

Court File No.: T-791-14

FEDERAL COURT

BETWEEN:

**THUNDERCHILD FIRST NATION
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
NORTHERN DEVELOPMENT CANADA
(also known as the MINISTER OF ABORIGINAL
AFFAIRS AND NORTHERN DEVELOPMENT CANADA)**

Respondents

**WRITTEN REPRESENTATIONS OF THE RESPONDENTS, HER MAJESTY
THE QUEEN IN RIGHT OF CANADA****I. Overview**

1. The Minister of Indian Affairs and Northern Development (the Minister) decided to appoint a third party funding agreement manager (TPFAM) for the administration and the delivery of Aboriginal Affairs and Northern Development Canada (AANDC) funded programs and services to the membership of the Thunderchild First Nation (Thunderchild) because Thunderchild was unwilling to enter into a standard form funding agreement to administer and deliver these programs and services.
2. The Minister acted within the scope of his authority, exercised his discretion reasonably and followed fair procedure. Thunderchild has failed to discharge its onus to establish that the Minister erred and this application for judicial review should be dismissed.

II. Statement of Facts

3. The Respondent generally disagrees with the relevance of the facts put forward in Thunderchild's Memorandum of Fact and Law, and provides the following facts and clarification.
4. Parliament annually appropriates public funds to provide funding for a variety of programs and services to First Nations including education services, operations and maintenance of community infrastructures, administration of income assistance and administration of band offices.⁵ AANDC determines, within the framework established by the Treasury Board, the mechanism by which programs and services are provided to First Nations with the public funds appropriated by Parliament and provided to AANDC for this purpose. The Minister is accountable to Parliament for the expenditure of these funds.⁶
5. These funds may be provided to First Nations by the Minister for the delivery of services and programs in accordance with agreements that are entered into between respective First Nations and the Minister. Three standard form agreements for the 2014-15 fiscal year cover the administration and delivery of AANDC funded programs and services between First Nations and the Minister: the Aboriginal Recipient Funding Agreement (ARFA); the Streamlined Agreement; and the Canada Common Funding Agreement (collectively, the 2014-15 Funding Agreements).⁷

⁵ Affidavit of Anna Fontaine dated 13 May 2014 at para 13, Respondent's Record [RREC] at p. 7.

⁶ *Choken v Lake St. Martin Indian Band*, 2004 FCA 248, [2005] 1 FCR 69, CarswellNat 3546 at para 12.

⁷ Affidavit of Chief Wapass, dated 16 April 2014, para 18, Ex N APP REC 0008, 0099, Affidavit of Anna Fontaine dated 13 May 2014 at paras 23, 24; RREC at p.11; Cross-Examination of Anna Fontaine date 10 June 2014 at Ex. A-1, RREC at pp. 160-162.

6. In 2011, the Minister entered into an ARFA with the Thunderchild First Nation. The term of the agreement was from 1 April 2011 until 31 March 2014 (the 2011 ARFA).⁸

a. Consultation Process

7. In the autumn of 2013, AANDC proposed and announced potential changes to the standard ARFA and Streamlined Agreements for the 2014-15 fiscal year. Following announcement of the proposed changes, the Regional Director General of AANDC for Saskatchewan (RDG) sent letters to all First Nations in Saskatchewan inviting them to attend information and consultation workshops. Thunderchild leadership was invited to attend and participate by letter dated 6 November 2013.⁹
8. On 15 November 2013, Chief Wapass of Thunderchild wrote a letter to the Minister indicating that no representatives of Thunderchild would attend the workshops.¹⁰
9. At the workshops, AANDC staff explained the proposed changes to funding agreements for the 2014-15 fiscal year, beginning 1 April 2014, and provided participants with background papers, working tools and sample agreements. AANDC also sought and obtained feedback from Saskatchewan's First Nation leaders as to the contents of the ARFA and Streamlined Agreement. The feedback was recorded and forwarded to senior officials within AANDC.¹¹

⁸ Affidavit of Anna Fontaine dated 13 May 2014 at para 12 and Exhibit B at clause 2.0, RREC at pp. 6, 31.

⁹ Affidavit of Anna Fontaine dated 13 May 2014, para 16 Ex. H, I and J, RREC pp. 9, 147-149; Affidavit of Chief Wapass dated 16 April 2014, para 15, Ex. K, APP REC 007, APP REC 007, APP REC 0095

¹⁰ Affidavit of Chief Wapass, dated 16 April 2014, para 16, Ex. , APP REC 008, APP REC 0096

¹¹ Affidavit of Anna Fontaine dated 13 May 2014 at paras 16 and 17, Ex. K, RREC pp. 9, 150.

