Federal Court  Cour fédérale

Date: 20170519

Docket: T-492-16

Citation: 2017 FC 515

Ottawa, Ontario, May 19, 2017

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

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

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

Intervener

JUDGMENT AND REASONS

[1] 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.

[2] On a personal level, this case is about Josey's mother, Stacey Shiner. She felt her daughter's pain. She consulted two dentists. She fought her way through four levels of federal bureaucracy. Not satisfied, she came to this Court. Given the government's refusal, with the help of the Treaty 8 First Nations of Alberta, she still managed to have Josey fitted with braces at a cost of $6,000.00. Josey doesn't hurt anymore.

[3] Unfortunately, I must dismiss this judicial review. I find the decision that Josey's condition was not covered by the policy was reasonable, and that the procedure followed was fair.

Josey's Condition

[4] According to the evidence of Ms. Shiner, Josey's mother, which evidence was not contradicted, Josey suffered pain due to a severely blocked lower second premolar lingual. She had to take over-the-counter pain medicine on a daily basis to relieve the aching pain to her lower gums and the bottom of her mouth caused by overcrowding. She frequently had headaches. As a result of her malocclusion, meaning imperfect positioning of the teeth when the jaws are closed, she had clicking in her jaw, tooth-wear, and avoided chewing certain foods.

[5] Ms. Shiner consulted two dentists. She thought the first was somewhat vague and so then consulted Dr. Mark Antosz. It was his recommendation that Josey required orthodontic treatment. He wrote:

> She has crowding, and overbite and her midline is off centre. These problems are only to get worse as she gets older and can cause her problems when she reaches adulthood.
>
> These problems can be treatment [sic] now quite easily with appliances and braces. However, if left much longer she will require jaw surgery in conjunction with braces in order to correct this problem. This is a functional problem with her bite not a cosmetic problem.

[6] Josey had crowding, retroclined maxillary and mandibular incisors, mandibular midline deviated left, a deep overbite and constricted arches with space loss on the lower left and soft tissue injury, as well as an impacted tooth. Dr. Antosz was of the view that Josey had a severe and functionally handicapping malocclusion within the meaning of the Program's criteria.

[7] The initial application for coverage was dismissed. There are three subsequent levels of appeal. These appeals are *de novo* in that new evidence may be led and the decision is a fresh one based on all the evidence at hand. It is not an appeal limited to whether the earlier decision was reasonable. Each time, the advice of a different orthodontist is sought.

[8] The decision under judicial review is the third level appeal decision rendered by Scott Doidge, Director General, Non-Insured Health Benefits Program, First Nations and Inuit Health Branch, Health Canada. He stated that to be eligible for the Non-Insured Health Benefits Program, a claimant must have a severe and functionally handicapping malocclusion as set out in

the Program's published clinical criteria. Based on the documentation submitted, it was determined that Josey's condition fell short, and thus the request for coverage was denied.

Health Services in Canada

[9] As a general proposition, health care falls within provincial jurisdiction. However, the federal government contributes to the cost of providing health services through the *Canada Health Act*. It is a requirement of that funding that each province, and the three territories, provides or "insures" minimum health care. However, provinces may provide additional benefits so that coverage is not quite uniform across the country. As mentioned above, Josey's condition was not covered by the Alberta Plan.

[10] The federal government may provide direct health care services in matters which fall within its jurisdiction as set out in s 91 of the *Constitution Act, 1867*. For instance, one such class of subject is the "militia, military and naval service, and defence". Members of the Armed Forces are excluded from provincial health coverage but are provided with a federal plan in lieu thereof (*Canada (Attorney General) v Buffet*, 2007 FC 1061, 319 FTR 119).

[11] The federal government also has jurisdiction over, to use the words of the *Constitution*, "Indians, and lands reserved for the Indians". In furtherance thereof, Canada has put in place a Non-Insured Health Benefits Program that provides coverage to registered First Nations and recognised Inuit. In reality, it is an insurance policy, only better. There are no premiums, no deductibles, and no co-pay. The program provides coverage for a limited range of medically necessary goods and services not otherwise available. Apart from dental benefits, benefits

include eye and vision care, drugs, mental health consultations and the like. The Program is neither an Act of Parliament, nor a regulation thereunder.

[12] The dental services which are covered are drawn from various Canadian dental association guides and cover a wide range of services not otherwise provided. Coverage includes such routine matters as the filling of cavities and teeth cleaning. When it comes to more complex matters, predetermination is required.

