Federal Court of Appeal  Cour d'appel fédérale

Date: 20150123

Docket: A-410-13

Citation: 2015 FCA 18

CORAM: **NADON J.A.**
TRUDEL J.A.
BOIVIN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

CHIEF JESSE JOHN SIMON AND COUNCILLORS FOSTER NOWLEN AUGUSTINE, STEPHEN PETER AUGUSTINE, ROBERT LEO FRANCIS, MARY LAURA LEVI, ROBERT LLOYD LEVY, JOSEPH DWAYNE MILLIEA, JOSEPH JAMES LUCKIE, TYRONE MILLIER, MARY-JANE MILLIER, JOSEPH DARRELL SIMON, ARREN JAMES SOCK, JONATHAN CRAIG SOCK AND MARVIN JOSEPH SOCK ON BEHALF OF THEMSELVES AND THE MEMBERS OF THE ELSIPOGTOG FIRST NATION, AND ON BEHALF OF THE MI'GMAG FIRST NATIONS OF NEW BRUNSWICK, AND ON BEHALF OF THE MEMBERS OF MI'GMAG FIRST NATIONS OF NEW BRUNSWICK

CHIEF STEWART PAUL AND COUNCILORS GERALD BEAR, DARRAH BEAVER, EDWIN BERNARD, ELDON BERNARD, BRENDA HAFKE-PERLEY, TIM NICHOLAS, KIM PERLEY, ROSS PERLEY, THERESA (HART) PERLEY, TINA PERLEY-MARTIN, PAUL PYRES AND LAURA (LARA) SAPPIER ON BEHALF OF THEMSELVES AND THE MEMBERS OF TOBIQUE FIRST NATION AND ON BEHALF OF THE MALISEET FIRST NATIONS OF KINGSCLEAR, OROMOCTO AND WOODSTOCK AND THE MEMBERS OF THE MALISEET FIRST NATIONS OF KINGSCLEAR, OROMOCTO AND WOODSTOCK

CHIEF LEROY DENNY AND COUNCILORS BERTRAM (MUIN) BERNARD, LEON CHARLES DENNY, OLIVER JR. (SAPPY) DENNY, BARRY C. FRANCIS, GERALD ROBERT FRANCIS, ELDON GOULD, ALLAN WAYNE JEDDORE, DEREK ROBERT JOHNSON, KIMBERLY ANN MARSHALL, BRENDON JOSEPH POULETTE, JOHN FRANK TONEY AND CHARLES BLAISE YOUNG ON BEHALF OF THEMSELVES AND THE MEMBERS OF ESKASONI FIRST NATION AND ON BEHALF OF THE MI'KMAQ FIRST NATIONS OF ACADIA, ANNAPOLIS VALLEY, BEAR RIVER, GLOOSCAP, MILLBROOK, PAQTNKEK, PICTOU LANDING, POTLOTEK, SHUBENACADIE, WAGMATCOOK AND WAYCOBAH AND THE MEMBERS OF MI'KMAQ FIRST NATIONS OF ACADIA, ANNAPOLIS VALLEY, BEAR RIVER, GLOOSCAP, MILLBROOK, PAQTNKEK, PICTOU LANDING, POTLOTEK, SHUBENACADIE, WAGMATCOOK AND WAYCOBAH

CHIEF BRIAN FRANCIS AND COUNCILORS DANNY LEVI AND DAREN KNOCKWOOD ON BEHALF OF THEMSELVES AND THE MEMBERS OF ABEGWEIT FIRST NATIONS

Respondents

and

MADAWASKA FIRST NATION, ST. MARY'S FIRST NATION, MEMBERTOU FIRST NATION AND LENNOX ISLAND FIRST NATION

Respondents

Heard at Halifax, Nova Scotia, on September 8, 2014.

Judgment delivered at Ottawa, Ontario, on January 23, 2015.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: TRUDEL J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] Before us is an appeal brought by the Attorney General of Canada (the "Attorney General") which seeks to set aside a decision made by Scott J. (as he then was) of the Federal Court (the "Judge") dated November 4, 2013, *Chief Jesse John Simon et al. v. Canada*

("*Attorney General*"), 2013 FC 1117, [2013] F.C.J. No. 1203 (the "Federal Court Decision"), wherein he allowed the application for judicial review brought by the members of a number of First Nations from the Maritimes in their personal and representative capacities (the "Respondents").

[2] The issues in this appeal concern the eligibility criteria for income assistance on First Nations reserves in Atlantic Canada. By their judicial review application, the Respondents challenged the decision of the Minister of Aboriginal Affairs and Northern Development Canada (the "Minister") to ensure compliance with the provincial rates and eligibility criteria in accordance with a 1990 Memorandum of Understanding (the "1990 MOU") with the Treasury Board of Canada ("Treasury Board"). In oral submissions before this Court, the parties agreed that there is no dispute with regard to the rates of income assistance to be implemented for on reserve First Nations individuals. Therefore, this matter is not dealt with in these reasons.

[3] It is important to clarify the nature of the issue and the decision under review in this case as it appears that there was some confusion on this point in the Court below. At one point, the Judge described the decision which the Respondents sought to judicially review as, "changing the 'reasonably comparable' approach to the assistance rates and eligibility criteria in the Income Assistance Program to apply a requirement of strict compliance with provincial assistance rates and eligibility criteria[...]" (Federal Court Decision, at para. 1). However, later the Judge described the decision to be reviewed in a different way, specifically, "that the action being challenged in this application is the Minister's decision to interpret the [1990 MOU] narrowly

and enforce a mirror-like adherence to provincial rates and eligibility criteria" (Federal Court Decision, at para. 84).

[4] The Judge's understanding of the Minister's decision can be contrasted to that of our Court and that of the Federal Court in determining the Respondents' application for an interlocutory injunction prohibiting the implementation of a rule of strict compliance with provincial rates and standards for income assistance of First Nations reserves in the Maritimes until a decision had been rendered in the underlying judicial review application before the Federal Court which was the subject matter of the decision made by the Judge.

[5] Turning to those decisions, Madam Justice Simpson of the Federal Court characterized the Minister's decision as an "initiative to enforce the [1964 Treasury Board] Directive" (*Chief Jesse John Simon et al. v. Canada (Attorney General)*, 2012 FC 387, [2012] F.C.J. No. 446, at paragraph 9). On appeal to this Court, our former colleague Mainville J.A. characterized the Minister's decision as one requiring strict compliance with the provincial eligibility criteria and assistance rates (*Chief Jesse John Simon et al. v. Canada (Attorney General)*, 2012 FCA 312, [2012] F.C.J. 1538 at paragraph 9).

