existing funding levels could not reasonably provide for the home care services required by Maurina and Jeremy. In that regard, the needs of the Beadle family consumed nearly 80% of the Band's overall budget for in-home care.[78] Presented with this evidence, the decision-maker ought to have found that the Band Council was facing "unforeseen" and "exceptional" circumstances warranting additional discretionary funding. The failure to do so caused Jeremy and Maurina to be denied an equal benefit under the law and, as such, violated section 15(1) of the *Charter.*

67. The Supreme Court of Canada has repeatedly emphasized that discrimination claims must be evaluated contextually, with an understanding of claimant's place within a legislative scheme and society at large. Contextual factors help to determine whether an impugned law or decision perpetuates disadvantage or stereotyping.[79] In the present case, First Nations peoples have experienced significant historical disadvantages and racism in Canadian society. It is widely recognized that First Nations peoples living on reserves "lack the most basic services that other Canadians take for granted."[80] The fact that the ALP and the HCCP were designed to address these historic inequities and disadvantages is a cruel irony not lost on the Applicants.

68. The sad facts of this case suggest that the promise of equality enshrined in the *Charter*, and reflected in the First Nations context by Jordan's Principle, is far from a reality to individuals living on reserves.

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[77] AANDC Funding Agreement. p. 3 [AAR, Vol. I, Tab 3, p. 119]; and Agreement between Health Canada and Pictou Landing Band, p. 12 [AAR, Vol. I, Tab 3, p. 57]
[78] Briefing Note, p. 2[AAR, Vol. II, Tab 3, p. 558]
[79] *Withler v. Canada,* [2011] 1 SCR 396 at paras 63-66
[80] Status Report of the Auditor General of Canada to the House of Commons, Matters of Special Importance (Ottawa, 2011) at p. 6

v. Infringement cannot be justified under section 1 of the Charter

69. Once a section 15 violation is established, the respondent bears the burden to show that this infringement is justified in a free and democratic society. In particular, the government must tender evidence to demonstrate that a *Charter* breach is necessary to achieve a pressing and substantive objective, and that the measures adopted by the government to achieve this objective are proportionate to the harms caused by the constitutional violation.[81]

70. Financial cost is almost never sufficient to establish a s. 1 defence, and such an argument certainly cannot stand in this case. There can be no justification in a free and democratic society for denying equal public services to Jeremy and Maurina. As a disabled First Nations child living on reserve, Jeremy has compounded and intersecting disadvantages and is particularly vulnerable. The Court should be particularly sensitive to his vulnerable position and ensure it carefully scrutinizes the Crown's arguments in the present case.

ISSUE 4: Decision based on a serious misunderstanding of the evidence

71. The Applicants submit that even if the refusal to provide additional funding to the Band Council is not found to be discriminatory, the decision remains unreasonable as it was based on a serious misapprehension of evidence and a gravely flawed fact finding process. As such, the decision must be quashed.

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[81] *R. v. Oakes*, [1986] 1 SCR 103, para. 70

72. Firstly, the decision is unreasonable because it was based on an erroneous understanding of what was actually being requested by the Band Council. In her decision, Ms. Robinson wrote:

> We verified that the **request for the provision of 24 hour care for Jeremy** (either via direct provision of services or through the provision of per diem amounts comparable to long terms care rates) would exceed the normative standard of care. Provincial officials confirmed that there would be no exceptions.[82]

73. In short, the decision-maker denied the Band Council's request on the basis that 24 hour care was not available off reserve. However, this was not what was requested by the Band Council. In Ms. Pictou's request for additional funding, she stated: "Jeremy 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."[83] Ms. Robinson erred by characterizing the Band Council's request as funding for 24 hour services, as well as additional assistance for meal preparation and light housekeeping.[84]

74. Since the decision-maker failed to understand what was requested by the Band Council, it cannot be said that the request for additional funding was properly or fairly considered. Courts have held that a decision-maker's misapprehension of facts or evidence constitutes a palpable and overriding error.[85] In this case, the decision-maker's misapprehension of the Band Council's request not only affected the fact-finding process, but it formed the very basis for the denial of the request. This amounts to an unreasonable error.

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[82] Email from Barbara Robinson to Philippa Pictou, dated May 27, 2011 [AAR, Vol. II, Tab 3, p. 566]
[83] Briefing Note, [AAR, Vol. II, Tab 3, p. 558]
[84] Email from Barbara Robinson to Lorna MacPherson, dated May 13, 2011, p. 143 [RR]
[85] *Ontario (Director, Disability Support Program) v. Crane* (2006), 83 OR (3d) 321 (Ont.CA) (QL) at paras. 35-36

75. Ms Robinson also ignored relevant information before her. The provincial Home Care Policy confers up to $6600 per month in home care services to people with disabilities, and is not capped at $2,200.[86] Presented with clear evidence that individuals could received up to $6,600 in personal and home care services, Ms. Robinson's assertion that the normative standard of care off reserve is invariably $2,200 per month is simply untenable.[87] This Court has held that ignoring information of central importance to the decision amounts to an error in law.[88]

76. Yet, even if there was clear evidence that the normative standard of care off reserve was actually $2200 per month in personal and home care services, the decision-maker still erred in determining that two persons with disabilities living in the same household were not entitled to more services under the *SAA*. There was no evidence before the decision-maker which supported this factual finding. Indeed, the decision-maker made no efforts to inquire about the level of care provided to two individuals with disabilities residing in the same home. A decision made in the complete absence of evidence cannot stand. [89]

Summary

77. By denying the Band Council's request for additional discretionary funding, the decision-maker prevented Jeremy and Maurina from the equal benefit of the *SAA* and related programs. Not only was this decision contrary to section 15, it was also based on a

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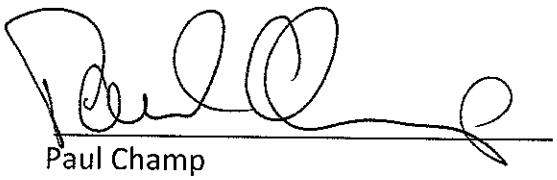
[86] Email from Susan Stevens to Wade Were, dated May 20, 2010 p. 188-189 [RR].
[87] In fact, even after drafting her decision, Ms. Robinson herself recognized she and her colleague had received conflicting information pertaining to the normative standard of care and that further clarification was required. Rather than making further inquiries in order to obtain these clarifications, Ms. Robinson simply denied the request.
[88] *Durrant v. Canada (Citizenship and Immigration),* 2010 FC 329, para. 35
[89] *De Seram v. Canada (Citizenship and Immigration),* 2007 FC 1123, para 30

serious misapprehension of the actual request, while ignoring highly relevant information to the decision. For all of these reasons, this decision cannot stand.

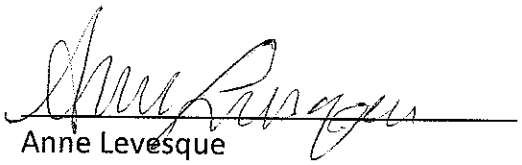
PART IV – ORDER SOUGHT

78. The Applicants respectfully request an order quashing the May 27, 2011 decision of AANDC Manager Barbara Robinson with costs. The Applicants also request that the Court make an order pursuant to section 24(1) of the *Charter* directing the Respondent to reimburse the PLBC for exceptional costs incurred providing home care to Jeremy and Maurina from May 27, 2010 to the present.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of November, 2011.



Paul Champ



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PART V – LIST OF AUTHORITIES

STATUTES AND CONSTITUION

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