Court File. No. A-188-17

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

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

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PART I – INTRODUCTION

1. Every day, federal government officials make decisions regarding the eligibility of First Nations children, like Josey Shiner, for crucial public services. The federal government funds many public services for First Nations children, many of which ordinarily fall under the jurisdiction of provincial governments.. Federal provision of services to First Nations children and youth are often governed by policy decisions made by the executive branch, rather than by legislation or regulation. In many cases, federal officials have considerable discretion in decision making, relying only on internal federal government policies or program manuals. Additionally, federally-constructed programs lack independent review mechanisms, short of review before the Federal Court. As in Josey's case, the appeal mechanisms fail to meaningfully incorporate principles of natural justice.

2. In the absence of the safeguards provided by the checks and balances of the legislative and regulatory process, First Nations children and youth are uniquely susceptible and vulnerable to administrative decisions made by federal government officials. For this reason, it is particularly important to ensure that federal officials make decisions regarding services for First Nations children in accordance with general principles of administrative law, including the best interests of the child, and the values underlying the *Canadian Charter of Rights and Freedoms* ("*Charter*").[1] Discretionary decisions that fail to appropriately consider the best interests of the child and the *Charter*'s substantive equality values cannot be said to be reasonable.

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[1] See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

3. The Caring Society submits that the Director General's decisions to deny Josey coverage for braces prescribed by a licensed orthodontist did not give due consideration to the best interests of the child and the substantive equality values underlying section 15 of the *Charter*.[2] Likewise, the application judge did not properly consider either of these factors when assessing the reasonableness of the Director General's decisions. The Caring Society respectfully submits that this Court ought to meaningfully consider the best interests of the child and substantive equality when reviewing the decisions of the Director General and the application judge. When taking into account these crucial factors, it is clear that the decisions at issue were not reasonable.

PART II – SUBMISSIONS

A. The unique vulnerability of First Nations children and youth who seek access to public services

4. While there are some limited examples of Canada providing services to First Nations children and youth by way of legislation,[3] in many cases, these programs and services are governed and administered by way of executive action. As such, the eligibility for, and scope of, services provided to First Nations children and youth are often determined through discretionary administrative decisions.[4] For example, as recognized by the application judge, the Non-Insured

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[2] Affidavit of Dr. Mark Antosz, affirmed May 6, 2016 (the "Antosz Affidavit"), at para. 14, Appeal Book, Vol. I, Tab 7, p. 119.

[3] See for example: *Safe Drinking Water for First Nations Act*, S.C. 2013, c. 21. Section 4 of the Act empowers the Governor in Council to make regulations regarding drinking water on-reserve on the recommendation of the Minister of Indian Affairs and Northern Development and/or the Minister of Health. No such regulations have yet been promulgated.

[4] *Simon v. Canada (Attorney General)*, 2015 FCA 18 at para. 9 (regarding essential services on-reserve); *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para. 83 [*FNCFCSC et al v. AGC*]. (regarding child welfare services).

Health Benefits Program ("NIHB Program"), the program at issue in this appeal, "is neither an Act of Parliament, nor a regulation thereunder."[5] Instead, the First Nations and Inuit Health Branch (FNIHB) was created in accordance with the federal executive branch's "general powers under the *Department of Health Act*, S.C. 1996, s. 8, and the *Canada Health Act,* R.S.C. 1985, C-6, and in accord with the Indian Health Policy adopted by Cabinet in 1979 and the 1997 Reviewed Mandate in that respect".[6] Other examples of programs and services for First Nations children and youth funded by the Government of Canada, in the absence of legislation include:

a) the personal and home care services funded by INAC under the Assisted Living Program (ALP) and by Health Canada under the Home and Community Care Program (HCCP)[7];

b) financial assistance for status Indian and Inuit students enrolled in eligible post-secondary programs, through the Post-Secondary Student Support Program;[8] and

c) federal child welfare programs offered on-reserve and in the Yukon.[9]

5. In many cases, eligibility for public services are guided by internal policies, funding agreements with Bands, or program manuals. [10] As a result, considerable discretion is given to administrative decision-makers when making the crucial determination of whether a First Nations child or youth ought to have access to a public service. This discretion may apply at the

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[5] *Shiner v. Canada*, 2017 FC 515 at para. 11.
[6] *1018025 Alberta Ltd. v. Canada (Minister of Health)*, 2004 FC 1107 at para. ii.
[7] *Pictou Landing Band Council v. Canada (Attorney General),* 2013 FC 342 at paras. 11 and 35.
[8] *Spoljarich v. Lakehead University*, 2016 HRTO 762 at para. 11.
[9] *Indian Act*, R.S.C. 1985, c. I-5, s. 88: "Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act,* or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts."
[10] See, for example, *FNCFCSC et al v. AGC,* 2016 CHRT 2 at paras. 49-65, 68, 122-139, 142-143. *Pictou Landing Band Council v. Canada (Attorney General),* 2013 FC 342 at para. 13.

level of decision-making regarding whether individual children will receive a given service, or at a higher level in deciding eligibility criteria for the receipt of services at the program level.

