File No. T-1514-06

FEDERAL COURT

BETWEEN:

HARRY WAWATIE, TOBY DECOURSAY, JEANNINE MATCHEWAN AND LOUISA PAPATIE, IN THEIR CAPACITY AS MEMBERS OF THE ELDERS COUNCIL OF MITCHIKANIBIKOK INIK (also known as ALGONQUINS OF BARRIERE LAKE)

APPLICANTS

- and -

MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

RESPONDENT

APPLICANTS MEMORANDIUM OF FACT AND LAW
Under s.18.1 *Federal Courts Act*

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INTRODUCTION:
OVERVIEW OF THE APPLICATION

1. The Applicants, Harry Wawatie, Toby Decoursay, Jeannine Matchewan and Louisa Papatie (the "Applicants") are members of the Elders Council of *Mitchikanibikok Inik*, also known as the Algonquins of Barriere Lake First Nation (hereinafter "the ABL").

2. The Applicants bring this Application for Judicial Review of the decision of the Minister (hereinafter the "Minister") of Indian Affairs and Northern Development (hereinafter "DIAND") and related administrative actions or inactions, in respect of the appointment of a Third Party Manager ("TPM") for the First Nation (hereinafter the "Minister's decision"). The Minister's decision was communicated in a Notice addressed to "the members of the Algonquin community of Barriere Lake", signed by the Regional Director General, Quebec Region, André Côté, and dated July 12, 2006.

Affidavit of Harry Wawatie, Paragraph 83, Exhibit 14, Tab 3 of the Applicants' Record. [hereinafter referred to as "Harry Wawatie"]

Affidavit of Pierre Nepton, Exhibit E-67.

3. The Minister's purported authority to intervene into the financial affairs of a First Nation derives from funding arrangements ("Contribution Agreements") signed with First Nations and the National Intervention Policy ("NI Policy"), the application of which is referred to in Contribution Agreements. The NI Policy is not law; it is an administrative policy which has been developed solely by DIAND without meaningful consultation with First Nations.

4. The Applicants do not dispute that their First Nation lacks administrative capacities and that their Customary Council needs support and assistance in financial management and program administration. Indeed the ABL accepted a cooperative financial arrangement with the Minister, referred to as "co-management" under the NI Policy.

5. What the Applicants dispute is the imposition of the TPM on the First Nation. The appointment of a TPM to the First Nation is a discretionary decision made under the purported authority of the "NI Policy". As per the above-noted Notice, the Minister's reasons for intervening were that the ABL had "increased its financial deficit significantly and essential community services were considered at risk".

6. The Applicants submit that the imposition of the TPM regime infringes their customs on governance, which have been codified and are known as *Mitchikanibikok Anishinabe Onakinakewin*. According to the Applicants these customs constitute protected Aboriginal rights under s. 35 of the *Constitution Act, 1982*. The appointment of the TPM was done pursuant to a policy which was developed without meaningful consultation and the appointment of the TPM itself was unjustified and done without meaningful consultation. As such, the Applicants submit that the Minister breached the honour of the Crown.

7. The Applicants also submit that the Minister breached the honour of the Crown in appointing a TPM to the First Nation without taking into account his obligations under three separate agreements entered into with the First Nation, namely: the Special Provisions Addendum which had been appended to all its Contribution Agreements prior to the appointment of the TPM ("Special Provisions"), the Memorandum of Mutual Intent and the Trilateral Agreement. Any or all of these agreements, if fulfilled in good faith by the Minister, would affect the financial position of the ABL such that it would eliminate the event which triggered the application of the NI Policy ("triggering event").

8. The Applicants submit that financial situation of the ABL is uncertain as a result of the Minister's failure to fulfill his obligations under the Trilateral Agreement, the Memorandum of Mutual Intent, and the Special Provisions.

Indeed, the Special Provisions specifically acknowledge this financial uncertainty and commits the Minister to enter into a process with ABL to clarify this situation, which the Minister has failed to do. The Applicants submit that without such clarification, the Minister is in breach of the honour of the Crown and the appointment of a TPM on the basis of a "financial deficit" cannot be sustained because of the absence of the triggering event under the NI Policy.

9. The Applicants also submit that the Minister failed to observe principles of natural justice and procedural fairness in his decision to appoint a TPM to the First Nation. Firstly, the Applicants argue that the Minister's real objective in imposing a TPM to the First Nation was to avoid its obligations under the three said agreements and the most striking evidence of this was the removal of the Special Provisions from the first annual Contribution Agreement signed by the TPM, purportedly on behalf of the First Nation, after the Minister's decision. As such, the Applicants submit that the Minister was in a conflict of interest; that his actions give rise to a reasonable apprehension of bias; and that he abused his discretion.

10. Secondly, the Applicants submit that the Minister acted unfairly in deciding to move the First Nation from a voluntary co-management regime to a unilateral TPM regime when ABL simply wanted to change its then co-managers. The following circumstances are amongst those that contribute to the violation of procedural fairness:

- the Minister did not take account of the representations made by Mr. Clifford Lincoln on behalf of the First Nation regarding efforts to replace the co-managers;
- the Minister ignored the willingness and remediation efforts taken by the ABL to address their financial and administrative problems;
- the Minister failed to consult the ABL about whether the TPM was acceptable to the ABL; and

- the Minister failed to properly notify the ABL about the appointment of the TPM.

11. Thirdly, the Applicants submit that the Minister breached the legitimate expectations of the ABL by failing to determine the real causes of the problems in the ABL administration and to work cooperatively with the ABL to resolve these problems. This is what is provided in the NI Policy and the ABL have a legitimate expectation that the NI Policy would be complied with. The Minister also breached the legitimate expectations of the ABL by failing to properly implement the Special Provisions, which promised the ABL that the Minister would work to clarify the financial position of the ABL.

12. To conclude this overview, it must be emphasized that the ABL is First Nation steeped in tradition – it maintains its Algonquin language, adheres to its customs and maintains its traditional way of life. However, the community is very poor financially. In the ABL settlement at Rapid Lake Reserve many people are living in dire poverty. By his own admission, Mr. Nepton on behalf of the Minister acknowledged that the First Nation is so poor that they received the lowest point score on the human development index. As the facts in this case will demonstrate, the ABL people live in dilapidated homes that are mold-ridden and often over-crowded. Despite the fact that the First Nation has a massive traditional territory, identified in the Trilateral Agreement, they are squeezed into a miniscule 59-acre reserve at Rapid Lake, located on lands that are badly eroded. The reserve has no more room for houses and is not connected to the hydro grid. Education and employment levels are extremely low amongst the First Nation and social and economic problems plague the ABL. The Applicants believe that the three agreements which the Minister refuses to honour provide an opportunity for the First Nation to maintain their traditional way of life while improving the social, education, housing and economic conditions of the First Nation. Rather than arbitrarily imposing a TPM on the First Nation, the Applicants submit that the Minister ought to be working in a spirit

of mutual respect and cooperation to address the deplorable conditions within the First Nation.

PART I: THE FACTS

13. The facts giving rise to this Judicial Review are necessarily complex. To properly understand and explain the implications of the impugned decision on the ABL, it is necessary to review the facts surrounding events in 1996 and onward, which gave rise to and connect with the three agreements the Applicants argue have a bearing on the Minister's decision. This Memorandum deals with the factual situation in three parts:

- Part IA: Context;
- Part IB: Facts Related to the Minister's Previous Decision to Recognise an Interim Band Council and Appoint Third Party Manager to the First Nation in 1996; and
- Part IC: Facts Related to the Minister's Decision Under Review – 2006 Appointment a Third Party Manager.

PART IA: CONTEXT

The Applicants

14. This Application is brought by the Elders Council on behalf of the ABL. One of the primary roles of the Elders is to safeguard the customs and traditions of the ABL. Elders are central to customary governance of the ABL. For instance, Elders nominate leadership candidates through consultations with the People and Elders are responsible for convening a Leadership Assembly of the People.

Harry Wawatie, Paragraphs 16-17, and Exhibit "D", Tab 3-D of the Applicants' Record.

15. The affidavits in support of this Application are provided by two deponents: Harry Wawatie who is an Elder and former Chief of the First Nation and one

Background on the First Nation

16. The ABL, known in the Algonquin language as the Mitchikanibikok Inik, is a band within the meaning of the *Indian Act*. The ABL people continue to engage in a traditional lifestyle and retain their cultural base. They continue to speak their native language, Algonquin Anishinabe, and use the lands and resources within their traditional territory for pursuits of hunting, fishing and gathering for subsistence.

Harry Wawatie, Paragraph 11, Tab 3 of the Applicants' Record.

17. The ABL has never entered into a land cession treaty with the Crown and thereby has not surrendered any rights, title and interests it asserts over its traditional territory. As admitted by Pierre Nepton in cross-examination, he understands that under DIAND policy, the fact that the ABL has never surrendered their Aboriginal rights, provides at least potentially that they have a claim over their traditional territory.

Harry Wawatie, Paragraph 12, Tab 3 of the Applicants' Record.

Cross-Examination Pierre Nepton, Questions 109, 262 – 270, Tab 5 of the Applicants' Record.

18. The ABL's traditional territory encompasses in excess of 17,000 square kilometres and has long been subject to encroachment by industrial and recreational interests, such as hydroelectric development, highway construction, recreational hunting, and especially logging. Their traditional territory includes La Verendrye Wildlife Reserve. Despite their expansive traditional territory, the ABL live on a small, 59 acre reserve at Rapid Lake.

The ABL has a band registry of 590 members, with approximately 461 of these members living in the traditional territory or at the Rapid Lake Reserve in north-western Quebec, approximately 3.5 hours north of Ottawa.

> **Harry Wawatie, Paragraph 11, Tab 3 of the Applicants' Record.**
>
> **Clifford Lincoln, Paragraphs 7 - 8, Exhibit "A", Tab 4-A of the Applicants' Record.**
>
> **Cross-Examination of Pierre Nepton, Question 118, Tab 5 of the Applicants' Record.**

19. The ABL survives as a result of their knowledge of their lands and resources. The ABL is heavily reliant on its traditional territory and as at 1995, almost 27% of their total local economy was generated through the domestic production of food, heat and shelter. Community members retain strong links to the land, and continuous access to lands and resources supplements the ABL's average income of $4700.

> **See also: Harry Wawatie, Exhibit "G", Tab 3-G of the Applicant's Record (the Report of Professor Elias, at page 15).**
>
> **Cross-Examination of Pierre Nepton, Questions 67 – 72, Tab 5 of the Applicants' Record.**

Customary Council

20. The ABL is governed by a Customary Council and has never been under *Indian Act* election provisions. Their governance customs – the *Mitchikanibikok Anishinabe Onakinakewin ("Anishinabe Onakinakewin")* – were affirmed and codified in 1996 under a Declaration of the ABL. The *Anishinabe Onakinakewin* are given legislative recognition under the definition of "band council" in section 2(1)(b) of the *Indian Act*, which recognizes that a First Nation's Chief and Council may be selected under the custom of the band:

> **2(1)(b)** in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or,

> where there is no council, the chief of the band chosen according to the custom of the band.

The ABL come within this provision. The *Indian Act* recognizes their Customary Council and thereby also recognizes the *Anishinabe Onakinakewin*.

> ***Indian Act*, R.S.C. 1985, c. I-5., s.2(1)(b)**
>
> **Harry Wawatie, Paragraphs 17 and 22, Tab 3 of the Applicants' Record.**

21. The *Anishinabe Onakinakewin* is based on the ABL's connection to and responsibility for their traditional territory. As is stated in the Mitchikanibikok Inik Declaration:

> As a First Nation, we possess these rights [life, liberty, culture, harmony, traditions, spirituality, self-determination and freedom] and have corresponding responsibilities to live in harmony with the land and to live on the land honouring our customs and traditions.
>
> **Harry Wawatie, Exhibit "D", Tab 3-D of the Applicants' Record.**

22. There are several aspects of the *Anishinabe Onakinakewin* that are relevant to this Application. The first is the scope of the customary governance authority of the Customary Council, which is known as *Nikanikabwijik.* The role of the *Nikanikabwijik* is described as follows:

> 8.2(1) The Council is the governing authority of the First Nation. It is accountable to the People and will act upon the directions of the People in fulfilling this role. Council will convene the seasonal assemblies as well as special assemblies as often as is required to ensure appropriate directions are obtained from the people.
>
> (2) The primary responsibilities for the Council are as follows:

(a) the care, stewardship and management of the traditional territory in consultation, coordination and cooperation with the Families;

(b) the protection of Aboriginal and treaty rights of the First Nation;

(c) entering into relations with the Crown, including treaties and agreements, subject to the approval of the people.

(3) The responsibility for the administration of programs and services is delegated to the Administrator, but Council retains inherent authority to supervise the Administrator.

Harry Wawatie, Exhibit "G" (Anishinabe Onakinakewin), Tab 3-G of the Applicants' Record.

23. The second aspect of the *Anishinabe Onakinakewin* that is relevant to this Application relates to the customary process by which the Applicants select their leadership, which is a process known as *Wasakawegan*:

8.6 (1) Wasakawegan, or blazing, is the process for selecting leaders. In this process, leaders are nominated by the Elders and selected by the People.

(2) To initiate a selection process, the Council consults with the Elders and asks them to help identify a suitable candidate or candidates if more than one position is open.

(3) Once a suitable candidate or candidates have been identified, the Elders convene a Leadership Assembly of the People.

(4) The Proceedings of the Leadership Assembly are as follows:

(a) the assembly starts in the morning;

(b) seats representing the number of position which are open are placed in the centre of the Assembly area;

(c) An equal number of seats are also placed in the centre for the spouses of the leaders to be selected;

(d) the People gather in a circle, around the seats;

(e) the nominated candidate is escorted by one of the Elders to one of the seats in the centre;

(f) the spouse of the nominated candidate is also escorted to a seat by another Elder;

(g) the Elder who nominates a candidate addresses the Assembly and the Elder who brings forward the spouse also addresses the Assembly;

(h) the candidate and spouse also addresses the Assembly;

(i) the floor will then be open for general discussion;

(j) if there is consensus amongst the People on the candidate, this shall be announced to the Assembly;

(k) the Assembly continues until all the positions are filled.

(5) Once a candidate is selected, the person undergoes a training, probation and evaluation period for two years. This transition allows the selected candidate to improve and enhance leadership skills by observing and working with the present council.

Harry Wawatie, Exhibit "G" (Anishinabe Onakinakewin), Tab 3-G of the Applicants' Record.

24. A central component of the *Anishinabe Onakinakewin* is the strong emphasis on discussion and consultation. The principle of consensus in decision-making underlies the *Anishinabe Onakinakewin*: "the final decisions rest with the General Assembly of the People". Article V of the *Anishinabe Onakinakewin* provides that the "highest authority within the Algonquins of Barriere Lake is the People. All important decisions must be made by the People." General assemblies are to be held at least four times a year, and special assemblies may be held if important issues arise which need to be addressed by the People.

Harry Wawatie, Exhibit "G" (Anishinabe Onakinakewin), Tab 3-G of the Applicants' Record.

25. Leadership review takes place in the context of extensive community meetings wherein a Chief may resign or be relieved of his responsibilities if

he does not agree with the will of the community. Leadership selection takes place over a community meeting process, with Elders presiding over the leadership selection process and providing on-going advice and support to the Customary Council.

Harry Wawatie, Paragraphs 19 – 21 and 38, Tab 3 of the Applicants' Record.

26. The *Anishinabe Onakinakewin* has existed since time immemorial, but has evolved over time, with the ABL maintaining their responsibilities to their traditional territory. The *Mitchikanibikok Inik* Declaration states:

> We wish to retain our customary system of government, but at the same time recognize the need to adapt to changes affecting our lands and institutions and that such changes require the consent of the people.

Harry Wawatie, Paragraphs 17 – 18, Exhibit "D", Tab 3-D of the Applicants' Record.

27. The *Anishinabe Onakinakewin* was amended in 1996-7 to create a body called "*Oshibikewinik*", which is a democratically elected Board of Directors, to look after administrative matters. The *Oshibikewinik* remain subject to the supervisory authority of the Customary Council.

Harry Wawatie, Exhibit "G" (Anishinabe Onakinakewin), Tab 3-G of the Applicants' Record.

28. The *Anishinabe Onakinakewin* has continuity with the ancient customs of the ABL and these customs are essential to the survival and integrity of the ABL.

Harry Wawatie, Exhibit "G", Paragraphs 17 – 18, Tab 3-D of the Applicants' Record.

Socio-Economic Conditions at Rapid Lake

29. The Rapid Lake reserve serves as the administrative and service delivery centre for the ABL. The only sources of employment for First Nation

members are through the administration of federal programs and from seasonal and tourism activities. Unemployment rates are high, probably in the range of 60-80%. The ABL is heavily reliant upon DIAND and federal transfers, especially social assistance.

Harry Wawatie, Paragraphs 12 and 13, Tab 3 of the Applicants' Record.

Clifford Lincoln, Paragraph 9, Tab 4, of the Applicants' Record.

Cross-Examination of Pierre Nepton, Questions 73 – 80, Tab 5 of the Applicants' Record.

30. The socio-economic conditions at the ABL are so poor that they received the lowest point score on the human development index as per Mr. Nepton's comment on the socio-economic conditions of the ABL:

Q. Would you agree that the economic situation of the ABL is at least as bad or amongst the worse in First Nations in Quebec?

A. I agree with that. To support my position, I point to the human development index that was developed and applied to analyze the situation of First Nations in Quebec and those indicators did show that the ABL had the worse performance.

Cross-Examination of Pierre Nepton, Question 88, Tab 3 of the Applicants' Record.

31. The Rapid Lake reserve has no available lands to build additional houses, which are much needed. Mr. Nepton confirmed: "all the construction space within the 59-acre parameter was maxed out... Everybody agreed on the need to build, but there was no more room."

Harry Wawatie, Paragraph 13, Tab 3 of the Applicants' Record.

Cross-Examination of Pierre Nepton, Tab 5, Questions 127 of the Applicants' Record.

32. Houses existing on the reserve are substandard, in disrepair, moldy and overcrowded, which creates an environment for social problems, such as drug and alcohol abuse. In autumn 2003, Health Canada prepared a Mold and Housing Condition Survey of around 65 houses at the Rapid Lake reserve. This survey includes, at Annex III, various colour photos which illustrate the extent of disrepair of the ABL housing. Several houses were listed as being a risk for electrocution, being overcrowded, having heating and / or freezing problems, being a risk for burning, having no hot water, or having water running under the home.

Harry Wawatie, Paragraph 13, Tab 3 of the Applicants' Record.

Cross-Examination of Pierre Nepton, Questions 651 – 652, Tab 5 of the Applicants Record, and Exhibit "10" of the Cross-examination (Mold and Housing Conditions Survey of the Algonquins of Barriere Lake), Tab 5-J of the Applicants' Record.

