Court File No.: T-791-14

FEDERAL COURT

BETWEEN:

THUNDERCHILD FIRST NATION as represented by its duly elected CHIEF AND COUNCIL

APPLICANT

-and-

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHER DEVELOPMENT CANADA (also known as the Minister of Aboriginal Affairs and Northern Development Canada)

RESPONDENTS

MEMORANDUM OF FACT AND LAW ON BEHALF OF THE APPLICANT

McKERCHER LLP

374 Third Avenue South
Saskatoon SK S7K 1M5
Telephone: (306) 653-2000
Fax: (306) 653-2669
Lawyer in Charge: Collin K. Hirschfeld

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MEMORANDUM OF FACT AND LAW ON BEHALF OF THE APPLICANT

I. INTRODUCTION

1. This application for judicial review is made under s. 18.1 of the Federal Courts Act and concerns the decision of the Minister of Indian Affairs and Northern Development Canada, as carried out by the Saskatchewan Regional Director General of Indian Affairs and Northern Development, to place the Applicant under third party management. This decision of the Minister of Indian Affairs and Northern Development was formally communicated to the Applicant in a written letter dated March 26, 2014. The Applicant now makes application for an Order in the nature of *certiori* quashing and setting

aside the aforesaid decision of the Minister of Indian Affairs and Northern Development Canada and a declaration that the aforesaid decision is illegal.

2. The grounds for this application are that the Minister of Indian Affairs and Northern Development Canada acted without jurisdiction, exceeded jurisdiction, refused to exercise its jurisdiction in a proper manner, acted contrary to law, failed to observe principles of natural justice, procedural fairness and other procedures that it was required by law to observe.

II. FACTS

3. Thunderchild First Nation ("Thunderchild") is a signatory to Treaty 6. Thunderchild has applied for judicial review is of a decision made by the Minister of Indian Affairs and Northern Development Canada ("INAC") to appoint a third party manager for Thunderchild. A third party manager, being Evan Schemenauer, CA Professional Corporation ("ESPC") has been in place since April 1, 2014. This is the first time that Thunderchild has been under third party management in its history.

THE 2013-2014 AGREEMENT

4. Thunderchild received the 2013-2014 proposed Aboriginal Recipient Funding Agreement in February of 2013. Thunderchild Chief and Council had significant concerns with the changes that were suggested to the agreement. Concerns included that changes were being made to the agreement unilaterally with no consultation with Thunderchild; the agreement was affording wider discretion to the Minister of INAC; questionable terminology was used; it included a consolidated audit; and the agreement proposed insufficient funding, which would have caused Thunderchild financial hardship and forced the administration to administer poverty. Further, providing inadequate levels of funding combined with indemnity on the part of AANDC results in a manifestly unfair situation for Thunderchild and its people in which Thunderchild is held accountable for AANDC's funding shortcomings. After meeting with INAC representatives, Chief and Council passed a Band Council Resolution on March 13, 2013 in order to express concerns and protect Thunderchild's rights.

5. On March 13, 2013, INAC and Chief and Council executed an amended 2013-2014 Funding Agreement that was to be effective March 15, 2013 to March 31, 2013 This Agreement was signed under protest and with a view to providing interim funding while INAC and Thunderchild worked through the impasse. Communications from INAC suggested that the negotiation process would begin earlier for the 2014 fiscal year to allow Thunderchild ample time to consult with its membership and conduct meaningful negotiation before signing.

6. Throughout the remainder of March, 2013, Thunderchild attempted correspondence with INAC. Thunderchild continued to express that it had signed the 2013 – 2014 agreement under duress and that it was not given enough time to properly and legally analyze the documents, arrange to have meaningful consultation with its citizens and with other First Nations, and correspond with INAC. Chief Delbert Wapass ("Chief Wapass"), on behalf of Thunderchild, advised INAC that Thunderchild would like to work with them on remedying this situation and preventing it from occurring again the following year.