[13] The program provides coverage for a limited range of orthodontic services:

> […] when there is a severe and functionally handicapping malocclusion, as set out by the established clinical criteria, which are a combination of marked skeletal and dental discrepancies.

[14] The clinical criteria are as follows:

> To be eligible for coverage for orthodontic treatment, client's condition must have a combination of marked skeletal and dental discrepancies such as, but not limited to: (my emphasis)
>
> - o Crossbite associated with a significant and clear functional shift;
> - o Severe overbite with evident soft tissue injury (> 2/3 overlap with impinging of the palate);
> - o Severe open bite (≥ 5mm)
> - o Severe overjet, positive (≥ 7 mm) or negative (≥ -4mm).

[15] Despite Dr. Antosz' opinion, Mr. Doidge preferred the wealth of opinion offered him by four other orthodontists. I do not find it was unreasonable for him to decide that Josey's

condition did not fall within the criteria. In his decision, he specifically referred to the "such as, but not limited to" part of the criteria.

Issues

[16] It is common ground that the standard of review is reasonableness. The applicant and the intervener submit that the decision was unreasonable because it was limited to the four bullets set out in the criteria. Consideration should have been given to matters:

(a) "such as" Josey's impacted tooth;

(b) "such as" soft tissue injury;

(c) "such as" possible jaw surgery in the future;

(d) "such as" Josey's best interests as a child, particularly her pain and suffering; and

(e) "such as" her equality rights as a member of a First Nation.

[17] The applicant adds that the decision was procedurally unfair because not one of the orthodontists retained by Health Canada examined Josey. No deference is owed to the decision-maker on this point.

Discussion

[18] The federal government was under no legal obligation to enact a law, regulation or policy providing benefits to members of First Nations not covered, in this case, by the Alberta Health Care Insurance Plan, or by any other provincial health plan. However, having enacted that policy, it must be properly interpreted and applied (*Laurentides Motels Ltd v Ville du Lac Beauport*, [1989] 1 SCR 705).

[19] The first step is to interpret the actual language used in the policy with respect to orthodontic treatment. There must be "marked skeletal and dental discrepancies". These discrepancies are measurable. There followed four examples, all of which were measurable, although there may be a difference of opinion as to what qualifies as "severe". This brings into play the limited class or *ejusdem generis* principle of interpretation. In *Sullivan on the Construction of Statutes*, 6th ed, Ruth Sullivan quotes Mr. Justice La Forest as saying in *National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 SCR 1029, at p 1040:

> Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it.

[20] There were two physical abnormalities: an impacted tooth and possible soft tissue injury. The impacted tooth was duly noted. There is no evidence to support a misinterpretation of the clinical criteria. At the second level appeal process, Dr. Clarke, an independent orthodontist retained by Health Canada, suggested that thought could be given to extracting that tooth.

[21] As to soft tissue injury, before a decision was reached at the third level appeal, the Honourable Charlie Angus MP raised Josey's condition during question period in the House of Commons. This led to a telephone conference between Dr. Jonathan Britton, a certified orthodontic specialist, and Health Canada officials on the one hand, and Dr. Antosz on the other. Dr. Britton had reviewed Josey's level one appeal. Mr. Doidge did not participate in that phone call. However, he was provided with notes thereof which indicated that Josey was not in fact suffering from soft tissue injury.

[22] As to possible jaw surgery in the future, the policy does not have an "ounce of prevention is worth a pound of cure" aspect to it, as it relates to malocclusion. If so, Dr. Antosz' suggestion would have had to have been critiqued.

[23] This leaves us with Josey's pain and suffering. The "such as" skeletal and dental discrepancies either do not take account of pain in accordance with the *ejusdem generis* rule or some pain and suffering is inherent in crossbite, overbite, evident soft tissue injury and overjet. In any event, Mr. Doidge testified that if he had received professional advice that remedial action was a medical necessity, he would have considered whether an exception should be made.

[24] The allegation that Mr. Doidge only limited his analysis to the four listed criteria is, accordingly, incorrect. The presumption that he considered the entire record, including the impacted tooth and soft tissue injury, has not been rebutted. There is nothing in the record which leads away from his decision and which therefore would have had to have been explained (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425).

[25] The applicant submits that there should be better criteria to assess whether a claimant suffers from a functionally handicapping malocclusion, referring to criteria being drafted by the American Association of Orthodontics. It's not for me to say. That is a matter for others.