33. The ABL is not connected to the Hydro-Quebec grid, and therefore relies on diesel generators the operation of which is funded by DIAND to provide the community with electricity. Because the diesel generators have a limited generating capacity, it is not possible to construct the housing and infrastructure which is needed at the Rapid Lake Reserve.

Affidavit of Pierre Nepton, Paragraph 71.

Cross-Examination of Pierre Nepton, Question 120, Tab 5 of the Applicants' Record.

34. Members of the ABL have chronically low levels of education. For instance, in 1995, when DIAND was operating the Rapid Lake School, students were behind by two or three years creating a significant age to grade deficit.

Harry Wawatie, Paragraph 15, Tab 3 of the Applicants' Record.

Cross-Examination of Pierre Nepton, Questions 92-99 & 370 – 377, Tab 5 of the Applicants' Record.

35. Many members of the ABL continue to use their traditional language, Algonquian Anishinabe. Although members of the ABL are proficient in their own language, English and French literacy levels are low. For example, Chief Harry Wawatie has never attended a Canadian school and was assessed at a grade six level of education. Harry Wawatie has limited ability to read and understand English and French, but he is fluent in Algonquin Anishinabe.

Harry Wawatie, Tab 3, Paragraph 5 and Exhibit "D", Tab 3-D of the Applicants' Record.

36. The ABL is lacking administrative and financial management capacity. The Chief and Council do not possess some of the basic skills required to operate and manage departmental programs, including: communication skills in English and French; the ability to read financial statements, develop budgets and review expenditures. The Chief and Council also lack the ability to understand program criteria and delivery and reporting requirements of DIAND, as per the Contribution Agreements they enter into with DIAND.

Cross-Examination of Stéphane Villeneuve, Questions 210 – 214, Tab 6 of the Applicants' Record.

Cross-Examination of Pierre Nepton, Questions 98 & 99, Tab 5 of the Applicants' Record.

37. The ABL is heavily dependant on outside expertise to assist them in the delivery of programs and services to its membership and to ensure the terms of the Contribution Agreements are upheld.

Cross-Examination of Stéphane Villeneuve, Questions 216 – 217, Tab 6 of the Applicants Record.

Trilateral Agreement

38. In August 1991, the ABL, Canada, and Quebec entered into the Trilateral Agreement as a means for the ABL to participate in the sustainable

development of their traditional territory. The Trilateral Agreement enables the ABL to participate in preparing a draft integrated resource management plan for renewable resources within the 10,000 km2 area of their traditional lands, thereby taking Algonquin traditional land uses into account.

Clifford Lincoln, Paragraph 11- 12, Exhibit "B", Tab 4-B of the Applicants Record.

39. The two main operational parties to the Trilateral Agreement were ABL and Quebec. The Trilateral Agreement states that Canada signed the Agreement pursuant to their "special fiduciary responsibility towards the Algonquins of Barriere Lake".

Harry Wawatie, Paragraph 12, Exhibit "A", Tab 3-A of the Applicants' Record.

Clifford Lincoln, Paragraph 12, Exhibit "B", Tab 4-B of the Applicants Record.

40. The Trilateral Agreement was a vehicle for reconciliation between the ABL and the Crown. It provided the parties with a phased process within which ABL land uses would be reconciled with those of outside users. According to the Agreement, phase one was to analyze and evaluate data and information relating to renewable resource use, including potential impacts and activities relating to resource exploitation. An integrated resource management plan (hereinafter "IRMP") for renewable resources was to be drafted in phase two. Phase three involved the development of recommendations to carry out the draft IRMP, the implementation of which was to be the subject of negotiations following the completion of phase three. Pending the completion and implementation of the IRMP, the Trilateral Agreement also committed the two main operational parties, ABL and Quebec, to design and implement interim protection measures for the duration of the Agreement.

Harry Wawatie, Paragraphs 12 and 58, Exhibit "A", Tab 3-A of the Applicants' Record.

41. The Trilateral Agreement sought to ensure the continuation of the traditional way of life of the ABL, while also enabling the ABL to have a decisive voice in resource management decisions in their traditional territory, which has never been ceded, or surrendered in a Treaty. Despite all of the resource development occurring on the ABL's traditional territory, such as forestry, hydro development and tourism which apparently generates millions of dollars a year, the ABL receives no benefit from such development.

Harry Wawatie, Paragraph 12-13, Tab 3 of the Applicants' Record.

Cross-Examination of Pierre Nepton, Questions 86, Tab 5 of the Applicants' Record.

42. The Trilateral Agreement was to have been completed in May of 1995. The signatories were overly optimistic about the schedule and did not foresee the difficulties and obstacles in implementing the vision of the Trilateral Agreement. The Agreement's implementation was beset by problems from the onset, which are outlined in a Mediation Report prepared by Judge Rejean Paul of the Quebec Superior Court. Judge Paul's Report praised the Trilateral Agreement and emphasized the good faith of our First Nation in trying to fulfill the Trilateral Agreement. Judge Paul likened the Trilateral Agreement to a "treaty" or that at the very least it was a solemn agreement which the Crown was obligated to honour.

Harry Wawatie, Paragraph 59, Exhibit "S", Tab 3-S of the Applicants' Record.

43. The work envisioned by Trilateral Agreement was not completed by May 1995, so the Agreement had to be extended by both Quebec and Canada. By letter dated February 27, 1995, Denis Chatain, on behalf of Canada, extended the Trilateral Agreement until December 31, 1996. The Minister's decision of January 23, 1996, which is discussed below, caused a further disruption to the Trilateral Agreement, thereby necessitating further extensions.

Harry Wawatie, Paragraph 60, Exhibit "T", Tab 3-T of the Applicants' Record.

The Respondent

44. The Respondent is Minister of the Department of Indian Affairs and Northern Development ("DIAND"), who has a statutory mandate under the *Department of Indian Affairs and Northern Development Act* and the *Indian Act*.

***Department of Indian Affairs and Northern Development Act,* R.S., 1985, c. I-6.**

***Indian Act*, R.S.C. 1985, c. I-5.**

45. DIAND is decentralized into regions and the Quebec Region is responsible for maintaining on-going relations with First Nations located in that province. This includes overseeing the delivery of programs and services by First Nations, including entering into funding arrangements with the ABL and analyzing the financial statements submitted annually by the ABL.

Affidavit of Stéphane Villeneuve, Paragraphs 6 – 7.

46. First Nation communities administer 85% of DIAND's program funds through funding arrangements ("Contribution Agreements"), and the Minister's power to intervene, including appointing a TPM, is found in the terms and conditions of the Contribution Agreement. A Contribution Agreement is a contract between the ABL and DIAND which provides the terms under which the ABL delivers programs and services to its membership on reserve.

2003 Report of the Auditor General, chapter 10.21.

National Intervention Policy, Chapter 5.8, section 7 (7.1-7.2).

Affidavit of Pierre Nepton, Paragraph 98.

47. The money that the ABL receives from DIAND annually pursuant to such Contribution Agreements pays for their administration and the provision of programs and services for the First Nation. According to the *Anishinabe Onakinakewin,* the administration of these programs and services would normally be under the *Oshibikewinik* and subject to the authority of the Customary Council. This includes but is not limited to: band employee salaries, education services and supplies, operation and maintenance of community infrastructure such as water and sewer, and administration of welfare recipient benefits.

Affidavit of Stéphane Villeneuve, Paragraph 14-16, Exhibit "A-1".

48. The Minister, who is in a fiduciary relationship with First Nations, is charged with the oversight of DIAND, which develops policies that apply to First Nations communities including the NI Policy and TPM Policies.

National Intervention Policy ("NI Policy") Regime

49. There are two relevant DIAND policies that govern intervention and the appointment of a TPM, both of which fall under Part 5 of DIAND's "Financial Policies and Procedures Manual". The relevant policies are Chapter 5.8, "Funding Arrangements: Third Party Manager" and Chapter 5.11, "Funding Arrangements – Intervention Policy", and both are designed to establish consistency in regional operations.

Affidavit of Pierre Nepton, Paragraph 99-100, 103, exhibits "E-1, E-2" [hereinafter "*National Intervention Policy*"].

50. Pursuant to Chapter 5.11 "Funding Arrangements – Intervention Policy", funding arrangements provide for three levels of intervention: low level (development of a remedial management plan), medium level (appointment

of a co-manager) and high level (appointment of a TPM). Funding arrangements provide for intervention, ranging from low to high, in the following situations:

- the Recipient defaults in any of its obligations under the Funding Arrangement;
- the audit indicates that the Recipient has a cumulative deficit ratio equivalent to eight (8) % or more;
- the auditor of the Recipient gives a denial of opinion or adverse opinion of the financial statements of the recipient in the course of conducting an audit pursuant to the terms and conditions of the Funding Arrangement; or
- Canada has a reasonable belief, based on material evidence, that the health, safety or welfare of the Recipient's community members is being compromised.

***National Intervention Policy*, Chapter 5.11, Section 7.0.**

51. When there has been a triggering event, DIAND is obliged to meet with the ABL to determine whether an event of default has occurred or is occurring. DIAND is to ascertain the reasons for the default, including "administrative, community, financial and/or managerial difficulty". DIAND is to assess the ABL's capacity and willingness to address the default or causes of the default.

***National Intervention Policy*, Chapter 5.11, Section 7.2.1 – 7.2.2.**

52. Pursuant to Chapter 5.8, "Funding Arrangements: Third Party Manager", Third Party Management is the highest level of intervention. The Policy Statement reads:

6.1 <u>The Council is responsible for the delivery of programs and services under the Funding Arrangement and all reasonable efforts should be made to sustain the Council's responsibility for doing so</u>.

6.2 The terms and conditions of the Funding Arrangement set out situations which constitute a default and remedies that may be taken by the Minister. The Minister's Intervention, in the form of an appointment of a Third Party Manager ("TPM"), is taken in order to protect public funds, delivery of one or all of Essential Services or maintain Ministerial accountability.

6.3 The appointment of a TPM is considered high level intervention and a temporary situation while the Council addresses/remedies the difficulty/default which gave rise to a default under the Funding Arrangement… . Monitoring of the TPM level of Intervention should be done in accordance with the processes set out in the Intervention Policy.

6.4 This Policy is about the appointment of a TPM which represents the highest form of Intervention in Council's affairs. The Policy is designed to establish consistency in regional operations and to facilitate an ongoing process of monitoring and improving upon its effectiveness. An important part of this level of intervention is working with the Council, through the TPM, in an orderly fashion to enhance the Council's capacity to the point where lesser, or no form of outside Intervention is required. Third party management provides a framework for remedial management measures and for expert assistance that will enhance the Council's capacity to resume delivery of programs and services.

The Minister commits to this objective and will work, through the TPM, with the Council, the community itself and outside parties such as financial institutions, where required, to enable a transfer of responsibility back to the Council. Furthermore, the Minister commits to the principles of transparency of

> operations and disclosure of information. It is through working together in a respectful relationship that will enable third party management Intervention to succeed in restoring stability in the delivery of programs and services.
>
> ***National Intervention Policy*, Chapter 5.8 Section 6.1 (emphasis added).**

53. The appointment of a TPM can only occur if a First Nation community is in a default situation under the funding arrangement, and it will become the role of the TPM to administer DIAND's programs and services to the First Nation.

***National Intervention Policy*, Chapter 5.8, Section 7.0.**

PART IB: FACTS RELATED TO THE MINISTER'S PREVIOUS DECISION TO RECOGNISE AN INTERIM BAND COUNCIL ("IBC") AND APPOINT A TPM TO THE FIRST NATION IN 1996

DIAND Recognition of the IBC

54. During the period prior to 1996, the Customary Council of ABL was lead by Chief Jean Maurice Matchewan. Between 1994 and 1995, a dissident group within the ABL made various attempts to get DIAND to recognize them as the legitimate council of the ABL. On numerous occasions, DIAND rejected requests for such recognition. For instance, on November 30, 1994, then Minister Ron Irwin notified Joseph Junior Wawatie, on behalf of that group, that:

> Under the *Indian Act*, however, the Department of Indian Affairs and Northern Development has no authority to intervene in the selection of Chiefs and Councils, which are carried out in accordance with the customs. Traditions and customs are, in fact, recognized by a community itself and accepted by the majority as force of law. Disagreements over the definition or nature of local customs should therefore be dealt with internally or be referred to the courts.
>
> **Affidavit of Pierre Nepton, Exhibit "A-3".**

55. On December 22, 1994, Denis Chatain, the Regional Director of the DIAND Quebec Region rejected the request of the same group on the grounds that DIAND "has no authority to intervene in the selection of Chiefs and Councils, which are carried out in accordance with customs."

Affidavit of Pierre Nepton, Exhibit “A-3”.

56. On July 6, 1995, Pierre Nepton received a verbal request from Joseph Junior Wawatie for DIAND to recognize his group and replace the Customary Council as the legitimate Band Council. In response, on July 10, 1995, Pierre Nepton notified Joseph Junior Wawatie that:

> Your band being governed by its own election custom rules. Departmental policy is not to interfere in band internal affairs. Any dissatisfaction with the electoral system or the leadership should be dealt with by the community.

Affidavit of Pierre Nepton, Exhibit “A-4”.

57. On November 23, 1995, DIAND received a petition from the same group, now calling itself the Interim Band Council (“IBC”), requesting the Customary Council be removed from leadership in favour of the IBC. In December 1995, the IBC brought an Application for Judicial Review in Federal Court, being File No. T-2590-95, seeking to replace the Customary Council as the legitimate Band Council of the First Nation (“IBC Application”).

Harry Wawatie, Paragraph 24, Tab 3 of the Applicants’ Record.

Affidavit of Pierre Nepton, Paragraphs17-19, Exhibits “A-3”.

58. Despite their former rejections and prior to a judicial determination, on January 23, 1996, DIAND officially recognized the IBC as the legitimate Band Council for the ABL, based on what it called an “electoral petition”. At the same time, DIAND appointed a TPM to the First Nation.

Harry Wawatie, Paragraphs 23 – 25, Exhibit "B", Tab 3-B of the Applicants' Record.

59. The rationale offered by DIAND at the time for its sudden reversal from its earlier refusal to "interfere in band internal affairs" was that the IBC had presented it with an "electoral petition". DIAND claimed that ABL's customs included a "modern custom of leadership selection by petition". According to the Harry Wawatie, this was based on a misinterpretation of ABL's customs. Harry Wawatie stated that, from his knowledge of the customs, as an Elder and past member of the Customary Council, "there is no modern custom of leadership selection by petition which exists in our First Nation".

Harry Wawatie, Paragraph 25, Tab 3 of the Applicants' Record.

60. It is to be noted that, in a judicial review involving a labour adjudication matter arising from the reign of the IBC, Madam Justice Tremblay-Lamer , found that found that the IBC had been instructed by DIAND to submit a petition in order to be recognized as the legitimate band council:

> …in September 1995, DIAND wrote to the dissident government… and explained how to become officially recognized by DIAND. The group followed the advice and circulated a petition on- and off-reserve proclaiming themselves to be the Interim Band Council (IBC) and submitted it to the department on November 27, 1995.

Cross-Examination of Pierre Nepton, Questions 293 – 325 and 300, Tab 5 of the Applicants' Record. Regarding *Mitchikanibikok Inik v. Michel Thusky, et al,* Federal Court Trial Division, Docket T-1761-98, September 8, 1999, paragraph 6.

61. In his Affidavit in the present Application Mr. Nepton claimed that the decision to appoint the IBC was also based on the fact that a majority of the ABL members supported the IBC. However, in cross-examination about an a DIAND affidavit prepared for the 1997 Judicial Review Proceedings which admitted the IBC was not supported by the majority, Mr. Nepton stated: "If

the question is was this a majority of the Band members, did the majority carry the day, I would say no, it was not a majority of the Band members".

Affidavit of Pierre Nepton, Paragraph 20, Exhibits "A-4".

Cross-Examination of Pierre Nepton, Questions 341-348, Tab 5 of the Applicants' Record.

Appointment of a TPM and Financial Situation in the Period Prior to 1996

62. As aforesaid, the DIAND decision of January 23, 1996 also included the appointment of a TPM. Mr. Nepton's Affidavit claims that this was at the request of the IBC. However, as was pointed out to Mr. Nepton in cross-examination, DIAND only recognized the IBC on January 23rd, so if the IBC requested TPM it was prior to being officially recognized.

Affidavit of Pierre Nepton, Paragraph 22.

Cross-Examination of Pierre Nepton, Questions 362-364, Tab 5 of the Applicants' Record.

63. Between 1993 and 1996, the financial situation of the ABL was such that their deficit exceeded the debt ratio of 8%, which could have triggered an intervention by DIAND:

- in the 1993-1994 fiscal year, the debt ratio was 10.44%, and
- in the 1994 -1995 fiscal year, the debt ratio was 9%.

Affidavit of Stéphane Villenueve, Exhibit "B-1"

Cross-Examination of Stéphane Villeneuve, Questions 272-279, Tab 6 of the Applicants' Record.

64. However, as Stéphane Villeneuve indicated in cross-examination, this was not the type of circumstance that would normally warrant TPM intervention, because the ABL demonstrated that progress was being made and the ABL was willingly working to minimize its debt.

Affidavit of Stéphane Villenueve, Exhibit "B-1"

Cross-Examination of Stéphane Villeneuve, Questions 272-279, Tab 6 of the Applicants' Record.

Rejection of the Minister's Decision of January 23, 1996

65. On February 8, 1996, the IBC brought a motion, bearing Federal Court File Number T-2590-95, to cease the IBC Application for Judicial Review, having already gained recognition by DIAND. Justice McGillis heard the motion and rejected it, finding that "the question of the legality of the selection of the Interim Band Council according to custom remain[ed] to be determined". DIAND continued to treat the IBC as the legitimate council of the ABL, refusing to deal with or acknowledge the authority of the Customary Council.

Affidavit of Pierre Nepton, Paragraph 23 (emphasis added).

66. The Customary Council led by Chief Matchewan brought an Application for Judicial Review in Federal Court, being Court File No. T-357-96, of the Minister's decision of January 23, 1996. The basis for the judicial review was that the Minister had misinterpreted the First Nation's customs and that the decision to appoint the IBC and the TPM was a violation of their customs.

Harry Wawatie, Paragraphs 23-25, Tab 3 of the Applicants' Record.

67. The Minister's decision to recognize the IBC was not accepted by the First Nation and the IBC failed to ever establish a governing authority at the Rapid Lake Reserve. Thus, the IBC and the TPM established their offices at Maniwaki, a two-hour drive south of Rapid Lake. The IBC could not properly provide programs and services to community members residing on the Rapid Lake Reserve. Pierre Nepton admitted there was a "suspension of programs and services" provided to the ABL during this time. Despite the inability of the IBC to establish governing authority at Rapid Lake, DIAND allocated $4,873,635.00 to the IBC and/or the TPM towards the administration of programs and services in the name of the First Nation.

Cross-Examination of Pierre Nepton, Questions 380 – 386, Tab 5 of the Applicants' Record.

Cross-Examination of Stéphane Villeneuve, Questions 306 and 328–332, Tab 6 of the Applicants' Record.

