

FEDERAL COURT OF APPEAL

BETWEEN:

**STACEY SHINER IN HER PERSONAL CAPACITY,
AND AS GUARDIAN OF JOSEY K. WILLIER**

Appellant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

**FIRST NATIONS CHILD AND FAMILY
CARING SOCIETY OF CANADA**

Intervener

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at (place where Federal Court of Appeal ordinarily sits).

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the Federal Courts Rules and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.



Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

June 16, 2017

Issued by: _____


BEATRIZ WINTER
REGISTRY OFFICER
AGENT DU GREFFE

Address of local office: Federal Court of Appeal
 180 Queen Street West
 Suite 200
 Toronto, Ontario M5V 3L6

TO: Attorney General of Canada
 Department of Justice
 The Exchange Tower
 130 King Street West
 Suite 3400, Box 36
 Toronto, Ontario M5X 1K6

Michael H. Morris | Andrea Bourke
Tel: (416) 973-9704
Fax: (416) 973-0809

Lawyers for the Respondent

AND TO: Juristes Power | Power Law
 Suite 1103 - 130 Albert Street
 Ottawa, Ontario K1P 5G4

Sébastien Grammond | David Power | Anne Levesque
Tel: (613) 702-5563
Fax: (613) 702-5563

Lawyers for the Intervener

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Order of the Honourable Mr. Justice Harrington, dated May 19, 2017, in court file number T-492-16 (the “**Order**”) by which the decision of the Director General of the Non-Insured Health Benefits Program (the “**NIHB**”) dated March 11, 2016 was upheld and found to be reasonable.

THE APPELLANT ASKS that:

- (i) the appeal be allowed and the Order be set aside;
- (ii) the matter referred back to the NIHB for reconsideration and direction that the Respondent cover the cost of the orthodontic treatment;
- (iii) the costs in this Court and the Court below be awarded to the Appellant; and
- (iv) such further and other grounds as counsel may advise and this Honourable Court permits.

THE GROUNDS OF APPEAL are as follows:

Background

1. The Appellant’s daughter, Josey K. Willier (“**Josey**”) suffered from a severe and functionally handicapping malocclusion. For almost two years, Josey suffered from chronic headaches, jaw pain and persistent discomfort. She had to take over-the-counter pain medicine on a daily basis to relieve the aching pain to her lower gums and the bottom of her mouth caused by overcrowding. As a result of her malocclusion, Josey had clicking in her jaw, tooth-wear, and avoided chewing certain food.
2. In 2014, Josey was examined by two orthodontists who determined that braces were medically necessary in order to treat her severe and functionally

handicapping malocclusion. Both orthodontists determined that without braces Josey would require painful and invasive jaw surgery to address her condition.

3. Josey is a member of the Sucker Creek First Nation of Treaty 8 and is entitled to certain dental benefits provided through the NIHB Program operated by the First Nations and Inuit Health Branch of Health Canada (the “**FNIHB**”). Orthodontic services to address Josey’s severe and functionally handicapping malocclusion are specifically provided for in the NIHB Dental Policy.

The NIHB Program and Appeal Process

4. Pursuant to its general powers under the *Department of Health Act*, S.C. 1996, the Minister of Health created the NIHB Program, which provides coverage to registered First Nations and recognized Inuit for a limited range of medically necessary health related goods and services not otherwise provided through private insurance plans, provincial/territorial health or social program. The Program is neither an Act of Parliament, nor a regulation thereunder.
5. The purpose of NIHB dental plan is to provide coverage for braces for children under the age of 18 where braces are medically necessary. A parent/guardian must seek pre-approval from the NIHB Program before the cost of a child’s braces will be covered, as outlined in the NIHB Program dental guide (the “**Dental Guide**”). Where it is determined that a child has a severe and functionally handicapping malocclusion, the cost of the braces will be covered.
6. Determination for eligibility is not made by a child’s treating orthodontist. Instead, Health Canada contracts with orthodontic consultants, who review, among other things, the child’s treatment plan, teeth moldings, x-rays and pictures in order to determine whether the child’s indicators meets the NIHB clinical criteria for a severe and functionally handicapping malocclusion. These criteria are outlined in the Dental Guide:

To be eligible for coverage for orthodontic treatment, client's conditions must have a combination of marked skeletal and dental discrepancies such as, but not limited to:

- *Crossbite associated with a significant and clear functional shift;*
 - *Severe overbite with evidence of soft tissue injury (> 2/3 overlap with impinging of the palate);*
 - *Severe open bite (> 5mm);*
 - *Severe overjet, positive (> 7mm) or negative (< -4mm).*
7. The listed clinical criteria are not universally accepted indicators but rather are criteria specific to the NIHB Program.
 8. If the orthodontic consultant determines that the child is not eligible for coverage, the parent/guardian can appeal the decision to the FNIHB. There are three levels of appeal and each appeal is reviewed by a different orthodontic consultant, who makes a recommendation to the FNIHB. The FNIHB will then communicate the determination of the appeal with a written explanation of the decision taken.
 9. Decisions on level three appeals are communicated to parents/guardians by the Director General of the NIHB Program. The Director General is not an orthodontist or medical professional. As a result, he relies on the determinations and recommendations of the Health Canada orthodontic consultants in reaching his decisions. The current Director General, Mr. Scott Doidge, has never disagreed with an orthodontic consultant in the determination of a Level 3 Appeal.

Josey's Request for Coverage

10. In July 2014, Josey's treating orthodontist at the time, Dr. Michael Bindman, sought pre-approval for the cost of Josey's braces through the NIHB Program on the basis that Josey's condition meets the NIHB clinical criteria. That request was denied on July 18, 2014.

11. Thereafter, Ms. Shiner proceeded through all three stages of the appeal process. Josey's new treating orthodontist, Dr. Mark Antosz, was of the opinion that Josey's condition met the NIHB clinical criteria and provided the necessary diagnostic information in support of same. Moreover, Dr. Antosz warned that without braces, Josey would require surgery.
12. As part of this appeal process, the parent/guardian is required to provide a letter regarding the child. In each of her letters, Ms. Shiner recounted the ongoing pain and suffering experienced by Josey in relation to her severe and functionally handicapping malocclusion.
13. Ms. Shiner's Level 1 Appeal was dismissed on November 2014 and her Level 2 Appeal was dismissed on February 24, 2015. In dismissing the appeals, the FNIHB provided the same explanation: Josey's condition did not meet the NIHB Program's clinical criteria.
14. Notwithstanding that the consultants noted that Josey had an impacted tooth (which can be a basis to support a finding of a severe and functionally handicapping malocclusion) and notwithstanding that the clinical criteria are open and flexible in keeping with the purpose of the program, none of the orthodontic consultants considered the impacted tooth as a factor in making their decisions.
15. In addition, notwithstanding the purpose of the program, none of the reviewing consultants considered Josey's ongoing pain and suffering or her need for surgery without braces. At no time, did any Health Canada orthodontic consultant question or deny that Josey was experiencing chronic pain and discomfort or that such could not be addressed through the installation of braces.

The Level Three Appeal

16. In July 2015, Dr. Antosz advised Ms. Shiner that Josey's condition was getting worse and recommended that she not wait any longer to have the braces installed. That month, Dr. Antosz installed an expander and on September 14, 2015, Josey had her braces put on. Her pain and need for medication subsided.
17. On January 7, 2016, Ms. Shiner submitted her Level 3 Appeal. Dr. Antosz opined that Josey's condition met the NIHB clinical criteria, as Josey had a severe overbite with evidence of soft tissue injury. In addition, Josey had lower crowding that would lead to the loss of at least one permanent tooth and would create the potential to compromise other teeth as well as make the overbite worse.
18. Dr. Antosz further advised that without braces, Josey would face long term consequences, including but not limited to chronic pain, difficulty eating and potentially difficulty speaking.
19. Dr. Mark Britton was assigned by the Director General to review Josey's file, including the diagnostic material (x-rays, moldings, pictures, etc.), as well as Ms. Shiner's letters. He was then to report to the Director General regarding his conclusion.
20. Before making a final determination, Dr. Britton and other NIHB staff conducted a teleconference with Dr. Antosz to determine whether there was any further evidence to support his finding for soft tissue injury. Dr. Antosz clearly indicated that Josey had soft tissue injury.
21. At no time during the call did Dr. Britton inquire about Josey's pain and suffering, her need for surgery, or any other clinical criteria that could support a finding of a severe and functionally handicapping malocclusion. Dr. Britton also did not question or challenge Dr. Antosz's determination that without braces Josey would have needed surgery to redress her condition.