THE 2014-2015 AGREEMENT

7. On February 21, 2014, the 2014-2015 Aboriginal Recipient Funding Agreement was supplied to Thunderchild. This gave Thunderchild and INAC only one month and one week to review, consult, negotiate, and execute a Funding Agreement prior to the end of fiscal year to ensure funding for April 1, 2014.

8. On March 4, 2014, Chief and Council met to discuss the new Funding Agreement and determined it was necessary to meet with the community at large. Chief and Council met with Elders and Community Members at large on March 6, 2014, following which Chief and Council passed a motion to not sign the 2014 Funding Agreement. This decision not to sign was made for a variety of reasons, including both the terms of the proposed agreement and the manner in which it was being imposed.

THE DECISION

9. Thunderchild and INAC met on March 11, 2014. Present were Chief Wapass and Carla Nokusis ("Ms. Nokusis") on behalf of Thunderchild; Anna Fontaine ("Ms.

Fontaine") and Dwayne Johns on behalf of INAC; and three representatives of Little Pine First Nation, being its Chief Wayne Semaganis, Jacob Pete, and Evan Schemenauer ("Mr. Schemenauer"). Two more INAC representatives, Corrine Ibister and Sandra Burns, were present via telephone. At this meeting, Ms. Fontaine of INAC mentioned a third party manager as a possible solution to the impasse. Ms. Nokusis of Thunderchild disputed this suggestion, indicating that to her understanding a third party manager was only available as a remedy to default under an agreement, which Thunderchild would not be a party to on April 1, 2014. Further, Thunderchild was not in default of its current funding agreement. Ms. Fontaine immediately agreed with Ms. Nokusis and re-stated that it would be an expert resource, and not a third party manager, that would be engaged with involvement of Thunderchild. Ms. Fontaine did not explain the difference between the two terms, other than to suggest that the expert resource was not a third party manager. A follow-up email on March 12th confirmed that Thunderchild would not be signing the proposed agreement.

10. Despite attempts at communication on Thunderchild's behalf, no updates were given until March 17th at which time Ms. Fontaine informed Thunderchild that they were in the process of engaging an expert resource. The tender process closed that same day. In fact, it was not an expert resource but a third party manager that was being hired.

11. Also on March 17th, Mr. Rob Harvey ("Mr. Harvey") of INAC contacted Thunderchild and stated that a third party manager was being retained. Thunderchild disputed this, as it was at odds with Ms. Fontaine's representations, but suggested that Sheila Sutherland, CFO of Thunderchild First Nation, be considered while working through the impasse. This suggestion was not pursued by INAC. Thunderchild was not involved in, nor aware of, the process to obtain a third party manager until March 17th, 2014, the same day the tender process closed.

12. On March 25, 2014, Thunderchild was informed by Mr. Harvey that ESPC had been appointed as Thunderchild's third party manager. Mr. Harvey explained the difference between a third party manager and expert resource. Again, this explanation was at

odds with Ms. Fontaine's representations and her affidavit evidence, which was eventually corrected during cross-examination on her affidavit.[1]

13. Ms. Fontaine, as explained in her affidavit and affirmed on cross-exmaination, was the individual Crown servant responsible for making the decision to appoint a third party manager for Thunderchild. She states that it was her perception that Thunderchild had gone into default, because she had "reached the conclusion that, unless a TPFAM [third party funding agreement manager] was appointed, the health, safety, or welfare of the people of the TFN [Thunderchild] would be placed at risk of being compromised from April 1, 2014 onwards."[2] Before making this determination, she "considered whether the TFN had the financial where-with-all to deliver the programs and services without the benefit of AANDC funding. Based on a review of the TFN consolidated audited financial statement for 2012-2014, [she] determined that this was not an option. TFN did not have enough 'own-source' revenue to deliver the programs and services."[3]

14. However, come April 1, 2014, Mr. Schemenauer was not properly set up to deliver the programs and services he was required to as third party manager. Instead, for a period of time after April 1, 2014, Thunderchild in fact delivered cheques and directly delivered the programs and services, later being reimbursed by Mr. Schemenauer.

15. As of the date of filing, Thunderchild is still under third party management and suffering the financial and reputational negative effects associated with this label.