68. During the IBC's reign, the Rapid Lake School had to be closed. It was closed by the Principal, Jonathon Robinson, and because of security concerns, he refused to reopen the school. He also refused to reopen the School when ordered by the IBC. The IBC attempted to obtain a court order forcing him to reopen the school, but Madame Justice Trudel of the Quebec Superior Court refused to grant the order.

Affidavit of Pierre Nepton, Paragraph 21.

Cross-Examination of Pierre Nepton, Question 389-399, Tab 5 of the Applicants' Record

69. The Customary Council of Chief Matchewan, formally resigned in March 1996 explaining that they felt they had no choice, but to resign because of the actions of the IBC and the Department of Indian Affairs. A new Customary Council was subsequently selected to replace Chief Matchewan's Council, which was led by Chief Harry Wawatie. At first, DIAND did not recognize the Wawatie Customary Council, but as a result of mediation and facilitation, described below, Chief Wawatie and his Customary Council was eventually recognized.

Harry Wawatie, Paragraphs 26-27, Tab 3 of the Applicants' Record.

70. The Applications for Judicial Review both by the IBC (Court File No. T-2590-95) and the Customary Council (Court File No. T-357-96) were never determined on the merits by the Federal Court. The issues rising out of the Minister's decision were resolved outside of the court process *via* mediation and facilitation.

Harry Wawatie, Paragraphs 27-40, Tab 3 of the Applicants' Record.

Cross-Examination of Pierre Nepton, Questions 403-404, Tab 5 of the Applicants' Record.

Mediation: Judge Paul's Report

71. In April 1996, Harry Wawatie recommended mediation to address the matter of customs and leadership selection. DIAND accepted the recommendation. A mediation team was appointed by DIAND made up of Judge Rejean Paul of the Quebec Superior Court, and two Elders from outside the ABL. On January 28, 1997, Judge Rejean Paul issued a formal Report to then Minister of Indian Affairs, Ron Irwin.

Harry Wawatie, Paragraphs 28-29, Exhibit "C", Tab 3-C of the Applicants' Record.

72. The main findings and recommendations in Judge Paul's Report with regard to the customs of our First Nation on leadership selection, were as follows:

a. leadership selection is done by the Elders;
b. the selection process occurs with the participation of community members; and
c. the community members who are allowed to participate are only those people residing, having connection and knowledge of the land and not all registered band members.

Harry Wawatie, Paragraph 28 - 29, Exhibit "C", Tab 3-C of the Applicants' Record.

73. Judge Paul's Report did not include a finding that the ABL's customs included a modern custom of leadership selection by petition.

Facilitation: Codification and Approval of Customs and Resolution of the Leadership Issue

74. With the support of the ABL Elders, Chief Wawatie recommended that facilitators be appointed to implement the recommendations of Justice Paul. The request for facilitation was accepted by DIAND on March 12, 1997. Co-

facilitators were appointed: Michel Gratton was the Facilitator representing the ABL and Andre Maltais was the Facilitator representing DIAND. Accordingly, the ABL underwent a facilitation process to resolve the leadership issue and to codify the *Anishinabe Onakinakewin* based on Justice Paul's Report.

Harry Wawatie, Paragraph 33 – 35 of the Applicants' Record, Exhibits "E" & "F", Tab 3-E, 3-F of the Applicants' Record.

Cross-Examination of Pierre Nepton, Question 412 , Tab 5 of the Applicants' Record.

75. The Facilitators oversaw the approval of the codified customs, amendments, and their affirmation by Declaration. They also oversaw the selection or reaffirmation of Chief Wawatie's Customary Council in 1996, based on those codified customs. The leadership dispute was resolved, and finalized at a community meeting on April 9, 1997.

***Harry Wawatie*, Paragraphs 36, 37 and 39, Exhibit "G", Tab 3-G of the Applicants' Record.**

76. On April 17, 1997, DIAND recognized the ABL Customary Council, fifteen months after the Minister's decision to wrongfully recognize the IBC. DIAND also acknowledged the ABL's customs as codified and amended under the Declaration.

Harry Wawatie, Paragraph 36 & 40, Exhibit "H", Tab 3-H of the Applicants' Record.

Outstanding Issues

77. There were a number of outstanding issues as a result of the Minister's decision of January 23, 1996. The Facilitators were also given the mandate to address these outstanding issues.

***Harry Wawatie*, Paragraph 41, Tab 3 of the Applicants' Record**.

78. Upon their re-instatement in 1997, the Customary Council summarized the harm and hardship caused to the ABL by the Minister's decision of January 23, 1996, as follows:

a) It resulted in the closure of the Rapid Lake School and the disruption of education services to our elementary students;

b) It derailed the Trilateral Agreement;

c) It created administrative turmoil when the Interim Band Council established its administrative offices in Maniwaki because the community refused to accept the imposition of their authority;

d) It disrupted health and medical transportation services;

e) It caused the community healing process under Valdie Seymour to be halted, which in turn created the potential for serious emotional harm, especially for the children;

f) It disrupted jobs and employment training programs; and

g) It caused general disruption of delivery of all programs and services to the community members.

Harry Wawatie, Paragraph 42 & 43, Tab 3 of the Applicants' Record.

Cross-Examination of Pierre Nepton, Question 318-424, Tab 5 of the Applicants' Record.

79. During the period from January 23, 1996 until the Customary Council was re-recognized and the delivery of programs and services were regularized, $4,873,635.00 was allocated to the IBC and/or the TPM in the name of the ABL. During this same period, the Customary Council received no funding and DIAND admits there was a "suspension of programs and services" to the ABL during that time.

Affidavit of Pierre Nepton, Paragraph 32, Exhibits "D-1", "D-2".

Harry Wawatie, Paragraph 73, Exhibit "I", Tab 3-I of the Applicants' Record.

Cross-Examination of Pierre Nepton, Question 437, Tab 5 of the Applicants' Record.

Cross-Examination of Stéphane Villeneuve, Question 306, Tab 6 of the Applicants' Record.

The Special Provisions

80. One of the key components in addressing the outstanding issues was the Special Provisions. In order to restore programs and services to the First Nation, the Customary Council needed to enter into a Contribution Agreement with DIAND. However, the Customary Council refused to accept the financial situation in the aftermath of the Minister's decision of January 23, 1996, including the transactions entered into by the IBC and the TPM.

Harry Wawatie, Paragraphs 42 - 52, Tab 3 of the Applicants' Record

81. The position of the Customary Council is set out in a number of resolutions to address issues regarding the administration and financial situation:

- Resolution 97-01 requests an apology from DIAND;
- Resolution 97-02 sets-out a series of steps recommended or required by our Customary Council on the resolution of the administrative issues;
- Resolutions 97-13 and 97-16 appoint Interim Administrators;
- Resolution 97-18 (which included Resolution 97-13 as Part G) required that the interim administration be consistent with Customary Council Resolutions 97-01 through 97-12;
- Resolution 98-16 highlights the disagreement between the ABL and DIAND regarding the financial positions and attaches to it a Special Provision. This is the Special Provision that then attaches to every single Contribution agreement from 1997 until the current agreement between DIAND and the TPM

Harry Wawatie, Paragraph 47-51, Exhibits "J"; "K"; "L", "M"; "N"; "O", Tab 3-J; 3-K; 3-L; 3-M; 3-N; 3-0 of the Applicants' Record.

82. With the support and guidance of the Facilitators, DIAND and the ABL negotiated that the "Special Provisions", would attach to and form part of the 1997 Contribution Agreement. The Special Provisions paved the way for the restoration of programs and services to the ABL, while recognizing that the Minister and the Council disagreed about and committed to resolve the financial position of the ABL. The Special Provisions state that the Minister and the ABL are to enter into a process to clarify the financial position of the ABL and seek a solution by May 1998. If an agreement was not reached by May 1998, it was agreed that the Special Provisions would be added to the funding arrangement of the following year.

Harry Wawatie, Paragraph 51, Exhibit "O", Tab 3-O of the Applicants' Record.

Affidavit of Stéphane Villeneuve, Exhibit "A-25" at page 229.

83. The Facilitators, Mr. Maltais and Mr. Gratton, in their Report on Outstanding Issues in December 1997, emphasized that the financial situation of the ABL needed to be clarified in the aftermath of the reign of the IBC:

> The issue of the financial situation of the ABL must also be cleared up. The Customary Council objects to expenditures, financial transactions and financial statements undertaken or prepared in the name of the ABL for the period starting January 22, 1996, until the authority and administration of the Customary Council was restored. This issue is the subject of the special provisions under the Comprehensive Contribution Agreement between DIAND and Barriere Lake. Since the community has claimed for restoration in relation to the financial situation, the facilitators recommend that these two issues also be considered at the Ministerial level.

Harry Wawatie, Paragraphs 42 - 45, Exhibit "I", Tab 3-I of the Applicants' Record

84. The uncertainty in the state of the financial situation of ABL is reflected in the financial statements of the First Nation dated May 31, 1998, prepared by ABL's Auditors, Payne Foreman Kalli, Chartered Accountants ("May 1998 Audit") .

Harry Wawatie, Paragraph 51, Exhibit "P", Tab 3-P of the Applicants' Record.

85. The process outlined in the Special Provision has never been fulfilled. According to Mr. Nepton, DIAND refused to negotiate under the the Special Provisions because it refused the negotiate compensation ABL claims it is owed as a result of the Minister's decision of January 23, 1996:

> Q. But you indicate in [paragraph 93 of your affidavit], you at least implied that DIAND refused to negotiate the issue of compensation.
>
> A. The compensation issue was wider than the mere financial issue. So we refused to go along with that. …
>
> Q. But the fact is, and I will put it to you again, Mr. Nepton, that the process envisioned in [the Special Provisions] has not been concluded.
>
> A. If going by the management remedial plan adopted by the Council last year, I would say yes. <u>But on a formal basis, was the process completed? I agree with you that it was not</u>.
>
> **Cross-Examination of Pierre Nepton, Questions 432 – 440, Tab 5 of the Applicants' Record. [Emphasis added]**
>
> **Harry Wawatie, Paragraph 51-52 and 73, Tab 3 of the Applicants' Record.**

86. The Special Provisions has been included in every Contribution Agreement entered into between ABL and DIAND since 1997. This emphasizes that the Special Provisions remain unfulfilled; that the financial position of the ABL remains unclear; and that the process to clarify the ABL's financial

position was never completed. It was only after the TPM was appointed to the First Nation in July 2006, DIAND failed to attach the Special Provisions to the Contribution Agreement, executed with the TPM and without the approval of the Chief and Council.

Cross-Examination of Pierre Nepton, Questions 450-457, Tab 3 of the Applicants' Record.

The Memorandum of Mutual Intent ("MOMI")

87. The Facilitators spent a significant amount of time with both the ABL and DIAND to address the matter of outstanding issues and reparation. The Facilitators recommended and facilitated the negotiation of a MOMI between ABL and DIAND to address the outstanding issues. The MOMI was signed on October 21, 1997 by Chief Harry Wawatie and then Deputy Minister, Scott Serson. It committed "the parties to strengthen their relationship based on the principles of trust, partnership, mutual respect and fairness". The MOMI also confirmed a commitment by the Minister to provide funding for various measures contained in the Global Proposal for Rebuilding the Community, which was attached to the MOMI when it was signed. The Global Proposal identifies the "Needs/Priorities" of the ABL, to include "housing and infrastructure", "educational development", "restoration and consultation costs", the "Trilateral Agreement", and "expanded land base and electrification". The MOMI commits the parties to establish a process to address those needs.

Harry Wawatie, Paragraphs 53-56, Global Proposal is an attachment to MOMI at Exhibit "R", Tab 3-R of the Applicants' Record.

88. The MOMI was signed on the basis of goodwill and although its purpose was "not to create legally enforceable rights or obligations", the MOMI was intended to "re-establish the relationship of trust between DIAND and the Band Council". In effect, the MOMI was a commitment by DIAND to work in partnership with the ABL on the quality of life issues, including the urgent

issues of housing and infrastructure. It also committed DIAND to pursue the objectives of the Trilateral Agreement.

Cross-Examination of Pierre Nepton, Questions 468 and 474, Tab 5 of the Applicants' Record.

Clifford Lincoln, Paragraph 15, Tab 4 of the Applicants' Record.

89. According to Elder Wawatie, DIAND was initially committed to the MOMI. However, in approximately 2000-2001, ABL reached an impasse with DIAND in negotiations regarding the Trilateral Agreement, housing and electrification.

Harry Wawatie, Paragraph 57, Tab 3 of the Applicants' Record.

90. Some commitments in the MOMI and the Global Proposal have been fulfilled by the Minister but a number of major outstanding commitments remain, including:

a) The construction of 10 new houses per year for five years at $650,000 per year;

b) The construction of a multi-functional community centre administration building;

c) The construction of a school; and

d) The electrification of the community by connecting to the Hydro-Quebec grid.

Cross-Examination of Pierre Nepton, Questions 480 – 484, 487, 499-501, Tab 5 of the Applicants' Record.

Cross-Examination of Stéphane Villeneuve, Questions 120-124, 145 – 155, Tab 6 of the Applicants' Record.

91. The failure to implement the MOMI results in the preservation of the socio-economic status quo of poverty at the ABL: Rapid Lake remains unconnected to the Hydro-Quebec electricity grid and operates on diesel generators, community members continue to live in substandard and

Cross-Examination of Pierre Nepton, Question 89-90, Tab 5 of the Applicants' Record.

See also: Harry Wawatie, Paragraph 13, Tab 3 of the Applicants' Record.

92. DIAND takes the position that it was not committed to all aspects of the Global Proposal to Rebuild the Community. In his Cross-Examination, Pierre Nepton stated:

> Q. So don't you think that if there were parts of the Global Proposal that were not acceptable, that should have been indicated at the onset?
>
> A. If memory serves, at the time, there were a lot of discussions and it was said repeatedly that many aspects of the Global Proposal were unacceptable.
>
> Q. But if that is the case, then why would the Global Proposal, as it presently exists, have been attached to the MOMI?
>
> A. As I already explained, the Global Proposal was the will of the community and it is the community expressing its vision. So we were there to respect it. The MOMI was there to support the community within the existing programs and within a reasonable time frame.
>
> Q. But wouldn't it have been more fair, Mr. Nepton, and more mutually respectful that if DIAND did not intend to even honour or negotiate that aspect of compensation that it ought to have said so directly?
>
> A. Well, that is your viewpoint.

Cross-Examination of Pierre Nepton, Questions 477 – 479, Tab 5 of the Applicants' Record.

Trilateral Agreement Issues

93. As part of the process to address outstanding issues in the aftermath of the Minister's recognition of the IBC on January 23, 1996, DIAND committed to

continue and complete the work of the Trilateral Agreement. The Minister of Indian Affairs, Ron Irwin, wrote to Quebec Minister Guy Chevrette on November 25, 1996 confirming his Department's commitment to honour the Trilateral Agreement. This was reaffirmed by DIAND on October 21, 1997, when Deputy Minister Serson signed the MOMI.

Harry Wawatie, Paragraphs 62, Tab 3 of the Applicants' Record.

94. On May 26, 1998, the ABL and the Government of Quebec as represented by Guy Chevrette, Minister of Natural Resources and Native Affairs, signed a Bilateral Agreement. This Agreement extends the Trilateral Agreement. In fact, under the 1998 Agreement, Quebec and the First Nation made a commitment "to finalize the work begun under the Trilateral Agreement to the satisfaction of both parties". Beyond this, the Bilateral Agreement was an agreement on the approach and process to complete Phase II and III of the 1991 Trilateral Agreement. It also tackled the "quality of life" issues for the Algonquins, and outlines objectives to meet, such as expansion of the Rapid Lake Reserve, connection of the community to the hydro grid, and access to economic spin-offs from the territory including resource revenues.

Clifford Lincoln, Paragraph 16, Exhibit "D", Tab 4-D of the Applicants' Record.

95. There was progress being made under the Trilateral Agreement, in conjunction with the 1998 Bilateral Agreement with Quebec and the MOMI with Canada. In fact, on April 27, 1999, at a meeting on the Rapid Lake Reserve, the Special Representatives for Canada, Quebec and the First Nation, reached an Agreement in Principle on expansion to the Rapid Lake Reserve. The commitment by Quebec to transfer lands under the Agreement in Principle is conditional on a commitment by the federal government to a capital "investment plan, schedule and a clear commitment to spend".

Harry Wawatie, Paragraphs 65-6, Exhibit "W", Tab 3-W of the Applicants' Record.

96. In response to this and on behalf of DIAND, Mike Samborski in a letter of May 7, 1999, said:

> One of these provisions was that our department indicate to those party to the agreement the level of investments that will be dedicated to the community of Kiiganik to improve physical living conditions, and the social health and safety conditions of the Mitchikanibikok Inik. We are therefore pleased to inform you on a more formal basis of what these investments might be as illustrated in the Appendix here-attached.

The Appendix is entitled "5-Year Capital Reference Levels" and targets a total outlay of $17,102,600 over five years for "housing & infrastructure", "education facilities" and "other community infrastructure & and equipment" to spend money on capital infrastructure for the expanded reserve.

Harry Wawatie, Paragraph 67, Exhibit "X", Tab 3-X of the Applicants' Record.

97. The relationship between ABL and DIAND became problematic in approximately 2000-2001 in respect of a number of issues, including housing and electrification. At approximately this same time, DIAND withdrew from the Trilateral Agreement without the agreement of ABL or Quebec in 2001.

Harry Wawatie, Paragraph 57 and 68, Exhibit "Y", Tab 3-Y of the Applicants' Record.

Cross-Examination of Pierre Nepton, Questions 232-234, Tab 5 of the Applicants' Record.

98. Notwithstanding DIAND's withdrawal from the Trilateral Agreement, ABL and Quebec carried on their relationship under the Trilateral Agreement and the 1998 Bilateral Agreement. ABL appointed Clifford Lincoln as its Special Representative under the Trilateral Agreement and Quebec appointed John Ciaccia as its Special Representative.

Clifford Lincoln, Paragraph 17, Tab 4 of the Applicants' Record.

99. The Special Representatives for ABL and Quebec have made significant progress under the Trilateral Agreement, including:

- the completion of a draft integrated resource management plan (IRMP) for the Trilateral Agreement territory; and
- joint recommendations were developed between Quebec and the Algonquin Special Representatives regarding implementation of the IRMP, co-management, resource revenue sharing, expansion of the Rapid Lake Reserve and connection to the hydro grid.

Such recommendations have the potential to bring significant improvement in the overall economic situation of the First Nation. A commitment by Quebec to sharing benefits from the resources, to the extent of $1.5 M as recommended by the Special Representatives, will provide additional much needed revenues for the community.

Clifford Lincoln, Paragraph 17-18, Tab 4 of the Applicants' Record.

Cross-examination of Pierre Nepton, Questions 282-288, Exhibit No. 4, Tab 5-D of the Applicants' Record.