[6] The Attorney General, both in his Memorandum of Fact and Law and orally before us, describes the Minister's decision as one seeking to implement an updated regional social assistance manual, ultimately by way of a new national social assistance manual, which affirms the requirement that First Nations band councils adopt provincial rates and eligibility criteria in the administration of income assistance on reserves in accordance with various agreements

between the predecessor to the Department of Aboriginal Affairs and Northern Development Canada ("Aboriginal Affairs") and Treasury Board (see Attorney General's Memorandum of Fact and Law, at paragraph 32). The Attorney General's characterization differs from that of the Judge in that it does not refer to the Minister's interpretation of the 1990 MOU, but rather suggests that the Minister is simply enforcing pre-existing obligations under agreements with the Treasury Board.

[7] The Respondents do not agree with the Attorney General's understanding of the decision under review. They frame the decision as a change in the Minister's interpretation of his obligations under the 1990 MOU. They point to various Aboriginal Affairs manuals and internal documents to support their argument that the Minister used to interpret the 1990 MOU such that income assistance standards and rates had to be "reasonably comparable" to provincial standards and rates. However, under the Minister's new interpretation, the Income Assistance Program must mirror provincial eligibility criteria and rates. In other words, the Respondents say that the Minister's decision goes beyond the adoption of a new manual and represents a substantive change to the Income Assistance Program.

[8] In my view, the decision under review is the Minister's decision to enforce strict compliance with provincial eligibility criteria and rates in accordance with pre-existing obligations Aboriginal Affairs owed to the Treasury Board. Therefore, the real issue is whether this decision to enforce compliance was reasonable. In my view, it was.

I. Background and Context

[9] As there is no specific federal legislation which regulates essential services and programs to First Nations, Canada has provided some of these services and programs through directives from the Treasury Board. On the basis of these directives, Aboriginal Affairs has developed policies for the delivery of the services and programs.

[10] In 1964, the Treasury Board approved a proposal from Aboriginal Affairs requesting the adoption of provincial or local municipal standards and procedures for the administration of relief assistance for First Nations. More particularly, the proposal made by Aboriginal Affairs concerned the adoption of provincial or local municipal welfare rates and regulations for on reserve First Nations individuals. The culmination of this negotiation was a 1964 Treasury Board Directive enabling Aboriginal Affairs to adopt provincial or local municipal standards and procedures for relief assistance (the "1964 Directive").

[11] Commencing in 1967, Aboriginal Affairs implemented the Treasury Board's directive through the development of regional manuals and until the late seventies it administered the provision of essential services to First Nations directly. However, in the early eighties, Aboriginal Affairs entered into agreements with First Nations allowing them to administer the Income Assistance Program to their members with a view of encouraging greater self-administration by First Nations.

[12] These agreements were funded by Aboriginal Affairs on an actual expense basis. In that context, the role of Aboriginal Affairs was to ensure, through regular accountability and

compliance reviews, as well as audits, that the appropriate eligibility criteria and rates were being applied by the First Nations.

[13] In August, 1990, the Treasury Board entered into a MOU with Aboriginal Affairs entitled the "Increased Ministerial Authority and Accountability Memorandum of Understanding between DIAND [Aboriginal Affairs] and Treasury Board." In replacing the 1964 Directive, the 1990 MOU consolidated existing authorities for all education and social development programs, including the conditions upon which Aboriginal Affairs would obtain funding for income assistance for on–reserve First Nations individuals.

[14] The following provisions of the 1990 MOU are of particular interest to this appeal.

> I) **Social Assistance**. The department funds social assistance in accordance with the service standard and method of program delivery as outlined below:
>
> – **Service Standard**. For each province and the Yukon Territory, the Social Assistance Program must adopt the qualifying requirements and assistance schedules of the general assistance program of the province or territory. The level of benefits provided are adjusted to reflect the services and benefits provided to Indian and Inuit people through other federal programs, e.g. the Indian Housing Program and Non-insured Health Benefits.
>
> [...]
>
> Funding for social assistance services is provided by the department for the following items, but not limited to:
>
> – **Financial Assistance**. Funds for income support payments for eligible recipients consistent with the assistance schedules of the provincial/territorial general assistance program; and
>
> [...]

ANNEX 1: Program Performance Frameworks

The enhanced ministerial accountability in the area of program delivery that is being provided through the IMAA Memorandum of Understanding consists of program performance frameworks for four key areas of the department and an outline of the proposed development of performance frameworks for the other significant areas of the department.

The four completed program performance frameworks are for the following activities:

- Education
- Social Development
- Capital Management
- Administration

[...]

Social Development: Program Performance Framework

General: The Social Development activity consists of three major programs: Social assistance, Indian child and family services, and adult care.

Social Assistance: The objective of the social assistance program is to ensure that eligible Indians receive the same level of social assistance benefits as other provincial residents and to reduce Indian dependence on social assistance to the extent possible.

Sub-Objectives	Results	Indicators	Targets Reporting
Same level of benefits	Fair treatment of eligible on-reserve Indians who will receive benefits comparable to those available to other Canadians	Percentage of social assistance funds under band or departmental administration that have been correctly administered	Develop systems and targets for AMR June 1991. Report against targets June 1992 and subsequent years.
Reduced dependency rate	Greater self-reliance	Percentage of social assistance budget transferred under existing authorities to provide training and development to eligible individuals	This indicator will not be targeted because it is subject to many uncontrollable influences. The indicator will be reported in all AMRs.

Evaluations: An evaluation of the longer term impacts of the social assistance transfer authority will be reported on in the AMR June 1993 or in a previous AMR.

[Table altered from original and emphasis added]

[15] The initial 1990 MOU was valid for the period of April 1, 1990 to March 31, 1993 and was renewed by further MOUs on the same terms insofar as is relevant here.

[16] The purpose of the 1990 MOU was to set out the parameters within which Aboriginal Affairs can spend the funds appropriated to it. For example, like the 1964 Directive that it replaced, the 1990 MOU required Aboriginal Affairs to adopt the qualifying requirements and assistance schedules of the welfare programs of the provinces in which the First Nations are situated. This requirement has remained constant since the initial 1990 MOU came into effect on

April 1, 1990. In other words, the rates and eligibility criteria for assistance to First Nations were to be the same as those in force in the provinces where the First Nations were situated.

[17] Because the *Indian Act*, R.S.C. 1985, c. I-5 does not provide for a proper framework regulating the devolution of program administration to First Nations, Aboriginal Affairs used funding arrangements of two types, namely Comprehensive Funding Agreements (CFAs) and Alternative Funding Agreements (AFAs), i.e. multi-year agreements pursuant to which First Nations received a block of funding. Under an AFA, First Nations are able to transfer any unused or surplus funds from one program to another approved program whereas under a CFA, they are obliged to return any surplus funds to Aboriginal Affairs.

[18] For social services and all programs provided and delivered by Aboriginal Affairs under the types of funding agreements described above, First Nations must follow policies and guidelines elaborated by Aboriginal Affairs, including national and regional manuals setting out the overall objectives and requirements for the social programs delivered on reserves and in particular for the Income Assistance Program. The various manuals prepared by Aboriginal Affairs were meant as interpretative aids for the standards and objectives contained in the 1990 MOU.