III. ISSUES

A. Did the Minister acted without jurisdiction, exceed jurisdiction, refuse to exercise jurisdiction in a proper manner, or act contrary to law?

B. Did the Minister fail to observe the principles of natural justice, procedural fairness, or other procedure required by law to observe?

IV. STANDARD OF REVIEW

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[1] See page 136 of Cross-Examination on Affidavit of Anna Fontaine by Mr. Hirschefeld, Volume 1, held Tuesday, June 10, 2014.
[2] See paragraph 8 of the Affidavit of Anna Fontaine, sworn May 13, 2014.
[3] *Ibid.*

16. The standard of review for the Minister's decision that the THUNDERCHILD was in default is correctness.[4] The Minister's decision of what remedy to apply in the event of default is reviewable on the reasonableness standard.[5] The standard of review for breach of procedural fairness is correctness.[6]

V. LEGAL ARGUMENT

A. The Minister acted without jurisdiction, exceeded jurisdiction, refused to exercise jurisdiction in a proper manner, and acted contrary to law.

(i) The Minister erred in determining that there was a default. The Minister had no jurisdiction to make such a determination, and it was contrary to law.

17. The Minister unreasonably and incorrectly determined that Thunderchild was in default. This decision was unreasonable and incorrect because there was nothing to suggest that the health, safety, or wellbeing of Thunderchild or its members was in jeopardy.

18. Since the commencement of this litigation, the Ms. Anna Fontaine, an agent of the Crown, has expressed that her decision that Thunderchild was in default was made because in her opinion the health, safety, or wellbeing of Thunderchild members was at risk.[7] This opinion was unreasonable for the following factual reasons:

(a) Thunderchild has never failed to properly deliver programs and services to its members;

(b) Thunderchild has never failed to properly administer government funds;

(c) Thunderchild actually provided the programs and services from own-source revenue on April 1, 2014 when the third party management failed to do so;

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[4] See *Attawapiskat First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development),* 2012 FC 948 at para 63-67 [*Attawapiskat*].
[5] *Ibid* at para 68.
[6] *Nunavut Wildlife Management Board v. Canada (Minister of Fisheries and Oceans)*, 2009 FC 16, [2009] 1 C.N.L.R. 256 at para 61; See also *Tobique Indian Band v. Canada*, 2010 FC 67.
[7] See Affidavit of Anna Fontaine.

(d) Thunderchild has an active and engaged leadership that has demonstrated a high level of involvement and commitment in furthering its peoples' wellbeing and interests; and

(e) Thunderchild never, at any time, expressed or suggested that it would refuse to deliver programs and services to its people.

19. Further, there was no legal or policy basis upon which to make the determination that Thunderchild was in default. Since the commencement of this litigation, Thunderchild has been referred, for the first time, to an internal government policy entitled: "Default Prevention and Management Policy 2013."[8] According to the policy: "A default is specified in the funding agreement and may include...in the opinion of the department(s), the healthy, safety, or welfare of the Aboriginal community is at risk of being comprised."

20. Another internal policy, "Directive 210 – Third Party Funding Agreement Management" states at paragraph 3.1 that the objective of the directive is "[t]o provide for the timely and effective remedy of high risk Defaults, where the Recipient is assessed by the Department as being unwilling and/or unable to rectify its default situation and only when deemed by the department to be necessary, by engaging a Third Party Funding Agreement Manager to administer the terms and conditions of the funding agreement signed by the Department…"[9] It is unreasonable for INAC to now assert that Thunderchild's failure to sign an agreement that its leadership sincerely felt was not in the best interests of its people and community to constitute a "high risk Default." While paragraph 4.0 goes on to cite "Third Party Funding Agreement Management as an administrative response appropriate in the event of high risk Defaults involving a First Nation, Tribal Council and Other Aboriginal Recipient providing essential services; or the funding agreement that would normally exist with these recipients is not in place", there is no policy, that Thunderchild is aware of, stating that the *only* remedy in the case of failure to sign a agreement is the implementation of a third party manager. Further, if this policy were to exist, it in itself would be unreasonable.