Attempts to Re-engage DIAND in the Trilateral Process

100. The numerous efforts on the part of the ABL to have the federal government honour its obligations under the Trilateral Agreement and its other agreements have been unsuccessful to date.

Harry Wawatie, Paragraph 71, Tab 3 of the Applicants' Record.

101. On February 6, 2004, Chief Wawatie sent a letter to Andy Mitchell, federal Minister of Indian Affairs and Northern Development, requesting an urgent meeting to discuss the re-engagement of the federal government in the 1991 Trilateral Agreement process.

Clifford Lincoln, Exhibit "F", Tab 4-F of the Applicants' Record.

Affidavit of Pierre Nepton, Paragraphs 54, Exhibit "B-10".

102. On June 30, 2005, by Resolution of the Customary Council of the ABL, Clifford Lincoln was appointed Special Representative under the Trilateral Agreement. Part of his task was also to get the Federal Government re-engaged in the 1991 Trilateral Agreement process and the 1997 MOMI.

Clifford Lincoln, Paragraphs 22-23, Tab 4 of the Applicants' Record.

103. On July 6, 2005 Chief Wawatie sent a letter to the new federal Minister of Indian Affairs and Northern Development, Mr. Mitchell's successor, Andy Scott, informing him that the ABL had mandated Clifford Lincoln, as their Special Representative, to initiate discussions with the federal government to re-engage on commitments arising from the 1991 Trilateral Agreement and the 1997 MOMI.

Clifford Lincoln, Paragraphs 25, Exhibit "G", Tab 4-G of the Applicants' Record.

104. On March 3, 2006, Chief Wawatie sent a letter to the new federal Minister of Indian Affairs and Northern Development, Jim Prentice, informing him that Clifford Lincoln was mandated to assist the ABL in re-engaging the federal government in negotiations regarding the outstanding obligations from the various signed agreements the ABL entered into with the federal government. He also requested an urgent meeting with the Minister.

Clifford Lincoln, Paragraphs 26, Exhibit "H", Tab 4-H of the Applicants' Record.

105. Despite efforts to re-engage the Minister in the Trilateral Agreement and the MOMI, DIAND would not negotiate or discuss the issues facing the ABL under either agreement. However, it was agreed that DIAND would issue a proposal regarding housing and infrastructure, although, as is stated in the Clifford Lincoln, the aforesaid proposal "would not address the Trilateral Agreement, for the time being."

Clifford Lincoln, Paragraph 29, Tab 4 of the Applicants' Record.

PART IC: FACTS RELATED TO THE MINISTER'S DECISION UNDER REVIEW – 2006 APPOINTMENT OF THIRD PARTY MANAGER

Financial Situation at 2001

106. The 1996 decision of the Minister to recognize the IBC and appoint the firm of BDL as TPM had a serious impact on the financial situation of the First Nation. The confused state of the financial situation is reflected in the financial statements of the First Nation dated May 31, 1998, prepared by ABL's Auditors, Payne Foreman Kalli, Chartered Accountants ("May 1998 Audit").

Harry Wawatie, Paragraph 51, Exhibit "P", Tab 3-P of the Applicants' Record.

107. Subject to the Special Provisions and the contingencies identified in the May 1998 Audit, after the reign of the IBC the First Nation was in a deficit position. However, as of the fiscal year of 1999-2000, the ABL was able to garner a surplus. By March 31, 2000, DIAND's analysis of the ABL's financial statements showed that the accumulated deficit had been completely wiped out and the financial situation of the ABL had clearly improved. It is to be noted that the First Nation was able to overcome their deficit even though the Special Provisions had not yet been fulfilled; consequently, the contingencies identified in the May 1998 Audit remained.

Affidavit of Stéphane Villeneuve, Paragraph 25 and 29.

Bob Smith as Financial Manager/Controller

108. Bob Smith was hired as the Financial Manager/Controller ("Financial Manager") of the ABL in April 2001 and worked with the ABL until June 2004. During Bob Smith's tenure, the ABL experienced the largest growth in its deficit, other than during the reign of the IBC. Over four years as Financial Controller, Bob Smith either misallocated or accounted improperly for approximately $1,698,000.00 of the ABL's finances, which Stéphane Villeneuve admits are "large, large adjustments".

Cross-Examination of Stéphane Villeneuve, Questions 221 – 240, Tab 6 of the Applicant's Record.

109. Stéphane Villeneuve further admitted that Bob Smith had not prepared the financial statements according to DIAND's demands and this indicated very poor management skills or ability or poor knowledge of departmental criteria, despite Bob Smith's training and accreditation as a Chartered Accountant.

Cross-Examination of Stéphane Villeneuve, Questions 223-228, 230–241, Tab 6 of the Applicants' Record.

110. On February 13, 2004, then Chief Harry Wawatie was informed by letter of DIAND's concern with ABL's financial situation and of the application of the NI Policy. According to DIAND's letter, their analysis of their 2002-2003 funding arrangement revealed an accumulated deficit of 9.43% of total revenues.

Harry Wawatie, Paragraphs 74 and 76, Exhibit "2", Tab 3-2 of the Applicants' Record.

Cross-Examination of Pierre Nepton, Question 597, Tab 5 of the Applicants' Record.

Chief Wawatie Attempts to Alert the Regional Director General

111. Chief Wawatie was already aware that the First Nation experiencing serious financial and administrative difficulties during the tenure of Bob Smith as the ABL Financial Manager. Responding to a letter asking for his contract to be renewed until June 30, 2004, on February 9, 2004, Chief Harry Wawatie wrote to Bob Smith and advised him that the ABL would not be renewing his contract. This letter stated:

> As Chief of Mitchikanibikok Inik, I must admit to being disappointed, especially over the extreme lateness of our Audit – it was due in July and was submitted in November. This is consistent with the general lateness or lack of proper reporting to Council on the financial position of our First Nation.
>
> I cannot go into the town of Maniwaki anymore without being harassed by our suppliers, and because I do not receive proper financial reporting from you, I am not in a position to let them know when they are likely to receive payment. This is not acceptable to me and is not good for the administration of the ABL.
>
> **Exhibit "8B" to the Cross-Examination of Pierre Nepton, June 22, 2007 (emphasis added), Tab 5-H of the Applicants' Record.**
>
> **See also: Cross-examination of Pierre Nepton, Question 597, Tab 5 of the Applicants' Record.**

112. Shortly thereafter, on February 11, 2004, Chief Harry Wawatie notified the DIAND Regional Director General, André Côté, that Bob Smith's employment as the Financial Manager of ABL had not been renewed. A copy of the February 9, 2004 letter to Bob Smith was transmitted to Mr. André Côté. As well, Chief Wawatie outlined several steps the ABL was taking to address the problems arising from Bob Smith's tenure and the financial difficulties experienced by the ABL. Chief Wawatie noted that he met with Andrew Foreman, the auditor for the ABL, to assist in the transition from Mr. Smith to a new Financial Manager. Mr. Foreman was to contact Mr. Smith to obtain the financial records of the ABL in order to prepare a status report on the ABL's finances. Mr. Foreman would also provide the

ABL with management advice on steps to be undertaken for transition to a new Finance Director and provide names of possible candidates to undertake the role of Finance Director, on an interim basis.

Exhibit "8A" to the Cross-Examination of Pierre Nepton, June 22, 2007, Tab 5-H of the Applicants' Record.

Cross-examination of Pierre Nepton, Question 597-604, Tab 5 of the Applicants' Record.

113. Mr. Foreman sent a letter to Bob Smith on February 12, 2004, following-up on Chief Wawatie's instructions. Mr. Foreman asked Bob Smith for ABL's financial records.

Exhibit "9" to the Cross-Examination of Pierre Nepton, June 22, 2007, Tab 5-I of the Applicants' Record.

114. Despite his letters, Chief Wawatie never received a response from André Côté indicating DIAND would work with the ABL to discuss the problem of Bob Smith. Although DIAND knew the Customary Council lacked financial and administrative capacity and the NI Policy required DIAND to work with the ABL at all times to prevent higher levels of intervention than are required, DIAND neglected to respond to Chief Wawatie's letter of February 11, 2004.

Cross-Examination of Pierre Nepton, Questions 604 – 609, Tab 5 of the Applicants' Record.

***National Intervention Policy*, Chapter 5.11, Section 7.2.1 – 7.2.2.**

115. On March 12, 2004, DIAND confirmed to ABL that a remedial management plan ("RMP") was required according to the NI Policy. DIAND gave ABL 30 days to submit the RMP. On April 30, 2004, DIAND gave ABL an additional 30 days.

Affidavit of Pierre Nepton, Paragraph 107 and111, Exhibits "E-4" and "E-7".

Bob Smith Refuses to Cooperate

116. Despite Chief Wawatie's notice to Bob Smith of February 9, 2004, Mr. Smith refused to leave his position as Financial Manager of the First Nation. He also refused to cooperate with Mr. Foreman as directed by Chief Wawatie:

- In April 2004, ABL passed a resolution retaining the firm of Loewen & Caine Management Services ("Loewen & Caine") to prepare an RMP for the First Nation;
- On May 25, 2004, DIAND received a draft RMP prepared by Bob Smith;
- Also on May 25, 2004, Loewen & Caine informed ABL that given it was impossible to work with the finance branch, namely Bob Smith, they would not be in a position to assist the community;
- As indicated in the Affidavit of Mr. Nepton, Bob's Smith's ongoing presence created confusion;
- On June 21, 2004, Bob Smith confirmed to DIAND be email that he was leaving effective July 2, 2004;
- On June 30, 2004, Loewen & Caine informed the ABL that they were still unable to prepare the RMP because of lack of financial information -- they said they were still not getting cooperation from the financial services branch, namely Bob Smith;
- On July 6, 2004, DIAND representatives met with ABL and informed them that the First Nation's auditor, Mr. Foreman, indicated that he could not prepare the First Nation's audit for 2003-4 because he had not been paid and he did not have the necessary financial records;
- On July 22, 2004, Loewen & Caine informed the ABL that the financial documents provided were innaccurate; and
- On July 27, 2004, Loewen & Caine informed the ABL that no bookkeeping had been done since May 31, 2004.

Cross-Examination of Pierre Nepton, Questions 611-613, 2007, Tab 5 of the Applicants' Record.

Affidavit of Pierre Nepton, Paragraphs 110, 114-126.

117. The Applicants admit that the First Nation experienced significant financial and administrative chaos as a result of Bob Smith's tenure as Financial Manager.

Affidavit of Pierre Nepton, Paragraphs 113, 116, 129, 130, 141 and 151.

Co-Management from November 2004 to June 2006:

118. On October 21, 2004, the ABL was notified that it would be required to be placed under a co-management regime, and the ABL obliged this level of intervention. In November 2004, the ABL contracted with Loewen & Caine as co-manager who submitted a draft RMP on July 11, 2005. Loewen & Caine resigned as co-manager due to personal reasons on July 28, 2005. On August 23, 2005, the ABL contracted with co-mangers, William Paquin and Jeff Leblanc, of the firm Atmacinta Hartel and Paquin, to provide training, advisory and management services, including the completion of a Remedial Management Plan, for the ABL. On November 28, 2005, the new co-manager submitted an RMP to DIAND and DIAND approved the RMP on April 18, 2006.

Harry Wawatie, Paragraph 76, Tab 3 of the Applicants' Record.

Affidavit of Pierre Nepton, Paragraphs 140, 149, 156-158, 161-163.

119. As indicated by Mr. Nepton in cross-examination, the First Nation satisfied the requirements of the NI Policy with regard to the submission of an RMP and co-management:

Q. …Prior to the decision by ABL to let go of the co-manager, they had already put in place a satisfactory remedial management plan. Isn't that correct?

A. Yes, they had approved a remedial plan through vote in the Council.

Q. That had been accepted by the department. Isn't that correct?

A. Yes, I believe so, but I don't know if there were any conditions attached to it.

Q. But to that extent, the policy was satisfied. You had a remedial management plan in place and that is what the policy calls for. That, in itself, is an indication of a willingness of the First Nation to address those administrative issues and by this time, Mr. Bob Smith was out of the picture. Isn't that correct?

A. Yes, that is one of the criterion for a remedial plan, to have it approved, but there remains another one, the implementation of it.

Q. There was a set of co-managers in place at that point in time, wasn't there, Mr. Nepton?

A. Yes, there were two co-managers in that enterprise.

Q. There was no indication from Chief Wawatie or from the Council that they were opposed to the idea or the principle of co-management, was there?

A. But it took us more than a year to convince the Council to accept the principle of co-management… But when the events of June occurred, I had no indication that the Council was against co-management.

Cross-Examination of Pierre Nepton, Questions 625-629, Tab 5 of the Applicants' Record.

120. Throughout the co-management regime, from 2004 until 2006, the debt ratio of the ABL increased to 52.56% in the fiscal year of 2004 - 2005.

Affidavit of Stéphane Villeneuve, Paragraph 25.

121. On May 8 and 9, 2006 based on the numerous advice of their advisors, including Special Representative, Clifford Lincoln, the Customary Council unanimously agreed that William Paquin and Jeff LeBlanc should be replaced based on their unsatisfactory performance. On June 2, 2006, the

Customary Council made a resolution that they had decided to terminate the "Co-Management Agreement" and that William Paquin and Jeff Leblanc would be directed to liaison with the new co-manager, when selected, to transfer all relevant financial information to enable a smooth transition between co-management regimes.

Clifford Lincoln, Paragraph 31, Tab 4 of the Applicants' Record.

122. On June 5, 2006, Chief Wawatie received a letter from Pierrette Gourde, DIAND's Senior Funding Officer which stated that, based on DIAND's analysis of the ABL's 2005-2006 financial statement, and the ABL had an accumulated deficit of $83,382.00. The letter also requested activity reports for the period from January 1, 2006 until April 30, 2006, as per the Remedial Management Plan.

Harry Wawatie, Exhibit "7", Tab 3-7 of the Applicants' Record.

123. On June 9, 2006 and per the June 2, 2006 resolution of the Customary Council, Chief Wawatie wrote to the co-managers, William Paquin and Jeff Leblanc, and provided a 60-day notice of termination under Section 7.1 of the "Co-Management Agreement". Mr. Paquin and Mr. Leblanc were requested to complete year-end reporting and audited financial statements for 2005/2006 fiscal year ending March 31, 2006.

Clifford Lincoln Paragraph 32, Exhibit "J", Tab 4-J of the Applicants' Record.

Harry Wawatie, Paragraph 78, Exhibit "8", Tab 3-8 of the Applicants' Record.

Affidavit of Pierre Nepton, Paragraph 169, Exhibit "E-56".

124. On June 11, 2006, Mr. Leblanc wrote to Chief Wawatie and indicated that the co-managers would adhere to the contractual 30-day notice period, and

on June 12, 2006, the co-managers confirmed the same in letters to the ABL and to DIAND.

Clifford Lincoln, Exhibit "L", Tab 4-L of the Applicants' Record.

Affidavit of Pierre Nepton, Paragraph 171, Exhibit "E-58".

125. On June 13, 2006, Chief Wawatie wrote to Pierre Nepton and provided the reasons for the loss of confidence in the co-managers, namely that they failed to provide regular financial reports; they failed to produce a comprehensible remedial plan; they failed to respect the ABL's community customs; and they failed to work harmoniously with the Council and Community. Chief Wawatie also noted that their Special Representative, Clifford Lincoln, would be seeking suitable replacement co-mangers within the 60-day notice period provided to Mr. Paquin and Mr. Leblanc.

Harry Wawatie, Paragraph 79, Exhibit "9", Tab 3-9 of the Applicants' Record.

Clifford Lincoln, Paragraph 34, Tab 4 of the Applicants' Record.

126. At no time did the ABL express an unwillingness to be under a co-management regime.

Cross-Examination of Pierre Nepton, Questions 625-629, Tab 5 of the Applicants' Record.

Appointment of Third Party Managers

127. On June 15, 2006, Pierre Nepton wrote to Chief Wawatie, stating that DIAND thought it prudent to continue with the current co-managers and encouraged the ABL to "find a suitable agreement to solve the communication and working relationship issues you have raised". Mr. Nepton also requested an Action Plan by June 21, 2006, which would describe actions and critical dates to identify a possible new co-manager. Mr. Nepton admitted that, in effect, this only provided a six-day notice period

for the ABL to resolve their co-management issues to the satisfaction of DIAND, failing which, DIAND would reassess its level of intervention.

Clifford Lincoln, Paragraph 36, Exhibit "l", Tab 4-1 of the Applicants' Record.

Harry Wawatie, Paragraph 79, Exhibit "10", Tab 3-10 of the Applicants' Record.

128. On June 20, 2006 wrote to Pierre Nepton following their meeting of July 13, 2006, wherein Mr. Nepton indicated that under Mr. Paquin and Mr. Leblanc co-management regime, the deficit had increased up to 50%. Chief Wawatie expressed his shock and surprise that Mr. Nepton would want the ABL to continue to retain these co-managers. Further Chief Wawatie noted that despite the Special Provisions, the ABL still had unresolved financial issues:

> As you know, there are still many outstanding issues arising from your Department's illegal intervention in 1996, including the resolution of financial issues related to the mess that was created. As you may recall, we negotiated a Special Clause in our Contribution Agreements with Canada, which requires your government to enter into a process with us to clarify these financial issues. We have made efforts in the past to get the Department to engage in such a process with us, but our efforts have always been met with refusal. I am again calling upon your Department to honour its undertakings and engage in a process with us to once and for all resolve these financial issues.

Chief Wawatie questioned DIAND's rationale for threatening to reassess the level of intervention rather than assisting the ABL in finding suitable replacement for the co-managers.

Harry Wawatie, Paragraph 80, Exhibit "11", Tab 3-11 of the Applicants' Record (emphasis added).

Affidavit of Pierre Nepton, Paragraph 176, Exhibit "E-62".

Affidavit of Stéphane Villeneuve, Paragraph 25.

129. Chief Wawatie received no response to this letter requesting that DIAND work with the AB, requesting that the causes of ABL's financial difficulties be addressed.

Harry Wawatie, Paragraph 81, Tab 3 of the Applicants' Record (emphasis added).

130. On June 22, 2006 DIAND completed an internal Diagnostic Card calling for high intervention, specifically Third Party Management.

***Fiche de Diagnostic Partie A Analyse de la Situation*, Produced Material #3, Tab 7-B-3 of the Applicants' Record.**

131. On June 28, 2006 Clifford Lincoln wrote to Pierre Nepton and advised that the ABL was actively proceeding to appoint a credible and qualified interim financial administrator to assist the ABL during its search for replacement co-managers. The ABL had devised a well-structured search for replacement co-managers and had already identified one credible candidate.

Clifford Lincoln, Paragraph 38, Exhibit "N", Tab 4-N of the Applicants' Record.

132. Clifford Lincoln received no response to his letter.

Clifford Lincoln, Paragraphs 38 – 39, Exhibit "N", Tab 4-N of the Applicants' Record.