[19] More particularly, commencing in 1991, Aboriginal Affairs has provided to First Nations regional and national program manuals which identify its policy priorities and set the rates and eligibility criteria for income assistance on reserves. In some cases, First Nations have developed their own policy manuals.

[20] In 1991, Aboriginal Affairs prepared a regional manual referred to as the New Brunswick Social Assistance Manual (the "1991 Manual"). The relevant part of this manual provided as follows:

CHAPTER I –

OBJECTIVES, PRINCIPLES & STANDARDS

1.1 Introduction

[...]

> The DIAND [Aboriginal Affairs] Social Assistance Program adopts and follows rates and conditions established by the New Brunswick Provincial Government and adheres to a framework of national DIAND [Aboriginal Affairs] standards. This enables Indian individuals and families to receive benefits which compare to non-Indians living in similar circumstances.
>
> [Emphasis added]

[21] A draft of the 1991 Manual was sent to First Nations in the affected region prior to its implementation by Aboriginal Affairs. The Elsipogtog First Nation responded to the draft manual with comments concerning Aboriginal Affair's decision to adopt and follow the rates and conditions in force in the province of New Brunswick.

[22] Pursuant to the 1991 Manual, an applicant will be eligible if he or she can demonstrate residency on the reserve and the need for income assistance. Need is determined by applying the budget deficit principle and using a budget deficit calculation. If there is no budget deficit, there is no need and, as a result, no eligibility.

[23] In 1994, the Elsipogtog First Nation developed its own social assistance manual which provided for eligibility criteria that differed from the 1991 manual (the "Elsipogtog Manual").

The Elsipogtog Manual has been used by this First Nation since at least 1999. Under this manual, eligibility does not depend on a financial budget deficit but depends on the occurrence of a number of situations namely: certified medical condition; a lack of required training or skills which prevents an applicant from accessing either work or training programs; a lack of available employment or supportive training programs; employment income which falls below a computed budget allowance level; or the single parent status of the applicant.

[24] The evidence is clear that, on a number of occasions, Aboriginal Affairs indicated to the Elsipogtog First Nation that there was a problem with its manual. The Judge, at paragraphs 16 and 90 of the Federal Court Decision, pointed out that the Elsipogtog Manual and the 1991 Manual contained different criteria for determining eligibility for income assistance on reserves.

[25] Although the 1991 Manual provides for compliance reviews, no such reviews were conducted by Aboriginal Affairs between 1991 and 2008. However, a compliance review conducted in 2010 of a five percent sample of income assistance recipients on the Elsipogtog First Nation reserve revealed that 21 recipients, who were employees of the First Nation, received income assistance without any reduction of benefits to take into account their employment income, as would be the case for income assistance recipients living outside of a reserve.

[26] Commencing in 2004, Aboriginal Affairs made attempts to update its regional and national income assistance manuals. First, it developed a draft national manual entitled "Income Assistance-National Standards and Guidelines Manual" (dated February 16, 2004; the "2004

Draft National Manual"), the goal of which was to establish national standards to guide the development of regional policies. The 2004 Draft National Manual provided the following under the heading "Program Principles":

> 1.5.1 INAC [Aboriginal Affairs] has adopted the following general principles in its approach to social policy:
>
> – delivery of income assistance at standards reasonably comparable to the reference province or territory of residence.
>
> – recipients of income assistance must be ordinarily resident on reserve (for more information, see *Ordinarily Resident on Reserve* in *2 – Program Components*)
>
> – First Nations administering income assistance are required to adhere to a common set of accountability requirements that address areas of high risk through transparency, disclosure, and redress policies
>
> 1.5.2 The Income Assistance Program is only one of a number of income support programs that are available to First Nations. It must be administered in the context of the total range of programs and services related to economic development, health, social services, education, and employment. The Income Assistance Program should be considered the last rather than the first resource to meet the income support needs of First Nations.
>
> [Emphasis added]

[27] Then, under the heading of "Program Objectives", the 2004 Draft National Manual provided, at Section 1.6.1, that all income assistance programs must be delivered at standards reasonably comparable to the reference province or territory of residence.

[28] Following on the 2004 Draft National Manual, Aboriginal Affairs developed a national manual entitled "Income Assistance Program – National Manual" (dated May, 2005; the "2005 National Manual"). The relevant portions of this manual provided as follows:

0.4 Relationship to Regional Manuals

0.4.1 This manual provides a national framework for the Income Assistance Program. It covers the broad standards and guidelines within which each INAC [Aboriginal Affairs] regional program must operate. However, because the program is guided by provincial or territorial rates and eligibility criteria, there are significant differences in how the program operates in each region. Each region's implementation of provincial or territorial standards and practices is subject to the availability of resources.

0.4.2 This manual sets broad national standards and guidelines while also providing sufficient flexibility to accommodate most regional variations and practices. Regions will need to develop their own regional manuals to interpret these national standards and guidelines within the context of their province or territory. Much of the procedural detail that regional staff will need to manage their programs will be found in the regional manuals rather than in this national manual.

[Emphasis added]

[29] The 2005 National Manual provided, at Section 1.4.1, under the section entitled "Program Principles" that:

1.4.1 INAC [Aboriginal Affairs] has adopted the following general principles in its approach to income assistance policy:

- delivery of income assistance at standards reasonably comparable to the reference province or territory of residence

[Emphasis added]

[30] Lastly, Section 1.6.5 is also of interest. This portion provided:

> ***Provinces and Territories***
>
> 1.6.5 Although the provincial and territorial governments have no direct roles or responsibilities in the implementation of the federal Income Assistance Program, the terms and conditions from Treasury Board state that INAC [Aboriginal Affairs] must deliver the Income Assistance Program at standards reasonably comparable to the host province or territory. As a result, these standards are taken from the provincial or territorial income assistance legislation.
>
> [Emphasis added]

[31] Having released a new national manual, Aboriginal Affairs began efforts to update its regional manuals. Therefore, in 2011, the Minister advised New Brunswick First Nations of Aboriginal Affair's intent to implement an updated Atlantic Region Social Assistance Manual and presented them with a draft version of it (the "2011 Draft Atlantic Manual"). This draft manual, which, as it turns out, was never implemented, simply continued the 1991 Manual's requirement that the rates and eligibility criteria of the province were to be adopted and/or followed. Again, it is worthwhile referring to some of its relevant portions. Namely, Section 1 thereof, under the heading "Main Objective and Program Description", provided that:

> The objectives of the programs are to provide funding so that:
>
> [...]
>
> - Programs will be delivered at standards reasonably comparable to those of the reference province/territory of residence.
>
> [Emphasis added]

[32] The 2011 Draft Atlantic Manual went on to state that, "[t]he Income Assistance program on a reserve is administered using the same rate structure and eligibility criteria as the parallel program administered by the province for off reserve residents" (Emphasis added). Further,

Section 4 of this draft provided, under the heading "Basic Needs", that, "Basic Needs rates should follow the standards and rate schedules of the province" (Emphasis added). As noted above, the 2011 Draft Atlantic Manual was never implemented. However, it would eventually be replaced by a revised national manual (the "2012 National Manual").