22. Dr. Britton mechanically applied the four listed criteria pursuant to the Dental Guide and incorrectly determined that Josey did not have soft issue injury. He failed to consider two fundamental factors (a) Josey's pain and suffering as it related to her severe and functionally handicapping malocclusion and (b) the impacted tooth. Both clearly demonstrate that coverage for Josey's braces ought to have been provided.
23. The Director General did not participate in the teleconference with Dr. Antosz and did not review the diagnostic material. Instead, notwithstanding that he was aware of Josey's chronic pain, as well as the prospect of surgery, the Director General simply adopted the conclusion of Dr. Britton. On March 11, 2016, in direct conflict with the overall purpose of the program, the Director General denied Ms. Shiner's request for coverage, advising that Josey's condition did not meet the program's established clinical criteria.

The Judicial Review

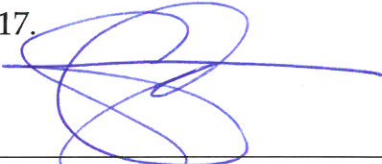
24. The Application Judge dismissed the Appellant's application for judicial review on the basis that the Director General's decision was reasonable: (i) the Director General was under no obligation to consider the best interests of the child, including the undisputed evidence that Josey was experiencing chronic pain and would require surgery if braces were not installed; and (ii) the Director General properly interpreted and applied the clinical criteria.
25. While the Application Judge identified the appropriate standard of review, he incorrectly applied the reasonableness standard to the decision of the Director General.
26. In dismissing the Appellant's application for judicial review, the Application Judge made the following reviewable errors:
 - a. incorrectly and unreasonably determining that Josey's chronic pain and

suffering was not a relevant consideration in determining her eligibility under the NIHB dental program;

- b. incorrectly and unreasonably determining that the prospect of painful jaw surgery was not a relevant consideration in determining Josey's eligibility under the NIHB dental program;
- c. ignoring or discounting the importance and relevance of a child's best interests in the delivery of and access to a federal health program designated for children;
- d. ignoring or discounting the unique context of First Nations children in the delivery of and access to a federal health program designated for First Nations and registered Inuit children;
- e. improperly applying a higher level of deference to the Director General's decision than warranted on the basis that the NIHB Program is a benefit provided only to First Nations and registered Inuit children;
- f. improperly disregarding the purpose of the NIHB program in reviewing the interpretation given to the criteria by the Director General;
- g. improperly interpreting and diving into the record in an effort to save the decision of the Director General;
- h. ignoring or discounting the evidence of Dr. Britton in considering the Director General's decision;
- i. making factual findings unsupported by the evidence and contrary to the evidence, including findings that:
 - i. Josey did not have soft tissue injury and therefore did not meet the clinical criteria;

- ii. the Director General considered Josey's impacted tooth as a relevant consideration in dismissing the Level 3 Appeal;
 - iii. the Director General considered the entire record, including Josey's pain and suffering and potential for surgery in dismissing the Level 3 Appeal; and
 - iv. the Health Canada orthodontic consultants considered all relevant information, such that it was reasonable for the Director General to rely on their advice and recommendations.
27. Sections 27 and 52 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.
28. Rule 3 and Part 6 of the *Federal Court Rules*.
29. Such further and other grounds as set out in the memorandum filed in support of this appeal.
30. Such further and other grounds as counsel may advise and this Honourable Court may permit.

DATED at Toronto, Ontario, this 16th day of June, 2017.



Sarah Clarke
Clarke Child & Family Law
36 Toronto Street, Suite 950
Toronto, Ontario M5C 2C5
Tel: (416) 260-3030
Fax: (647) 689-3286

Lawyer for the Appellant