T-1045-11

FEDERAL COURT

BETWEEN

PICTOU LANDING BAND COUNCIL
and MAURINA BEADLE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

RESPONDENT'S RECORD

VOLUME III

RESPONDENT'S MEMORANDUM OF FACT AND LAW

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OVERVIEW

1. The issues raised by the Applicants must be considered within the context of the broader question that goes to the heart of the dispute between the parties: can the decision of a Band Council to provide in-home health care to one of its members beyond the normative provincial standard of care legally oblige Canada to fund such services? The Attorney General of Canada's position is that it cannot.

2. In this case, the Pictou Landing Band Council ('Band Council") unilaterally decided to provide services in excess of the normative standard to a severely disable teenager, Jeremy Meawasige ("Jeremy"), who lives with his mother on the Pictou Landing reserve. Management of his condition requires medically trained and other personnel to be available to him 24 hours a day.

3. Following its decision to provide these services, the Band Council requested Canada reimburse it for the additional funding through the auspices of Jordan's Principle, a non-binding resolution passed by the House of Commons that ensures continual care for an on-reserve child when there is a jurisdictional dispute between the levels of government.

4. However, Jordan's Principle was not engaged in this case, as there was no jurisdictional dispute between Canada and Nova Scotia.

5. This decision was rendered by Barbara Robinson ("Robinson"), the Jordan's Principle focal point for Aboriginal Affairs and Northern Development (Aboriginal Affairs") who was tasked with responding to the Band Council's request on behalf of Aboriginal Affairs and Health Canada, the government departments who administer Jordan's Principle.

6. Robinson's decision was based on the fact that there was no jurisdictional dispute between Canada and Nova Scotia which would engage Jordan's Principle. The level of care requested by the Band Council was also above the provincial normative standard of care and was at a level that Nova Scotia would not provide to a child who lived off-reserve in Jeremy's situation. As Jordan's Principle does not create discretionary authority to fund where there is no underlying entitlement, Robinson could not grant the request for

additional funding.

7. Furthermore, there can be no discrimination under section 15(1) of the *Charter of Rights and Freedoms* for failing to provide a benefit that no one else in Nova Scotia is entitled to receive.

8. Consequently, this application for judicial review should be dismissed.

PART I – FACTS

9. The Pictou Landing Band Council is the elected representative of the Pictou Landing First Nation and makes governance decisions concerning its members, including the allocation of funding received from Canada through block contribution agreements.[1]

10. Maurina Beadle is a 55 year-old member of the Pictou Landing First Nation. Her son, Jeremy, is a 17 year-old special needs Mi'kmaq member of the Pictou Landing First Nation. Full details of Jeremy's condition and special needs are described in the Affidavits and cross-examination of Beadle and provincial health assessments.[2]

Jordan's Principle

11. Jordan's Principle is non-binding resolution passed by the House of Commons. It is a child-first principle which exists to resolve jurisdictional disputes between the federal and provincial governments regarding health and social services for on-reserve First Nations children. Jordan's Principle ensures that where there is a dispute as to which level of government should pay for an eligible service, the child should not go without that service while the source of funding is determined. [3]

12. Canada's implementation of Jordan's Principle involves the following four criteria: 1) the

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[1] *Indian Act*, 1985, c I-5, ss. 2, 74-80; *Indian Bands Council Elections Order, Can Reg 97-138*, Schedule 1; *Affidavit of Philippa Pictou*, paras. 3-7, Applicants' Record, Vol. 1, Tab 3, pp. 26-27; *Cross examination of Philippa Pictou*, Respondent's Record, Vol. 2, Tab 4, pp. 499-503.

[2] *Affidavit of Beadle*, paras. 3-5, Applicants' Record, v. 1, tab 2, pp. 12-13; *Cross-examination of Beadle*, Respondent's Record, v. 2, tab 3, pp. 443-447; *Cross-examination of Pictou*, Exh. 7, Respondent's Record, v. 2, tab 5.

[3] *Affidavit of Robinson*, para. 5, Respondent's Record, v. 1, tab 1, p. 2.

First Nations child is living on a reserve (or ordinarily resident on a reserve); 2) the First Nations child has been assessed by health and social service professionals and has been found to have multiple disabilities requiring services from multiple service providers; 3) the case involves a jurisdictional dispute between a provincial government and the federal government as to who should pay for a service; and 4) the case involves services to a child that are comparable to the standard of care set by the province in a similar geographic location – the normative standard of care.[4]

13. Once these four criteria are met, Canada's response to Jordan's Principle will ensure that care for the child will continue even if there is a dispute about responsibility. The current service provider that is caring for the child will continue to pay for necessary services until there is a resolution between the levels of government.[5]

14. Jordan's Principle is procedural in nature; it does not create a substantive right to receive funding that is beyond the normative standard of care in the child's geographic location.[6]

15. If a matter potentially raises Jordan's Principle, federal employees from Aboriginal Affairs and Northern Development Canada and Health Canada known as a "focal points", carefully examines the case to determine if Jordan's Principle applies. Focal points gather facts and meet with the affected parties, provincial government officials and service providers. The focal points determine whether there is a genuine jurisdictional dispute and whether or not the services being requested or received meet the provincial normative standard of care provided to children in similar geographic locations off reserve.[7]

Funding on the Pictou Landing Reserve through Block Contribution Agreements

16. Canada funds a variety of services, programs, and infrastructure development for people living on reserves. It does so by entering into contribution agreements with band councils representing First Nations. These funding allocations under block contribution agreements for particular designated programs are based on a community needs assessments, which

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[4] *Affidavit of Robinson*, para. 6, Respondent's Record, v. 1, tab 1, pp. 2-3.
[5] *Affidavit of Robinson*, para. 6, Respondent's Record, v. 1, tab 1, pp. 2-3.
[6] *Affidavit of Robinson*, para. 5, Respondent's Record, v. 1, tab 1, p. 2.
[7] *Affidavit of Robinson*, para. 8-10, Respondent's Record, v. 1, tab 1, p. 3.

are completed at the time the initial contribution agreement is entered into between Canada and the First Nation. These contribution agreements include, but are not limited to funding education, health, income assistance, community development and infrastructure, such as housing.[8]

17. This initial base level of funding is usually increased each year. However, if a community's needs significantly change and the level of funding is inadequate, that First Nation may, at any time, ask to conduct an updated community needs assessment. The First Nation may also re-negotiate the entire block contribution agreement if it is consistently in an underfunded position.[9]

18. If a First Nation runs a surplus in any area where block funding is not specifically allocated for a program, then those funds can be "transferred" or re-directed to other programs and services.[10]

19. The Pictou Landing First Nation has not conducted an updated community needs assessment, nor has it requested that the funding it receives under its block contribution agreement be reconsidered. It is open to the First Nation to do so at any time.[11]

Canada's Funding of In-home Care Services on the Pictou Landing Reserve

20. At the center of this application are two separate programs included in the block contribution agreements with the Pictou Landing First Nation, the Assisted Living Program ("ALP") and Home and Community Care Program ("HCCP"), which are designed to provide continuing care services in the home for people who live on reserves.