10. Upon receipt of the feedback, AANDC made changes to the proposed ARFA and Streamlined Agreement to address concerns raised by First Nation leaders who attended the workshops.¹²

b. Thunderchild's decision not to sign the 2014-15 Agreement

11. On 15 December 2013, AADNC posted the final form 2014-15 Funding Agreements publically on the AANDC website.¹³

12. On 4 February 2014, AANDC sent the linkages to the ARFA, Streamlined Agreement and the Canada Common Funding Agreement for the 2014-15 fiscal year to Thunderchild and invited the First Nation to sign one of the 2014-15 Funding Agreements.¹⁴ On 21 February 2014, AANDC followed up, in the absence of response from Thunderchild, by sending the 2014-15 ARFA to Thunderchild and invited the First Nation to sign the Funding Agreement.¹⁵

13. On 6 March 2014, Thunderchild's Chief and Council passed a motion not to sign the 2014-15 Funding Agreements.¹⁶

14. On 7 March 2014, the Director of Operations for Thunderchild informed AANDC that Thunderchild would not be signing the 2014-15 Funding Agreement.¹⁷

¹² Affidavit of Anna Fontaine dated 13 May 2013 at para 20, RREC p. 10.

¹³ Affidavit of Anna Fontaine dated 13 May 2014 para 22, RREC p.10; Cross-Examination of Anna Fontaine dated 10 June 2014, Ex. A-1, RREC pp. 160-162.

¹⁴ Cross-Examination of Anna Fontaine date 10 June 2014 at Ex. A-1, RREC at pp. 160-162.

¹⁵ Affidavit of Chief Wapass, dated 16 April 2014, para 18, Ex N APP REC 0008, 0099, Affidavit of Anna Fontaine dated 13 May 2014 at paras 23, 24, RREC p. 11.

¹⁶ Affidavit of Chief Wapass, dated 16 April 2014, para 20, APP REC 0008.

¹⁷ Affidavit of Carla Nokusis, para 10, APP REC 0206. Affidavit of Anna Fontaine dated 13 May 2014 at para 25, RREC p. 12; Affidavit of Kim Biem, dated 15 May 2014 para 3, Ex A., RREC pp. 364, 366

c. Alternatives to TPFAM

15. On 11 March 2014, a meeting took place between representatives of AANDC and Thunderchild.¹⁸ At the meeting, Chief Wapass of Thunderchild stated that he was unwilling to sign any of the 2014-15 Funding Agreements.¹⁹
16. On 11 March 2014, the RDG advised Thunderchild that, in the absence of a signed Funding Agreement with Thunderchild, AANDC would not be transferring public funds to Thunderchild for the delivery of the programs and services covered by a Funding Agreement from 1 April 2014. Transferring public funds to a recipient is conditional on the recipient having signed a 2014-15 Funding Agreement promising and covenanting to deliver the programs and services in accordance with certain standards and reporting requirements.²⁰
17. AANDC discussed, with Thunderchild, the possibility of engaging an outside expert resource. Thunderchild presented the option of having an individual, Ms. Sutherland, act as an outside expert resource. An outside expert resource is an outside contractor who is hired by a First Nation to assist it in carrying out the functions covered by a Funding Agreement. As the ability to hire an outside expert resource arises from the terms of an agreement, the prior execution of a Funding Agreement by the First Nation is a prerequisite in order to retain an outside expert resource.²¹ Having Ms. Sutherland act as an outside expert resource was not viable in the absence of a Funding Agreement between AANDC and Thunderchild.²²

¹⁸ Affidavit of Anna Fontaine dated 13 May 2013, paras 10, 27, 28; RREC pp. 6, 12.

¹⁹ Affidavit of Anna Fontaine dated 13 May 2013, para 28, RREC p. 12.

²⁰ Affidavit of Anna Fontaine dated 13 May 2014 at paras 28, 30, RREC pp. 12-13. Affidavit of Chief Wapass, dated 16 April 2014, para 22, APP REC 0009; Cross-Examination of Anna Fontaine date 10 June 2014 at p 89, APP REC 0309.

²¹ Affidavit of Rob Harvey dated 14 May 2014, paras 4, 5, 10, RREC pp. 359, 360; Cross-Examination of Robert Harvey dated 10 June 2014 at pp. 20, 28, APP REC 0440, APP REC 0448.

²² Cross-Examination of Anna Fontaine date 10 June 2014 at pp. 48-49, APP REC 0268-0269.

