Court File No. A-158-13

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Respondents

and

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY, AND AMNESTY INTERNATIONAL AND ASSEMBLY OF MANITOBA CHIEFS SECRETARIAT INC.

Interveners

MEMORANDUM OF FACT AND LAW OF THE INTERVENER ASSEMBLY OF MANITOBA CHIEFS SECRETARIAT INC.

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OVERVIEW

1. Jordan's Principle aims to ensure that no First Nations child is treated differently simply because he or she resides on a reserve. Its goal is to protect the interests of vulnerable children from the deprivation of essential care while bureaucracies make protracted decisions.

2. Jordan's Principle is confirmed in a non-binding resolution of the House of Commons and the implementation of Jordan's Principle is effected through federal policy. While it stems from a grassroots movement originating in Manitoba, the government of Canada has, through a discretionary act or undertaking, committed to provide equal health and medical support services to children living on reserve.

3. The Crown must act honourably in implementing that promise. Jordan's Principle gives rise to fiduciary obligations and a legal duty that engages the honour of the Crown. Technical interpretations and applications of Jordan's Principle must be set aside in favour of measures aimed at treating children with disabilities living on reserve equally, preventing harm and remedying historical disadvantage. It is a child-first approach.

PART I – STATEMENT OF FACTS

4. In response to the jurisdictional dispute that impacted the life of Jordan River Anderson,[1] a Private Member's Motion in the House of Commons was passed unanimously.[2] In the debate, a member of the governing party stated:

> This approach, known as Jordan's Principle, forces those involved to set aside any disagreements between two governments, two departments or organizations with respect to payment for services provided to First Nation children.[3]

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1 *Pictou Landing Band Council et al v Canada (Attorney General)*, 2013 FC 342 at para 17 [*Pictou*].
2 The motion stated: 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: House of Commons Debates, 39th Parl, 1st Sess, No 157 (18 May 2007) at 1426 (Hon Jean Crowder). The motion was passed: House of Commons Debates, 39th Parl, 2nd Sess, No 36 (12 December 2007) at 1755.
3 House of Commons Debates, 39th Parl, 2nd Sess, No 31 (5 December 2007) at 1730 (Hon Steven Blaney).

...
... the Minister of Indian Affairs and Northern Development and officials in his department are working diligently with their partners ... and first nations organizations on child and family service initiatives that will transform the commitment we make here today into a fact of daily life for first nations parents and their children.[4]

5. Services for children with disabilities who do not live on reserve are provided by the provincial government through provincial legislation and policies. There is no corresponding federal legislation relating to services for First Nations children with disabilities living on reserve. The federal government has interpreted Jordan's Principle through the "federal response",[5] developed without First Nations input or involvement. The federal response narrowed the interpretation of Jordan's Principle by limiting its application to children with multiple disabilities and limiting it to disputes between federal and provincial governments about who will pay.[6]

PART II – POINTS IN ISSUE

6. The Assembly of Manitoba Chiefs Secretariat Inc. ("AMC") aims to assist the court in making determinations as to the reasonableness of Ms. Robinson's decision[7] and has been granted leave on the following points in issue: (1) the correct interpretation of "jurisdictional dispute"; (2) the legal status of Jordan's Principle; and (3) the appropriate remedy in a Jordan's Principle case.

PART III – SUBMISSIONS

A. <u>The correct interpretation of "jurisdictional dispute"</u>

7. Jordan's Principle must be given a broad interpretation to ensure that it achieves the dual objectives of (a) ensuring that First Nations children with disabilities living on reserve have equal

4 *Pictou, supra* note 1 at para 83.
5 *Ibid* at para 84.
6 Cross-examination of Ms. Philippa Ann Pictou, Appeal Book, Volume 4, at p. 1184.
7 AMC takes no position as to the appropriate standard of review. The submissions will refer to reasonableness in this memorandum and AMC submits that the same conclusions would apply if the standard of review was correctness.

access to services and (b) remedying existing and historical disadvantage. It must not be limited to the "federal response" to Jordan's Principle.

8. The application judge was correct in finding that the term "jurisdictional dispute" encompasses disputes about the normative standard of care. AMC further submits that the term "jurisdictional dispute" must also include any dispute that results in a First Nations child not being able to access comparable services, for instance a dispute between two federal departments such as AANDC and Health Canada about who will pay, or between departments and First Nations service providers.