21. The ALP is funded by Aboriginal Affairs and Northern Development Canada ("Aboriginal Affairs"), and is administered by the recipients, most of whom are First Nations. The ALP

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[8] *Affidavit of Pictou*, paras. 3-7 and exh. B and C, Applicants' Record, v. 1, tab 3, pp. 41-160.
[9] *Cross-examination of Robinson*, Applicants' Record, v. 3, tab 7, pp. 677-681; *Cross-examination of Ross*, Applicants' Record, v. 3, tab 8, pp. 772, 777; *Affidavit of Philippa Pictou*, exh. B and C, Applicants' Record, v. 1, tab 3, pp. 63, 128.
[10] *Cross-examination of Robinson*, Applicants' Record, v. 3, tab 7, pp. 677-678; *Cross-examination of Ross*, Applicants' Record, v. 3, tab 8, pp. 772-77.
[11] *Cross-examination of Robinson*, Applicants' Record, v. 3, tab 7, pp. 680-681; *Cross-examination of Ross*, Applicants' Record, v. 3, tab 8, p. 777.

has both an institutional and in-home care component.[12] The ALP provides funding for non-medical, social support services to seniors, adults with chronic illness, and children and adults with disabilities (mental & physical) living on reserve, and includes such things as attendant care, housekeeping, laundry, meal preparation, and non-medical transportation.[13]

22. The HCCP is funded by Health Canada, and is administered by the recipient First Nation. Under the HCCP framework, recipient First Nation are required to prioritize and fund 'essential services' before 'support services' and HC spells out what falls under each of these headings. The HCCP provides funding to assist with delivery of basic in-home health care services which require a licensed/certified health practitioner or the supervision of such a person. The recipient First Nation is not authorized to use the HCCP funds for other purposes, but under specific conditions the recipient may transfer funds from other programs within the contribution agreement to be used for HCCP purposes. The First Nations determines how the contribution agreement dollars for the HCCP are spent in the provision of basic in-home health care services.[14]

23. For both programs included in the block contribution agreements, the level of funding provided is designed to provide for eligible services within the federal funding authority that are reasonably comparable to those provided by the province for people who do not live on a reserve. As a result, funding for a service under these programs is only available within the provincial "normative standard of care", meaning it is equivalent to the funding available to a person in similar circumstances living off reserve.[15]

24. The programs are designed to complement each other, but not to provide duplicate funding for the same service. If a type of care, such as respite care, is already being paid for by one of the programs, it will not be an eligible expense under the other.[16]

25. Under the current block contribution agreements between the Pictou Landing First Nation

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[12] *Affidavit of Robinson*, paras. 12 and 24, Respondent's Record, v. 1, tab 1, pp. 4, 7-8.
[13] *Affidavit of Robinson*, paras. 13-14, Respondent's Record, v. 1, tab 1, p. 4.
[14] *Affidavit of Robinson*, para. 23, Respondent's Record, v. 1, tab 1, p. 7; *Affidavit of Ross*, para. 6, Respondent's Record, v. 2, tab 2, p. 426.
[15] *Affidavit of Robinson*, paras.12 and 15, Respondent's Record, v. 1, tab 1, pp. 4-5.

and Aboriginal Affairs, and between Pictou Landing First Nation and Health Canada, the First Nation receives $55,552.00 for funding eligible services under the ALP, and $75,364.00 under the HCCP respectively.[17]

The Band Council's decision to fund the care for Beadle and Jeremy

26. In May 2010, Beadle suffered a stroke, and was unable to continue to care for Jeremy without assistance. The Band Council determined it would provide the funding for their assistance.[18]

27. Between May 27, 2010 and March 31, 2011, the Band Council spent $82,164.00 on in-home care services for Beadle and Jeremy. The Band estimates that Jeremy's in-home care expenses are $12,000 per month.[19]

The Band's request for additional funding under Jordan's Principle

28. Canada first became aware of Jeremy's situation on February 16, 2011, when Philippa Pictou, the Health Director at the Pictou Landing First Nation Health Centre contacted Susan Ross, the Atlantic Regional Home and Community Care Coordinator at Health Canada. Pictou expressed her opinion that Jeremy's case met the definition of Jordan's Principle and asked Ross to participate in case conferencing regarding his needs.[20]

29. On February 28, 2011, a case conference was held regarding Jeremy's needs. In attendance were provincial care assessors from the Nova Scotia Department of Health and Wellness, the Pictou Landing Community Health Nurse, representatives of the Pictou Landing First Nation, and Ross and Deborah Churchill on behalf of Canada.[21]

30. At this case conference, Jeremy's needs were discussed, and in particular a needs assessment prepared by employees of the Nova Scotia Department of Health and

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[16] *Affidavit of Robinson*, para. 22, Respondent's Record, v. 1, tab 1, p. 7.
[17] *Affidavit of Robinson*, para. 15, Respondent's Record v. 1, tab 1, p. 5; *Affidavit of Ross*, para 9, Respondent's Record, v. 2, tab 2, p. 427.
[18] *Affidavit of Pictou*, paras. 14-16 and 22-23, Applicants' Record, v. 1, tab 3, pp. 29-30, 32-33.
[19] *Affidavit of Pictou*, exh. K, Applicants' Record, v. 1, tab 3, p. 559; *Affidavit of Robinson*, exh. A, Respondent's Record, v.1, tab 1, pp.160-161.
[20] *Affidavit of Ross*, para 17, Respondent's Record, v. 2, tab 2, p. 429; *Affidavit of Robinson*, exh. A, Respondent's Record v. 1, tab 1, p.182.