133. On July 4, 2006, DIAND signed a TPM contract with Lemieux Nolet Inc. Despite having already contracted with a Third Party for the ABL, on the same day, Pierre Nepton wrote to Chief Harry Wawatie and provided the ABL with contact information for a DIAND official who might assist the ABL with identifying a replacement co-manager, thereby leading the Customary Council to believe that DIAND would consider an interim solution and allowing the ABL to remain under co-management.

Clifford Lincoln, Paragraph 40, Exhibit "P", Tab 4-P of the Applicants' Record.

Affidavit of Pierre Nepton, Paragraph 178, Exhibit "E-64" and Exhibit "E-65".

Affidavit of Pierre Nepton, Paragraph 182, Exhibit "E-65"

Third Party Management Agreement, Produced Material #2, Tab 7-B-2 of the Applicants' Record.

134. On July 5, 2006, Clifford Lincoln notified Pierre Nepton that the accounting firm, Van Bavel and Doyle, was prepared to assume the ABL's interim administration, which would give the ABL some time to continue their search for co-managers. In response, on July 6, 2006, Jacques Giroux, Regional Director, Funding Services for DIAND, telephoned Clifford Lincoln to inform him that DIAND had already initiated a public tender process for a TPM. Mr. Giroux failed to tell Mr. Lincoln that Lemieux & Nolet Inc. had already been retained by DIAND. As a result, the ABL's proposed candidate as Interim Administrator would not be considered by DIAND.

Clifford Lincoln, Paragraphs 38-42 Exhibit "O", Tab 4-O of the Applicants' Record.

135. On July 6, 2006 Jacques Giroux wrote to Chief Wawatie to notify him that a DIAND official would visit the Rapid Lake Reserve on July 12, 2006 to explain the mandate of the TPM. The TPM, Lemiuex & Nolet Inc, was chosen without consulting the ABL and the ABL had no input into the appropriate selection criteria for a TPM.

Clifford Lincoln, Paragraph 41, Exhibit "Q", Tab 4-Q of the Applicants' Record.

Affidavit of Pierre Nepton, Paragraph 182, Exhibit "E-65".

136. On July 12, 2006, the ABL was formally notified that DIAND mandated the firm Lemieux & Nolet Inc. as the TPM for the ABL, on the basis that the ABL had increased its financial deficit significantly and essential community

services were considered at risk. The notice, the decision under scrutiny in this Judicial Review Application, read:

> In the past few years, the Algonquin Council of Barriere Lake has increased its financial deficit significantly, to the extent that essential community services are now considered at risk. Consequently, the Department has no other choice than to proceed with the appointment of a third party manager. This interim measure is therefore necessary to preserve the delivery of programs and services to which you are entitled.
>
> We believe that this approach will help the Band Council establish practice, procedures, policies and financial control mechanisms that will enable it to implement an effective recovery plan. The third party manager has the mandate to deliver the programs and services on the same conditions as those stipulated under the Funding Arrangement signed between the Band Council and the Government of Canada. These programs and services mainly over the fields of band support, education and maintenance of community infrastructures.
>
> The Department will closely monitor the services rendered by the third party manager and will evaluate them formally on a regular basis. The term of the third party manager's mandate will depend on the Band Council's willingness to work with it in resolving the current situation, in the interest of the Algonquins of Barriere Lake.
>
> **Harry Wawatie, Exhibit "14", Tab 3-14 of the Applicants' Record.**
>
> **Clifford Lincoln, Exhibit "Q", Tab 4-Q of the Applicants' Record.**

137. On August 10, 2006, the Applicants' herein filed for Judicial Review of the aforesaid decision of the Minister to appoint a TPM to the ABL.

Leadership Selection in 2006

138. On July 10, 2006, Chief Wawatie tendered his resignation as Chief. Mr. Wawatie stated that at his age, he lacked the health and stamina to fight with the federal government on issues such as the imposition of a TPM, the

Memorandum of Mutual Intention ["MOMI"] and the 1996 reign of the IBC. Jean Maurice Matchewan was selected, in accordance with the *Anishinabe Onakinakewin,* as the new Chief as of August 2006. Harry Wawatie remained on the Elders' Council.

Harry Wawatie, Paragraph 82, Exhibit "13", Tab 3-13; and Paragraph 21, Tab 3 of the Applicants' Record.

139. At first, DIAND refused to recognize the results of the Customary Council selection process, but Chief Matchewan and his Council have since been formally recognized by DIAND.

Affidavit of Pierre Nepton, Paragraph 193, Exhibit "F-3".

Cross-Examination of Pierre Nepton, Questions 573 and 666, Tab 5 of the Applicants' Record.

Failure to attach the Special Provisions to the most recent Contribution Agreement

140. After the disputed 2006 appointment of a TPM to the ABL, DIAND executed a Contribution Agreement with the TPM which excluded the Special Provisions for the first time since 1996. This Contribution Agreement was executed between the TPM and DIAND, without the approval of the Chief and Council.

Cross-Examination of Pierre Nepton, Tab 3, Questions 450-457 of the Applicants' Record.

PART II: THE ISSUES

141. The issues are as follows:

Preliminary Issues:

1. Whether the Minister's decision is subject to judicial review?

2. Whether the Applicants have standing to bring this Application?

3. What is the appropriate standard of review?

Constitutional and Jurisdictional Issues:

4. Whether the Minister violated the principle of the honour of the Crown by failing to engage in meaningful consultations with the First Nation prior to appointing a Third Party Manager (TPM) to the ABL?

5. Whether the Minister violated his fiduciary obligations or the principle of the honour of the Crown by failing to take account of the Special Provisions, the Memorandum of Mutual Intent and the Trilateral Agreement prior to appointing a TPM to the ABL?

Natural Justice, Procedural Fairness, Legitimate Expectations, Abuse of Discretion and Bias

6. Whether the ABL was denied procedural fairness in the manner in which the Minister appointed the TPM?

7. Whether the Minister complied or fulfilled the legitimate expectations of the First Nation in applying the NI Policy and by appointing the TPM in the manner in which he did?

8. Whether there was reasonable apprehension that the Minister was biased in his decision to appoint a TPM to the First Nation?

9. Whether the Minister abused his discretion under the NI Policy to appoint a TPM to the First Nation?

Relief

10. Whether the appropriate remedy to issue directions and / or a declaratory remedy, give all the circumstances?

PART III: SUBMISSIONS

PRELIMINARY ISSUES

1. The Minister's Decision is Subject to Judicial Review

142. Section 18.3(a) of the *Federal Court Act*, R.S.C. 1985 c. F-7 provides that federal boards, commissions or other tribunals are subject to judicial review. On an application for judicial review, the Federal Court may:

> (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
>
> (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

***Federal Court Act*, R.S.C. 1985 c. F-7 ["*Federal Court Act*"].**

143. The Minister derives his jurisdiction from the *Indian Act*, R.S.C. 1985, as amended, and from the *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c I 8.

144. The Minister's decision to appoint a TPM to a First Nation is a decision of a "federal board, commission or other tribunal" and therefore this decision falls within the purview of Section 18.1 of the *Federal Court Act*, and is subject to judicial review.

***Federal Court Act*, section 18.1.**

***Pikangikum First Nation v. Canada (Minister of Indian and Northern Affairs)* [2002] F.C.J. No. 1701, Paragraph 84 [*Pikangikum*].**

2. The Elders Council has Standing to Bring the Judicial Review Application

145. Section 18.1(1) of the *Federal Court Act* provides that an Application for Judicial Review may be brought by any anyone directly affected by the matter in respect which relief is sought.

***Federal Court Act*, section 18.1(1).**

146. The members of the Elder's Council bring this application on their own behalf and on behalf of the ABL. It is not challenged that the Elders Council have the authority to safeguard customs and traditions and that they are central to the governance of the ABL. The elders are directly impacted by the Minister's Decision to impose a TPM onto the ABL.

Harry Wawatie, Paragraphs 16-17, and Exhibit "D", Tab 3-D of the Applicants' Record.

147. Accordingly, the Elders' Council has standing to bring with within application for judicial review.

3. The Applicable Standards of Review

148. As per the Supreme Court of Canada's recent decision in *Dunsmuir v. New Brunswick*, there are two standards of review which are applicable in judicial review proceedings: correctness and reasonableness.

***Dunsmuir v. New Brunswick*, 2008 SCC 9, Paragraph 34 & 45 [hereinafter "*Dunsmuir*"].**

149. The reasons, as per Bastarache, LeBel, J.J. for the majority, in *Dunsmuir* address the structure and characteristics of the system of judicial review as a whole. Based on *Dunsmuir* the application of the "pragmatic and functional analysis" is no longer required; exhaustive review is not required in every case to determine the proper standard of review. Thus existing jurisprudence may identify some of the questions that generally fall to be determined according to the correctness standard meaning that the analysis required is already deemed to have been performed and need not be repeated.

***Dunsmuir*, Paragraphs 33, 56 and 57.**

150. In determining the proper standard of review, the Court should be directed by the summary of the process as stated n *Dunsmuir* :

> [T]he process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

***Dunsmuir*, Paragraph 62.**

151. If the second step is required, the following factors should be assessed to see whether the decision maker's decision must be approached with deference, and therefore the reasonableness standard applied:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

***Dunsmuir,* Paragraph 64. See also Paragraphs 55-56.**

152. The Applicants submit that the standard of review of correctness is required to determine the constitutional and jurisdictional issues and the standard of review of reasonableness is required to determine the issues of natural justice, procedural fairness, legitimate expectations, abuse of discretion and bias.

Correctness

153. Ministerial decisions which affect asserted or proven Aboriginal and treaty rights, being recognized and affirmed by the *Constitution*, may be reviewed on a standard of correctness to ensure the Ministerial decisions are consistent with the honour of the Crown. The Ontario Court of Appeal described the constitutional imperative as:

> The related principle of constitutionalism rests on the proposition that the Constitution is the supreme source of law and that all government action must comply with its requirements.
>
> ***LaLonde v. Ontario (Commission de restructuration des services de sante)*, 2001, 56 O.R. (3d) 577, (2001), 153 O.A.C. 1, Paragraph 110 [*LaLonde*].**

154. Further, correctness review applies to constitutional questions because Courts are to be the interpreters of the *Constitution*. As stated by the Supreme Court of Canada, in *Dunsmuir :*

> For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322. Such questions, as well as <u>other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution</u>: *Nova Scotia (Workers Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; Mullan, *Administrative Law*, at p. 60.
>
> ***Dunsmuir*, Paragraph 58 [emphasis added].**

155. When Aboriginal rights are asserted and potentially impacted, it is not simply the duty to procedural fairness that is engaged. The honour of the Crown is also engaged, which requires the Crown to consult, and sometimes accommodate, the affected Aboriginal rights claimants. This triggers the standard of review of correctness.

***Haida*, Paragraphs 28 – 32.**

> ***The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the "Constitution"].**

156. The standard of review of correctness as stated in *Dunsmuir*:

> must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.
>
> ***Dunsmuir,* Paragraph 50**

157. NI Policy contains no privative clause and therefore has no impact on the level of deference. This is a neutral factor.

> ***Giroux* v. *Swan River First Nation,* [2006] F.C.J. No. 406, Paragraph 54. [hereinafter "*Giroux*"]**

158. The expertise of the decision-maker in making legal determinations is lower than that of the reviewing Court. As DIAND employee Pierre Nepton has admitted, the honour of the Crown and the fiduciary duty are legal questions which he lacks the capacity to address. This warrants a low level of deference, requiring the standard of review of correctness. As the Supreme Court stated in *Dunsmuir*, "courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'".

> **Cross-Examination of Pierre Nepton, Questions 110, Tab 5 of the Applicants' Record.**
>
> ***Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, Paragraph 61 [*Haida*].**

***Dunsmuir,* Paragraph 60 (citing *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63, Paragraph 62).**

159. To determine whether the Crown acted in accordance with the honour of the Crown and its fiduciary obligation to the ABL in these circumstances may be a question of mixed law and fact. However, the question has a clear constitutional nature. Moreover, because the Minister has misconceived the seriousness of the impact of appointing the TPM to the ABL, given that it infringes the governing capacity and selection process outlined in the *Anishinabe Onakinakewin*, this is a question of law which triggers the standard of review of correctness.

***Paul v. British Columbia* (Forest Appeals Commission), [2003] 2 S.C.R. 585, 2003 SCC 55.**

See generally, *Law Society of New Brunswick vs. Ryan,* [2003] 1 S.C.R. 247, 2003 SCC 20.

***Haida*, Paragraph 63.**

160. Therefore, the standard of review of correctness is to be applied to review the alleged breaches of the honour of the Crown committed by the Minister in appointing a TPM to the ABL, and breaches of fiduciary duty and the honour of the Crown in failing to implement the Special Provisions, the MOMI and the Trilateral Agreement.

Reasonableness

161. The majority in *Dunsmuir* explained what is entailed in conducting a review for reasonableness, and stated:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within

> the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> ***Dunsmuir*, paragraph 47**

162. Again the NI Policy contains no privative clause and therefore has no impact on the level of deference. This is a neutral factor.

***Giroux,* Paragraph 54.**

163. The Minister's decision to appoint a TPM to the ABL is discretionary decision made by application of the NI Policy. Questions of fact, discretion or policy attract a standard of reasonableness.

***Dunsmuir*, Paragraph 53.**

164. Therefore, the standard of review of reasonableness is to be applied to the review of the Minister's breaches of procedural fairness committed by the Minister in appointing a TPM to the ABL.

165. In respect of these breaches of procedural fairness committed by the Minister, the Applicants submit that their lacks justification, transparency and intelligibility in the process of the decision-making that resulted in the appointment of the TPM to the ABL. Further, whether or not the decision falls within a range of possible, acceptable outcomes, the Applicants submit that the outcome is not defensible in respect of the facts and law.

***Dunsmuir*, paragraph 47.**

CONSTITUTIONAL AND JURISDICTIONAL ISSUES

4. The Minister Breached the Honour of the Crown by Failing to Engage in Meaningful Consultations with the ABL Prior to Imposing a TPM on the First Nation

166. The Applicants submit that their customs on governance, the *Anishinabe Onakinakewin,* constitute Aboriginal rights. By failing to meaningfully consult with the ABL prior to implementing the TPM, the Applicants submit that the Minister breached the honour of the Crown.

Harry Wawatie, Exhibit "G" (Anishinabe Onakinakewin), Tab 3-G of the Applicants' Record.

(1) ABL Customary Governance Practices, the *Anishinabe Onakinakewin,* are Protected Under s. 35(1) of the *Constitution Act, 1982*

167. Section 35(1) of the *Constitution* states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

168. Rights to self-government cannot be framed in excessively general terms. The Applicants do not assert in this Application a broad right of self-government. Rather, they are asserting that their *Anishinabe Onakinakewin,* an internal custom on governance, constitute protected Aboriginal rights under section 35.

***Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, Paragraph 170 [hereinafter "*Delgamuukw*"].**

169. The applicable legal test to determine whether the *Anishinabe Onakinakewin* constitute protected Aboriginal rights is given in the Supreme Court of Canada decision of *Van der Peet*. The *Van der Peet* test for identifying an Aboriginal right under Section 35(1) requires the ABL to prove the following: :

> (i) the existence of the ancestral practice, custom or tradition advanced as supporting the claimed right;
>
> (ii) that this practice, custom or tradition was "integral" to his or her pre-contact society in the sense it marked it as distinctive; and;

> (iii) reasonable continuity between the pre-contact practice and the contemporary claim.
>
> ***R v. Van der Peet*** **[1996] 2 S.C.R. 507, Paragraphs 44- 47, 55- 56, 60- 62. [hereinafter "*Van der Peet*"]**

(a) The Existence of the Ancestral Practice, Custom or Tradition

170. The ABL's customary governance system, as set out in the *Anishinabe Onakinakewin* arises from the ABL's connection to and responsibility for their traditional territory. This is consistent with the Supreme Court of Canada's observations in *Van der Peet*:

> In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of the aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society.
>
> ***Van der Peet*****, para 74, and reiterated in *Delgamuukw* at 141 [emphasis added].**
>
> **Harry Wawatie, Exhibit "G" (Anishinabe Onakinakewin), Tab 3-G of the Applicants' Record.**

171. The ABL's customs are recognized under the s. 2(1) of the *Indian Act* and the ABL are not subject to the election provisions under 74 of the *Indian Act*. As is stated by former Chief Wawatie, and as is unchallenged by the Respondents:

> We have never been under the *Indian Act* election provisions. … The position of Chief and Councillor is based on connection to and knowledge of the land, hereditary entitlement and community support.
>
> **Harry Wawatie, Paragraph 17, Tab 3 of the Applicants' Record.**

172. The *Indian Act* recognizes that First Nations have the power to choose their chief and council in accordance with their internal governance selection processes. Mr. Justice Heald of the Federal Court, in *Bone v. Sioux Valley Indian Band No. 290*, described the legal effect of the inclusion of custom First Nations within the definition section of the *Indian Act*:

> [i]t does not confer a power upon a Band to develop a custom for selecting its council. Rather, it recognizes that an Indian Band has customs, developed over decades if not centuries, which may include a custom for selecting the Band's Chief and Councillors. The definition of "council of a band" acknowledges that prior to the enactment of the Indian Act in 1951, Indian Bands had their own methods for selecting the Band Council. The power or ability to continue choosing the Band Council in the customary manner is left intact by the Indian Act, except in those cases where the power is removed by a ministerial order under subsection 74(1) of the Act...Thus in my view the Band may exercise this inherent power unrestrained by subsection 2(3)(a) of the Indian Act.
>
> ***Bone v. Sioux Valley Indian Band No. 290*** **[1996], F.C.J. No 120, Paragraoh 31 (F.C.T.D.) (emphasis added).**

173. As codified in the *Anishinabe Onakinakewin*, there are several aspects to ABL's customary governance system, including the following two distinct aspects: the governing authority of the Customary Council, known in the Algonquin language as *"Nikanikabwijik",* which is accountable to and is directed by the people of the ABL; and *Wasakwegan*, the customary process by which the Applicants select their leadership.

174. It is submitted that these two aspects of *Anishinabe Onakinakewin*, which are affected by the Minister's decision to appoint a TPM, exist as customs which are recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

(b) Integral to Distinctive Culture

175. In *Van der Peet*, the Court considered the question of what made a practice integral to the distinctive culture of an Aboriginal group. The test is: whether the practice was a practice, custom or tradition that was a defining feature of the culture in question, or whether without the practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is.

Van der Peet**, Paragraph 59.**

176. Without the governance customs, *Anishinabe Onakinakewin,* ABL's culture would be fundamental altered. As is stated by former Chief Wawatie, and is unchallenged by the Respondents, "Our customs are vital to the survival and integrity of our First Nation."