Best Interests of the Child

[26] Both the applicant and the intervener submit that Mr. Doidge unreasonably failed to consider Joey's best interests. Reference was made to the *Convention on the Rights of the Child*, and to *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 which dealt with a seventeen-year-old refugee claimant. The intervenor points out that First Nations children are overrepresented in the child welfare system and refers to a recent decision of the Canadian Human Rights Tribunal which held that it is unlawful and discriminatory for the Canadian government to engage in conduct that adversely impacts First Nations children by acting in such a manner as to leave them open to be removed from their families and homes (see *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). Reference was also made to the summary of the final report of the Truth and Reconciliation Commission of Canada.

[27] With the greatest respect, this case has nothing to do with the European settlement of North America. It has nothing to do with residential schools. It has nothing to do with "scooping" First Nations children from their homes. This case has to do with Josey's teeth; no more, no less.

[28] Hypothetical scenarios wherein Josey could have been taken away from her mother for failing to care for her and that the child welfare authorities in Alberta might have caused braces to be fitted are distasteful in the extreme. The federal plan comes into play because Josey was not covered by the Alberta Health Insurance Plan, plain and simple.

[29] Josey is not a candidate for the child welfare system. In fact, we should all be so lucky as to have a mother who stands up for her children as Ms. Shiner has!

[30] The *Convention*, although ratified by Canada, is not, in itself, part of Canadian domestic law, as it has not been enacted by Parliament (see *Chung Tchi Cheung v The King*, [1939] AC 160; *Reference as to Powers to Levy Rates on Foreign Legations*, [1943] SCR 208; and *Adventurer Owner Ltd v Canada*, 2017 FC 105). Nevertheless, international law may serve as a guideline as to the content of our own domestic law (see *Pembina County Water Resource District v. Manitoba (Government)*, 2017 FCA 92).

[31] 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.

[32] 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.

Procedural Fairness

[33] It is suggested that the procedure followed was unfair because Josey was not physically examined by any orthodontist retained by Health Canada. This is a lawyer's point, raised after the fact. There was no request, while the process was ongoing, that Josey be examined. There is no evidence whatsoever to suggest that the documentation submitted, such as diagnostic orthodontic models, a cephalometric radiograph and tracing, a panoramic radiograph, intraoral

and extraoral photographs, a complete orthodontic treatment plan, as well as information gathered during the teleconference with Dr. Antosz, was insufficient to allow a decision to be made. If indeed this was the applicant's assertion, it should have been raised a lot sooner.

The Intervention

[34] In addition to the best interests of the child, the intervener raised s 15 of the *Canadian Charter of Rights and Freedoms*, Schedule B to the *Constitution Act, 1982* which provides:

Equality before and under law and equal protection and benefit of law	**Égalité devant la loi, égalité de bénéfice et protection égale de la loi**
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.	15 (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
Affirmative action programs	**Programme de promotion sociale**
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de

leur âge ou de leurs déficiences mentales ou physiques.

[35] Based on *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395, it was submitted that the decision-maker had to balance the infringement of a Charter right with the statutory purposes at hand.

[36] In my opinion, there is absolutely no breach of an equality right here. Indeed, if anything, the orthodontic policy, and the Non-Insured Health Benefits Program as a whole, is an "affirmative action program" within the meaning of s 15(2) of the Charter.

[37] This is not to say, and indeed the Attorney General of Canada so acknowledges, that there are not historical disadvantages faced by First Nations children, colonial roots underpinning much of that disadvantage, and the overrepresentation of First Nations children in foster care. These are indeed important and serious matters, but they are beyond the scope of this judicial review.

[38] As stated at the onset, my duty is to rule on a disagreement between Ms. Shiner, as Josey's mother, and Health Canada. Anything I would say that is not necessary to resolve that matter would not only be obiter but would also be unhelpful in such future consideration, as there may be, of issues which are not strictly before me.

Costs

[39] The Attorney General does not seek costs, and none shall be awarded. The First Nations Child and Family Caring Society of Canada was granted leave to intervene on the basis that it would neither seek, nor be saddled with, costs. So it shall be.

[40] Finally, the style of cause is amended to add First Nations Child and Family Caring Society of Canada as intervener.

JUDGMENT

For reasons given, this application for judicial review is dismissed. There shall be no order as to costs. The style of cause is amended to add First Nations Child and Family Caring Society of Canada as intervener.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-492-16
STYLE OF CAUSE:	SHINER v ATTORNEY GENERAL OF CANADA AND FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
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