Wellness. The provincial care assessors indicated that Jeremy's care needs exceeded what the province would provide in home to a person living off reserve. They suggested that long term care would be the appropriate option for a person living off reserve.[22]

31. Ross confirmed with the provincial care assessors that the level of care required in Jeremy's needs assessment would not be funded in the home for any Nova Scotian living off reserve.[23]

32. The provincial Direct Family Support Program provides funding for the purchase of respite services to assist with scheduled breaks for family care givers – however, it is not intended to provide for full time / 24 hour in home support.[24] Likewise, the Home Care Policy Manual states that the respite component of in home care provides relief for short periods of time and the District Health Authority is required to comply with the maximum monthly home care service limits established by the Department of Health and Wellness.[25]

33. On April 19, 2011, a second case conference took place to discuss Jeremy's needs. Because Pictou had earlier requested that Jeremy's situation be considered a Jordan's Principle's case, Barbara Robinson, the Aboriginal Affairs focal point for Jordan's Principle, had been contacted by Ross to participate in the case conferencing. Both Ross and Robinson attended the second case conference, as did Troy Lees, a civil servant with the provincial Department of Community Services.[26]

34. At the case conference, Lees explained what the province would provide to a child with similar needs and circumstances off reserve. He explained that a family living off reserve could receive a maximum of $2,200 per month in respite services (which would be proportionately reduced if the family received additional services from any other provincial program). Lees also stated that the province would not provide 24 hour care in the home

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[21] *Affidavit of Ross*, para. 17, Respondent's Record, v. 2, tab 2, p. 429.
[22] *Affidavit of Robinson*, exh. A, Respondent's Record, v.. 1, tab 1, pp. 160-161; *Affidavit of Ross*, para. 24, Respondent's Record, v. 2, tab 2, p. 431; *Cross-examination of Pictou*, exh. 7, Respondent's Record, v. 2, tab 4.
[23] *Affidavit of Ross*, para. 22, Respondent's Record, v. 2, tab 2, p. 430.
[24] *Affidavit of Pictou*, exh. G, Applicants' Record, v. 2, tab 3, pp. 392, 397 and 408.
[25] *Affidavit of Pictou*, exh. H, Applicants' Record, v. 2, tab 3, pp.474 and 485.
[26] *Affidavit of Robinson*, para. 31, Respondent's Record v. 1, tab 1, pp. 9-10.

or funding equivalent to the costs of institutional care.[27]

35. On May 12, 2011, Pictou submitted her request for additional funding to pay for Jeremy's care, based on her view that there were jurisdictional disputes with this case. The request also stated that "even if it is not a Jordan's Principle case, I would like either the Federal or Provincial Government to reimburse us up to the level that he would qualify for if institutionalized (estimated by Community Services to be $350 per day)."[28]

36. As the Jordan's Principle focal point, Robinson was designated as the federal decision maker tasked with responding to Pictou's request on behalf of both Health Canada and Aboriginal Affairs.

37. Robinson contacted the appropriate provincial authorities to verify the provincial normative standard of care for children with similar disabilities and care needs residing in Nova Scotia who do not live on reserves. She contacted appropriate personnel, including Lorna MacPherson and Carolyn Maxwell at the Nova Scotia Department of Community Services and the Nova Scotia Department of Health and Wellness to determine whether the level of care requested by Pictou would be available to a child residing off reserve.[29]

38. The provincial authorities were clear that neither the Nova Scotia Department of Community Services nor Nova Scotia Department of Health and Wellness would provide funding for services at the level Jeremy required if he was living off reserve. The Nova Scotia policy Direct Family Support Program provides the allowable cost of $2,200 per month for respite in-home care, with the possibility of a greater amount for exceptional circumstances. However, the Directive from the Department of Community Services dated October 2006 indicated that the maximum for respite in-home care was $2,200 per month, with no exceptions.[30] The Department of Health and Wellness also indicated that existing policies had a cap of $2,200, and new policies were to be implemented by December 2011 that would fund in home care for up to 5 hours a day, and only if that care did not require a

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[27] *Affidavit of Robinson*, para. 31 and exh. A, Respondent's Record, v. 1, Tab 1, pp. 9-10, 124-126.
[28] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, p. 149.
[29] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, pp. 187-189, 212-228.
[30] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, p.115.

trained nurse.[31]

39. The provincial authorities indicated that, if Jeremy were residing off reserve, the option they would support would be long term care in a nursing home. They identified an appropriate facility for children, located in Kentville, Nova Scotia that had availability to accommodate Jeremy.[32] This option was rejected by Jeremy's family, as their choice was not to place him in long term care.[33] Even if Jeremy's family wished to place him in a long-term residential facility, his care needs would exceed Aboriginal Affairs' authority and would be covered by the province.[34]

40. As a result of the information received from the provincial authorities, Robinson concluded there was no jurisdiction dispute in this matter as both levels of government agreed that the funding requested was above what would be provided to a child living on or off reserve. Therefore, Robinson determined the case "does not meet the federal definition of a Jordan's Principle case..."[35]

41. The Applicants challenge Robinson's decision that this is not a Jordan's Principle case and that the additional funding requested could not be granted.

PART II – ISSUES

42. Canada's position on the issues in this judicial review application is as follows:

i) The standard of review is reasonableness;

ii) Jordan's Principle was not engaged in this case;

iii) The request for additional funding was properly assessed; and

iv) The decision does not violate section 15(1) of the *Charter of Rights and Freedoms*.

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[31] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, pp. 115, 187-189, 199-214.
[32] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, p. 223.
[33] *Cross-examination of Beadle*, Respondent's Record, v. 2, tab 3, pgs. 486-7.
[34] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, pp. 417.
[35] *Decision dated May 27, 2011, Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, p. 154.

43. The overriding issue in this case, which the Applicants do not address, is that the decision of a Band Council to provide in-home health services to one of its members beyond the normative provincial standard of care does not legally oblige Canada to fund such services.

PART III – LAW AND ARGUMENT

Issue I – the standard of review is reasonableness

44. Robinson's decision is subject to review on the standard of reasonableness. The Applicants mischaracterize the obligations that Robinson was required to meet in answering their request for funding when they describe it as a determination of law. In her role responding for Aboriginal Affairs and Health Canada, Robinson was required to determine whether Jeremy's situation engaged Jordan's Principle.

45. The question of whether the service provided by the Band Council exceeded the provincial normative standard of care is a question of fact and requires a decision maker to gather facts about the assistance needs of the claimant, the treatments required, and the nature of the disabilities at issue. It also requires fact gathering about the services that are currently available to similar people living off reserve and gathering factual information from provincial authorities and the federal program requirements. However, the decision maker is entitled to give significant weight to the definition of the normative standard of care provided by the provincial authorities.