> **Harry Wawatie, Paragraph 17, Tab 3 of the Applicants' Record.**

(c) Continuity

177. Aboriginal rights to practice customary governance survive the assertion of sovereignty:

> European settlement did not terminate the interest of Aboriginal peoples arising from their historical occupations and use of land. To the contrary, Aboriginal interest and customary laws were presumed to survive the assertion of sovereignty.
>
> ***R. v. Mitchell,*** **[2001] 1 S.C.R. 911, Paragraph 10 (emphasis added). [hereinafter "*Mitchell"*]**

178. The *Anishinabe Onakinakewin* has continuity with the pre-contact customs of the ABL. As is stated by former Chief Wawatie, and as is unchallenged by the Respondents, the *Anishinabe Onakinakewin* of the ABL has continued in uninterrupted existence since time immemorial.

> **Harry Wawatie, Paragraph 17, Tab 3 of the Applicants' Record.**

179. Based on the foregoing, and in particular upon the affidavit evidence of former Chief Wawatie, the Applicants submit that they have satisfied the requirements of the *Van der Peet* test. Accordingly, their *Anishinabe Onakinakewin*, constitute Aboriginal rights which are recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.

(2) *Haida*: the Minister has a Duty to Consult Even if ABL's Rights are Merely Asserted Aboriginal Rights

180. The duty to consult with the ABL and accommodate their customary governance custom of Anishinabe Onakinakewin is grounded in the honour of the Crown. The honour of the Crown is always at stake in the Crown's dealings with Aboriginal peoples. DIAND is obligated to act honorably in dealing with the ABL as the honour of the Crown is the unifying concept for describing the relationship of the Crown and Aboriginal peoples:

> In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown".
>
> ***Haida*, Paragraphs 16- 17.**

181. Even if the Applicants have not established that their *Anishinabe Onakinakewin* constitute Aboriginal rights, they have asserted them as Aboriginal rights and this is sufficient to give rise to the honour of the Crown. As stated in *Haida*, the honour of the Crown obliges the Minister to consult with the ABL when there is a potential threat or risk of harm to an Aboriginal right:

> The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.
>
> ***Haida*, Paragraph 35**.

182. The Applicants submit that that the Minister had knowledge of the *Anishinabe Onakinakewin* and that these customs had the force of law. In a letter dated November 30, 1994, from then Minister Ron Irwin to Joseph Junior Wawatie, the Minister acknowledged that these customs "… are in fact recognized by the community itself and accepted by the majority as the

force of law". He said that DIAND had "no authority to intervene in the selection of Chiefs and Councils carried out according to customs". It is further submitted that the Minister knew or ought to have known that these customs were protected Aboriginal rights under section 35 of the *Constitution Act, 1982*.

Affidavit of Pierre Nepton, Paragraph 19, Exhibit "A-3".

183. After their codification, the Minister was aware or ought to have been aware of the nature and content of the *Anishinabe Onakinakewin.* DIAND was provided with a copy of those customs, as codified in 1997, by the Facilitators in their Report. Pierre Nepton admitted that he was aware of and had read the *Anishinabe Onakinakewin*. As was stated by Mr. Nepton in his cross-examination, DIAND has a policy which recognizes governance customs:

> Q. Does DIAND recognize those customs as codified, as having legal force?
>
> A. The department is not a legal court and, therefore, does not have a legal recognition of that. But they do have a specific policy of recognizing the customs and a specific policy on how to handle them.

Affidavit of Harry Wawatie, Paragraph 36, Exhibit "G", Tab 3 of the Applicants' Record.

Cross-Examination of Pierre Nepton, Question 55, Tab 5 of the Applicants' Record.

184. The Applicants also submit that the appointment of a TPM to the First Nation is conduct contemplated by DIAND that might adversely affect the ABL's customary governance right, within the meaning of the *Haida* case. As such, the honour of the Crown is engaged and the Minister had a duty to meaningfully consult prior to appointing a TPM to the First Nation.

(3) The Scope of the Duty to consult in the circumstances of this case

185. The extent of the Crown's duty to consult is proportionate to the strength of the claim to Aboriginal rights asserted and the seriousness of the potential adverse effect on the *Anishinabe Onakinakewin*.

***Haida*, Paragraph 39.**

(a) Strength of the ABL Claim of Aboriginal Rights

186. The Applicants submit that based on the evidence of Harry Wawatie, they have established that their *Anishinabe Onakinakewin* constitute Aboriginal rights; or at the very least, that they have established a strong *prima facie* claim that their *Anishinabe Onakinakewin* constitute Aboriginal rights.

187. It is to be noted as well that the ABL Customary Council is recognized under the *Indian Act*, which is at least an implicit recognition of the customs that define and describe that Customary Council.

***Indian Act*, R.S.C. 1985, c. I-5.**

(b) The NI Policy and its Application by the Minister, in Appointing a TPM, has a Serious Adverse Impact on the Anishinabe Onakinakewin

188. The Applicants submit that the impact of Minister's decision to impose a TPM is extremely serious. The Crown knew or ought to have known that NI Policy would have a significant impact on the *Anishinabe Onakinakewin*. The appointment of a TPM to the ABL is the highest form of intervention by DIAND and effectively removes the control over the provision of such programs and services from the Customary Council and places it into the hands of the TPM.

***National Intervention Policy*, Chapter 5.8, Section 6.**

189. The duty to consult obliges the Crown to consider the process by which any government action is undertaken, if that action has the potential to infringe

an Aboriginal right. This process must be compatible with the honour of the Crown. As was stated by the Supreme Court of Canada in *Mikisew*

> The Court must first consider the process by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.
>
> ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] 3 S.C.R. 388, Paragraph 59 [emphasis added, [hereinafter "*Mikisew*"].**

190. The application of the NI Policy, particularly the imposition of TPM, impacts adversely on several aspects of the ABL's right of customary governance, *Anishinabe Onakinakewin*. First, the NI Policy impedes the authority of the Customary Council to govern the ABL and places this authority in the TPM. Second, the NI Policy infringes the ABL's leadership selection process, in that DIAND unilaterally chose the TPM without consulting the ABL. Finally, the appointment of a TPM usurps the function of the "*Oshibikewinik*", which is a democratically elected Board of Directors, to look after administrative matters.

> **Harry Wawatie, Exhibit "D", Tab 3-D of the Applicants' Record.**

Impact on Governing Authority of the Customary Council

191. The decision-making process of the TPM is not made through the consultative process stated in s. 8(2)(1) of the *Anishinabe Onakinakewin*. This is inconsistent the manner in which the Customary Council is required to be accountable and to act upon the directions of the People of the ABL.

> **Harry Wawatie, Exhibit "G" (Anishinabe Onakinakewin), Tab 3-G of the Applicants' Record.**

192. With the authority over the ABL being removed from the Customary Council and placed in the TPM, there is no guarantee that decisions will be made for

the community in the best interests for the traditional territory or in accordance with principles of sustainable development. This contravenes s. 8.2(2)(a) of the *Anishinabe Onakinakewin*, which states that the Customary Council has responsibility for the care, stewardship and management of the ABL's traditional territory.

Harry Wawatie, Exhibit "G" (Anishinabe Onakinakewin), Tab 3-G of the Applicants' Record.

193. By removing the contractual authority of the Customary Council and giving it to the TPM, DIAND was able to negotiate a Contribution Agreement for the benefit of the ABL which excluded the Special Provisions. This contravenes s. 8.2(b) of the *Anishinabek Onakinakewin*, which confirms that the Customary Council has the authority to enter into relations with the Crown, including treaties and agreements.

Harry Wawatie, Exhibit "G" (Anishinabe Onakinakewin), Tab 3-G of the Applicants' Record.

194. The appointment of a TPM to the ABL, as was found in *Pikangikum* in similar factual circumstances, "basically takes away the Applicants right to manage its affairs"

***Pikangikum*, Paragraph 100.**

Impact on the Leadership Selection Process of the ABL

195. The NI Policy infringes the ABL's leadership selection process, in that DIAND unilaterally chose the TPM without consulting the ABL. This offends *Wasakawegan*, the customary process by which the Applicants select their leadership. *Wasakawegan* requires that the leaders are nominated by the Elders and selected by the People of the ABL on consensus. In addition, *Wasakawegan* requires that a councillor undergoes a training, probationary and evaluation period, allowing the new councillor to improve and enhance her or his leadership skills.

Harry Wawatie, Exhibit "G" (Anishinabe Onakinakewin), Tab 3-G of the Applicants' Record.

196. The Minister admits that he failed to consult the ABL about the appropriateness of the TPM, Lemiuex & Nolet Inc, whom DIAND had contracted with directly. In addition, DIAND failed to consult with the ABL about appropriate selection criteria for a TPM. As was stated by Mr. Nepton in his Cross-Examination:

> Q. Is it the regional office's general practice if they are putting any First Nation within their region into third party management to allow them to have input on the selection of the third party manager?
>
> A. In the case of Barriere Lake, we had to go to a call for tender and there was only one bidder. But as far as the policy is concerned, I cannot speak for the other regions, the answer is no because we did not apply this, it was not our policy.
>
> **Cross-Examination of Pierre Nepton, Question 588, Tab 5 of the Applicants' Record.**

197. The Applicants submit that the leadership selection process of *Wasakawegan* ensures that ABL's leaders are accountable to the community, in that they are placed into leadership roles through an open, consensus-based process, and that ABL's leaders are supported by the Elders. The unilateral appointment of a TPM to the ABL, without consulting the ABL, offends the customary governance right of *Anishinabe Onakinakewin*.

Authority to Manage Programs and Services

198. The appointment of a TPM to the ABL removes the contractual authority of the *Oshibikewinik* to manage programs and services and gives it to the TPM. Therefore, the TPM becomes responsible for the management of the ABL's funds for the provision of essential services to the ABL. This contravenes the authority of the *Oshibikewinik* as well as that of the Customary Council to supervise the administration of programs and services to the ABL.

***King*, paragraph 19.**

(4) The Minister did not Engage in Meaningful Consultations with Respect to the Adoption and / or the Application of the NI Policy to the ABL

(a) No Consultations Respecting the Adoption of the NI Policy

199. DIAND, through Pierre Nepton, admitted that it did not endeavour to meaningfully consult with First Nation groups prior to the adoption of the NI Policy, but rather chose to consult with the "best-informed" and those in the best place to advance the mandate of the Quebec Regional DIAND. As is stated in the cross-examination of Mr. Nepton:

> Q. To tie back some of the thoughts that we have gone through together, in terms of the Auditor General's reports and what we discussed in terms of meaningful or effective consultation, the Auditor General reports said that such effective consultation only works when Canada is willing to speak to the First Nation parties and that while there is no input into the selection of the third party managers, then consultation is not necessarily occurring.
>
> Does the regional office consider the target groups or focus that DIAND worked with as full and meaningful consultation?
>
> A. The answer is no, but I have a nuance to provide. The nuance is that we [Quebec Regional DIAND] did invite <u>those we considered to be the best informed members</u> of the First Nations Communities and those who were <u>best place to help us push forward the regional approach</u>.
> Not all of them, but we had a critical mass.
>
> **Cross-Examination of Pierre Nepton, Question 587, Tab 5 of the Applicants' Record (emphasis added).**

200. In NI Policy makes no provision for First Nation input or consultation in the selection process of the TPM, despite the fact that the NI Policy provides for openness and cooperation between DIAND, the TPM and First Nations. This shortcoming was highlighted by the 2003 Report of the Auditor General

in the critique of the TPM policy which noted that this often results in poor working relationships between First Nations and the TPM.

2003 November Report of the Auditor General of Canada to the House of Commons, Chapter 10 Other Audit Observations. Cross-Examination of Pierre Nepton, Exhibit "6", Tab 5 of the Applicants' Record.

(b) No Meaningful Consultations with ABL in the Appointment of the TPM

201. The Minister failed to meaningfully consult the ABL in appointing the TPM. DIAND could have consulted with the ABL by providing an opportunity for the ABL to make submissions for consideration as to why the TPM regime would not be appropriate. DIAND could have been more understanding in identifying the causes of ABL's financial problems, particularly the role of Bob Smith in mismanaging ABL's funds. DIAND could also have been more respectful in working with the Customary Council especially given their lack of capacity with respect to financial and program management. However, DIAND failed to do so. DIAND provided only a six-day window for the ABL to provide an Action Plan to remediate their financial deficit and to submit the names of suitable co-managers. In addition, DIAND had also issued a public tender process and contracted a TPM without officially notifying the ABL that it would be under TPM.

Clifford Lincoln, Paragraph 39 – 42, Exhibits "O" and "P", Tab 4-O; 4-P of the Applicants Record.

202. The Minister could have consulted with the ABL by inviting them to formally participate in assessing the required level of intervention. The Minister could have accommodated the interests of the ABL by working with the Customary Council to scrutinize the root causes of the ABL's cumulative deficit, including through the implementation of the Special Provisions, the MOMI and Trilateral Agreement, as the ABL may not have been in a deficit position if the financial situation was clarified. Chief Wawatie raised these issues with DIAND, but to no avail.

Affidavit of Harry Wawatie, Paragraph 75, Tab 3 of the Applicants' Record.

Affidavit of Clifford Lincoln, Paragraph 37, Exhibit "M", Tab 4 –M of the Applicants Record.

203. In addition, the Minister failed to explain why TPM was necessary for the ABL at the given time that the TPM was appointed. The Applicants do not take issue with the co-management level of intervention and submit that they had taken several measures to work co-operatively with DIAND to continue in co-management. Practically, the difference between co-management and third party management is that a First Nation under co-management retains their ultimate decision-making and contractual authority, whereas under TPM the ABL retains no right to manage their affairs.

***Pikangikum*, Paragraph 100.**

***King*, Paragraph 20.**

204. The Minister could have consulted with the ABL by providing them written reasons to show that DIAND considered ABL's concerns were accounted for in their decision-making process.

(5) The Minister's Failure to Consult the ABL Invalidates the Minister's Decision and / or invalidates the NI Policy

205. Pursuant to Section 18.1 (a) of the *Federal Court Rules*, the Federal Court has jurisdiction to determine whether the decision maker in question has acted without jurisdiction. Furthermore, a tribunal which bases its decision on a constitutionally invalid provision commits a jurisdictional error. By implication, in order to determine whether a decision-maker acted within its jurisdiction, the constitutionality of the conferring provision must be assessed. A decision maker who bases his decision on constitutionally invalid legislation commits a jurisdictional error.

***Raza v. Canada (Minister of Citizenship and Immigration*) [1998] F.C.J. No. 1826, (1998), 157 F.T.R. 161 (F.C.T.D.).**

***Gwala v. Canada*, [1999] 3 F.C. 404.**

206. The NI Policy violates Section 35 of the *Constitution Act, 1982* in so far as the Minister has failed to consult with the ABL with respect to the adoption and application of the NI Policy and in so far as the NI Policy infringes the *Anishinabe Onakinakewin*.

207. The Applicants submit that the Minister exceeded his jurisdiction in that the NI Policy is not consistent with the Crown's fiduciary obligation to First Nations and with the honour of the Crown.

5. The Minister Breached his Fiduciary Obligations and/or the Principle of the Honour of the Crown by Failing to Implement the Special Provisions, the MOMI and the Trilateral Agreement Prior to Imposing the TPM on the First Nation

(1) The Fiduciary Duty and the Honour of the Crown Obligate the Minister to Fulfill Agreements he has Entered into with the ABL

(a) The Fiduciary Duty

208. The honour of the Crown gives rise to the fiduciary duty when the Crown has assumed discretionary control over special Aboriginal interests.

***Haida*, Paragraph 18.**

209. The Applicants submit that the Minister owes the ABL a fiduciary duty with respect to the Trilateral Agreement, which is expressly acknowledged in the Trilateral Agreement. The Trilateral Agreement states that Canada signed the Agreement pursuant to their "special fiduciary responsibility towards the Algonquins of Barriere Lake".

Harry Wawatie, Paragraph 12, Exhibit "A", Tab 3-A of the Applicants' Record.

210. In fulfilling the fiduciary duty to the ABL, the honour of the Crown is engaged and requires the Crown to act in the best interests of the ABL when

exercising discretionary control over the ABL's interests, which includes the reconciliation of interests within the ABL traditional territory. The relationship between the Crown and Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historical relationship.

***Haida*, Paragraph 18.**

***Sparrow*, Paragraph 59.**

***R v. Guerin*, [1984] 2 S.C.R. 335, at pages 335 and 384 [*Guerin*].**

211. In implementing the Trilateral Agreement, the fiduciary duty obligates the Crown to act in trust for the ABL: "Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal."

***Guerin*, at page 385.**

212. It is a violation of the acknowledged fiduciary responsibility of the Minister to refuse to participate in the Trilateral Agreement, especially given that the Special Representatives for ABL and Quebec have recommended measures that if adopted could potentially create dramatic improvements in the socio-economic situation of the First Nation. This includes finalizing the expansion of the 59-acre Rapid Lake Reserve, connection to the Hydro-Quebec grid, establishing a co-management regime which will allow ABL a decisive voice in management of resources within their traditional territory and resource revenue sharing in the amount of $1.5M per year.

Affidavit of Clifford Lincoln, Paragraph 17, Tab 4 of the Applicants Record.

Exhibit "4" to the Cross-Examination of Pierre Nepton, Tab 5-D of the Applicants' Record.

(b) The Honour of the Crown

213. The Applicants repeat and rely on the previous submissions about the honour of the Crown as stated in the discussion of Issue 4. The Applicants repeat, for ease of reference, that the honour of the Crown is always at stake in the Crown's dealings with Aboriginal peoples:

> In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown".
>
> ***Haida*, Paragraphs 16- 17.**

214. The Applicants submit that the honour of the Crown requires the Crown to honour its agreements with the ABL, including the Special Provisions, the MOMI and the Trilateral Agreement. The Applicants submit that these agreements, particularly the Special Provisions and the MOMI, were part of a mediated and facilitated negotiated settlement which enabled the parties to resolve matters arising from the 1996 dispute with DIAND outside of the courts. In these extraordinary circumstances, where reconciliation and mutual trust and respect are central, the Crown has a higher obligation to honour its agreements, given the circumstances in which the Crown negotiated and implemented the aforesaid agreements. As Binnie J. held in *Mikisew*:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.
>
> ***Mikisew*, Paragraph 1.**

215. Interpretation of treaties and statutory provisions which have an impact upon treaty or Aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises.

R v. Badger **[1996] 1 S.C.R. 771, Paragraph 41**.

(2) The Non-fulfillment of these Agreements by the Minister Affects the Financial Position of the ABL, Precluding the Application of the NI Policy or at Least the Appointment of a TPM

(a) The Special Provisions

216. After the improper reign of the IBC in 1996, the Customary Council, upon reinstatement, objected to the financial chaos it had inherited from the IBC for the following reasons:

- the IBC failed to ever establish governing authority on the Rapid Lake Reserve,
- DIAND allocated nearly five million dollars to the IBC to administer programs and services for the benefit of, but which were not received by ABL members, and
- there was a complete lapse of delivery of programs and services to ABL members during the reign of the IBC.

Cross-Examination of Pierre Nepton, Questions 380 – 386, Tab 5 of the Applicants' Record.

Cross-Examination of Stéphane Villeneuve, Questions 306 and 328–332, Tab 6 of the Applicants' Record.