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[8] See Affidavit of Anna Fontaine at Exhibit "E".
[9] See Affidavit of Anna Fontaine at Exhibit "G".

21. Ms. Fontaine readily admitted that the policies in place and relied on had no application to the current situation. The policies were intended to deal with situations of financial mismanagement and that was not the case with Thunderchild. Ms. Fontaine conceded that none of the analyses set out in the policies were conducted with respect to Thunderchild.

22. It is clear that the policies relied on were not intended to deal with the situation currently before the Court. The intention behind the policies was to address situations dealing with financial mismanagement which clearly was not the situation with Thunderchild. The analyses under the policies were not applied by INAC here because they had no application to a situation like Thunderchild. Therefore, it was unreasonable and incorrect for INAC to rely on policies that clearly had no application to the situation before the Court.

23. Thunderchild simply was not party to a funding agreement and therefore the option of finding them in default was not available to the Minister. Further, even if the facts were different and Thunderchild was party to a funding agreement under which default was being contemplated, Thunderchild has, and continues to, adequately and appropriately provide for its community and properly administer funds and programs. It was the prospect of cutting funding off that was putting the community at risk of being in danger, which was INAC's decision.

(ii) The Minister was further unreasonable in implementing the remedy of third party management in the face of the alleged default.

24. If there was a default, which is expressly denied, the Minister had a choice of remedies and did not properly exercise its discretion when choosing the most severe and intrusive available remedy of third party management. As stated in *Attawapiskat, supra*, at paragraph 77:

> The reasonableness of the choices of remedies is conditioned by a reasonable and accurate appreciation of the facts and a consideration of the reasonable alternatives available.[10]

25. The choice of remedy made here by the Minister was unreasonable for the same factual reasons outlined above regarding the decision that there was default. Ms. Fontaine agreed that the appointment of a third party manager was the most extreme remedy and that it was a step not taken lightly. There clearly were other options available that seem to have been ignored or rejected. While the Minister now states that other alternatives to a third party manager were considered, these were not canvassed with Thunderchild. Further, it is unreasonable for INAC to suggest that the only way to deliver the funding required for Thunderchild to continue to care for its members was through a predefined, standard agreement, that was not open to discussion or negotiation. Finally, the appointment of a third party manager is a step reserved for the most serious of situations involving financial mismanagement, a important factor that was not present in the situation before the Court.

26. Attawapiskat First Nation ("AFN") faced a somewhat similar situation in 2011.[11] Due to the widely publicized housing crisis facing that community, the Minister determined that the health, safety, or welfare of the AFN members was at risk, and therefore the AFN was in default of their funding agreement.[12] On judicial review, the Federal Court seems to agree that the AFN was in default.[13] A very important distinguishing feature from AFN's situation to the one that Thunderchild currently faces is that AFN was party to a funding agreement under which they could be in default, whereas, as repeated above, Thunderchild was not.

27. Once the Federal Court found that the Minister was correct in determining that AFN was in default, the Court turned its mind to whether the remedy of implementing a third party manager was reasonable in the situation. The Court ultimately found that it was not a

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[10] *Attawapiskat, supra* note 4, at para 77.
[11] *Attawapiskat, supra* note 4, generally.
[12] *Ibid* at para 28.
[13] *Ibid* at paras 69-74.

reasonable decision.[14] In *Attawapiskat,* the major problem with the decision regarding remedy was that:

> [T]he ADM misunderstood the nature of the problem, choosing a financial tool in the form of a TPM to address what was really an operational problem. While the AFN were having trouble addressing the housing crisis, what they lacked was not the ability to manage their finances, in which case a TPM may have been an appropriate and reasonable remedy, but the material means to do so.[15]

28. Here, Thunderchild does not lack the ability to manage their own finances, nor does the Minister assert this. In fact, INAC officials have repeatedly stated that Thunderchild is a well-managed band. Instead, what Thunderchild lacks is a voice in ongoing negotiations, a say in the way funding is provided to its community, and an adequate amount of funding offered to provide much needed programs and services. Thunderchild chose not to sign the agreement while a more suitable agreement was pursued; they did not choose to stop administering funding and providing the necessary services to their members.