46. With respect to the assessment of the request made by the Applicants, the determination of what was actually requested is a question of pure fact. Robinson was required to review Jeremy's situation and determine what their request constituted based on all of the material submitted. The Supreme Court of Canada has determined that where a question is a factual determination which depends purely on the weighing of evidence, the applicable standard of review is reasonableness.[36] Alternately, where, as here, the

[36] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, paras 53 – 54.

underlying factual and legal issues cannot be separated, the appropriate standard of review is still reasonableness.[37]

47. That standard is particularly appropriate in the present case, where the decision maker must make a determination of eligibility under a federal policy for which he or she is the expert designated authority in a discrete and special administrative regime, with particular expertise, and with the unique ability to interact with the provincial authorities whose co-operation is required to make the necessary determination.[38] The reasonableness standard is the most reflective of the nature of the inquiry being undertaken and the context in which it takes place.

48. Regarding the *Charter* issue, there is no "standard of review" of the constitutional issue in this Court. This issue is a matter of constitutional law and not administrative law, where the standard of review is an issue. This is the first time that the section 15 argument has been raised in this matter. This is the Court of first instance for the determination of the constitutional question.

49. Robinson did not make any determination under section 15 of the *Charter*. The Applicants did not ask her to, and she was not required to do so under her mandate to respond to the Applicants' request for additional funding. The Applicants' *Charter* argument is based on the effect of the decision, not the conclusions that Robinson herself reached on an issue of constitutional interpretation. Since Robinson did not consider the constitutional issues, they are not before her as part of the judicial review.[39]

50. As with other section 15 cases where the court is the first instance of constitutional determination, the onus is on the claimant, in this case the Applicants, to prove on balance of probabilities that a *Charter* guaranteed right or freedom has been infringed.[40]

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[37] *Dunsmuir v. New Brunswick, supra.*
[38] *Dunsmuir v. New Brunswick, supra*, paras 54 – 55, 63 – 64.
[39] *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, para 51.
[40] *Miron v Trudel*, [1995] 2 SCR 418, para 36.

Issue II – Jordan's Principle was not engaged in this case

51. In order to determine whether Jordan's Principle was engaged, Robinson had to determine if there was a jurisdictional dispute between Canada and Nova Scotia regarding the provision of funding for Jeremy's care and if the funding provided by Canada met the normative standard of care in Nova Scotia.

No jurisdictional dispute existed

52. There was no jurisdictional dispute. Both Canada and Nova Scotia agreed that Jeremy's situation entitled him to receive institutional care and the Province acknowledged it would pay for services over and above federal authority.

The normative standard of care in Nova Scotia was properly determined

53. Robinson determined the normative standard of care for in-home services in Nova Scotia was $2200 per month. She arrived at this conclusion after consultation with provincial authorities and her assessment of the evidence.

54. When Robinson received the request for additional funding, she consulted with a range of provincial officials to determine whether, if Jeremy lived off reserve, the level of care he was seeking would be available in-home. Robinson consulted with provincial officials from multiple departments, and raised with them the applicability of the *Social Assistance Act,* the Direct Family Support Policy, the Health and Wellness Program, and the recent decision of the Nova Scotia Supreme Court in the *Boudreau* case. She also considered a Directive from the Department of Community Services dated October 2006 indicating the maximum for respite in-home care was $2,200 per month.[41] She brought all of the Applicants concerns and arguments before the provincial officials.[42]

55. The provincial representatives were very clear in their response to Robinson. They unequivocally concluded that the level of care Jeremy required and had received from the

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[41] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, p.115.

[42] *Affidavit of Robinson*, paras. 25-42 and exh. A, Respondent's Record, v. 1, tab 1, pp. 8-12; pp. 124-126, 130-132, 138-152, 154-163, 165-166, 168-179, 182-204, 207-309, 320-323, 326-328, 338-342, 347-348, 353, 360, 366-424;

Band Council was not available under any provincial program in Nova Scotia for in-home care. They informed Robinson that the maximum Jeremy would receive for respite care if he lived off reserve would be $2,200 per month under the Direct Family Support Policy, or he could receive up to 5 hours of home support services per day in a 28 day period under the Home Care Policy; in addition, they would support Jeremy's admission into long-term care in a residential facility. [43]

56. The process Robinson undertook to determine the normative standard of care was procedurally correct and her conclusion that the request was beyond the normative standard of care was reasonable. She considered the applicable policies and legislation, and consulted with the appropriate officials to confirm their application.

57. In giving weight to the determination of the provincial officials, Robinson did not err in the process she used. The provincial officials are in the best position to say what services are available to residents of the province living off reserve. It is those officials who craft the applicable policy, who daily interpret provincial social assistance legislation and who make determinations on eligibility for services for people living off reserve.

58. In addition, the internal policies in applying benefit legislation are created by the province. A federal decision-maker may not have all the information required in order to properly interpret the normative standard. For example, in the present case, had Robinson not consulted the provincial officials, she would have only had access to the *Social Assistance Act* and the Direct Family Support Policy, an incomplete basis on which to make the required assessment.

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

Affidavit of Ross, paras. 17-26, Respondent's Record, v. 2, tab 2, pp. 429-431; *Affidavit of Pictou*, paras. 18-25 and exh. K, Applicants' Record, v. 1, tab 3, pp. 31-33; *Cross-examination of Pictou*, exh. 8 Respondent's Record v. 2, tab 6.

[43] *Affidavit of Robinson*, paras. 30-38 and exh. A, Respondent's Record, v. 1, tab 1, pp. 9-12, 115, 124-126, 140-141, 158-159, 187, 211-218.

60. Further, Robinson raised the evidence she had received with the Applicants. The Applicants were present when the provincial care assessors made clear in their case conferences that Jeremy's needs could not be met in-home if he lived off reserve. The Applicants were aware of the $2,200 per month limitation and the Directive strictly limiting any discretionary increases. In fact, the Applicants agreed that the services being provided to Jeremy "are beyond any program responsibilities" and made submissions as to why the normative standard of care was beyond the level claimed by the province.[44] Robinson discussed those submissions with the provincial assessors and she is entitled to rely on their response.

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

61. The Applicants rely on the *Boudreau* decision[45] to support their premise that the Band Council can require Canada to pay for in home care that exceeds the normative standard of care and its refusal to do so constitute discrimination. Their reliance is misplaced.

62. *Boudreau* is a case about exceptional circumstances to the provincial standard of care but does not purport to change the standard of care itself. The funding in the block contribution agreements are based on the existing standard of care and not exceptions to the standard. Similarly, Jordan's Principle is based upon the standard and not exceptions to it.