[33] Prior to implementation of the 2012 National Manual, Aboriginal Affairs met, during the month of May, 2011, with First Nations to answer questions and provide training on the then-planned implementation of the 2011 Draft Atlantic Manual. Further, in September, 2011, New Brunswick First Nations were invited by Aboriginal Affairs to a training session led by Aboriginal Affairs staff in conjunction with an expert on New Brunswick's provincial income assistance policy where a presentation was made concerning the 2011 Draft Atlantic Manual.

[34] However, the chiefs of the First Nations represented at the training session did not react positively to the 2011 Draft Atlantic Manual and to Aboriginal Affair's presentation. They issued a resolution expressing their displeasure with the 2011 Draft Atlantic Manual but agreed to establish a joint steering committee and working subcommittee with Aboriginal Affairs to discuss a number of issues pertaining to the implementation of the 2011 Draft Atlantic Manual.

[35] In order to provide the steering committee with time to do its work, the intended implementation date of the 2011 Draft Atlantic Manual was pushed back from November 1, 2011 to April 1, 2012. Between October, 2011 and January, 2012, one-on-one training sessions were conducted by Aboriginal Affairs staff and a provincial expert for First Nations income assistance administrators.

[36] In January 2012, Aboriginal Affairs gave notice that the 2011 Draft Atlantic Manual would not be implemented and that it would, instead, be replaced by the 2012 National Manual. Under the heading "Main Objective and Program Description", the 2012 National Manual provided for the following:

> 1.1 The purpose of the IA [Income Assistance] program, as a last means, is to:
>
> - support the basic and special needs of indigent residents of Indian reserves and their dependents; and
> - support access to services to help clients transition to and remain in the workforce.
>
> 1.2 The objective of the program is to provide funding so that:
>
> - basic needs for food, clothing and shelter are met;
> - employment and pre-employment support is provided;
> - special needs allowances are available for goods and services essential to the physical or social well-being of a client;
> - programs will be delivered at standards reasonably comparable to those of the reference province/territory of residence; and
> - amounts payable for income assistance will be equivalent to the rates of the reference province or territory.
>
> [Emphasis added]

[37] Further, Section 2.2, under the heading "Type and Nature of Eligible Expenditures", provided that:

> 2.2 Amounts payable for IA [Income Assistance] shall be equivalent to the rates of the reference province or territory. AANDC's [Aboriginal Affairs and Northern Development Canada] contribution will be adjusted to reflect the provision of related federal or provincial/territorial benefits to avoid funding duplication.
>
> [Emphasis added]

[38] The 2012 National Manual further provided, at Section 3.0, under the heading "Eligibility Requirements for Clients", that:

> 3.1 For purposes of confirming the eligibility for IA [Income Assistance] benefits, the client must demonstrate that he/she is:
>
> - ordinarily resident on-reserve;
> - eligible for basic or special financial assistance (as defined by the province or territory of residence, and confirmed by an assessment covering employability, family composition and age, and financial resources available to the household); and
> - able to demonstrate a requirement for IA [Income Assistance] programs and services support and demonstrate they have no other source of funding to meet basic needs.
>
> [Emphasis added]

[39] The 2012 National Manual is now in force in Canada except in the provinces of New Brunswick, Nova Scotia and Prince Edward Island (by reason of the interlocutory injunction obtained by the Respondents from the Federal Court).

[40] On October 7, 2011 (amended February, 2012), representatives of the Elsipogtog First Nation and other New Brunswick Mi'gmag First Nations commenced a judicial review application of the Minister's decision to "unilaterally impose provincial social assistance rates and standards on First Nations governments administering social assistance to First Nations people living on Indian Act reserves in New Brunswick." By motion in the Federal Court, the remaining First Nations in Nova Scotia, New Brunswick and Prince Edward Island were added as parties to the judicial review as applicants and as respondents in the case of those who refused to participate.

II. The Federal Court Decision

[41] The Judge first reviewed the relevant facts and, in so doing, reviewed the 1964 Directive, the 1990 MOU and the various social assistance manuals developed by Aboriginal Affairs. He then turned to the issues before him which he defined as follows:

> 1. Does the Minister's decision to have rates and eligibility requirements applicable to funding of income assistance on reserves mirror those provided by the province conform to the Treasury Board's MOU [1990 MOU]?
>
> 2. Did the Minister breach the applicants' [Respondents on appeal] right to procedural fairness?

[42] He began his discussion of the issues with a consideration of the applicable standard of review. He concluded that he had the authority to review the Minister's decision which he characterized as being one interpreting, "the meaning of the words 'adopt', 'comparable', and 'consistent with', in the [1990 MOU], as meaning to mirror provincial rates" (Federal Court Decision, at paragraph 39). He concluded that the decision ought to be reviewed against a standard of reasonableness while, with respect to the second issue of procedural fairness, he held that the applicable standard of review was correctness.

[43] He reviewed at length the parties' submissions, from paragraphs 41 to 75 of the Federal Court Decision, and then turned to a preliminary issue, which he entitled, "What is the Decision under review?" At paragraph 84 of the Federal Court Decision, he answered that question by saying that the decision challenged by the Respondents was, "the Minister's decision to interpret the [1990 MOU] narrowly and enforce a mirror-like adherence to provincial rates and eligibility criteria".

[44] In the following paragraphs of the Federal Court Decision, the Judge began his discussion of the issues. However, before addressing the issues, he stated that the Minister was bound by "public policy to provide funding for income assistance programs on reserves since 1964" (Federal Court Decision, at paragraph 85), adding that the Minister had broad discretion in the implementation of the policy. The Judge then stated that however the Minister exercised his discretion, he had to ensure that he remained "within the confines and parameters of the policy's terms and ensure that the objectives set by the Treasury Board will be attained" (Federal Court decision, paragraph 86). This led him to asking the question, which is at the heart of this appeal, namely whether the Minister's decision to enforce strict compliance with provincial eligibility criteria and rates was in accordance with the 1990 MOU and, hence, provided for the delivery of income assistance to First Nations at the same level as that provided to Canadians living off reserves. His answer to the question, found at paragraph 87 of the Federal Court decision, was that in applying provincial standards to the provision of income assistance to First Nations, the Minister would be delivering a level of social assistance benefits comparable to that provided to other provincial residents.

[45] Turning to the issues, the Judge first rejected the argument made by the Respondents that the manuals' reference to provincial standards constituted a delegation of the Minister's power and was, therefore, unconstitutional. In his view, the reference to provincial standards constituted, "an exercise of federal jurisdiction to fund welfare on reserves on a basis that recipients will be treated on a comparable basis to welfare recipients living off reserve in the same province," and concluded that, "[w]hile it [the reference to provincial standards] imports eligibility standards and rates set by the provinces, it does not purport to abdicate the federal

government's jurisdiction over Indians under the *Constitution Act*, 1867" (Federal Court Decision, at paragraph 88).