18. AANDC explored, with Thunderchild, having one of the regional Tribal Councils, who had a Funding Agreement with AANDC, serve as the recipient whereby the Tribal Council would deliver the programs and services that would normally be performed by Thunderchild. AANDC also explored, with Thunderchild, the possibility of the Treaty 6 Education Council, who had a Funding Agreement with AANDC, serve as the recipient whereby the Treaty 6 Education Council would deliver programs in education that would normally be performed by Thunderchild. Thunderchild rejected these options.²³

19. In the absence of a Funding Agreement between the Minister and Thunderchild, it is hypothetically possible that Thunderchild fund, deliver and administer to its membership the programs and services normally funded by AANDC. Based on a review of Thunderchild's consolidated financial statements for the 2012-13 fiscal year, AANDC determined that Thunderchild did not have sufficient own source revenue to deliver the programs and services for the 2014-15 fiscal year.²⁴ A review of Thunderchild's 2012-13 financial statements indicated that Thunderchild's expenditures were in excess of revenues. AANDC funding for the 2014-15 fiscal year for the delivery of programs and services to Thunderchild's membership is in excess of 7 million dollars.²⁵ This alternative to a TPFAM was not canvassed with Thunderchild by AANDC.

²³ Affidavit of Anna Fontaine dated 13 May 2014 at para 32, RREC p. 14.

²⁴ Affidavit of Anna Fontaine dated 13 May 2014 at para 8, RREC p. 4; Cross-Examination of Kirby Korchinski, dated 10 June 2014 at pp. 24, 30; APP REC 0408, APP REC 0413; Exhibi A-3 to the Cross-Examination of Anna Fontaine date 10 June 2014.

²⁵ Cross-Examination of Anna Fontaine date 10 June 2014, Ex. A-3, RREC p. 180; Affidavit of Chief Wapass, dated 16 April 2014, paras 24, 28, Ex. R; APP REC 0010 APP REC 0182.

20. The option of having AANDC deliver the programs and services to Thunderchild's membership directly was not available due to a lack of human resources at AANDC.²⁶

d. The Decision

21. In the absence of a 2014-15 Funding Agreement between the Minister and Thunderchild, it was necessary for AANDC to make a decision respecting the mechanism by which programs and services were to be delivered to Thunderchild's membership.

22. In light of the short time frame between 12 March 2014 and 31 March 2014 when the 2011 ARFA was to expire, AANDC started the process of tendering and selecting a pre-qualified person to serve as a TPFAM.²⁷

23. Timing factored into the decision making process. AANDC received notice that Thunderchild would not sign any of the standard form Funding Agreements on 7 March 2014. In the absence of a Funding Agreement with Thunderchild for the 2014-15 fiscal year, the time required to identify an alternative solution prior to 1 April 2014 was limited. The decision-maker considered that there was a risk that programs and services would not be available to Thunderchild's membership on 1 April 2014 if the process for engaging an individual or organization to administer and deliver programs and services did not commenced promptly.²⁸

24. The decision-maker considered that she had an obligation to Thunderchild's membership to ensure that income assistance to meet basic needs for individuals and families, post-secondary education allowances, and infrastructure maintenance programs continued after 1 April 2014.²⁹

²⁶ Cross-Examination of Anna Fontaine date 10 June 2014 at p. 49, APP REC 0269.

²⁷ Affidavit of Anna Fontaine dated 13 May 2014 at para 40, RREC p. 16.

²⁸ Cross-Examination of Anna Fontaine date 10 June 2014 at pp. 25-26, 46-47, 106-107, APP REC 0245-0246; APP REC 0266-0267; APP REC 0326-0327.

²⁹ Cross-Examination of Anna Fontaine date 10 June 2014 at pp. 52-53, APP REC 0272-0273.

25. AANDC's decision to engage a TPFAM conforms to internal directives. The administrative response when no Funding Agreement is in place is outlined in AANDC Directive 210 entitled "Third Party Funding Agreement Management". Section 4.0 of Directive 210 outlines that third party funding agreement management is the administrative response when no Funding Agreement is in place. Section 8.1 also outlines that third party funding agreement management may be the most appropriate response in extraordinary circumstances.³⁰
26. The decision-maker was of the view that the absence of a Funding Agreement with Thunderchild constituted extraordinary circumstances. AANDC did not appoint a TPFAM because of any default by Thunderchild under the 2011 ARFA.³¹ Other options for intervention listed under Directive 210 were not available to AANDC as the ability to use the listed alternatives arose upon default under a Funding Agreement.³²
27. Various assessment and default management tools are used by AANDC in the event of default. These tools were not applied in the circumstances of this case as Thunderchild had not defaulted under the 2011 ARFA.³³

³⁰ Affidavit of Anna Fontaine dated 13 May 2014 at para 15, Ex. G, RREC pp. 8, 132, 134, 137.