63. The provincial authority had already determined that Boudreau required in home care in an amount far less than what the Band Council has provided here. The $2,200 limit had already not been applied in Boudreau's case because he had been "grandfathered". The record also established that his mother had been unable to retain or maintain personal care workers for Boudreau because the average hourly rates in Halifax had exceeded the amounts she received.[46]

64. The situation in Boudreau is quite different from Jeremy's because Boudreau was receiving exceptional circumstances funding prior to the October 2006 Directive from the

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[44] *Affidavit of Pictou*, exh. K, Applicants' Record, v. 1, tab 3, p. 564.
[45] *Nova Scotia (Department of Community Services) v. Boudreau*, 2011 NSSC 126.
[46] *Boudreau, supra*, para. 70.

Department of Community Services that indicated the maximum for respite in-home care was $2,200 per month, with no exceptions. Moreover, Canada and Nova Scotia have already determined that the applicable standard for Jeremy is institutional, not respite care. The Applicants are trying to use the *Boudreau* case to create a new standard of care that neither the Province nor Canada recognizes.

65. Robinson did not err by determining that *Boudreau* did not alter the normative standard of care. Although she was cognizant of the decision, as clearly indicated in her cross-examination, she determined it did not affect the normative standard of care due to the difference in the facts underlying each case.[47]

Exceptional circumstances do not come into play in the block contribution agreements

66. The Applicants do not clearly indentify the policy they are relying on for the argument that "exceptional circumstances" in the block contribution agreements existed such that the normative standard of care should be altered - Clause 23 of the Contribution Agreement or Clause 3.4 of the Aboriginal Recipient Funding Agreement. No matter which policy is being advanced, the "exceptional circumstances" would not operate in this case to alter the normative standard of care. In any event, Robinson did not have the authority to amend these agreements.

67. First, there is no evidence that the Band Council raised either clause in their representations to the federal decision-maker concerning the services it was providing to Jeremy and his family. In addition, each block contribution agreement provides for a dispute resolution process regarding the interpretation of its provisions but the Band Council chose not to avail itself of this option.[48]

68. While the applicants have a right to seek judicial review regarding Robinson's decision that Jordan's Principle was not engaged here, if they are unhappy with the amounts they receive under their funding agreements, then their recourse is to ask Canada to renegotiate and amend those agreements.

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[47] *Cross-examination of Robinson*, Applicants' Record, v. 3, tab 7, pp. 723-727.
[48] *Affidavit of Pictou*, exh. B and C, Applicants' Record, v. 1, tab 3, pp. 61, 126-127.

69. The Band Council did not raise these provisions before Robinson and did not seek available remedies under the terms of those agreements. Even if they had (which is not admitted) Robinson had no authority to amend the contribution agreements.

70. Second, Clause 23 of the Contribution Agreement between the Band Council and Health Canada and Clause 3.4 of the Aboriginal Recipient Funding Agreement with Aboriginal Affairs do not apply here. Clause 23 states that in the event of circumstances such as, but not limited to, community emergencies or disaster, the Minister and the Band council will mutually agree on the financial and program measures to be taken to expediently manage the unforeseen circumstances and maintain effective delivery of health services.[49] According to Ross, that provision has never been used in the HCCP in Atlantic Canada and is intended to deal with an unforeseen, community wide circumstance that was beyond the Band's control.[50]

71. Similarly, under Clause 3.4 of the Aboriginal Recipient Funding Agreement, in the event of exceptional circumstances the Band Council may return to the Federal Department that provides funding for the program, service or activity that is supposedly affected by the exceptional circumstances and seek changes to the level of funding or to obtain assistance. It is intended to address circumstances that were not foreseeable at the time the Agreement was entered into and which have a significant impact on the Band Council's performance of its terms and conditions. Changes to funding levels are made by way of a written amending agreement.[51]

72. When asked about this provision, Robinson gave an example where there was flooding in Northern New Brunswick and the Department increased capital funding to pay for the costs of repairs that were necessary after that natural disaster. However, Robinson also testified that if a band council chooses to spend the funding it receives in a manner that is inconsistent with the applicable policy and standards, such that the expenditure is not

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[49] *Affidavit of Pictou*, exh. B, Applicants' Record, v. 1, tab 3, p. 57.
[50] *Cross-examination of Ross*, Applicants' Record, v. 3, tab 8, p. 776.
[51] *Affidavit of Pictou*, exh. C, Applicants' Record, v. 1, tab 3, p. 119

eligible under the Agreement, the Department does not consider that situation to be an exceptional circumstance that falls outside of a band council's control.[52]

73. Contrary to the Applicants' assertions, the decision of the Pictou Landing Band Council to provide services to Jeremy and his family is not the result of "unforeseen" or "exceptional" circumstances contemplated by the funding agreements between Canada and the Band Council.

Issue III – The request for additional funding was properly considered

74. The evidence is clear that the Applicants requested the equivalent of 24 hour per day care, and only for Jeremy, contrary to the Applicants' arguments that Robinson misapprehended the request for additional funding.

75. The Applicants allege that they requested only funding for in-home care 24 hours per day, 7 days per week, less what Jeremy's own family could provide. For this proposition they rely on a specific sentence in the Briefing Note Pictou prepared on Jeremy's case which was sent to Health Canada and Aboriginal Affairs. In that note, Pictou 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), but which department is obligated to meet his care needs?".[53]

76. In the immediately preceding paragraph in the Briefing Note, Pictou refers to 24 hour per day, 7 days a week care without any limitation regarding family assistance.[54]

77. Further, the operative request for additional funding, if there was one at all, was contained at the end of the Briefing Note, where Pictou wrote:

> Therefore, we would like either the Federal or Provincial government to reimburse us for his care needs over and above the $2,200 per month

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[52] *Cross-examination of Robinson*, Applicants' Record, v. 3, tab 7, pp. 682-683.
[53] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, p. 63; *Applicants' Memorandum of Fact and Law*, para. 73, Applicants' Record, v. 4, tab 9, p. 828.
[54] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, p. 63.

> maximum allowed in our funding agreements since May, 2010 and continuing until his care needs are capable of being met within our budget.[55]

78. In the email with the formal request for additional funding (which attached the Briefing Note), Pictou stated:

> Even if it is not a Jordan's Principle case, I would like either the Federal or Provincial Government to reimburse us up to the level that he would qualify for if institutionalized (estimated by Community Services to be $350 per day).[56]

79. Robinson was reasonable in concluding that the Applicants had requested the funding equivalent of 24 hour per day in-home care, and to verify whether that need was beyond the normative standard of care that the province would provide for in-home care for any Nova Scotian.

80. Even if the Applicants' request could be interpreted as 24 hours minus what family members could provide (which is not admitted), Robinson's factual finding that that the Applicants' funding request exceeded the provincial standard for in-home care is reasonable given the evidence.