[46] The Judge also rejected the Respondents' submission that the Minister had fettered his discretion because the 2012 National Manual retained the reasonably comparable criteria.

[47] The Judge then held that the eligibility requirements found in the Elsipogtog Manual differed from the eligibility requirements of the province of New Brunswick. He found that the 2012 National Manual was an attempt to realign the eligibility requirements for applicants living on reserve with the eligibility requirements of the provinces in which they lived. In so finding, he noted that the language of the 2012 National Manual was contradictory in that it required, on the one hand, strict adherence to the eligibility requirements of the provinces and, on the other hand, it provided that programs were to be delivered at standards reasonably comparable to those of the reference province or territory of residence. This led the Judge to state that, "[t]he question is whether the mirroring of provincial rates and eligibility criteria will result in recipients on reserve receiving less financial assistance than individuals eligible under the provincial welfare systems" (Federal Court Decision, at paragraph 90).

[48] Following a review of the evidence (Federal Court Decision, at paragraphs 91-105) the Judge opined that the significance of the change in policy by Aboriginal Affairs, i.e. from a reasonably comparable standard to one of strict adherence to provincial rates and conditions, would be in its effect on the eligibility of applicants, adding that the Respondents had not provided much in the way of evidence other than with respect to the provinces of Prince Edward

Island and Nova Scotia. In the former, the Respondents "[allege] that 35 percent of recipients would no longer be entitled to benefits," whereas with regard to the latter province, the First Nations applicants alleged that, "youth eligibility […] will now be subject to a higher age threshold of 19 years of age" (Federal Court Decision, at paragraph 106).

[49] The Judge then asked himself the following question: "is the decision to apply strictly provincial criteria in conformity with the Treasury Board's Memorandum?" (Federal Court Decision, at paragraph 112). The Judge gave an affirmative answer to his question and explained his reasoning as follows (Federal Court Decision, at paragraphs 113-115):

> [113] The Court finds it is nonetheless consistent with the Treasury Board's memorandum for the same reasons as above, in that the wording in the Manual reflects the intent and objective found in the original [1990 MOU]. It is not reasonable, however, because there is no data on the number of recipients who will loose [sic] their benefits as a result of the application of provincial eligibility criteria. The Minister failed to obtain data on the impact the strict application of provincial eligibility criteria would have on recipients, this omission renders his decision unreasonable (see *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 91).
>
> [114] The Court also notes that the language used in the [2012 National Manual] departs somewhat from the wording in the [1990 MOU] as it relates to standards applicable to programs in that the concept of reasonable comparability has been retained. The Applicants [Respondents on appeal] should consequently benefit from this change in that the standard applicable to the programs need only be reasonably comparable.
>
> [115] Having found that the application of provincial eligibility criteria and rates conforms to the Treasury Board Memorandum there remains only one issue to address and that is consultation.

[50] Thus, notwithstanding that the Judge found that the Minister's decision to apply provincial rates and eligibility criteria to the provision of income assistance to on reserve First Nations individuals was entirely consistent with the 1964 Directive and the 1990 MOU, the

Judge concluded that the decision was unreasonable because the Minister had failed, in effect, to assess the impact of his decision on First Nation recipients of income assistance. Consequently, the Judge turned his attention to the Respondents' submissions that they had not been accorded procedural fairness and were owed a duty of meaningful consultation.

[51] First, the Judge made it clear that he did not agree with the Respondents' contention that the honour of the crown was at stake in the present matter. In his view, the Respondents had not persuaded him that an Aboriginal right or Aboriginal title existed that could be adversely affected by the Minister's decision. However, he agreed with the Respondents that they were entitled, in the circumstances, to procedural fairness.

[52] He then indicated that he would review, "the course of events," (Federal Court Decision, at paragraph 124) so as to determine whether a duty of fairness was owed to the Respondents and whether Aboriginal Affairs had an obligation to consult with them and whether they had been properly consulted with respect to the Minister's decision.

[53] The Judge's review of the, "course of events," led him to observe that the First Nations had indeed been consulted with respect to the implementation of the 2012 National Manual, but that they had chosen to abandon the process of consultation. However, in his view, such consultation had not been meaningful with regard to, "the merits of a strict application of provincial rates and eligibility criteria before it was developed and implemented," (Federal Court Decision, at paragraph 143). In other words, Aboriginal Affairs' consultation with the First Nations had not been about discussing whether the 2012 National Manual should be

implemented in its present form, but rather about First Nations having to adapt to the new regime.

[54] Having concluded that the Respondents were owed a duty of consultation and that the consultation that had taken place had not been meaningful, the question to be answered pertained to the extent of the obligation to consult. He referred to the factors set out by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 and reviewed these factors against the facts and context of the matter before him. His analysis of these factors led him to conclude, at paragraph 153 of the Federal Court Decision, that the Respondents were owed, "greater procedural protection in the form of consultations before the [Minister's] [d]ecision was taken," adding that the First Nations had not been given the opportunity of putting forward their views regarding the Minister's decision.

[55] Consequently, in his view, the Minister had breached his duty of procedural fairness in that he should have engaged in substantive discussions with the Respondents with regard to the impact of the strict application of provincial rates and eligibility criteria on First Nations recipients especially in the context of Aboriginal Affairs' policy to grant greater autonomy to First Nations in the management of their affairs (Federal Court Decision, at paragraph 155).

III. Analysis

[56] In my view, two issues need to be determined. First, what is the applicable standard of review? Second, did the Judge err in concluding that the First Nations had to be consulted prior to the Minister deciding that the eligibility criteria for income assistance on First Nations

reserves were to be identical to the criteria adopted by the province wherein the First Nations were situated?

A. *What Is The Standard Of Review?*

[57] The approach taken by this Court in deciding an appeal of a decision on an application for judicial review is to determine "whether a Court below identified the appropriate standard of review and applied it correctly" (Canada Revenue Agency v. Telfer, 2009 FCA 23, [2009] F.C.J. No. 71 at para. 18). As noted above, the Judge held that the Minister's decision was reviewable on the standard of reasonableness, while the issue of procedural fairness attracted a standard of correctness.

[58] The Attorney General agrees with the Judge's conclusion that the proper standard for reviewing the Minister's decision is reasonableness as the Minister was interpreting a document – the 1990 MOU – with which he has special familiarity. Similarly, the Attorney General agrees that procedural fairness is reviewed on a standard of correctness. As to the Respondents, they make no submissions on the standard of review.

[59] I agree that the Minister's decision should be reviewed on a standard of reasonableness. The Supreme Court has held that a Minister's interpretation of his own statute is owed deference and thus attracts a standard of reasonableness (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] S.C.J. No. 36 at para 50; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] S.C.J. No. 40 at para. 55). As the Judge emphasizes, the 1990 MOU circumscribes the Minister's powers in administering the Income Assistance Program and thus he has special familiarity with its terms.

[60] With respect to the issue of procedural fairness, there can be no doubt that such issue must be reviewed on a standard of correctness (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at paras. 79 and 83).