9. A broad interpretation of Jordan's Principle is consistent with the *Interpretation Act*, the principles of statutory interpretation and relevant case law.

i) The Interpretation Act

10. According to s. 2 of the *Interpretation Act,*[8] the term "enactment" is defined as meaning "an Act or regulation or any portion of an Act or regulation". A "regulation" includes a resolution made "in the execution of a power conferred by or under the authority of an Act" or "by or under the authority of the Governor in Council". Therefore a House of Commons resolution is an "enactment" for the purposes of the *Interpretation Act*.

11. Section 12 of the *Interpretation Act* states:

> Enactments deemed remedial
> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

12. As Jordan's Principle is a House of Commons resolution, it must be given a fair, large and liberal construction. It must be given the interpretation that best ensures the attainment of its object, which is to ensure that First Nations children with disabilities living on reserve receive equal access to health and social services.

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8 *Interpretation Act*, RSC, 1985, c I-21.

ii) Rules of statutory interpretation

13. Although Jordan's Principle has not been enacted by legislation, it is helpful to look to principles of statutory interpretation for guidance. The modern principle confirms that the words of the *Act*, in their entire context and grammatical and ordinary sense should be read harmoniously with the scheme and object of the *Act*, as well as the intention of Parliament.[9] The "purposive approach" must be used to interpret a right guaranteed under the *Charter*.[10] A purposive approach means the primary consideration is adopting an interpretation that achieves the purpose.

14. In *Nowegijick*, the Supreme Court of Canada ("SCC") considered the interpretation of s. 87 of the *Indian Act*. The SCC set aside the technical construction of the statute and found that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.[11] In *Mitchell*, Dickson C.J. reaffirmed the principles of interpretation from *Nowegijick* and stated:

> The *Nowegijick* principles must be understood in the context of this Court's sensitivity to the historical and continuing status of aboriginal peoples in Canadian society...Underlying *Nowegijick* is an appreciation of societal responsibility and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation.[12]

15. In relation to the interpretation of a federal Order in Council that granted an interest in land to the province of British Columbia, the SCC in *Osoyoos* found that:

> ... if two approaches to the interpretation and application of an enactment are reasonably sustainable as a matter of law, then the interpretation or application that impairs the Indian interests as little as possible should be preferred...[13]

iii) Application of interpretive principles to Jordan's Principle

16. The wording of the resolution, as unanimously passed, is that Jordan's Principle applies "to

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9 *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21.
10 *R v Big M Drug Mart*, [1985] 1 SCR 295 at paras 116-117.
11 *Nowegijick v The Queen*, [1983] 1 SCR 29 at 36.
12 *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 98.
13 *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746 at para 68.

resolve jurisdictional disputes involving the care of First Nations children". There is no express mention in the resolution that "jurisdictional disputes" are those only between the federal and provincial governments about who will pay. Similarly, the wording of Jordan's Principle is not limited to First Nations children with multiple disabilities who need services from multiple providers. An honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose.[14]

17. Based on the above interpretive principles, AMC submits that the federal government's interpretation of Jordan's Principle is incorrect. AMC submits that the term "jurisdictional dispute" must be given a large and liberal interpretation to ensure that it achieves the objectives of Jordan's Principle.

B. The legal status of Jordan's Principle

i) Jordan's Principle is not an ordinary non-binding House of Commons resolution

18. Jordan's Principle is not an ordinary House of Common resolution. Jordan's Principle is engaged in this case in a way that gives rise to fiduciary obligations and legal obligations. It is also different from an ordinary House of Commons resolution because the Crown has a general duty to act honourably in all its dealings with Aboriginal peoples. Because of the unique relationship between the federal government and First Nations in Canada, Jordan's Principle is *sui generis* and in a category of its own. It exists only because the federal government has assumed the obligation of providing health and social services to First Nations people living on reserve.

ii) Jordan's Principle engages the honour of the Crown

19. The honour of the Crown is a general duty owed to Aboriginal peoples.[15] It "is not a mere

14 *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 at para 77 [*Manitoba Metis Federation*].