81. According to the service plan in effect since October 2010, the Band Council has provided 492 hours of in-home respite services to Jeremy and his mother per 28 day period, leaving only a 9 hour period during each week-night for family contributions. Provincial officials had advised that family members would need to augment additional hours of home support above the maximum amounts and the primary concern is the sustainability of the plan and risk to Jeremy and his family.[57]

82. The evidence demonstrates that the ability of Jeremy's family to provide assistance is limited. According to Beadle, her son Jonavon cannot help her with Jeremy's care

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[55] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, p. 64.
[56] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, p. 149.
[57] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, pp. 415-417.

between May and November because he is away fishing, and other family members on the reserve are unable to help out because they work too.[58]

83. Beadle also testified that if she hadn't had any workers come to her house after her stroke in May 2010, she would have been "alone"; if possible, she would have a care worker stay with her and Jeremy throughout the entire night on weekdays; and, if the current level of care was reduced (either by hours or the number of care workers), she would manage "terribly".[59]

84. There is no evidence that the Applicants ever made representations to Robinson concerning family supports - but, even if they had, it would still be left to Canada to pay for 20.5 days worth of services per 28 day period. Accordingly Robinson made no reversible error.

85. The Applicants' argument selectively highlights only one small passage in the package they submitted to Robinson. On balance, it is clear that Robinson's consideration of the request for funding is reasonable and consistent with the request put forward and the evidence advanced.

Issue IV – The decision does not violate the *Charter*

86. The decision not to grant the request for additional funding up to the daily rate of institutional care does not discriminate against Jeremy or any other First Nations child. The benefit the Applicants requested is not a benefit provided by law. Under the ALP and HCCP, the Band Council has funding to provide their community with reasonably comparable services to those that would be available to the off-reserve population. Funding for those benefits was and is available to Jeremy, and he is treated no differently than any other Nova Scotian with similar needs. There is no distinction on which a discrimination claim can rest.

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[58] *Cross-examination of Beadle*, Respondent's Record, v. 3, tab 3, pp. 438-440.
[59] *Cross-examination of Beadle*, Respondent's Record, v. 3, tab 3, pp. 438, 480 and 490.

The Section 15 Framework

87. Section 15 of the *Charter* enshrines Canada's commitment to substantive equality, promoting the idea that Canadian society is one where "all people are recognized at law as human beings equally deserving of concern, respect and consideration".[60] That equality guarantee is set out in s.15(1), which reads:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[61]

88. The original test for determining establishing whether conduct amounted to discrimination under the *Charter* was set out by the Supreme Court of Canada in *Andrews v Law Society of British Columbia.* That framework was revisited in *R. v Kapp* and *Withler v Canada*. The Supreme Court of Canada has now adopted a two-part test for assessing a s.15(1) claim:

i) Does the law create a distinction based on an enumerated or analogous ground? and;

ii) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[62]

89. Every section 15 analysis must take into account the totality of the circumstances of the affected individuals and the context of the law at issue which affects them. Simply because law affects people who have historically been disadvantaged does not render it discriminatory in every situation. In *Withler*, the Supreme Court of Canada stated:

> Whether the s. 15 analysis focuses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is

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[60] *R. v. Kapp*, [2008] 2 S.C.R. 483, para 15, citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, pp. 164-165.

[61] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11, s. 15.

[62] *Kapp, supra*, para 17; *Withler v. Canada (Attorney General)*, 2011 SCC 12, para 30.

contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.[63]

Jordan's Principle Does Not Engage Section 15

90. The Applicants argue that Robinson's decision not to grant them additional funding does not respect Jordan's Principle, and therefore is discriminatory under section 15 of the *Charter*. This, they claim, is because Jordan's Principle is a legal mechanism by which the objectives of section 15 are achieved.[64]

91. Jordan's Principle is a non-binding resolution of the House of Commons. It is not a statute, regulation, or policy which provides legal authority to act and has no independent normative effect. It cannot independently form the basis of a section 15 claim.

92. Motions agreed by the House of Commons in order to make a declaration of opinion or purpose are called resolutions. In *Stockdale v Hansard* the English Court of Queen's Bench held that a resolution by the House declaratory of their own privileges was beyond the control of the law and could not be questioned in any court.[65]

93. In *Michaud v Bissonnette*, the Quebec Court of Appeal upheld this principle, and found that a resolution of the provincial assembly of Quebec cannot independently create legal obligations or consequences. The Court held "[C]ontrary to a law, a resolution is merely a means of expressing an opinion of the MNAs and has no normative effect."[66]

94. In any event, Jordan's Principle clearly is not engaged in this case. Jordan's Principle was adopted to ensure that no First Nations child would be denied services while governments debated over the jurisdictional responsibility to provide an eligible service. What is at stake in this case is not a jurisdictional dispute at all, but a claim that the Band Council's decision to provide in-home health care to one of its members beyond the normative provincial standard of care legally obliges Canada to fund such services.

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[63] *Withler supra*, para 37.

[64] *Applicants' Memorandum of Fact and Law*, paras. 56, 57, Applicants' Record, v. 4, tab 9, p. 822.

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

95. Moreover, it is not clear from the record that either the Band's expenditures from May 2010 onwards or its request for additional funding is entirely based on Jeremy's care needs. The evidence on the record suggests that some of these expenditures and additional funding relate to Beadle's past and present care needs and Jordan's Principle was never intended to address her situation.

Benefit of the Law

96. Before a section 15 claim can succeed, the person claiming denial of a benefit must establish that the benefit claimed or burden imposed must be provided for by law. That is, a claimant must show that the law provides for a benefit available to others or a burden imposed on him or her that is not imposed on others. If the benefit a claimant seeks is not one that is provided for to anyone by law, then section 15 is not engaged.[67]

97. In the present case, the benefit sought by the Applicants is not one that is conferred by law. The Applicants claim that they are entitled to funding for in-home care at the same financial level that would be paid if Jeremy were institutionalized, on the basis that "the benefit conferred by the *SAA* is the right of persons in need be furnished with the assistance they require".[68]

98. The benefit sought by the Applicant is not provided for by the law. Neither the Federal nor Provincial Government have legislated the right to receive any level of in-home care so long as there is a need. There are defined limits to the degree of in-home care available both in amount and degree.