B. *Did The Judge Err In Concluding That The First Nations Had To Be Consulted Prior To The Minister Deciding That The Eligibility Criteria For Income Assistance On First Nations Reserves Were To Be Identical To The Criteria Adopted By The Province Wherein The First Nations Were Situated?*

[61] In order to determine whether the Judge erred in regard to this issue, I need to address both the 1990 MOU and the various Aboriginal Affairs manuals.

(1) The 1990 MOU

[62] In my view, there is no ambiguity in regard to what the 1990 MOU directs the Minister to do. It is to provide income assistance to First Nations on the same conditions as the conditions in force in the province where the First Nation reserve is situated.

[63] The proposal from Aboriginal Affairs, adopted by the Treasury Board on July 16, 1964 in the form of the 1964 Directive, put into motion the process which now prevails for the provision of income assistance to First Nations. This proposal and the resultant 1964 Directive is unequivocal, i.e. it sought the adoption of provincial standards and procedures for the administration of relief assistance for on reserve Aboriginals.

[64] The 1964 Directive led to the 1990 MOU which provided in no uncertain terms that the Social Assistance Program had to adopt the, "qualifying requirements and assistance schedules," of the assistance programs of the province in which the First Nation was situated. The 1990

MOU also provided that the funds that will be disbursed for the assistance program were to be, "consistent," with the provinces' general assistance programs.

[65] In Annex 1 to the 1990 MOU, entitled "Program Performance Framework", we find wording which states that the goal of the Social Assistance Program, "is to ensure that eligible Indians receive the same level of social assistance benefits as other provincial residents [...]." Under the title "Sub-objectives", Annex 1 then provides that Aboriginals are to receive the, "same level of benefits," as other Canadians and that, pursuant to this sub-objective, it is expected that, "fair treatment of eligible on-reserve Indians," will result as eligible on reserve Aboriginals will, "receive benefits comparable to those available to other Canadians." The words "benefits comparable" in this context can only mean that First Nations individuals will be treated the same way that other Canadians are treated. It cannot mean and does not mean that First Nations will receive benefits that are different from those received by all Canadians.

[66] Consequently, with respect, the 1990 MOU is clear and unambiguous. Aboriginal Affairs is to provide income assistance to First Nations on terms, i.e. rates and qualifying conditions, that are in force in the provinces in which the First Nations are situated. Those were the Minister's marching orders from the Treasury Board and have remained unchanged in the intervening years. As a result, Aboriginal Affairs had to dispense income assistance funds to First Nations on the same conditions as those which applied to other Canadians in the provinces.

[67] This is the conclusion which the Judge arrived at when he held that the Minister's decision to apply, "strictly provincial criteria in conformity with the Treasury Board's

memorandum," was consistent with the 1990 MOU (Federal Court Decision, at paragraph 112). In other words, the Minister's attempt to ensure that income assistance funds are to be distributed in accordance with provincial conditions, i.e. rates and qualifying requirements, respects the 1964 Directive and the 1990 MOU. In that respect, it is worth referring to paragraph 35 of the Federal Court Decision where the Judge says:

> [35] According to the Respondent [the Attorney General], the [1990 MOU] "was an exercise of [its] legal authority over the financial management of the funds [pursuant to the *Financial Administration Act*, R.S.C. 1985, c. F-11] and constituted a constraint on the Minister's authority to spend such funds" […]. The Court agrees. Given that Parliament has refrained from legislating in the area of income assistance to First Nations, the Treasury Board's Directive, [the 1990 MOU] and Policy on Transfer Payments are the only documents which express Parliament's purpose or goal in providing funds for income assistance on reserves. In that sense, they represent a kind of legislative decision-making that binds the Minister's discretion over the expenditure of funds authorized for that purpose. <u>They are, in this Court's view more than simple guidelines for the expenditure of funds and the efficient management of the income assistance program since they also set out criteria against which these funds can be expended and results to be attained</u> (see [1990 MOU]).
>
> [Emphasis added]

(2) The Aboriginal Affairs Manuals

[68] I now turn to the various manuals developed by Aboriginal Affairs to determine whether the Minister has been consistent in his approach to the provision of income assistance to First Nations. The Attorney General says that he has while the Respondents say that he has not.

[69] First, there is the 1991 Manual which was developed for First Nations in New Brunswick. This manual made it clear that Aboriginal Affairs intended to, "adopt and follow the rates and conditions established by the New Brunswick Provincial Government," adding that Aboriginals should receive, "benefits which compare to non-Indians living in similar circumstances." Thus,

in context, the words, "benefits which compare to non-Indians," necessarily meant that Aboriginals will receive the same benefits as those received by non-Aboriginals.

[70] Next is the 2004 Draft National Manual. This draft manual provided that income assistance shall be delivered to Aboriginals at standards, "reasonably comparable to the reference province or territory of residence". It also provided that income assistance programs must be delivered, "at standards reasonably comparable to the reference province or territory of residence." With respect, I see nothing in this wording which would justify or allow a departure from the 1990 MOU's explicit direction that the rates and qualifying requirements must be those of the province in which First Nations are situated. In other words, the expression "reasonably comparable" can only mean that Aboriginals shall be treated in the same way as non-Aboriginals in respect of the provision of income assistance.

[71] I now turn to the 2005 National Manual which began by clearly stating that the Income Assistance Program, "is guided by provincial or territorial rates and eligibility criteria." It then stated, as in the case of the 2004 Draft National Manual, that the delivery of income assistance to Aboriginals will be done on, "standards reasonably comparable to the reference province or territory of residence." It then pointed out, at section 1.6.5, that the 1990 MOU directs the provision of income assistance, "at standards reasonably comparable to the host province or territory," and that, therefore, the applicable standards should be drawn from the relevant provincial or territorial income assistance legislation.

[72] Again, with respect, there cannot be much doubt that Aboriginal Affairs is indicating through the 2005 National Manual that the rates and qualifying conditions for the provision of income assistance to First Nations are those of the province where the First Nation is situated. I can see nothing in the text of this manual which can lead to a different view of the matter.

[73] Before moving on to the 2011 Draft Atlantic Manual, I should point out that the National Income Assistance Manuals for 2006 and 2007 adopted the same language as the 2004 Draft National Manual and the 2005 National Manuals to which I have just referred.

[74] The 2011 Draft Atlantic Manual, like previous manuals, provides for the delivery of programs, "at standards reasonably comparable to those of the reference province/territory of residence," and that the Income Assistance Program for on reserve Aboriginals will be administered, "using the same rate structure and eligibility criteria as the parallel program administered by the province for off reserve residents." On this wording, it cannot seriously be argued, in my view, that Aboriginal Affairs intended to depart from the 1990 MOU's explicit direction that income assistance to on reserve First Nations individuals must be delivered on the same conditions as those prevailing in the provinces. In support of this finding, Section 4 of the 2011 Draft Atlantic Manual, under the heading of "Basic Needs," provided that, "Basic Needs rates should follow the standards and rates schedules of the province".