6. In light of the foregoing, First Nations children and youth are uniquely susceptible and vulnerable to administrative decisions of government officials when seeking access to public services. Any transparency or safeguards arise only by way of the operation of the system the executive has put into place to govern the exercise of its discretion. When this discretion is not exercised in accordance with the best interests of the child and substantive equality, First Nations children and youth may experience discrimination or harm. [11] Indeed, both the Federal Court and the Canadian Human Rights Tribunal have spoken to the unique vulnerability of First Nations children and youth to experiencing discrimination as a result of discretionary decisions made by public officials.[12]

7. In these circumstances, the application of principles of administrative law, namely the best interests of the child, and the *Charter* value of substantive equality, provide safeguards that can protect First Nations children and youth from experiencing such discrimination and harm. The judicial review process is meant to ensure that safeguards are given due consideration. When this is not the case, the decision at hand must be deemed to be unreasonable.

B. Administrative Decisions and the *Charter*

8. Discretionary decisions made by public officials must be consistent with the *Charter*.[13] In *Doré v. Barreau du Québec*, the Supreme Court of Canada set out a framework for analyzing individual administrative decisions that have an impact on *Charter* rights. This framework

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[11] *FNCFCSC et al v AGC*, 2016 CHRT 2 at, para. 341 to 381. See also *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342, at para 110

[12] *FNCFCSC et al v. AGC*, 2016 CHRT 2 at paras. 366 to 377.

[13] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 SCR 1120 at para. 133. See also, *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para. 30.

requires decision-makers to balance *Charter* values with the importance of the statutory purposes underlying the decision, and to ensure that the *Charter* value(s) is (or are) impaired as little as possible. The Supreme Court described the framework as follows:

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. [...]
>
> Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. [...]
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> On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani,* when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.[14]

9. This framework is applicable in cases such as this one, as the decision under review interferes with the value of substantive equality underlying the *Charter*. The interference arises because, as will be explained below, the decisions under review paid no regard to substantive equality. It is respectfully submitted that the application judge also erred in his application of *Doré* by reviewing the decisions at issue by using a formal equality analysis.

10. Canada's vast jurisprudence relating to the *Charter*'s equality protections recognizes that substantive equality for members of historically disadvantaged groups, like First Nations

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[14] *Doré v. Barreau du Québec*, [2012] 1 SCR 395 at paras. 55-57.

children and youth, cannot be achieved through the formalist "treat likes alike" approach.[15] Yet, the application judge's decision is premised on that very notion. While recognizing that First Nations children experience a historical disadvantage and significant overrepresentation in the child welfare system as a result colonialism and Canada's discriminatory provision of services, the application judge began his analysis of the reasonableness of the Director General's decisions to deny Josey's dental coverage by emphasizing that the service she sought did not appear to be funded for non-First Nations children living off reserve. In the first paragraph of the decision, the application judge wrote:

> The one; the only; legal issue in this judicial review is whether the federal government should pay for Josey Willier's dental braces. The costs were not covered by the Alberta Health Insurance Plan. Broadly speaking, Medicare does not cover dental care. As a First Nations adolescent, Josey could benefit from Health Canada's Non-Insured Health Benefits Program. However, it was determined that her condition was not serious enough to warrant braces [emphasis added].[16]

11. Later on in the decision, the application judge again emphasized the fact that the service sought for Josey was not available to non-First Nations children and youth living off reserve. He wrote:

> There is nothing in the record to suggest that any child in Canada, First Nations or not, would have been treated any differently than Josey was.[17]

12. The application judge's repeated focus on whether the service sought for Josey was available to non-First Nations children is clearly at odds with the *Charter*'s equality jurisprudence. Indeed, Canadian courts have firmly rejected the notion of formal equality. They have also consistently held that providing mirror services to members of a historically disadvantaged group, such as First Nations children and youth, may often give rise to

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[15] *Withler v. Canada (Attorney General)*, [2011] 1 SCR 396 at paras. 42-43.
[16] *Shiner v. Canada (Attorney General)*, 2017 FC 515 at para. 1.
[17] *Shiner v. Canada (Attorney General)*, 2017 FC 515 at para. 31.