217. It was in this context that the Customary Council passed a Resolution approving the Special Provisions, which highlights that a disagreement exists between the ABL and DIAND and which ABL and DIAND negotiated would attach to the 1997 Contribution Agreement. The Special Provisions were aimed at resolving the financial position of the ABL, committing the Minister and the ABL to enter into a process to clarify the financial position

of the ABL. In acting honourably, the Minister is obligated to clarify the financial position of the ABL through the process contemplated by the Special Provisions.

Harry Wawatie, Paragraph 51, Exhibit "O", Tab 3-O of the Applicants' Record.

Affidavit of Stéphane Villeneuve, Exhibit "A-25" at page 229.

218. The Minister breached the honour of the Crown by failing to clarify the financial position of the ABL. The Minister, via Pierre Nepton, has admitted that the Minister refused to negotiate compensation owing to the ABL as a result of the reign of the IBC, and this is the reason why DIAND has refused to implement the Special Provisions. It is submitted that the potential compensation includes the amount of funding DIAND denied to the Customary Council and the First Nation during the disputed period of 1996-97. In his cross-examination, Stephane Villeneuve confirmed the amount of funding that was received by the IBC and the TPM (a firm known as BDL) in 1996-7, was $4,873,635. He also confirmed that the administration of this amount was correspondingly denied to Customary Council (Matchewan/Wawatie Council). Mr. Villeneuve also confirmed in cross-examination that a resolution on this disputed amount would affect the deficit. This would have eliminated or precluded the 8% deficit triggering event in the NI Polcicy. Mr. Villeneuve's cross-examination is as follows:

Q. If the Barriere Lake First Nation was to reach a resolution with the Department on that disputed year, would it affect the deficit or surplus?

A. It could affect the deficit or the surplus because all the calculations would have to be made again.

Cross-Examination of Pierre Nepton, Question 432, Tab 5 of the Applicants' Record.

Cross-Examination of Stephane Villeneuve, Questions 297-310 and 406-409, Tab 5 of the Applicants' Record.

219. The Minister breached the honour of the Crown by failing to clarify the financial position of the ABL. The Crown, vis-à-vis Pierre Nepton, has admitted that the Minister refused to negotiate compensation owing to the ABL as a result of the reign of the IBC, and this is the reason why the Crown has refused to implement the Special Provisions. The Applicants submit that if indeed a *de jure* financial deficit exists, the ABL is entitled to know the full extent of the said deficit, since the process envisioned by the Special Provisions has been completed.

Cross-Examination of Pierre Nepton, Question 432, Tab 5 of the Applicants' Record.

220. The Minister breached the honour of the Crown by failing to attach the Special Provisions to the most recent Contribution Agreement, signed between the TPM (on behalf of the ABL) and DIAND. DIAND admits that the Special Provisions were deliberately excluded from the most recent Contribution Agreement, as executed between DIAND and the TPM on behalf or the First Nation:

> Q. But Mr. Nepton, wouldn't it have been easy, and certainly knowing the position of ABL in previous years, just to include [the Special Provisions] as a part of this contribution agreement?
>
> A. Yes, that is a good question, a good point of view, but I would have to check with our experts to see if the introduction of the special provision wouldn't have tied the hands of the third party administrator who would also have had to work with that special provision and govern with that additional aspect.
>
> Q. Yes, that is exactly the point, Mr. Nepton.

Cross-Examination of Pierre Nepton, Questions 463-464, Tab 5 of the Applicants' Record.

221. The Minister breached the honour of the Crown by failing to include the ABL in any negotiations about the terms and conditions of the most recent

Contribution Agreement. DIAND further admits that the most recent Contribution Agreement was put into place without the approval of the ABL:

> Q. But, Mr. Nepton, this contribution agreement was put in place without it being approved by the Chief in Council of ABL. Is that correct?
>
> A. Yes, but there is a nuance in that there was still a governance issue within the ABL community according to the data we have.
>
> Q. Yes, and we will get to that issue. But my question was this was put in place without it being approved by ABL Chief in Council, certainly without the approval of anybody actually on behalf of the ABL. Isn't that correct?
>
> A. Indeed, as Mr. Nahwegahbow says, it was not possible to have it approved by either of the councils that were running.
>
> Q. More specifically, it was <u>not approved by the Matchewan Council</u>. Isn't that correct?
>
> A. <u>Yes, indeed, I did say none of the councils approved it</u>.
>
> **Cross-Examination of Pierre Nepton, Questions 457 – 459, Tab 5 of the Applicants' Record [Emphasis added].**

222. The Minister breached the honour of the Crown by appointing a TPM to the ABL on the basis of a financial deficit, although DIAND, through Pierre Nepton, as admitted that the process envisioned by the Special Provisions was never formally completed. It is contrary to the honour of the Crown to break promises made to the ABL. Without fulfilment of the Special Provisions, it is not possible to know whether the Minister acted properly in appointing a TPM to the ABL on the basis of a financial deficit.

***Badger*, Paragraph 41.**

(b) Memorandum of Mutual Intent (MOMI)

223. The MOMI was another agreement arrived at via the mediation and facilitation process engaged in between ABL and DIAND in the aftermath of the IBC debacle in 1996. The Customary Council, upon reinstatement,

negotiated the MOMI with DIAND as a means "to strengthen their relationship, based on the principles of trust, mutual respect and fairness."

Harry Wawatie, Paragraphs 53-56, Global Proposal is an attachment to MOMI at Exhibit "R", Tab 3-R of the Applicants' Record.

Cross-Examination of Pierre Nepton, Question 468, Tab 5 of the Applicants' Record.

224. The Minister breached the honour of the Crown by failing to fulfil various commitments made to the ABL under the Global Proposal of the MOMI, including:

a) The construction of 10 new houses per year for five years at $650,000 per year;

b) The construction of a multi-functional community centre administration building;

c) The construction of a school; and

d) The electrification of the community by connecting to the Hydro-Quebec grid.

Cross-Examination of Pierre Nepton, Questions 480 – 484, 487, 499-501, Tab 5 of the Applicants' Record.

Cross-Examination of Stéphane Villeneuve, Questions 120-124, 145 – 155, Tab 6 of the Applicants' Record.

225. The Minister's breach of the honour of the Crown by preserving the poverty and substandard conditions in which the ABL members live: the Rapid Lake reserve remains unconnected to the Hydro-Quebec electricity grid and operates on diesel generators, community members continue to live in substandard and mouldy housing, and services continue to be provided in substandard infrastructure and buildings.

Cross-Examination of Pierre Nepton, Question 89-90, Tab 5 of the Applicants' Record.

See also: Cross-Examination of Pierre Nepton, Questions 120 – 126, Exhibit "10" of the Cross-examination (Mold

and Housing Conditions Survey of the Algonquins of Barriere Lake), Tab 5-J of the Applicants' Record.

226. The Applicants submit that if the Crown had honoured the MOMI, there would have been an infusion of cash-flow into the ABL aimed at construction and infrastructure, which would improve the financial position and the debt to revenue ratio of the ABL. This would clarify the financial position of the ABL. It is contrary to the honour of the Crown to break promises made to the ABL. Without fulfilment of the MOMI, it is not possible to know whether the Minister acted properly in appointing a TPM to the ABL on the basis of a financial deficit.

***Badger*, Paragraph 41.**

c. Trilateral Agreement

227. Finally, after the improper reign of the IBC in 1996, the Customary Council, upon reinstatement, negotiated the MOMI with DIAND, which included the Global Proposal for Rebuilding the Community. The Global Proposal recognized that the Trilateral Agreement was fundamental to the future of the ABL.

Harry Wawatie, Paragraphs 53-56, Global Proposal is an attachment to MOMI at Exhibit "R", Tab 3-R of the Applicants' Record.

228. The implementation of the Trilateral Agreement is governed by both the honour of the Crown and the fiduciary duty, as the federal government signed the Trilateral Agreement pursuant to its "special fiduciary responsibility towards the Algonquins of Barriere Lake". Equity should intervene to ensure the Crown fulfills the Trilateral Agreement and acts with "utmost loyalty to his principal."

Harry Wawatie, Paragraph 12, Exhibit "A", Tab 3-A of the Applicants' Record.

***Haida*, Paragraph 35.**

***Guerin*, pages 384 – 385.**

229. The Trilateral Agreement was negotiated to bring economic gains to the ABL resulting out of the exploitation of their traditional territory and DIAND admits that the ABL should benefit from the socioeconomic developments on their traditional territory. In addition, the Crown admits that were Phase III of the Trilateral Agreement implemented, it would involve the transfer of $1.5 million dollars to the ABL for resource revenue-sharing. This would significantly improve the financial situation of the ABL.

Cross-Examination of Pierre Nepton, Question 286, Tab 5 of the Applicants' Record.

230. The ABL does not receive any benefit from the economic activities taking place on their traditional territory, including the exploitation of natural resources which yield millions of dollars of revenue annually and which would fall under the purview of a fully-implemented Trilateral Agreement.

Harry Wawatie, Paragraph 13, Tab 3 of the Applicants' Record.

Cross-Examination of Pierre Nepton, Questions 86 – 87, Tab 5 of the Applicants' Record.

***Haida*, Paragraph 27.**

231. It is a breach of the Minister's fiduciary duty and the honour of the Crown by failing to properly implement the Trilateral Agreement. It is contrary to the honour of the Crown to break promises made to the ABL. Without fulfilment of the Trilateral Agreement, it is not possible to know whether the Minister acted properly in appointing a TPM to the ABL on the basis of a financial deficit.

***Badger*, Paragraph 41.**

(3) The failure of the Minister to take into account these agreements invalidates the Minister's decision

232. The Applicants submit that the Minister's failure to take into account the Special Provisions, the MOMI and the Trilateral Agreement result in breaches of his constitutional obligations, the honour of the Crown and his fiduciary duty. By failing to pay any attention to the Minister's constitutional obligations, without offering proper justification for infringing the Constitution obligations owed to the ABL, the Minister's decision to appoint a TPM to the ABL is invalid and should be quashed.

***Lalonde*, paragraph 184 and 187.**

6. The ABL was Denied Procedural Fairness in the Manner in which the Minister Appointed the TPM

233. In appointing a TPM to the ABL, the Minister owes the ABL a duty of procedural fairness. The common law duty of procedural fairness lies on every public authority making an administrative decision which is not of a legislative nature and which affect the rights, privileges or interests of an individual.

***Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, Paragraph 14.**

234. Participatory rights in the duty of procedural fairness ensures 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.

***Baker*, Paragraphs 18.**

235. A judicial review of the Minister's decision on the standard of reasonableness requires that the Minister's decision is made in a process that can be justified, is transparent and intelligible.

***Dunsmuir*, Paragraph 47.**

(a) The proper cause of the problems in ABL administration was not determined

236. The Minister failed to respond to the ABL's requests for assistance in dealing with the significant financial problems arising as a result of Bob Smith's tenure as Financial Manager/Controller of the ABL in 2004. Rather than working with the ABL to resolve such problems, DIAND simply warned the First Nation that it intended to apply the NI Policy; and DIAND put the ABL into co-management and ultimately forced them into TPM.

Exhibit "8A" to the Cross-Examination of Pierre Nepton, June 22, 2007, Tab 5-H of the Applicants' Record.

Cross-examination of Pierre Nepton, Question 597-604, Tab 5 of the Applicants' Record.

237. The Minister failed to respond to former Chief Wawatie's request for assistance in dealing with the significant deficit remaining after the co-managers Paquin and Leblanc were terminated. During the tenure of these co-managers, the deficit of the ABL had increased by $83,382.00. On the unanimous recommendation of his advisors, including Clifford Lincoln, ABL decided to terminate and find a replacement for Paquin and Leblanc. Former Chief Wawatie wrote to DIAND and expressed that the ABL lost confidence in the co-managers, Paquin and Leblanc, on the basis that they failed to provide regular financial reports, they failed to produce a comprehensible remedial plan, and they failed to work harmoniously with the Council and the ABL.

Clifford Lincoln, Paragraphs 31-32, Exhibits "J" and "L", Tab 4-J; 4-L of the Applicants' Record.

Harry Wawatie, Paragraph 78, Exhibit "8", Tab 3-8 of the Applicants' Record.

Affidavit of Pierre Nepton, Paragraph 169 - 171, Exhibits "E-56" and "E-58".

238. The Applicants do not dispute that they rely on outside consultants to assist the ABL with their financial and administrative management. In 2006, the Applicants were prepared to continue with DIAND's intervention at a co-management level but with co-managers who were appointed by the Customary Council. DIAND insisted that the ABL retain the co-managers, Paquin and Leblanc, despite the difficulties the ABL experienced working with Paquin and Leblanc.

Harry Wawatie, Paragraph 80 – 81, Tab 3 of the Applicants' Record .

239. The imposition of TPM should be a last resort and every effort should have been made by the Minister to enhance the ABL's self-reliance and to minimize intervention. As was found in *Pikangikum*, a First Nation that is subject to the appointment of a TPM should have the opportunity to know what the difficulty or default is, in order to satisfy the NI Policy requirement that "the recipient lacks the capacity, to address/remedy its difficulty/default."

***Pikangikum*, Paragraph 99.**

***National Intervention Policy*, Chapter 5.8, Section 6.**

240. DIAND appointed a TPM to the ABL without properly explaining to the ABL why co-management was not appropriate for the ABL, or why TPM would remedy any of the financial problems. This offends the principles of transparency and intelligibility in decision-making, and by implication, the Minister's decision is unreasonable. Based on the experience of the ABL, TPM was actually detrimental to the ABL in 1996. In 1996 the appointment of a TPM, as coincided with the reign of the IBC, actually resulted in a complete lapse in the delivery of services to the First Nation during that time. Pierre Nepton has admitted this in his cross-examination.

Cross-Examination of Pierre Nepton, Tab 3, Questions 380 – 386 of the Applicants' Record.

***Dunsmuir*, Paragraph 47.**

241. DIAND has not presented any material evidence that the imposition of a TPM on the ABL, on such a rushed basis, was necessitated by a situation where the "health, safety or welfare of the Recipient's community members is being compromised". In fact, the ABL's socioeconomic condition has not changed since DIAND signed the MOMI 1997 and DIAND failed to implement the Global Proposal. This offends the principle of justification in decision-making, and by implication, the Minister's decision is unreasonable.

***National Intervention Policy,* Chapter 5.11, section 7.1**

Cross-Examination of Pierre Nepton, Questions 480 – 484, 487, 499-501, Tab 5 of the Applicants' Record.

Cross-Examination of Stéphane Villeneuve, Questions 120-124, 145 – 155, Tab 6 of the Applicants' Record.

***Dunsmuir*, Paragraph 47.**

(b) The Six-day Notice Period was not Satisfactory

242. The Minister failed to give the ABL adequate time to replace the co-managers. The ABL was only provided with a six-day period (from June 15, 2006 to June 21, 2006) to prepare an Action Plan and to describe actions and dates for the identification of a new co-manager, failing which, the ABL would be put into TPM.

Cross-Examination of Pierre Nepton, Question 651, Tab 5 of the Applicants' Record.

Clifford Lincoln, Paragraph 42, Tab 4 of the Applicants' Record.

243. The Applicants submit that DIAND was not even willing or prepared to entertain the Action Plan it had requested from the ABL. While a six-day period is not sufficient notice in and of itself, DIAND had also issued a public tender process and contracted a TPM without officially notifying the ABL that it would be under TPM.

Clifford Lincoln, Paragraph 39 – 42, Exhibits "O" and "P", Tab 4-O; 4-P of the Applicants Record.

244. The Applicants submit that the Minister took advantage of the highly discretionary NI Policy in order to appoint a TPM to the ABL, thereby acting in an unreasonable manner and breaching his obligation of fairness to the ABL. There has not been sufficient rationale provided to the ABL about why a TPM was required so urgently at ABL in August 2006, given that the financial situation of the ABL had not been clarified, nor had any of the agreements with the ABL, namely the Special Provisions, the MOMI, and the Trilateral Agreement, been fulfilled. This offends the principle of justification and intelligibility in decision-making, and therefore the decision is unreasonable.

***Dunsmuir*, Paragraph 47.**

7. Legitimate Expectations

245. The Applicants had a legitimate expectation that the NI Policy would be implemented consistently. The Applicants also submit that the ABL had a legitimate expectation to have the provisions of the Special Provisions respected and implemented to clarify their financial position after the Minister wrongfully recognized the IBC and installed a TPM in 1996.

The ABL has a legitimate expectation that Minister would implement the NI Policy in a consistent manner

246. The doctrine of legitimate expectations encompasses the reasonable and actual assumptions a party has when dealing with the government. The doctrine of legitimate expectations affords a party affected by the decision of the public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity; failing which, the Court may provide a remedy when to the party who is led to believe that his or her rights would not be affected without consultation.

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)
[1990] S.C.J. No. 137, Paragraph 74 [*Old St. Boniface*].

247. The Applicants submit that they had a legitimate expectation that the NI Policy would be complied with and the causes of the intervention would be identified so that the ABL could address/remedy the difficulty/default which gave rise to the alleged default under the Contribution Agreement. As was held in *Pikangikum*, it is incumbent on the Minister to notify the ABL of the specific problems so that the problems may be addressed.

***Pikangikum*, Paragraph 102.**

***National Intervention Policy*, Chapter 5, Section 6.**

248. The Applicants submit that DIAND failed to make all reasonable efforts to sustain the Customary Council's responsibility for the delivery of programs and services under the Contribution Agreement, contrary to the NI Policy. As aforesaid, DIAND ignored the ABL's proposed co-managers to replace Paquin and Leblanc after they were terminated, and provided only a six-day window within which the ABL was to provide an action plan to avoid the appointment of a TPM. DIAND had contracted with a TPM firm before even notifying the ABL that they would be placed under TPM.

***National Intervention Policy*, Chapter 5, Section 6.**

***Supra*, Paragraphs 127 – 134.**

249. The Applicants submit that the Minister has applied the NI Policy in an arbitrary procedure, and in applying the NI Policy to the ABL, the Minister has breached his procedural obligations of promoting regularity, predictability and certainty in government's dealing with the ABL.