³¹ Affidavit of Anna Fontaine dated 13 May 2014 at para 37, RREC p. 15; Cross-Examination of Anna Fontaine date 10 June 2014 at pp. 58, 68, 81, 98, 103, APP REC 0278, APP REC 0288, APP REC 0301, APP REC 0318, APP REC 0323; Cross-Examination of Robert Harvey dated 10 June 2014, p. 20, APP REC 0440.

³² Cross-Examination of Anna Fontaine date 10 June 2014 at p. 102-104, APP REC 0322-0324.

³³ Cross-Examination of Anna Fontaine date 10 June 2014 at p. 99,104, APP REC 0319, APP REC 104. Cross-Examination of Robert Harvey dated 10 June 2014 at pp. 20, 28, APP REC 0440, APP REC 0448.

28. AANDC utilized AANDC's TPFAM call up process to engage the TPFAM.³⁵

The process is outlined in Directive 210. Section 6.1 outlines that Third Party Funding Agreement Managers are pre-qualified and placed on a roster. AANDC uses this roster to appoint a TPFAM by applying call-up procedures in the event AANDC requires TPFAM services on short notice.³⁶

29. AANDC sent an invitation to bid under a third party funding agreement management call-up to a list of potential service providers.³⁷ At the time of the call-up, there were three pre-qualified TPFAMs for the delivery of AANDC funded programs and services in Saskatchewan. Ms. Sutherland was not one of these TPFAMs.³⁸

30. Evan Schemenauer, CA Professional Corporation (ESPC) was the successful bidder. On 21 March 2014, the Minister entered into an agreement with ESPC to ensure AANDC funded programs and services were delivered to Thunderchild's membership.³⁹ Thunderchild is not a party to the TPFAM Agreement.⁴⁰

e. Notice of Decision

31. Between 11 March 2014 and 26 March 2014, AANDC communicated to Thunderchild that AANDC was considering, or had entered into, an agreement with a third party individual or organization for the administration and the delivery of AANDC funded programs and services to Thunderchild's membership.⁴¹

³⁵ Affidavit of Anna Fontaine dated 13 May 2014 at para 7, RREC p. 4; Affidavit of Chief Wapass dated 16 April 2014 at para 2, Ex. A, APP REC 0005, APP REC 0013.

³⁶ Affidavit of Anna Fontaine dated 13 May 2014 at para 15, Ex. G, RREC pp. 8, 136. Cross-Examination of Anna Fontaine date 10 June 2014 at pp. 50, 68, 118, APP REC 0270, APP REC 0288, APP REC 0338.

³⁷ Affidavit of Kim Biem dated 15 May 2014, at para 3, Ex A, RREC pp. 364, 384.

³⁸ Cross-Examination of Anna Fontaine date 10 June 2014 at p. 111, APP REC 0331.

³⁹ Affidavit of Anna Fontaine dated 13 May 2014 at para 7, RREC p. 4; Affidavit of Chief Wapass 16 April 2014 at para 28, Ex. R; APP REC 0011, APP REC 0198.

⁴⁰ Cross-Examination of Robert Harvey dated 10 June 2014 at p. 16, APP REC 0436.

⁴¹ Affidavit of Anna Fontaine dated 13 May 2014 at para 37, RREC p. 15. Affidavit of Kim Biem dated 15 May 2014, at para 3, Ex A, RREC p. 364, 368, 377, 380, 388.

32. During this time period, AANDC used the terms 'expert resource' and TPFAM to describe the third party individual or organization.⁴²

33. On 17 March 2014, an AANDC representative explained the difference between TPFAM and an Outside Expert Resource (OER) to Chief Wapass. While both terms referred to outside contractors, in the case of TPFAM the outside contractor would be retained by AANDC for the purpose of receiving transfer payments that would normally go to a First Nation and would use those transfer payments to administer and deliver services to the members of a First Nation. In contrast, an OER would be someone the First Nation would hire at the behest of AANDC to assist the First Nation in carrying out the functions, and in meeting the terms and conditions, covered by an ARFA. Prior execution of an ARFA by the First Nation is a prerequisite in order for AANDC to direct that an OER be retained. The AANDC representative indicated that the process of selecting a TPFAM from the pre-qualified individuals and organizations had commenced and that the tenders would close that day. The AANDC representative indicated that an OER could not be used in the circumstances because the presence of a signed ARFA was a pre-requisite.⁴³ AANDC also informed Thunderchild that the services and programs deliverable by the successful bidder were outlined in the 2014-15 ARFA.⁴⁴

⁴² Affidavit of Anna Fontaine dated 13 May 2013 para 37, RREC p. 15; Cross-Examination of Anna Fontaine date 10 June 2014 at p. 57, 136, APP REC 0277, APP REC 0356.