29. The fact that third party management was not appropriate in *Attawapiskat,* a case dealing with financial issues, is telling when compared to the situation before the Court. If third party management was not appropriate in a case where there was possibly some financial issues at play, how could it be even thought to apply to the situation facing Thunderchild. The appointment of a third party manager has no reasonable or rational basis in this situation.

30. As in *Attwapiskat,* Thunderchild relies on funding from the government to provide essential services to its members. Because the funding from the government historically has changed hands via a Contribution Funding Agreement ("CFA"), the CFA is essentially an adhesion contract imposed on Thunderchild as a condition of receiving funds, despite the fact that the Thunderchild has in the past consented to CFAs. As discussed above, the last CFA that was signed by Thunderchild was done so under duress. Whether there was technical legal duress or not, all parties have been acutely aware and acknowledged that the Thunderchild did not agree with the provisions of the 2013-2014 CFA, and signed it

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[14] *Ibid* at para 90.
[15] *Ibid* at para 78.

only to ensure that services continued to be delivered to the community while a more suitable agreement was negotiated. However, this situation has created a stark power imbalance between First Nations like Thunderchild and the government. As in *Attwapiskat:*

> There is no evidence of real negotiation. The power imbalance between government and this band depend for its sustenance on the CFA confirms the public nature and adhesion quality of the CFA.[16]

31. The Minister improperly used its position of power to attempt to force Thunderchild to become party to an agreement it fundamentally disagreed with, or have its power, authority, and autonomy usurped by a Third Party Manager, at significant financial and reputational cost to Thunderchild.

32. Finally, the remedy of implementing a third party manager was further unreasonable because alternatives were not seriously considered. It is clear from a review of the relevant policies and from the cross-examination of each of Ms. Fontaine, Mr. Korchinksi, and Mr. Harvey, that the policies followed in this instance were not designed to deal with a situation where third party management was imposed in the face of the First Nation refusing to sign a funding agreement. While Ms. Fontaine determined, with the help of her staff, that there were no other alternatives available to them, there was no discussion of this issue with senior officials. Specifically, there was no discussion of possible alternatives to third party management in this unique situation with senior officials who had the ability to craft or at least consider unique solutions.

33. There are relatively very few Federal Court decisions, aside from *Attawapiskat*, on the issue of the reasonableness of implementing a third party manager. Others include *Elders Council of Mitchikanibikok Inik v. Canada (Minister of Indian Affairs and Northern Development) [2009] 3 C.N.L.R. 76; Kehewin Cree Nation v. Canada [2011] F.C.J. No. 700;* and *Tobique Indian Band v. Canada [2010] F.C.J. No. 60*. However, we note that these decisions are so factually different as to not be particularly useful in the case at bar. Each of those decisions involved an application for judicial review of the Minister's decision to appoint a third party manager due to default by the band. However, in each of those the relevant band was currently a party to a funding agreement. Further, in each of

[16] *Ibid* at para 59.

those cases, the relevant band was experiencing acute financial difficulties and had demonstrated that it was unable to appropriately manage its finances, thereby going into default as per their respective funding agreements.

B. The Minister failed to observe the principles of natural justice, procedural fairness, or other procedure required by law to observe.

34. This case raises questions of administrative law and Aboriginal law because of the *sui generis* relationship between the Crown and Aboriginal peoples in Canada. In making the impugned decisions, the Minister held the basic administrative duty to act fairly. As stated in Administrative Law in Canada, at page 11:

> At a minimum, the duty to act fairly requires that, before a decision adverse to a person's interests is made, the person should be told the case to be met and be given an opportunity to respond.[17]

35. First Nations are entitled to procedural fairness by the federal Crown regarding the provision of federal services.[18] *Baker v. Canada* sets out the nature and extent of procedural fairness owed by the Crown using the following factors:

(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 individual challenging the decision;

(5) The decision maker's own choice of procedure. [19]

36. Justice l'Heureux Dube stated regarding these factors:

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[17] See Administrative Law in Canada, 5th Edition, by Sara Blake (Markham, Ontario: Lexis Nexis, 2011) at 11; see also *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners*, [1979] S.C.J. No. 121.
[18] *Simon v. Canada (Attorney General)*, 2013 FC 1117 at para 144.
[19] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at paras 21 through 28, relied upon in *Simon v. Canada (Attorney General), supra* note 18; See also Native Law by Jack Woodward, Q.C., volume 2, at page 19-7.