[75] The last manual to be dealt with is the 2012 National Manual which, like the other manuals, provides for the delivery of programs "at standards reasonably comparable to those of the reference province/territory of residence," adding that the amounts which shall be paid for

income assistance to Indians "will be equivalent to the rates of the reference province or territory." The exact same wording is repeated later in the 2012 National Manual under the heading "Type and Nature of Eligible Expenditures." Then, under the heading "Eligibility Requirements for Clients", the manual indicates that First Nation clients must be eligible for "...financial assistance (as defined by the province or territory of residence […])".

[76] Again, the 2012 National Manual leaves the reader in no doubt as to its purpose. Namely, that the 1990 MOU must be followed by Aboriginal Affairs and by those administering the Income Assistance Program.

[77] With great respect for the contrary view, I can see no indication in any of the manuals under consideration that the Minister and Aboriginal Affairs intended to depart from the direction given by the Treasury Board in the form of the 1990 MOU that income assistance to First Nations must be provided on the same conditions as those applicable in the provinces. In any event, this is how the Minister saw it in enacting the last manual which attempts to enforce the application of provincial rates and eligibility criteria to the provision of income assistance to First Nations. Under a standard of reasonableness, that decision is surely not unreasonable.

(3) The Judge's View Of The Matter

[78] The Judge concluded that the decision challenged by the Respondents was in accordance with the 1964 Directive and the 1990 MOU in that the 2012 National Manual, "reflects the intent and objective found in the original [1990 MOU]" (Federal Court Decision, at paragraph 113). The Judge nonetheless concluded that the Minister's decision was unreasonable because of its impact on a number of recipients of income assistance who would lose their benefits by reason of

the application of provincial rates and eligibility criteria (Federal Court decision, at paragraph 113). The Judge's rationale resulted from a number of findings he made throughout the Federal Court decision.

[79] First, at paragraphs 83 and 84 of the Federal Court Decision, the Judge stated that although the Minister's decision was limited by the terms and conditions of the 1964 Directive and the 1990 MOU, the decision actually challenged by the Respondents was the Minister's decision to interpret the 1990 MOU narrowly with the result that the provision of income assistance to on reserve First Nations individuals was to be made on the basis of provincial rates and eligibility criteria.

[80] Second, at paragraph 86 of the Federal Court decision, the Judge held that the Minister had broad discretion in the application of the policy enacted by the Treasury Board and that in the exercise of his discretion, the Minister was bound to remain within the parameters of the Treasury Board's policy and to ensure that the objectives of the Treasury Board's policy were met.

[81] Third, at paragraphs 86 and 87 of the Federal Court Decision, the Judge posed the question as to whether the Minister's decision was in accordance with the 1990 MOU's principles. He answered this in the affirmative and concluded that by making income assistance subject to the provincial rates and conditions, the Minister would meet the object of providing income assistance to First Nations at a level comparable to that of all other Canadians.

[82] Fourth, the Judge was of the view that the 2012 National Manual constituted a change of policy on the part of the Minister. The Judge contrasted the wording of the 1991 Manual and the 2004 Draft National Manual with that of the 2011 Draft Atlantic Manual and the 2012 National Manual and found that the wording of the earlier manuals was to the effect that income assistance to First Nations was to be provided at standards "reasonably comparable" to those applied in the provinces. However, the 2011 Draft Atlantic Manual's wording was to the effect that it, "mandated strict adherence or mirror-like compliance with provincial rates and standards" (Federal Court Decision, at paragraph 20), whereas the 2012 National Manual mandated the strict application of provincial rates but, in a contradictory fashion, seemed to both retain and dispense with the reasonably comparable standard with respect to eligibility (Federal Court Decision, at paragraph 22).

[83] It was this view of the evolution of the manuals that led the Judge to conclude, at paragraph 105 of the Federal Court Decision, that the Minister's interpretation of the 1990 MOU as reflected in the 2012 National Manual constituted a change of policy. This change of policy, however, was, in the Judge's view, in compliance with the 1990 MOU which dictated that First Nations recipients must receive the same benefits as other Canadians.

[84] Fifth, although the Judge found that the Minister's decision to mandate the application of provincial rates and eligibility criteria to the provision of income assistance to First Nations was in conformity with the 1990 MOU, he nevertheless found the Minister's decision unreasonable because the Minister had failed to adequately assess the impact of his "change of policy" upon those who had previously been entitled to receive income assistance.

[85] Thus, because of the Minister's decision to change his approach with regard to the provision of income assistance to First Nations, i.e. from standards reasonably comparable to those applied in the provinces to a strict application of provincial rates and conditions of eligibility, the Judge determined that the Respondents were entitled to procedural fairness.

(4) Discussion

[86] In my view, the Judge erred in a number of respects.

[87] I begin by saying that it is clear that the Minister has absolutely no discretion with respect to the application of the 1964 Directive and the 1990 MOU. These documents require that eligibility criteria for the provision of income assistance to on reserve First Nations was to be the same as the eligibility criteria for the provision of income assistance to Canadians living off reserve. The Minister had no choice but to ensure that the 1964 Directive and the 1990 MOU were implemented. In my view, the Minister clearly understood this when the manuals at issue were enacted. In other words, the Minister understood that strict adherence to provincial eligibility criteria was the norm which he had to apply.

[88] Consequently, the Judge was wrong when he stated, at paragraph 86 of the Federal Court Decision, that the Minister had broad discretion in the implementation of the 1964 Directive and the 1990 MOU. The Minister had no discretion with respect to the eligibility criteria to be applied to the provision of income assistance to on reserve First Nations.

[89] A second observation is that the manuals do not evidence a change of policy on the Minister's part. In that respect, I have already explained why I believe that the manuals, when

read in context, clearly implemented the direction from the 1964 Directive and the 1990 MOU to provide income assistance to First Nations on the basis of the eligibility criteria applicable in the relevant province. Thus, in my view, the Judge erred in finding that there was a change of policy on the Minister's part when the 2011 Draft Atlantic Manual and the 2012 National Manual were enacted. No change of policy occurred.

[90] The Judge also erred when he determined that the Respondents were entitled to procedural fairness in the way of consultation with regard to the merits of the Minister's decision to enforce a strict application of provincial rates and conditions of eligibility. I conclude in this manner for two reasons. First, because the manuals are consistent with the direction found in the 1964 Directive and the 1990 MOU which require that the provision of income assistance to First Nations be made on the basis of the eligibility criteria applicable in the provinces. The Minister has no discretion in this regard and therefore consultations on the merits are not warranted and would be fruitless. Second, because the manuals do not denote any change of policy on the Minister's part. Thus, in those circumstances, the Respondents were not entitled to any form of consultation on the merits.

[91] Before concluding, I wish to address one last point. The Respondents say that, irrespective of what the manuals said, Aboriginal Affairs interpreted and applied the 1990 MOU as if it required that rates and standards of eligibility for on reserve First Nations be "reasonably comparable" to provincial standards and rates. Without deciding this point, I will, for the discussion which follows, accept that that was the case.