⁴³ Affidavit of Rob Harvey dated 14 May 2014, paras 4, 5, 10, RREC pp. 359-360.

⁴⁴ Affidavit of Kim Biem dated 15 May 2014, at para 3, Ex A, RREC pp. 364, 382.

34. AANDC formally communicated its decision to enter into an agreement with ESPC to Thunderchild by letter dated 26 March 2014. The letter indicated that AANDC's third party funding agreement manager call-up process was used and provided a list of the programs and services that ESPC would deliver.⁴⁵
35. The Applicant filed and served its Notice of Application dated 31 March 2014. The Notice of Application seeks a judicial review of the decision of the Minister to appoint a TPFAM on the grounds that the Minister exceeded his jurisdiction and failed to observe procedural fairness.⁴⁶

III. Issues

- a. Did the Minister have jurisdiction to enter into an agreement with ESCP?
- b. What is the standard of review of the Minister's exercise of jurisdiction?
- c. Was the Minister's decision to enter into an agreement with ESPC reasonable in the circumstances?
- d. Was there a breach of procedural fairness?

IV. Submissions

36. Canada has general prerogative power to enter into agreements with Third Party Funding Agreement Managers. On 7 March 2014, Thunderchild notified AANDC that it would not enter into a Funding Agreement with Canada for the delivery of AANDC funded programs and services for the 2014-15 fiscal year. The 2014-15 fiscal year commenced on 1 April 2014. AANDC aims to ensure that programs and services are delivered to Thunderchild's membership. Given the time frame, the decision to enter into an agreement with a TPFAM was entirely reasonable and the procedure followed was fair.

⁴⁵ Affidavit of Anna Fontaine dated 13 May 2014 at para 7, RREC p. 4; Affidavit of Chief Wapass dated 16 April 2014 at para 2, Ex. A; APP REC 005, APP REC 0013-0015.

⁴⁶ Notice of Application, dated 31 March 2014, APP REC 004.

a. *The Minister has jurisdiction to enter into an agreement with a Third Party Funding Agreement Manager*

37. The Minister has the jurisdiction to enter into an agreement with a TPFAM. The Minister and his delegates have been delegated the general prerogative power of the Crown to enter into agreements with respect to Indian Affairs. The Minister's contractual capacity with respect to Indian Affairs has been codified in section 4. (a) of the Department of Indian Affairs and Northern Development Act (*DIAND Act*).

38. The broad statutory power of the Minister of Indian Affairs and Northern Development is articulated in section 4. (a) of the *DIAND Act*.⁴⁷ It states:

4. The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to
(a) Indian affairs;

39. This provision grounds the ability of the Minister to enter into agreements like the Third Party Funding Agreement Management Agreement.⁴⁸

40. When, as here, the statutory provision is simply a codification of the Crown's general prerogative power, the scope for judicial review is limited.⁴⁹

b. *The Standard of Review of the Decision is Reasonableness*

41. The decision under review is the decision to enter into an agreement with a TPFAM after receiving notification that Thunderchild's Chief and Council would not sign a 2014-15 Funding Agreement.

⁴⁷ *DIAND Act*, R.S.C., 1985, c. I-6, s. 4.

⁴⁸ *Irving Shipbuilding v Canada*, 2009 FCA 116 at para 21.

⁴⁹ *Gestion Complexe Cousineau (1989) Inc v Canada (Minister of Public Works and Government Services)* [1995] 2 FC 694, 1995 CarswellNat 673 at para 24.