discrimination, which is prohibited by section 15 of the *Charter*.[18] As explained by the Supreme Court of Canada in *Withler v. Canada*,

> [F]ormal comparison based on the logic of treating likes alike is not the goal of s. 15(1). What s. 15(1) requires is substantive, not formal equality.
>
> Comparison, he explained, must be approached with caution; not all differences in treatment entail inequality, and identical treatment may produce "serious inequality" (p. 164). For that reason, McIntyre J. rejected a formalistic "treat likes alike" approach to equality under s. 15(1), contrasting substantive equality with formal equality.
>
> The Court's s. 15(1) jurisprudence has consistently affirmed that the s. 15(1) inquiry must focus on substantive equality and must consider all context relevant to the claim at hand. The central and sustained thrust of the Court's s. 15(1) jurisprudence has been the need for a substantive contextual approach and a corresponding repudiation of a formalistic "treat likes alike" approach. [emphasis added].[19]

13. Following the Supreme Court of Canada's guidance, the CHRT recently elaborated on how substantive equality can be achieved when providing services to First Nations children and their families. In its January 2016 decision relating to the federal government's implementation of Jordan's Principle and delivery of child welfare services for First Nations children and youth living on-reserve, the panel wrote:

> [H]uman rights principles, both domestically and internationally, require AANDC to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve. [emphasis added]. [20]

14. Similarly, in one of the CHRT's three follow-up orders relating to Canada's non-compliance with its January 2016 decision, the CHRT ordered Canada to ensure that public officials cease focusing on comparability of services available to non-First Nations children

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[18] *Moore v. British Columbia (Education)*, [2012] 3 SCR 360 at para. 5. See also *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para. 80.
[19] *Withler v. Canada (Attorney General)*, [2011] 1 SCR 396, 2011 SCC 12 at paras. 41-43
[20] *FNCFCSC et al v. AGC*, 2016 CHRT 2, para. 465

when determining the eligibility for, or level of service to be provided to, a First Nations child or youth. Rather, the CHRT ordered Canada to adopt the following approach when making such decisions:

> When a government service, including a service assessment, is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child. Where such services are to be provided, the government department of first contact will pay for the provision of the services to the First Nations child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Clinical case conferencing may be undertaken only for the purpose described in paragraph 135(1)(B)(iii). Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is provided, the government department of first contact can seek reimbursement from another department/government. [emphasis added].[21]

15. The CHRT orders, which require government officials to eschew the formalistic "treat likes alike" approach to equality when determining whether a public service ought to be provided to a First Nations child or youth, are consistent with Canada's constitutional obligations under section 15 of the *Charter*, which are also informed by Canada's international human rights law obligations.

16. Indeed, pursuant to the *International Covenant on Economic, Social and Cultural Rights*, Canada must take steps to achieve the full realisation of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[22] According to the UN Committee

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[21] *FNCFCSC et al v. AGC*, 2017 CHRT 14 at para. 135, B, iv (as amended by *FNCFCSC et al v. AGC*, 2017 CHRT 35. It bears noting that Canada consented to the approach in question and has discontinued its application for judicial review of 2017 CHRT 14).

[22] *International Covenant on Economic, Social and Cultural Rights,* adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, article 12.

on Economic, Social and Cultural Rights ("UN CESCR"), States have heightened human rights obligations when providing health services to Indigenous persons, like Josey. In General Comment 14 on the Right to the Highest Attainable Standard of Health, the UN CESCR wrote:

> In light of emerging international law and practice and the recent measures taken by States in relation to indigenous people, the Committee deems it useful to identify elements that would help to define indigenous peoples' right to health in order better to enable States with indigenous peoples to implement the provisions contained in article 12 of the Covenant. The Committee considers that indigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health. The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health [emphasis added]. [23]

17. The UN Committee on the Rights of the Child ("UN CRC") has echoed the views of UN CESCR in its General Comment on the Right of the Child to the Highest Attainable Standard of Health. UN CRC reiterated that States must pay special attention to the unique needs of members of under-served populations, such as Indigenous Peoples, when providing them with health services. In particular, efforts must be made to help children and youth overcome the unique barriers they may face when seeking to access health services in order to eliminated these barriers and to allow for more equal health outcomes:

> Article 24, paragraph 1, imposes a strong duty of action by States parties to ensure that health and other relevant services are available and accessible to all children, with special attention to under-served areas and populations. It requires a comprehensive primary health-care system, an adequate legal framework and sustained attention to the underlying determinants of children's health. Barriers to children's access to health

[23] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, para. 27.

services, including financial, institutional and cultural barriers, should be identified and eliminated. [emphasis added]. [24]