[92] In my view, even if Aboriginal Affairs interpreted and applied the 1990 MOU in this manner, it does not change the result of this appeal. First, Aboriginal Affairs did not have a legal basis to interpret or apply the 1990 MOU in such a permissive manner since the Treasury Board had clearly indicated the manner in which income assistance to First Nations had to be provided. Consequently, with regard to the eligibility criteria, the Minister had no choice but to apply provincial standards and rates. Second, in such circumstances, the most that could be said is that the Respondents would have been entitled to a degree of procedural fairness in the form of the provision of formal notice of the Minister's intention to enforce strict compliance with provincial rates and eligibility criteria, the allowance of a transitional period for First Nations to comply with the strict approach and the provision of training to First Nations on the implementation of the 2012 National Manual. In my view, the Respondents were certainly not entitled to consultations on the "merits" of the Minister's decision to apply provincial standards and rates.

[93] In my opinion, by giving notice, time and training to First Nations to allow them to adapt their income assistance administration to the provincial eligibility criteria, the Minister met his duty of procedural fairness.

[94] In brief, at a meeting in May, 2011 with the Atlantic Policy Congress of First Nations Chiefs ("Atlantic Policy Congress"), Aboriginal Affairs gave notice that, as of November 1st, 2011, income assistance for on reserve First Nations individuals would have to be provided in strict compliance with provincial rates and eligibility criteria. As a result, some of the Respondents adopted a motion which opposed this alleged change in policy.

[95] In September, 2011 the Deputy Minister of Aboriginal Affairs met with some of the Respondents to discuss their concerns with regard to the provision of income assistance to First Nations. At the end of September, 2011, the 2011 Draft Atlantic Manual was presented by Aboriginal Affairs to the Atlantic Policy Congress and at the end of that month, Aboriginal Affairs hosted a session in Fredericton to inform the Respondents with regard to the application of provincial standards and rates. On September 29, 2011, the Atlantic Policy Congress passed a resolution in support of the Nova Scotia Chief's opposition to the implementation of the 2011 Draft Atlantic Manual and requested the creation of a joint working group on social assistance to discuss, *inter alia*, the proposed adoption of provincial rates and standards for income assistance. Further, a joint steering committee and working subcommittee was established by the Respondents, the Nova Scotia Chiefs, and Aboriginal Affairs to look at these issues.

[96] At the end of October, 2011, this committee process came to an end and the Minister delayed the planned implementation of the 2011 Draft Atlantic Manual from November 1, 2011 until at least the end of March, 2012. On December 20, 2011, the Minister wrote to the Atlantic Policy Congress asking it to participate in a working group which led to Aboriginal Affairs offering a two-day training session as well as one-on-one training sessions in New Brunswick concerning the proposed implementation. On December 28, 2011, the Minister advised the New Brunswick Chiefs by letter that the new implementation date was April 1, 2012 and invited them to make proposals for an alternative to the working group. This invitation was declined. Finally, in mid-February, 2012, a workshop pertaining to the implementation of provincial rates and standards was conducted by Aboriginal Affairs for First Nation social development administrators.

[97] On the above facts, I am satisfied that the duty of procedural fairness was met. In *Baker*, the Supreme Court articulated the elements of procedural fairness in the administrative law context. More particularly, the Court said at paragraph 28 of its reasons:

> […] The values underling the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional and social context of the decision.

[98] Thus, procedural fairness is premised on the principle that those involved in a process should be provided with an opportunity to fairly present their case. In *Baker*, the Supreme Court enumerated a non-exhaustive list of factors which were to be considered in determining whether the process at issue respected the duty of fairness. In establishing the list of factors, the Supreme Court made it clear that the duty of fairness was flexible and variable and depended, it goes without saying, on the decision maker's appreciation of the context of the particular statute and the particular rights affected by a decision. The factors enumerated by the Supreme Court are:

(1) the nature of the decision being made and the process followed in making it;

(2) the nature of the relevant statutory scheme;

(3) the importance of the decision to the individuals affected;

(4) the legitimate expectations of the individuals challenging the decision; and

(5) lastly, the decision maker's choice of procedure.

[99] Contrary to *Baker*, the case before us is not one of "participatory rights". If such rights did exist herein, Band Councils would be affected in their capacity as administrators of the Income Assistance Program. Individuals on reserves do not, in my respectful view, have any such rights. Of significance is the fact that the Minister's decision did not involve any hearing nor the determination of individual rights. The Minister's decision simply determined that provincial rates and standards would be enforced in regard to the provision of income assistance to First Nations. Also of significance, is the fact that the Minister's decision is, in effect, a reaffirmation of the 1964 Directive and the 1990 MOU, no more, no less.

[100] The Minister's decision will have no impact on the Respondents in their capacity as administrators of the Income Assistance Program other than the fact that they will have to adapt their administration so as to meet the eligibility criteria dictated by the 1990 MOU and by the Minister's decision. With regard to individual recipients of income assistance on reserves, the impact of the Minister's decision will be to render ineligible for income assistance, or a certain level of income assistance, those recipients who do not meet the eligibility criteria of the provinces. While somewhat significant, in my view, the level of procedural fairness discussed above (in the sense of provision of formal notice, transition time and training) suffices as the duty of fairness for those affected individuals. It is important to keep in mind the overall goal of the alleged change in policy, that on reserve First Nations individuals are to be treated in the same way as those Canadians living off reserve.

[101] It is worthwhile to repeat that, from the outset, the provision of income assistance to First Nations has been predicated on the premise that First Nations are to receive income assistance at rates and standards that are those of the province where the First Nation is situated. The Respondents in their capacity as administrators of the Income Assistance Program have the responsibility to provide income assistance to those who live on their territory in accordance with the conditions established by the Treasury Board in the 1990 MOU. The decision at issue simply reaffirms what has been a long standing requirement. In such circumstances, and for the reasons I have already indicated, if the Respondents were entitled to procedural fairness, they were entitled to notice, training and time so as to allow for their administration of the Income Assistance Program to be adapted or modified. In the context of the Baker factors, which I need not analyze in more detail, procedural fairness has been met. Contrary to what the Judge held, there is no basis whatsoever for an order to the effect that the Respondents must be consulted with regard to the "merits" of the Minister's decision.

IV. Conclusion

[102] For these reasons, I would allow the appeal with costs, I would set aside the judgment of the Federal Court dated November 4, 2013 and rendering the judgment which ought to have been rendered, I would dismiss the Respondents' judicial review application with costs.

"M Nadon"

J.A.

"I agree.
Johanne Trudel J.A."

"I agree.
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-410-13
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE SCOTT OF THE FEDERAL COURT DATED NOVEMBER 4, 2013, DOCKET NUMBER T-1649-11)	
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. CHIEF JESSE JOHN SIMON et al
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	SEPTEMBER 8, 2014
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	(TRUDEL, BOIVIN JJ.A.)
DATED:	JANUARY 23, 2015

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