42. Canada disagrees that the standard of review of the decision is correctness. The standard of review cited by the Applicant applies when the Minister is interpreting whether there is a default under agreement.⁵⁰ Whether or not there has been a default under an agreement is not at issue in this case.
43. The question in this case is whether the decision to enter into an agreement with a TPFAM for the administration and delivery of AANDC funded programs and services, in the absence of a Funding Agreement with Thunderchild, was reasonably open to the Minister having regard to the extremely broad statutory power he was exercising under section 4. (a) of the *DIAND Act*.
44. An exhaustive analysis of the standard of review is not required in every case to determine the proper standard of review. The Court must first ascertain whether the jurisprudence has already determined the degree of deference accorded to a decision maker with regard to a particular question.⁵¹
45. The standard of review applicable to a decision to enter into an agreement with a TPFAM, in the absence of a signed agreement, was at issue in *Kehewin v Canada*.⁵² In that case, the Minister decided not to enter into an agreement with the First Nation for the 2010-11 fiscal year because of continuing unremedied defaults by the First Nation. The decision to appoint a third party manager, in the absence of a funding agreement, was held to a standard of reasonableness.⁵³

⁵⁰ *Attawapiskat v Canada*, 2012 FC 948 at para 63.

⁵¹ *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 57, *CLA Vol 3, Tab 18* [Dunsmuir]

⁵² *Kehewin Cree Nation et al v Canada*, 2011 FC 364 [Kehewin]

⁵³ *Kehewin Cree Nation v Canada*, 2011 FC 364 at para 18.

46. When applying the reasonableness standard, reviewing courts look to both the reasons and the outcome.⁵⁴ The reviewing courts cannot substitute their own appreciation of the appropriate solution.⁵⁵ Rather, the court must give deference to the decision-maker. This is particularly true when dealing with questions which do not lend themselves to one specific result. Further, it should be presumed, in accordance with ordinary litigation rules, that the decision under review is reasonable until the applicant shows otherwise.⁵⁶

c. The Decision was Reasonable

47. Given the breadth of section 4. (a) of the *DIAND Act*, it was reasonably open to the Minister's delegates to enter into an agreement with a TPFAM in the absence of a 2014-15 Funding Agreement between the Minister and Thunderchild.

48. Decisions made by AANDC regarding funding, and the administration of that funding, are highly discretionary. AANDC is at liberty to choose how it will dispense the funding that flows to a First Nation and may enter into agreements setting out the parties' obligations with respect to the same.⁵⁷

49. The AANDC programs and services at issue include necessary elements such as income assistance to meet basic needs of individuals and families, assisted living programs, post-secondary education allowances, and infrastructure maintenance programs. It would have caused hardship to the recipient population if the programs and services were not delivered. Entering into an agreement with a pre-qualified TPFAM is a reasonable means to ensure continued delivery of these programs and services.⁵⁸

⁵⁴ *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 14.

⁵⁵ *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paras 59 and 61, *CLA Vol 3, Tab 10 [Khosa]*.

⁵⁶ *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at paras 47-49, 146, 155, *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5 at para 18.

⁵⁷ *Tobique Indian Band v Canada*, 2010 FC 67 at para 69.

⁵⁸ Affidavit of Kim Biem dated 15 May 2014, para 3, Ex A, RREC pp. 364, 385; Cross-Examination of Anna Fontaine date 10 June 2014 at pp. 52-53, APP REC 0272-0273.

50. Time was a factor for the decision-maker. AANDC received notice that Thunderchild would not sign any of the Funding Agreements on 7 March 2014. In the absence of a Funding Agreement with Thunderchild for the 2014-15 fiscal year, the time required to identify an alternative solution was limited. If the process for engaging an individual or organization to administer and deliver programs and services to Thunderchild's membership was not completed promptly, there was a risk that programs and services would not be available to Thunderchild's membership on 1 April 2014.⁵⁹
51. The Minister is accountable to all members of Thunderchild, not only to Chief and Council. The Minister took steps to ensure funding would continue to flow to the whole of Thunderchild. This is a justified objective.⁶⁰
52. The reasonableness of the decision under review is evidenced by its consistency with AANDC directives that identify that a TPFAM is the administrative response when there is no Funding Agreement in place.⁶¹
53. The Minister's decision is also consistent with the jurisprudence. In *Kehewin*, the Minister decided not to enter into a funding agreement with the band for the 2010-11 fiscal year because of continuing unremedied defaults by the First Nation. Justice Phelan held that there was nothing unreasonable in the Minister's decision to enter into an agreement with a third party manager for the delivery of programs and services. What was done was reasonably open to the Minister and it was not for the court to second guess the Minister's conduct.⁶²

⁵⁹ Cross-Examination of Anna Fontaine date 10 June 2014 at pp. 25-26, 46-47, 106-107, APP REC 0245-0246; APP REC 0266-0267; APP REC 0326-0327.

⁶⁰ *Tobique Indian Band v Canada*, 2010 FC 67 at para 71.