99. In *Auton v British Columbia,* the Supreme Court of Canada has already rejected an argument identical to the one advanced by the Applicant's here. In *Auton*, parents of children with autism argued that their children should be entitled to government-funded specialized therapy. The Supreme Court characterized the claim in this way:

> In this case, the issue of whether the benefit claimed is one conferred by law does arise, and must be carefully considered. The claim, as discussed, is for

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[66] *Michaud v Bissonnette,* 2006 QCCA 775, para 41.
[67] *Auton (Guardian ad litem of) v. British Columbia (Attorney General),* [2004] 3 S.C.R. 657, para 29.
[68] *Applicants' Memorandum of Fact and Law*, paras. 51 and 58, Applicants' Record, v. 4, tab 9, p. 819-820.

> funding for a "medically necessary" treatment. The unequal treatment is said to lie in funding medically required treatments for non-disabled Canadian children or adults with mental illness, while refusing to fund medically required ABA/IBI therapy to autistic children. The decisions under appeal proceeded on this basis. The trial judge, affirmed by the Court of Appeal, ruled that the discrimination lay in denying a "medically necessary" service to a disadvantaged group while providing "medically necessary" services for others. Thus the benefit claimed, in essence, is funding for all medically required treatment. (emphasis added)[69]

100. The Court held that section 15 was not engaged because the benefit claimed by the applicants in *Auton* was not provided for by the law:

> ...the legislative scheme does not promise that any Canadian will receive funding for all medically required treatment. All that is conferred is core funding for services provided by medical practitioners, with funding for non-core services left to the Province's discretion. Thus, the benefit here claimed — funding for all medically required services — was not provided for by the law.[70]

101. The Applicants repeatedly rely on *Eldridge v British Columbia* for the proposition that government must exercise its discretion to provide the funding they require, because they claim that the services funded by the ALP and HCCP are under inclusive for people living on reserve. *Eldridge* is inapplicable to this case. In *Auton,* the Supreme Court of Canada distinguished *Eldridge* for reasons that are identically applicable in this case:

> The petitioners rely on *Eldridge* in arguing for equal provision of medical benefits. In *Eldridge*, this Court held that the Province was obliged to provide translators to the deaf so that they could have equal access to core benefits accorded to everyone under the British Columbia medicare scheme. The decision proceeded on the basis that the law provided the benefits at issue — physician-delivered consultation and maternity care. However, by failing to provide translation services for the deaf, the Province effectively denied to one group of disabled people the benefit it had granted by law. *Eldridge* was concerned with unequal access to a benefit that the law conferred and with applying a benefit-granting law in a non-discriminatory fashion. By contrast,

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[69] *Auton, supra,* para 30.
[70] *Auton, supra,* para 35.

this case is concerned with access to a benefit that the law has not conferred. For this reason, *Eldridge* does not assist the petitioners.[71]

102. In the case at bar, the decision to provide Jeremy with services that exceed the provincial normative standard was made independently by the Band Council. In doing so, the Band Council does not become an agent of the federal Crown because it already has the authority to do so without the need for additional powers being delegated to it by the Crown.[72]

103. Having made that decision, the Band Council must accept the consequences that may result from it, including whether and how long to continue to provide Jeremy and his mother with these services. Such consequences do not involve or concern the application of a benefit-granting law that would engage section 15(1).

104. The evidence clearly indicates that Jeremy's needs well exceed the levels of in-home care that would be available to anyone living off-reserve in Nova Scotia. This was confirmed by the provincial officials who indicated that this level of in-home care would not be available and institutionalization would be the supported option. This is not a case where the application of federal programs or policies denies a benefit that would otherwise be available to someone else. The Applicants are attempting to create a benefit out of the ALP and HCCP that simply do not exist at law.

Comparison

105. Even if this Court finds that section 15 is engaged, it is clearly not violated by Robinson's decision to deny the Applicant's funding request. Equality is an inherently comparative concept. In order to determine whether the decision not to grant the Applicants' additional funding request was discriminatory, this Court must first determine whether that decision

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[71] *Auton, supra,* para 38.

[72] *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games,* 2009 BCCA 522, paras. 63-65; *Affidavit of Pictou*, exh. B and C, Applicants' Record, v. 1, tab 3, pp. 63-64, 129.

created a distinction between Jeremy and others like him, based on an enumerated or analogous ground. In *Withler*, the Supreme Court of Canada held:

> The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).[73]

106. The Supreme Court of Canada has adopted a flexible approach to comparisons, which does not require the comparator to be an exact mirror of the claimant except for the enumerated ground. In *Withler*, the Court stated:

> It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.[74]

107. However, it is still necessary to establish an appropriate comparison in order to determine whether a distinction has been made that adversely affects the Applicants. In the present case, Applicants argue that the reason that Jeremy receives lesser benefits is because he is an aboriginal person with complex disabilities living on a reserve, where services are funded by Canada and not the province of Nova Scotia.

108. This is an inappropriate comparison on which to found a claim under the equality provisions of the *Charter*. Section 15 of the *Charter* does not permit comparisons between what one level of government provides a group of people with what another government provides another group.

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[73] *Withler, supra,* para 62.
[74] *Withler supra, para 63.*

109. This is not a case where, as in appropriate *Charter* comparisons, a single government actor or action differentiates between two different categories of benefit recipient. Rather, the Applicants are seeking to draw a comparison between themselves and every other Nova Scotian by claiming the right to a benefit that does not exist for anyone else – the ability to equalize or even increase certain social assistance benefits provided by different levels of government to different categories of recipient.

110. Differences between benefit schemes, including eligibility requirements and the content of the benefits provided will differ between governments. This is an inherent part of the reality that Canada is a federal state. In *Constitutional Law of Canada*, Professor Peter Hogg has noted that as a minimum, federalism must preclude an argument that involves comparing the law of one province with the law of another province: federalism can be an exception to the guarantee of equality, to a limited extent.[75]

111. This is applicable as it relates to distinctions drawn between the federal and provincial governments as well. Simply because the federal government provides a different benefit scheme which may or may not result in different degrees of benefits than those received by programs implemented by a provincial government, does not and cannot engage the *Charter*. To do so would override the burdens imposed by federalism. Section 15 of the *Charter* does not create a guarantee of identical legislation across Canada – to read it so would use section 15 to nullify the effect of s.91 and 92 of the *Constitution Act, 1867,* a proposition that has been rejected by the Supreme Court of Canada.[76]

112. At its root, this case is about the Applicants, who receive funding from the federal government on a community needs based block contribution basis, attempting to compare themselves with people who receive funding from a provincial government on an individual application basis. Such a comparison cannot engage the equality provisions of the *Charter*.

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[75] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (loose-leaf), Vol. 2 (Toronto: Carswell, 2007), at pp. 55-59 and 55-83).