> [U]nderlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully, and have them considered by the decision maker.[20]

37. Particularly relevant to Thunderchild's situation are above points three and four. The issues at play in this decision have an immense impact on the individual members of Thunderchild and the community as a whole, as discussed throughout this brief. Further, Thunderchild has an enforceable legitimate expectation that they will be consulted with, in a meaningful, serious manner, before significant changes are made to federal services.[21] It is entirely reasonable for Thunderchild to expect that, prior to signing an 'agreement' on behalf of their community regarding issues fundamental to the community's wellbeing, meaningful consultation and negotiation would occur. Additionally, consultation and negotiation regarding funding agreements was, and continues to be, ongoing with other Nations at this time.

38. Further, the Minister was under a duty to negotiate in good faith, as derived from the honour of the Crown.[22] Once negotiations commence, on the basis of the principles of fiduciary duty, the Crown must act in good faith.[23] The Minister failed to negotiate in good faith, or at all. INAC instead provided Thunderchild with one standard agreement, one week and one month prior to the fiscal year end, with no flexibility whatsoever regarding terms of the agreement, and required that Thunderchild sign it *holus bolus* or be put under third party management. This is token consultation at best, and surely does not constitute negotiating in good faith, if at all.

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[20] *Baker, ibid.*
[21] See *Simon, supra* at para 151.
[22] See *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para 16, [2004] 3 SCR 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 74.
[23] See Halsbury's Laws of Canada, IV. Aboriginal and Treaty Rights, 5. Reconciliation of Aboriginal and Treaty Rights with Crown Sovereignty.

39. Thunderchild also relies on Canada's endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples* [UNDRIP], specifically artices 19, 21, and 43[24] which read as follows:

> **Article 19**
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> **Article 21**
> 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
>
> 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.
>
> **Article 43**
> The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

40. The Supreme Court in *Simon, supra*, noted that while UNDRIP does not create substantive rights, the Court nonetheless favours an interpretation that will embody its values. In this situation, serious consideration of the UNDRIP values suggests that INAC should have engaged in meaningful, good faith negotiations and consultation before unilaterally making decisions relating to the funding agreements which directly affect the economic and social conditions of Thunderchild's people.

41. It is unacceptable that the first Thunderchild heard of the reasons for the implementation of a third party manager, being an alleged default on account of an alleged risk to the health, safety, and wellbeing of Thunderchild members, was through the Affidavit

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[24]See online: < http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

exchange process of this litigation. Because of this lack of communication, Thunderchild was unable to properly respond to the Minister before the decision was made.

42. The Minister has also failed to observe the principles of procedural fairness by failing to follow the guidelines and procedures it is required to follow. The Minister, since this action has been commenced, refers to the Aboriginal Affairs and Northern Development Canada "Default Prevention and Management Policy 2013" as providing part of the basis for authority upon which the third party manager was implemented.[25] It is inadequate, and indicative of a failure of procedural fairness, that Thunderchild was only provided this information after the commencement of litigation. However, it is even more troublesome that these procedures were not followed anyways.

43. Specifically, the Affidavit of Ms. Anna Fontaine notes that she, as the Crown servant responsible for this decision, held the opinion that the health, safety, or welfare of Thunderchild was in danger and therefore Thunderchild was in default. However, there are various problems with relying on this opinion held by Ms. Fontaine to provide the basis for implementation of a third party manager:

- Section 4.2 of the Policy (Default Management) notes: "Where a default occurs, support effective recipient management of the default with a flexible range of strategies that is as least intrusive as possible and that will assist recipients to address the default situation based on timelines agreed to by the recipient and the departments; and transparency to Aboriginal community members through disclosure of the General Assessment and/or Management Action Plan." There was no flexibility offered here – Thunderchild had to sign an agreement it fundamentally disagreed with, or be forced into third party management. Further, no General Assessment and/or Management Action Plan were provided to the Community.