⁶¹ Affidavit of Anna Fontaine dated 13 May 2014 at para 15, Ex. G, RREC at pp. 8, 132, 134, 137.

⁶² *Kehewin Cree Nation v Canada*, 2011 FC 364 at para 18.

54. In all of the circumstances, the decision to appoint a TPFAM was reasonable and falls within the acceptable range of outcomes in view of the facts and the law in this case.

d. Procedural Fairness

55. The Respondent agrees with the Applicant's submission that, on the issue of procedural fairness, the correctness standard applies.⁶³

56. This is a judicial review of the Minister's decision to enter into an agreement with a TPFAM in circumstances where there is no Funding Agreement in place.⁶⁴ In these circumstances, the jurisprudence is clear that no advance notice is required.⁶⁵ The purpose of notice in the present case is to convey information that a manager has assumed certain responsibilities. The circumstances do not give rise to a right of a party to make representations to influence a decision.

57. The factor of urgency was at play in this matter. The decision to implement third party funding agreement management is meant to be a short term one in order to ensure the provision of services and the protection of funds. It must be acted upon quickly to ensure that this goal is met. The pressing circumstances giving rise to the decision point to a low threshold of procedural fairness.

58. The Applicant received notice of the decision. On 11 March 2014, AANDC communicated to Thunderchild that AANDC was considering entering into a contract with a third party individual or organization for the administration and the delivery of AANDC funded programs and services to Thunderchild's

⁶³ *Tobique Indian Band v Canada*, 2010 FC 67 at para 66, *Kehewin Cree Nation et al v Canada*, 2011 FC 364 at para 15.

⁶⁴ Notice of Application, dated 31 March 2014, APP REC 0003.

⁶⁵ *Tobique Indian Band v Canada*, 2010 FC 67 at para 79, *Kehewin Cree Nation et al v Canada*, 2011 FC 364 at para 19.

membership.⁶⁶ On 17 March 2014, Thunderchild was informed that, as the First Nation did not want to sign a 2014-15 Funding Agreement, AANDC was taking measures to ensure the continued delivering of programs and services through a tender process.⁶⁷ On 26 March 2014, the decision to enter into an agreement with ESPC was formally communicated to Thunderchild by letter.⁶⁸

59. In similar circumstances, Justice Phelan, in *Kehewin*, considered the procedural rights of the applicant. In *Kehewin*, the Minister decided on 3 March 2010 not to enter into a funding agreement with the band for the 2010-11 fiscal year. The next day the applicants were so informed and advised that an alternate service provider would provide the necessary programs and services and that the Minister was exploring options. By 9 March 2010, the Minister had appointed a third party manager but did not inform the applicants of the appointment until a meeting with the applicants on 19 March 2010. The appointment was further confirmed in a letter to the applicants on 24 March 2010.⁶⁹

60. Justice Phelan reasoned:

[19] The Applicants have argued that they were entitled to advance notice before a third party manager was appointed. Whether the Court approaches the issue as one of public law, applying the factors in *Baker v Canada*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817, or as one of contract, the result is the same – no advance notice is required.

[21] The general purpose of advance notice is to buttress the “right to be heard”. There is no such right under Treasury Board policies. This is not a case where a party has a right to make representations to influence a decision. The purpose of notice in the

⁶⁶ Affidavit of Anna Fontaine dated 13 May 2014 at para 37, RREC p. 15. Affidavit of Kim Biem dated 15 May 2014, at para 3, Ex A, RREC pp. 364, 378..

⁶⁷ Affidavit of Kim Biem dated 15 May 2014, at para 3, Ex A, RREC, pp. 364, 382, 388.

⁶⁸ Affidavit of Anna Fontaine dated 13 May 2014 at para 7, RREC p. 4; Affidavit of Chief Wapass dated 16 April 2014 at para 2, Ex. A; APP REC 005, APP REC 0013-0015.

⁶⁹ *Supra*, *Kehewin* at paras 10-11.

present case is to convey information that a manager has assumed certain responsibilities.