[76] See *Gosselin v. Quebec*, [2005] 1 S.C.R. 238, at para. 14.

113. In the alternative and in any event, even if this Court were to hold that such a cross-jurisdictional comparison could be made (which is denied), it is clear that there is no distinction drawn between Jeremy and any other child with similar needs with whom he would be compared. If the Court engages in a comparison across jurisdictions, an appropriate comparison in this case would be a person (whether aboriginal or otherwise) with similar disabilities and care needs that is not living on a reserve, and therefore would receive benefits provided by the province. This comparison must take into account that the funding mechanisms provided by the federal and provincial governments are different: the federal funding is through a community based block agreement, while the provincial funding is provided on an individualized basis. The underlying comparison of importance is not how the funding is provided, but whether an aboriginal person on reserve receives reasonably comparable in home care to a person with similar needs, who does not.

<u>There is no distinction between Jeremy and a child living off reserve</u>

114. It is apparent that neither Robinson's decision, nor the structure of the ALP and HCCP funding itself creates any distinction between Jeremy and a person with similar disabilities and care needs that is not living on a reserve. Under the ALP and the HCCP, Canada has elected to provide funding for services that are reasonably comparable with people living off reserve so that no such distinction will be created.

115. In that regard, Robinson was required to verify the provincial normative standard of care, and did so by <u>specifically</u> enquiring with the provincial authorities whether, if Jeremy was living off reserve, funding for his care needs could be provided in-home. The evidence was unequivocal that no such services would be available for Jeremy if he lived off reserve. The province was clear that if Jeremy lived off reserve the supported option would be institutionalization, and that the maximum funding he could receive for in-home care if he remained in the home was $2,200 per month.

116. Children who have similar care needs and their families living off reserve in Nova Scotia are faced with a choice regarding their care needs. The Province of Nova Scotia will provide for in-home care needs up to a certain maximum in funding. If the person's care needs exceed that level, the family must make a choice: receive the maximum amount of

benefit provided and live in-home with that amount, or have all their needs met in an institution. Jeremy's family had that same choice. They cannot claim he is treated differently because he is denied a benefit that no other person in Nova Scotia would ever receive.

117. Jeremy was treated equally with any other child with his needs living in the province of Nova Scotia. In the absence of any distinction, there can be no discrimination and section 15(1) of the *Charter* is not violated.

Jeremy is not disadvantaged compared to a child living off reserve

118. The Band Council can provide funding for his in-home care beyond the eligible funding from the ALP and the HCCP. Because the Pictou Landing First Nation operates under a block contribution agreement, if it runs a surplus in any transferable area of its budget, it can choose to direct additional funding to Jeremy's in-home care over and above what he is eligible to receive.

119. This benefit is not available to children with similar disabilities and care needs who reside off reserve. Because services provided by the province are funded on an individual basis rather than in a community block funding arrangement, a child whose services are provided by the Province of Nova Scotia is only provided services by the Department of Community Services and the Department of Health and Wellness in the amounts and for services provided for by those programs. These children cannot rely on the general consolidated revenue fund of the province to "boost" their in-home care benefits.

120. The province was clear that, had Jeremy been a child living off the reserve, the benefits he received would not be available in-home and the supported option would have been institutionalization.

121. In that regard, Jeremy has already benefitted from this arrangement because from May 2010 until the present time, he has and is receiving a greater degree of in-home care, funded by the Band Council, than any child not living on reserve could possibly receive.

122. To the extent that the funding arrangement for in-home care services on reserve creates any distinction at all between children who live on reserve and those who do not, it advantages those children who live on reserve. Even if section 15 permitted cross-jurisdictional comparisons, which it does not, the Applicants cannot meet the second branch of the section 15 analysis.

Canada has no legal obligation to provide additional funding

123. As stated previously, the essence of the dispute does not concern discrimination. The Band Council has brought forward one isolated case where, on their own initiative, they decided to provide services in excess of the provincial normative standard of care – services that, according to Philppa Pictou's own written submissions to Robinson, are "beyond any program responsibilities".[77] What they are attempting to do is use their own actions to require the federal government to provide additional funding beyond the levels it has determined according to its own policy and applicable provincial laws.

124. The Court should decline to grant such relief in this case. As the record indicates, the funding formulas are not provided on an individual basis but are community-based.[78] There is no evidence that the current funding does not meet the Band's needs. At the same time, the evidence of both Robinson and Ross indicate that there are mechanisms to review and, if necessary, recalculate funding levels for the community as a whole if such inadequacies are demonstrated.[79]

125. The Band Council decided not to engage those mechanisms, although Pictou acknowledged they could try to obtain increased funding by changing their current agreements with Canada.[80] Instead, they seek court intervention in order to obtain a remedy that they could and should have pursued using the above mechanisms available to

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[77] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, p. 64.
[78] *Affidavit of Ross*, para. 9, Respondent's Record, v. 2, tab 2, p. 427; *Affidavit of Robinson*, para. 15, Respondent's Record, v. 1, tab 1 p. 5.
[79] *Cross-examination of Robinson*, Applicants' Record, v. 3, tab 7, pp. 677-681; *Cross-examination of Ross*, Applicants' Record, v. 3, tab 8, p. 772.
[80] *Affidavit of Robinson*, exh. A, Respondent's Record, v. 1, tab 1, p. 62.

them. Canada repeats its submissions at paragraphs 68 and 69 and says this Honourable Court should decline to grant the relief sought here.

Conclusion

126. The decision of a Band Council to provide in-home health services to one of its members beyond the normative provincial standard of care does not legally oblige Canada to fund such services.

127. Jeremy Meawasige receives the same financial support that anyone in his position would receive if they lived off reserve. He is not disadvantaged or treated differently than anyone else with similar challenges. His family and his community must simply make a choice: Jeremy can continue to receive the maximum eligible benefits for in-home care under the ALP and the HCCP; or, he can receive 24 hour per day care in a long-term residential facility. This is the same choice faced by any child with similar needs in Nova Scotia.

128. The Band Council cannot, by their own choices regarding funding allocation, require the federal government to pay for a benefit that is not provided by the law and is not provided to anyone else in the province of Nova Scotia. It was not unreasonable for Robinson to conclude that Jordan's Principle was not engaged and she had no authority to provide funding for in-home care for Jeremy beyond what was available under the ALP or HCCP. That decision does not discriminate against Jeremy or anyone else.

PART IV – ORDER SOUGHT

129. The Respondent requests that this application be dismissed with costs.

DATED at the Halifax Regional Municipality this 20th day of January, 2012.

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Per.

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