18. Considering Canada's constitutional obligations under section 15 of the *Charter*, which are informed by Canada's international human rights law obligations, the starting point for determining whether a service denial to a member of a historically disadvantaged group, such as First Nations children and youth, is discriminatory cannot be to query whether that service is available is available to all others, as was done by the application judge. Following the CHRT's rationale in its decision regarding the provision of non-discriminatory services to First Nations children and youth, special consideration must be given to whether the service sought is necessary to ensure substantive equality and culturally appropriate services. For example, consideration ought to be given to whether members of the group in question have a greater need for the service at hand due to historical disadvantage, or whether denying the service would perpetuate the disadvantage experienced by members of the group.[25]

19. In this case, there is no evidence that the Director General turned his mind to principles of substantive equality in anyway. The Director General's decisions were focused on determining whether the service sought for Josey fell within the limited clinical criteria expressly listed within the non-exhaustive examples provided in the Respondent's Dental Policy. This unreasonable approach was compounded by the application judge, who, for his part, wrongly focused on whether the service sought for Josey was available to non-First Nations children and youth living off reserve. In such circumstances, it is respectfully submitted that these decisions are inconsistent with substantive equality and interfere with of the equality values underlying the *Charter*.

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[24] General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15

[25] *FNCFCSC et al v. AGC*, 2016 CHRT 2 at para. 403.

20. Given that the Director General did not engage with the *Charter* values put at issue in the decisions before him, he also conducted no balancing of the objectives of the statutory regime (to the extent a non-legislated regime such as the NIHB Program falls within the meaning of this concept). In light of the fact that there is no indication that any proper consideration was given to substantive equality values in any way, the Caring Society respectfully submits that the decisions cannot be said to be reasonable.

21. Administrative Decisions and the Best Interests of the Child

22. In addition to respecting the value of substantive equality underlying the *Charter*, administrative discretion must also be exercised in accordance the best interests of the child. As submitted by the Appellant in her memorandum of fact and law, it is well established that discretionary decisions impacting children must invariably consider the best interests of the child.[26] The central place of the best interest of the child in administrative decision-making related to children is supported both by general principles of administrative law and Canada's international human rights law obligations. [27] When there is no indication that this factor was at least considered in a discretionary decision impacting a child, the decision in question cannot be said to be reasonable.

23. This view is supported by international human rights law. Indeed, United Nations treaty bodies have stressed that the best interests of the child ought to be given "primary consideration", particularly in the context of health policies and programs for children and youth. In its General Comment on the Right to Health, UN CESRC expressed the following view:

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[26] Appellant's written submissions dated September 20th, 2017, at paras 49 to 62.
[27] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 SCR 76 [Appellant's BOA, Tab 9]. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 75 [Appellant's BOA, Tab 14].

> In all policies and programmes aimed at guaranteeing the right to health of children and adolescents their best interests shall be a primary consideration.[28]

24. UN CRC reiterated this position in its General Comment on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health. According to UN CRC:

> The Committee urges States to place children's best interests at the centre of all decisions affecting their health and development, including the allocation of resources, and the development and implementation of policies and interventions that affect the underlying determinants of their health. [...]
>
> The Committee underscores the importance of the best interests of the child as a basis for all decision-making with regard to providing, withholding or terminating treatment for all children. States should develop procedures and criteria to provide guidance to health workers for assessing the best interests of the child in the area of health, in addition to other formal, binding processes that are in place for determining the child's best interest. [emphasis added]. [29]

25. International human rights law requires states to take all necessary measures to provide children and youth, like Josey, with the highest attainable standard of health. This duty, coupled with the administrative law requirement to consider the best interests of the child, means that administrative decision-making regarding the eligibility of children and youth for health services must place the well-being of children and youth at its core.

26. The Caring Society submits that, at a bare minimum, the pain experienced by a child or youth must be considered when determining whether to provide a service that would alleviate this pain. Indeed, as the Supreme Court of Canada has held that suffering may engage the right to

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[28] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, E/C.12/2000/4, para. 24.