61. No issue of legitimate expectation of advance notice arises from the particular facts of this case. The Applicant cites various assessment and default management tools and states that AANDC ought to have been applied them. Those various tools are used by AANDC in the event of default. Those tools were not applied in the circumstances of this case as Thunderchild had not defaulted under the 2011 ARFA.⁷⁰
62. This application is a judicial review of the decision of the Minister to enter into an agreement with a TPFAM for the administration and the delivery of AANDC funded programs and services to Thunderchild's membership.⁷¹ This is not a review of changes to the standard forms of funding agreements offered by AANDC to First Nations for the 2014-15 fiscal year; nor is it a review of the processes by which AANDC sought and obtained input for the standard forms of funding agreements for the 2014-15 fiscal year.
63. The Applicant seeks to broaden the scope of judicial review to include the process by which AANDC sought and obtained input for changes to the standard form funding agreements for the 2014-15 fiscal. Thunderchild points to *Haida* and *Taku* for the proposition that Thunderchild has an enforceable legitimate expectation that they will be consulted before significant changes are made to federal services.⁷²
64. The Respondent disagrees that there is a duty to consult that gives rise to a legitimate expectation on the facts of this case. Thunderchild has not asserted any Aboriginal right and no evidence has been submitted by the Applicants to support a claim to an Aboriginal right or Treaty right. An Aboriginal right to

⁷⁰ Cross-Examination of Anna Fontaine date 10 June 2014 at p. 99,104, APP REC 0319, APP REC 104. Cross-Examination of Robert Harvey dated 10 June 2014 at pp. 20, 28, APP REC 0440, APP REC 0448.

⁷¹ Notice of Application, dated 31 March 2014, APP REC 0003.

⁷² Applicant's Memorandum of fact and law at para 37; APP REC 0478.

manage public monies received from AANDC could never exist. Funding to Thunderchild by way of a Funding Agreement constitutes a modern vehicle for funding selected by the Minister, at the Minister's discretion. This cannot be a practice rooted in pre-contact culture.⁷³

65. Even if a duty to consult had been triggered, it was met in the circumstances of this case. Proposed changes to the standard ARFA and Streamlined Agreement for the 2014-15 fiscal year were announced in the autumn of 2013. Following the proposed changes, Thunderchild leadership was invited to attend information and consultation workshops that resulted in changes made to the proposed ARFA and Streamlined Agreement. The changes were made to address concerns raised by First Nations leaders who attended and participated in the workshops.⁷⁴ On 15 November 2013, Chief Wapass of Thunderchild wrote a letter to the Minister indicating that no representatives of Thunderchild would attend the workshops.⁷⁵

66. Thunderchild cannot refuse to actively take part in the consultation process and then complain that it has not been consulted. The consultation process is reciprocal and cannot be frustrated by a refusal to participate.⁷⁶

67. The Applicant has referred to the United Nations Declaration on the Rights of Indigenous People (the Declaration) in support of their assertion that they had a right to be heard. The Declaration is not a legally binding instrument. It was adopted by a non-legally binding resolution of the United Nations General Assembly.⁷⁷ As a result of this status, it does not impose any international or domestic legal obligations upon Canada. As Canada noted in

⁷³ *R v Van der Peet*, [1996] 2 SCR 507 at paras 44-59, *CLA Vol 2, Part A, Tab 49*; *Wawatie v. Canada (Indian Affairs and Northern Development)*, 2009 FC 374 at para 40.

⁷⁴ Affidavit of Anna Fontaine dated 13 May 2014, para 16, 20, Ex. H, J, I, RREC pp. 9, 147-149; Affidavit of Chief Wapass, dated 16 April 2014, paras 15-16; APP REC 0007-0008.

⁷⁵ Affidavit of Chief Wapass, dated 16 April 2014, paras 15-16; APP REC 0007-0008.

⁷⁶ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 at para 65, *CLA Vol 2, Part A, Tab 28*.

⁷⁷ See: United Nations Charter, Articles 10, 13(1).

its public statement of support, the Declaration does not change Canadian laws. It represents an expression of political, not legal, commitment.⁷⁸

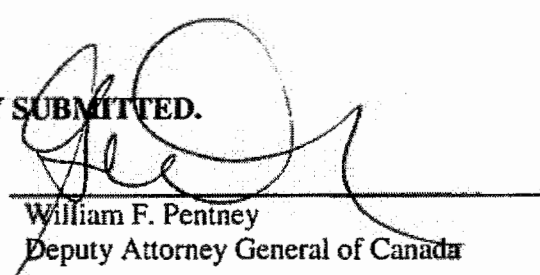
68. More importantly, it is not necessary to have reference to the Declaration in this case, because procedural fairness, the domestic legal principle to which the Applicant refers, is robust enough to provide the means necessary to protect the Applicant's claim areas.

V. Order Sought

69. The Respondent requests an Order dismissing this application with costs to the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

August 11, 2014



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⁷⁸ Canada's Statement of Support, November 12, 2010. Available at: Frequently Asked Questions on the United Nations Declaration on the Rights of Indigenous Peoples, November 12, 2010. Available at: <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>

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