15 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 16 [*Haida*].

incantation, but rather a core precept that finds its application in concrete practices"[16] and "gives rise to different duties in different circumstances"[17]. The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest.[18] The ultimate purpose of the honour of the Crown is reconciliation.[19]

20. In *Manitoba Metis Federation*, the SCC identified the situations in which the honour of the Crown had been applied in jurisprudence, while considering that the duty can arise in other circumstances. For example, when implementing a constitutional obligation that arises out of a historic promise, the SCC found that "the honour of the Crown requires that the Crown: (1) take a broad purposive approach to the interpretation of the promise; and (2) act diligently to fulfill it."[20]

21. The SCC also found that "an analogy may be drawn between such a constitutional obligation and a treaty promise. An "intention to create obligations" and a "certain measure of solemnity" should attach to both [...]"[21] The honour of the Crown in terms of treaty interpretation was articulated in *R v Badger*:

> ... the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.[22]

22. Jordan's Principle is not a constitutional obligation or a treaty. Nor is it a "specific program" operating with a "funding agreement" between the Crown and First Nations.[23] However, it is a "promise" espoused through a unanimous resolution of the Parliament of Canada which the

16 *Ibid.*
17 *Ibid* at para 18.
18 *Ibid.*
19 *Ibid* at paras 17, 32-33.
20 *Ibid* at para 73.
21 *Manitoba Metis Federation*, supra note 14 at para 71.
22 *R v Badger*, [1996] 1 SCR 771 at para 41.
23 Cross-examination of Ms. Barbara Jean Robinson, Appeal Book, Volume 4 at p 30 Appeal Book, Volume 4, at pp. 1299-1301. Ms. Robinson, testified that Jordan's Principle is not a funded program. Rather, it is a pool of money that Health Canada can access with ADM approval and it is intended to pay for the services while the disputes are worked out. It is different from the funding agreements with First Nations that are intended to fund specific programs.

government has undertaken to implement through federal policy. This promise in relation to care for First Nations children living on reserve flows from the federal jurisdiction of Canada over Indians and Lands reserved for Indians.[24]

23. The honourable interpretation of Jordan's Principle cannot be a legalistic one that divorces the words from their purpose.[25] The "honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and aboriginal interests".[26]

24. AMC takes the position that the conduct of the federal government has elevated Jordan's Principle to a legal duty that engages the honour of the Crown. While the honour of the Crown does not constitute a guarantee that the promise will be achieved,[27] AMC submits that the honour of the Crown requires a decision maker to take a broad purposive approach to the interpretation of the promise; and act diligently to fulfill it.

iii) Jordan's Principle gives rise to a fiduciary duty

25. The content of the Crown's fiduciary duty toward Aboriginal peoples varies with the nature and importance of the interest sought to be protected,[28] and arises in two circumstances, both of which apply to Jordan's Principle.

26. Firstly, a fiduciary duty may arise if there is (1) a specific or cognizable aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest.[29] The interest must be "distinctly aboriginal" and communal.[30] Although aboriginal interests in land have been considered in the leading cases on the Crown's fiduciary obligations to Aboriginal people, the category of "aboriginal interests" has not been explicitly limited to land interests nor considered to explicitly exclude other forms of

24 *Constitution Act, 1867* (UK), 30 &31 Vict, c3, s 91(24), reprinted in RSC 1985, App II, No 5.
25 *Manitoba Metis Federation, supra* note 14 at para 77.
26 *Ibid* at para 78.
27 *Ibid* at para 82.
28 *Wewaykum Indian Band v Canada,* 2002 SCC 79, [2002] 4 SCR 245 at para 86 [*Wewaykum*]. This was affirmed in *Manitoba Metis Federation, supra* note 14 at para 49.
29 *Wewaykum, ibid* at paras 79-83; *Haida, supra* note 15 at para. 18. This was affirmed in *Manitoba Metis Federation, supra* note 14 at para 51.
30 See *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 37.

aboriginal interests.

27. AMC submits that Jordan's Principle is an aboriginal interest that gives rise to a fiduciary duty. Jordan's Principle is an aboriginal interest because it applies only to First Nations children living on reserve. It is also an interest of the highest importance because it affects the health and welfare of First Nations children with disabilities who reside on reserve. The Crown has assumed discretionary control over this aboriginal interest because of its unique relationship with Aboriginal people and because of its constitutional obligations.

28. Alternatively, it could be argued that the fiduciary duty arises out of an aboriginal interest in land. The federal government is responsible for funding services for health on reserve because of its jurisdictional responsibility for First Nations and reserves. The location of the child (on reserve) is determinative of the engagement of Jordan's Principle.