[29] UN Committee on the Rights of the Child (CRC), *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, 17 April 2013, CRC/C/GC/15. See also General Comment No. 11 of the Committee on the Rights of the Child on Indigenous children and their rights under the Convention that overlays best interests with the right of Indigenous children to grow up as members of their group and enjoy their culture and language, CRC/C/GC/11 at paras. 30 to 33.

life, security and safety under section 7 of the *Charter,* it is clear that the principle of the best interests of the child must encompass the alleviation of pain in children and youth.[30]

27. The Caring Society adopts the Appellant's submission that there is no evidence in the record to suggest that Josey's pain was considered by the Director General when determining whether to provide her with the service sought by her mother. The application judge, for his part, declined to examine whether the failure to consider Josey's pain when determining her eligibility for a service under the NIHB Program was reasonable, given his view that the program was designed to benefit children and youth generally. He wrote:

> The whole point of the dental policy is to benefit children. If there are those who think the policy does not go far enough, redress should be sought from Health Canada or Parliament, not from the courts.[31]

28. The Caring Society respectfully submits that this analysis is wholly inconsistent with the best interests of the child. From residential schools, to the Sixties Scoop, to the more than twenty-five years of discrimination perpetuated by the child welfare system for First Nations children, the historical record is replete with examples of the federal government's having failed to account for the best interests of First Nations children in its decision-making.[32] As this context demonstrates, the simple fact that a program is intended to confer a benefit to children and youth generally does not make it the case that the program is in a child's best interests. . Rather, federal officials must demonstrate a deliberate and meaningful application of the best interests of the child as defined in Canadian jurisprudence in their discretionary decisions and/or frameworks regarding service eligibility/provision, *precisely* because child and youth stand to either greatly benefit from receiving a service, or to be harmed by the refusal of the service.

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[30] *Carter v. Canada (Attorney General)*, [2015] 1 SCR 331 at para. 64 to 70.
[31] *Shiner v. Canada (Attorney General)*, 2017 FC 515 at para. 32.
[32] *FNCFCSC et al v AGC*, 2016 CHRT 2 at paras 218, 227, 406-427, and 458-467.

29. Moreover, it is wrong to suggest that the only redress available to children and youth whose best interests have not been considered by the executive (whether in its program design or in its administrative decision-making) is through Parliament. To the contrary, as the Supreme Court of Canada held in *Dunsmuir*, "[a]s a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law",[33] and that "[t]he function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes."[34] As such, it is the role of reviewing courts to ensure that discretionary action is exercised in accordance with principles of administrative law, including the best interests of the child, and the values of the *Charter*, even in the absence of specific legislation to this effect. In fact, it is precisely in the absence of legislation, where large discretion exists, that courts have a heightened obligation to ensure that the best interest of the child is given proper consideration.

D. Conclusion

30. Discretion on the part of those who make decisions impacting First Nations children and youth must be exercised in accordance with the value of substantive equality enshrined in the *Charter* and the best interests of the child. When there is no indication that there factors were considered in any way at all, a decision is unreasonable.

31. This is the case in the decisions under review. Firstly, the denial of benefits under the NIHB Program benefits by the Director General and the refusal of the application judge to interfere with this decision were rooted in a formalistic "treat likes alike" approach to equality, which was rejected by the Supreme Court of Canada over thirty years ago. No consideration was

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[33] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 27.
[34] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28.

given to Josey's unique needs and circumstances a First Nations child and member of a historically disadvantaged group. A decision that uses formal equality as a starting point cannot be said to be consistent with the values underlying section 15 of the *Charter,* and is therefore unreasonable. Secondly, there is no indication that any consideration was given to the best interests of the child. Contrary to what was suggested by the application judge, it is the role of the courts, and not Parliament, to ensure that administrative decisions are made in accordance with principles of administrative law, such as the best interest of the child.

PART III- ORDER SOUGHT

32. For all of these reasons, the Caring Society respectfully requests that this Appeal be allowed and that this matter be referred back to the FNIHB Program for reconsideration with the direction that appropriate consideration be given to substantive equality, including consideration of Josey's unique needs and circumstances as a First Nations child, and the best interests of the child.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: December 11, 2017

per: Janice Quinland with authority
Anne Levesque
David P. Taylor

Counsel for the Caring Society

PART IV – LIST OF AUTHORITIES

Cases

1. *1018025 Alberta Ltd. v. Canada (Minister of Health)*, 2004 FC 1107
2. *Canada (Attorney General) v. Simon*, 2015 FCA 18
3. *Carter v. Canada (Attorney General)*, [2015] 1 SCR 331
4. *Doré v. Barreau du Québec*, [2012] 1 SCR 395
5. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624
6. *FNCFCSC et al v AGC*, 2016 CHRT 2
7. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 SCR 1120
8. *Moore v. British Columbia (Education)*, [2012] 3 SCR 360
9. *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342
10. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038
11. *Spoljarich v. Lakehead University*, 2016 HRTO 762
12. *Withler v. Canada (Attorney General)*, [2011] 1 SCR 396

Legislation

13. *Indian Act*, R.S.C. 1985, c. I-5, s. 88
14. *Safe Drinking Water for First Nations Act*, S.C. 2013, c. 21

Other sources

15. *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966
16. UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4

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