- As per 5.1, a responsibility of the Deputy Minister is to ensure that controls are in place to manage recipient defaults in a manner that is cost effective and proportionate to program and recipient risks. We submit that, even if there was a default, which we

[25] See online: <http://www.aadnc-aandc.gc.ca/eng/1386790074541/1386790301856#chp3-3>.

deny, implementation of a third party manager is neither cost effective nor proportionate to the program and recipient risks, especially considering Thunderchild's excellent record of properly administering funds and its active and capable leadership.

- Section 5.2.2 outlines a variety of actions that may be taken in the face of default, which as stated may vary depending on the funding agreement. Again, here there was no funding agreement. In the highest risk cases, the department may appoint a Third Party Funding Agreement Manager. Section 5.2.2 further states that defaults will not automatically result in the need for formal measures. By refusing to exercise discretion to find another way to ensure the health, safety, and wellbeing of the community was not sacrificed, the Minister refused to exercise jurisdiction and ultimately acted contrary to law.

- Section 5.2.2. also states that: "The appointment of a Third Party Funding Agreement Manager would be instituted as a last resort to ensure the continued delivery of Programs to community members."

44. In refusing to consider and advance other plausible alternatives to third party management, INAC fettered its discretion contrary to trite administrative law. Its many policies and guidelines are helpful, however:

> [C]are must be taken so that guidelines formulated to structure the use of discretion do not crystallize into binding and conclusive rules. Discretion, once conferred, may not be restricted or fettered in scope. If discretion is too tightly circumscribed by guidelines, the flexibility and judgment that are an integral part of discretion may be lost… The tribunal may not fetter its discretion by treating guidelines as binding rules and refusing to consider other valid and relevant criteria. In the circumstances of each case, the tribunal should consider whether it is appropriate to apply the policy.[26]

45. Here, by so rigidly applying policies and guidelines that were clearly and admittedly not designed to appropriately respond to Thunderchild's unique situation, INAC fettered its discretion. This resulted in an unfair result which has penalized, and continues to penalize, Thunderchild and its members.

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[26] See Administrative Law in Canada, *supra* note 17, at 102-103.

46. Finally, this situation, like the one faced in *Attawapiskat* engages the honours of the Crown, and as such is imbued with public law elements.[27] The honour of the Crown "a source of obligation towards [A]boriginal people, independent of treaties."[28] It is is "an overarching principle informing the Crown's relations with aboriginal peoples. It is found in fiduciary duties, the protection of aboriginal and treaty rights and the duty to consult and to negotiate in good faith."[29] INAC was required to act throughout this process within the honour of the Crown, which they failed to do.

VI. CONCLUSION

47. The Applicant, Thunderchild First Nation, therefore requests:

(a) An Order in the nature of certiori quashing and setting aside the aforesaid decision of the Minister of Indian Affairs and Northern Development Canada;

(b) A declaration that the aforesaid decision is illegal;

(c) An Order granting costs of this proceeding to the Applicant; and

(d) Such further and other relief as this Honourable Court shall deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 9th day of July, 2014.

McKERCHER LLP

Per:_____
Solicitors for the Applicant,
Thunderchild First Nation

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[27] *Attawapiskat, supra* note 4.
[28] See Halsbury's, *supra* note 23.
[29] *Ibid.*

CONTACT INFORMATION AND ADDRESS FOR SERVICE

Name of firm:	McKERCHER LLP
Name of lawyer in charge of file:	Collin K. Hirschfeld
Address of legal firm:	374 – 3rd Avenue South Saskatoon SK S7K 1M5
Telephone number:	(306) 653-2000
Fax number:	(306) 653-2669
E-mail address:	c.hirschfeld@mckercher.ca
File number:	27728.102

VII. TABLE OF AUTHORITIES

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