29. Secondly, a fiduciary duty may arise from an undertaking when:

> (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiaries; and (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiaries); and (3) a legal or substantial practical interest of the beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[31]

30. These three requirements are met in the context of Jordan's Principle. First, by passing and then implementing Jordan's Principle, the federal government undertook to act in the best interests of First Nations children with disabilities who live on reserve. Second, the only beneficiaries of Jordan's Principle are First Nations children. Unlike other programs or services, the federal government is not required to balance competing or other interests, its only concern is ensuring that First Nations children with disabilities receive equal access to health and social services. Third, the beneficiaries (First Nations children with disabilities living on reserve) have a substantial and practical interest in receiving equal access to services in a way that is not adversely affected by federal government's exercise of its

31 *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261 at para 36. This was affirmed in *Manitoba Metis Federation, supra* note 14 at para 50.

discretion and control. Jeremy Meawasige's situation is a good example of this: if he does not receive the services he needs on reserve, he could be removed from his home and community and placed in an institution. "He, like sad little Jordan, would be institutionalized, removed from family and the only home he has known."[32] This case engages the same principles as Jordan's case: it aims to prevent, where possible, the institutionalization of First Nations children and ensure equal funding and/or services are available on reserve.

31. Mandamin J. found that the government has "undertaken to implement this important principle"[33] . By unanimously passing Jordan's Principle, the federal government resolved to ensure that First Nations children with disabilities who live on reserve will receive equal access to health and social services and that no child would be left in limbo when there is a jurisdictional dispute. The statements made in Parliament when the resolution was passed describe Jordan's Principle as a "commitment" on the part of the federal government. In addition, it was expressly stated that Parliament's intent was to transform that commitment into a reality.

32. Based on this, AMC submits that Jordan's Principle was a solemn promise made by the federal government to aboriginal peoples and therefore the Crown has a duty to take a broad, purposive approach to its interpretation and to act diligently to fulfil it. If there is any action or inaction on the part of the federal government that results in a First Nations child with disabilities not receiving a comparable level of care as a child living off reserve, then the Crown has not fulfilled its obligation to act honourably.

C. Appropriate remedies in Jordan's Principle cases

33. Pursuant to s. 18.1 of the *Federal Courts Act*,[34] an applications judge may quash or set aside a

32 *Pictou, supra* note 1 at para 110.
33 *Ibid* at para 106.
34 *Federal Courts Act*, RSC, 1985, c F-7.

decision and refer the matter back for reconsideration. In exceptional circumstances, the Court may make a decision on the merits rather than refer the matter back for reconsideration, for instance when any other interpretation or solution would be unreasonable.[35]

34. Jordan's Principle is a legally enforceable obligation on the part of the federal government intended to ensure that First Nations children with disabilities living on reserve do not suffer needlessly while disputes preventing them from accessing services are being resolved. Sadly, the cases of Jordan River Anderson and Jeremy Meawasige illustrate the profound impact on First Nations children and their families when jurisdictional wrangling prevents them from accessing the services to which they are entitled. It is AMC's position that in a Jordan's Principle case, the appropriate remedy is for a Court to make that determination rather than remit the matter back for reconsideration. Any other remedy would be unreasonable as the further delay would cause irreparable harm.

PART IV – ORDER SOUGHT

35. AMC respectfully submits that this appeal be dismissed. AMC seeks no costs and costs should not be ordered against it, pursuant to the Order of Justice Mainville dated February 20, 2014.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of March, 2014.

for Beverly Jacobs,

Aimée Craft
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Assembly of Manitoba Chiefs Secretariat Inc.

35 *Stetler v The Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2009 ONCA 234 at para 42.

PART V – LIST OF ATHORITIES

Statutes and Constitution

Constitution Act, 1867 (U.K.), 30&31 Vict, c3, s. 91(24), reprinted in R.S.C. 1985, App II, No 5

Federal Courts Act, RSC, 1985, c F-7

Interpretation Act, RSC, 1985, c I-21

Case law

Alberta v Elder Advocates of Alberta Society, 2011 SCC 24, [2011] 2 SCR 261

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511

Manitoba Metis Federation Inc. v Canada (Attorney General), 2013 SCC 14, [2013] 1 SCR 623

Mitchell v Peguis Indian Band, [1990) 2 SCR 85

Nowegijick v The Queen, [1983] 1 SCR 29

Osoyoos Indian Band v Oliver (Town), 2001 SCC 85, [2001] 3 SCR 746

Pictou Landing Band Council et al v Canada (Attorney General), 2013 FC 342

R v Badger, [1996] 1 SCR 771

R v Big M Drug Mart, [1985] 1 SCR 295

R v Powley, 2003 SCC 43, [2003] 2 SCR 207

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27

Stetler v The Ontario Flue-Cured Tobacco Growers' Marketing Board, 2009 ONCA 234

Wewaykum Indian Band v Canada, 2002 SCC 79, [2002] 4 SCR 245

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