***Apotex Inc. v. Canada (Attorney General),* [2000] 4 F.C. 264 Paragraph 122.**

***Mount Sinai*, Paragraph 29 – 30.**

The Special Provisions Create a Legitimate Expectation Precluding or Mitigating the Imposition of TPM on the First Nation

250. The doctrine of legitimate expectations is also invoked when the government represents that a party will retain some benefit and when the benefit is not in fact conferred:

> Where … the Minister makes representations by word or conduct that someone will receive or retain some benefit, or that some procedural right will be afforded before a decision is taken, the availability and / or content of procedural fairness may be enlarged under the doctrine of legitimate expectations.
>
> ***Mount Sinai*, Paragraph 16.**

251. The ABL had a legitimate expectation that their financial situation would be clarified by virtue of the Special Provisions. The NI Policy provides that intervention is warranted when there is a default under a Funding Agreement, but the Special Provisions specifically preclude the Minister from finding the ABL to be in default of the Agreement pending resolution of the matters identified in the Special Provisions, which state:

> The Minister agrees that, for the purposes of section 4.0, Part B, of this Arrangement, the Council shall not be deemed to be in default of the Arrangement as a result of any circumstances related to arising out of pending matters as identified in this part.
>
> **Harry Wawatie, Paragraph 51, Exhibit "N", Tab 3 of the Applicants' Record.**
>
> **Affidavit of Pierre Nepton, Exhibit E-1(National Intervention Policy) Corporate Manual Systems, 7.0 and 8.0, at page 443 (emphasis added).**

252. The Applicants submit that by operation of the Special Provisions, the Minister is prevented from intervening to impose TPM on the basis of a default under the Contribution Agreement. The ABL had a legitimate expectation that the financial situation would at least be clarified prior to the

appointment of a TPM, and the Applicants submit that the ABL relied on this legitimate expectation to their detriment.

253. The Applicants also submit that they have a legitimate expectation that the Special Provisions would continue to attach to all funding agreements entered into for the benefit of the ABL, until the clarification process envisioned by the Special Provisions has been completed. The Minister has breached this legitimate expectation by entering into a Contribution Agreement with the TPM, on behalf of the ABL, which excludes the Special Provisions.

254. The Applicants submit that by virtue of the promise of the clarification of the financial position of the ABL that the Minister conferred upon the ABL, the Minister's failure to implement the Special Provisions and the omission of the Special Provisions from the most recent Contribution Agreement are unreasonable and cannot be sustained upon review.

8. Apprehension of Bias and Improper Motive of the Minister

255. The Applicants submit that the Minister was biased and had improper motive in appointing a TPM to the First Nation, contrary to the principles of procedural fairness which dictates that decisions must be made by unbiased decision makers. Justice must not only be done, it should be seen to be done as well. The apprehension of bias is "a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required".

> ***Committee for Justice and Liberty et al*. v. N*ational Energy Bd.*, [1978] 1 S.C.R. 369 at pp. 394-395 [*Justice and Liberty*].**
>
> ***Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities*, [1992] 1 S.C.R. 623.**

The Minister Failed to Give Proper Reasons for Appointing a TPM to the First

Nation

256. The Applicants submit that there is a reasonable apprehension that the Minister was biased against the ABL in that the Minister did not provide proper or sufficient reasons to support his decision. Any reasons provided to the ABL have been inconsistent and contradictory, which may be seen by a reasonable and right-minded person reviewing the facts giving rise to this matter.

257. Upon the July 12, 2006 appointment of the TPM, the ABL was given the following explanation:

> In the past few years, the Algonquin Council of Barriere Lake has increased its financial deficit significantly, to the extent that essential community services are now considered at risk. Consequently, the Department has no other choice than to proceed with the appointment of a Third Party Manager. This interim measure is therefore necessary to preserve the delivery of the programs and services to which you are entitled.
>
> **Harry Wawatie, Exhibit "14", Tab 3 of the Applicants' Record.**
>
> **Clifford Lincoln, Exhibit "Q", Tab 4 of the Applicants' Record.**

258. One reason provided to the ABL to support DIAND's imposition of a TPM was that the ABL had incurred a debt ratio greater than 8%, contrary to Section 7.1(a)(iii) of the Policy. As is stated in the Affidavit of Stéphane Villeneuve:

> A third party manager was appointed on July 11, 2006, primarily because of the fact that the debt ratio of the ABL was greater than 8% and the provision of essential services was threatened, as appears in the letter.
>
> **Affidavit of Stéphane Villeneuve, Paragraph 41.**

259. Another reason provided to the ABL was contained in Pierre Nepton's Affidavit, wherein he stated the reason for intervention was the absence of a band council that DIAND would recognize:

> The absence of a legitimate band council may, in and of itself, justify appointing a Third Party Manager, because DIAND is then unable to enter into a funding arrangement or to ensure its implementation which situation put at risk health, safety or welfare of the members of the ABL band as being provided in the National Intervention Policy.
>
> **Affidavit of Pierre Nepton, Paragraph 197**.

260. Mr. Nepton contradicted this assertion in his cross-examination by stating that the appointment of a TPM "has nothing to do with leadership".

> **Cross-Examination of Pierre Nepton, Questions 573 – 575, Tab 5 of the Applicants Record.**

261. Subsequently in his cross-examination, Mr. Nepton suggested that political uncertainty and the jeopardy of essential services legitimized the Minister's decision:

> Q. So you took action against the First Nation by forcing them into third party management when they refused to take your advice, Mr. Nepton. Isn't that true?
>
> A. Such reasoning surprises me. On the contrary, we acted in order to protect essential community services and to protect federal funds that would have been garnisheed if it had transferred them to the Council. That is why we stated in our letter that this was a temporary measure. So the right approach for the Council would have been to continue to work in search of a co-manager. <u>Unfortunately, the turn of events in July with two councils make that impossible</u>.
>
> **Cross-Examination of Pierre Nepton, Question 647, Tab 5 of the Applicants' Record.**

262. It is to be noted as well that it is the Minister himself who made the decision alluded to by Mr. Nepton, to not recognize the existence of a single

legitimate Council, thereby creating the situation by which he sought to justify the appointment of a TPM to the First Nation. This itself is evidence to support the apprehension of bias. As Mr. Nepton noted in his cross-examination, somewhat reluctantly, the situation referred to by him regarding the presence of "two councils" was rectified after an inquiry by Mr. Justice Rejean Paul. His Report recommended the recognition of the Council of Chief Matchewan, which recommendation was followed by the Minister.

Cross-Examination of Pierre Nepton, Question 666-7, Tab 5 of the Applicants' Record.

263. Based on the variety of contradictory reasons DIAND has offered to support the Minister's decision to impose the TPM, the Applicants submit that the Minister lacked independence sufficient to give rise to a reasonable apprehension of bias and sufficient to question the fairness of DIAND's decision making procedures:

> Independence is an essential element of the capacity to act fairly and any procedure or practice which unduly reduces this capacity is contrary to the rules of natural justice.
>
> ***Bell Canada v. C.T.E.A.*** **[2003] 1 S.C.R. 884.**
>
> ***I.W.A. v. Consolidated-Bathurst Packaging Ltd*** **[1990] 1 S.C.R. 282.**

The Minister was Misleading in Putting Forward Evidence to Support DIAND's Position

261. The Applicants submit that the Minister put forward evidence in this Application in a manner which creates an apprehension of bias. One of the issues in this case involves the Trilateral Agreement. In paragraph 46 of his Affidavit, Mr. Nepton suggests that there was a verbal agreement between DIAND and ABL to accept certain limitations with regard to funding the Trilateral Agreement. He put forward a letter dated February 9, 1999, to support this contention. In cross-examination, Mr. Nepton was asked why he failed to present three further letters in the exchange between ABL and DIAND,

which contradict DIAND's position. As was admitted in Pierre Nepton's cross-examination:

> I do not recall doing that specific point, but in this matter with ABL… there were so many letters. There were far more letters and written information than any other file that we have that we had to look for information that was relevant and put aside what we thought was not relevant to the matter before us here.
>
> **Affidavit of Pierre Nepton, paragraph 46, Exhibit B-5.**
>
> **Cross-Examination of Pierre Nepton, Questions 223-230, Tab 5 of the Applicants' Record.**
>
> **Exhibits "1", "2" and "3" to the Cross-Examination of Pierre Nepton, June 22, 2007, Tab 5-H of the Applicants' Record.**

The Minister had a conflict of interest with respect to its outstanding financial obligations to the ABL

264. A conflict of interest is sufficient to amount to a reasonable apprehension of bias. As Lord Denning held:

> No man can be an advocate for or against a party in one proceeding, and at the same time sit as a judge of that party in another proceeding. Everyone would agree that judge, or a barrister or solicitor (when he sits ad hoc as a member of a tribunal) should not sit on a case to which a near relative or a close friend is a party. So, also, a barrister or solicitor should not sit on a case to which one of his clients is a party; nor on a case where he is already acting against one of the parties. Inevitably people would think he would be biased.
>
> ***Metropolitan Properties Co (F.G.C.), Ltd. v. Lannon and Others*, [1968] 3 All E.R. 304, at 310 (C.A.).**

265. The Applicants submit that the Minister had an interest in eradicating any outstanding financial obligations owed to the ABL arising as a result of the Minister's improper recognition of the IBC in 1996. The Minister's interest conflicts with the interest of the ABL to have their financial situation clarified as a result of the financial chaos created by the Minister's decision to

recognize the IBC, and to install a TPM. As the Supreme Court of Canada has said, a conflict of interest arises and the decision-maker is disqualified: "if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty."

***Old St. Bonifice*, Paragraph 55.**

266. The Applicants submit that DIAND, the body making the decision to impose a TPM, is the subject of potential liabilities against it by the ABL, the body upon who is imposed the TPM. The Minister's decision to appoint a TPM provided an opportunity for DIAND to remove itself from the liability arising from the reign of the IBC and the Special Provisions. This set of circumstances alone gives rise to a reasonable apprehension of bias on the part of the Minister. However, this apprehension of bias is given further force because the Minister acted upon that opportunity and excluded the Special Provisions from the Contribution Agreement concluded between the TPM and DIAND following the appointment of the TPM.

267. The Applicants submit that by virtue of the Minister's completing obligations, both to the public interest in protecting public funds and to the clarification of the financial position of the ABL, the Minister should be disqualified from deciding to appoint a TPM to the ABL. On that basis, his decision should be quashed.

9. The Minister Abused his Discretion in Appointing a TPM to the First Nation

268. Absent the provision of proper reasons to the ABL for the imposition of the TPM, the Applicants submit that the appointment of a TPM to the ABL was an abuse of discretion aimed at eradicating financial obligations owing to the ABL under the Special Provisions. By appointing a TPM to the ABL, DIAND removed contractual authority from the ABL and placed it into the hands of

the TPM, thereby enabling DIAND to enter into a Contribution Agreement with TPM, on behalf of the ABL, which excluded the Special Provisions.

269. It has long been established in Canadian law that "there is no such thing as absolute and untrammelled 'discretion'": A Minister's discretion, however broadly framed, is not unfettered. At the very least the Minister must exercise the power for the purpose for which it was granted.

> ***Roncarelli v. Duplessis,*** **1959 CanLII 1 (S.C.C.), [1959] S.C.R. 121, at p. 140.**
>
> ***Lalonde*****, paragraph 172.**

270. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion.

> ***Martineau v. Matsqui Institution Disciplinary Board*****, 1979 CanLII 7 (S.C.C.), [1980] 1 S.C.R. 602**

271. The Applicants submit that there has been an abuse of discretion, at minimum in three respects, namely: first, the Minister abused the highly discretionary nature of the NI Policy and ignored his obligations under the Special Provisions; second, the Minister purported to act on an emergency basis when clearly the ABL had been in other more urgent circumstances which were not acted upon by the Minister; and, third, the Minister or his officers demonstrate a complete disregard for legal obligations and the law.

The discretionary nature of the NI Policy and the Special Provisions

272. As aforesaid, the NI Policy provides that intervention is warranted when there is a default under a Funding Agreement, but the Special Provisions specifically preclude the Minister from finding the ABL to be in default of the Agreement pending resolution of the matters identified in the Special Provisions, which state:

> The Minister agrees that, for the purposes of section 4.0, Part B, of this Arrangement, the Council shall not be deemed to be in default of the Arrangement as a result of any circumstances related to arising out of pending matters as identified in this part.
>
> ***Harry Wawatie, Paragraph 51, Exhibit "N", Tab 3 of the Applicants' Record.***
>
> ***Affidavit of Pierre Nepton, Exhibit E-1(National Intervention Policy) Corporate Manu*al Systems, 7.0 and 8.0, at page 443 (emphasis added).**
>
> ***Supra*, Paragraphs 80 - 86.**

273. The Special Provisions require the Crown to make all reasonable efforts to engage in a process to clarify the financial position of and resolve outstanding financial obligations to the First Nation. On June 20, 2006, Chief Wawatie opposed TPM, stating:

> … we negotiated a Special Clause in our Contribution Agreements with Canada, which requires your government to enter into a process to clarify these financial issues.… I am again calling upon your Department to honour its undertaking and engage in a process with us to once-and-for-all resolve these financial issues.
>
> **Clifford Lincoln, Exhibit "M", Tab 4 of the Applicants' Record.**

274. The Crown admits that the Special Provisions were deliberately excluded from the most recent Contribution Agreement and that the most recent Contribution Agreement was put into place without the approval of the ABL.

> **Cross-Examination of Pierre Nepton, Questions 457 – 459 and 463-464, Tab 5 of the Applicants' Record.**

The Existence of Other More Urgent Circumstances

275. The Applicants further submit that the Minister abused his discretion in being selective about the emergency situations he claimed to be acting

upon. The Minister purported to intervene on the basis of an emergency situation existing at the ABL after the termination of the co-managers. Yet, the Minister failed to act on a report issued in 2003 regarding the housing conditions in the First Nation, which raised more serious and pressing health concerns. Pierre Nepton indicated in his cross-examination that DIAND had been sufficiently apprised of the emergency situation at the ABL since the release of the "Mold and Housing Conditions Survey" in Autumn 2003. As aforesaid at paragraph 32, this report listed several houses as being a risk for electrocution, being overcrowded, having heating and / or freezing problems, being a risk for burning, having no hot water, or having water running under the home. As stated in the cross-examination of Pierre Nepton:

> Q. You wrote a letter on June 15, 2006. In that same letter, which is referred to again in paragraph 175, you asked them to prepare an action plan and identify a new co-manager by no later than June 21st. Don't you think that is a little unreasonable, Mr. Nepton?
>
> A. Considering the urgency of the situation created by the Council's decision, the departure of the co-manager expected in mid-July, I actually think that the deadline is, on the contrary, very reasonable. We were acting in an emergency situation here as far as I am concerned.
>
> Q. Let's s talk about emergencies, Mr. Nepton. Are you aware of this report [the "Mold and Housing Conditions Survey"]?
>
> I want you to open it up and have a look at some of the housing problems that it talks about. Do you want to talk about emergency situations?
>
> **Cross-Examination of Pierre Nepton, Questions 651 – 652, Exhibit "10" of the Cross-examination (Mold and Housing Conditions Survey Algonquins of Barriere Lake), Tab 5-J of the Applicants' Record.**

Disregard for Legal Obligations and the Law

276. The Minister has exhibited a complete disregard for his legal obligations in relation to the Special provisions, the MOMI and the Trilateral Agreement.

This attitude is further reinforced by the attitude expressed by Mr. Nepton to the opinion of a Judge of the Quebec Superior Court expressed in a Mediation Report regarding the Trilateral Agreement he issued in September 1992. One of Judge Paul's main findings referred to the Trilateral Agreement as possibly being a "treaty" or at the very least a "solemn agreement". Mr. Nepton's attitude are reflected in an exchange on this subject during his cross-examination:

Q. Judge Paul's report, the one we were just referring to, which is at Exhibit S of Harry Wawatie's affidavit, refers to the trilateral agreement "as possibly being a treaty or no less at least a solemn agreement". That is on page 4. Does DIAND agree with that characterization?

A. My answer is no.

Q. So it is not a solemn agreement?

A. It is an agreement leading to the setting up of a pilot project.

Q. Signed by four ministers of Quebec and one federal minister, and it is not a solemn agreement?

A. I am not a lawyer. You keep talking about a solemn agreement. If by that you mean that it is an official agreement, yes, it was signed. It is there said, I do not know how you are defining the word "solemn" in the solemn agreement statement. But what I am saying is that it is a signed agreement, but it is not a treaty as far as we are concerned.

Harry Wawatie, Exhibit "S", Tab 3-S of the Applicant's Record

Cross-Examination of Pierre Nepton, Questions 177- 180, Tab 5 of the Applicants' Record [emphasis added].

277. Mr. Nepton, a senior officer with DIAND, who is characterizes himself as the "number two man" in the Quebec Region DIAND, as the Associate Regional Director; with responsibilities that include regional operations in general and general supervision of all matters dealt with in the Regional Office, should be expected to have regard to DIAND's legal obligations and the law,

particularly law relevant to his duties and responsibilities. However Mr. Nepton demonstrates that not only does he disregard the law but particularly the findings and recommendations of Judge Paul, a person who is more than qualified to be making such findings:

> Q. Okay. It is not a treaty as far as you are concerned. But Justice Paul says this is a solemn agreement at the very least. Would you agree with that characterization?
>
> A. Judge Paul is entitled to his opinion and as I said, I am not a lawyer. I do not know what implications of agreeing with you that it is a solemn agreement are. So I will not go there.
>
> **Cross-Examination of Pierre Nepton, Questions 3-6 and Question 181, Tab 5 of the Applicants' Record [emphasis added].**

278. Given all the circumstances of this case, the Applicants submit that there is no proper justification for the Minister's application of his discretion in applying the NI Policy to the ABL and intervening to impose a TPM at the time at which he did.

279. To conclude on this point, the Applicants submit that the Minister abused his discretion under the NI Policy by negotiating a Contribution with the TPM that excluded the Special Provisions, and thereby took advantage of the vulnerability of the ABL. The Minister's decision to appoint a TPM provided an opportunity for DIAND to remove itself from the liability arising from the reign of the IBC and the Special Provisions. The Applicants submit that in executing a Contribution Agreement with the TPM for ABL that excluded the Special Provisions, the Minister failed to exercise his discretion for the purposes for which it was granted, but rather to serve his own interests.

> ***Roncarelli v. Duplessis,* 1959 CanLII 1 (S.C.C.), [1959] S.C.R. 121, at p. 140.**
>
> ***Lalonde*, paragraph 172.**

10. Remedy

It is not Enough to Quash the Minister's Decision

280. The Applicants submit that the appropriate remedy includes quashing the Minister's decision and returning the governance of the ABL to the Customary Council. In *Pikangikum*, the decision of the Minister to require co-management over the First Nation was rendered invalid due to a breach of the duty of procedural fairness, which sets a precedent for quashing a Minister's decision to intervene by virtue of the NI Policy, when the Minister fails to observe the principles of procedural fairness.

***Pikangikum*, Paragraph 110.**

281. However, to simply quash the Minister's decision will not be sufficient to remedy the underlying financial problems faced by the ABL which ultimately gave rise to the Minister's Decision. The relief granted in a judicial review application should further the public interest, which is in the instant case, the financial remediation of the ABL.

***Oninayak v. Lubricon Lake Indian National Election (Returning Office)*, [2003] 3 C.N.L.R. 180, 233 F.T.R. 254.**

This is an appropriate case for Issuing Directions

282. In these circumstances, this is an appropriate case for issuing directions that the Minister clarify the financial position of the ABL. This Honourable Court's power to issue directions is to ensure that the purposes of its Order are not frustrated.

***Lazavera v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 1661.**

A Declaratory Remedy is Appropriate

283. The Federal Court possesses the jurisdiction to grant declaratory relief in judicial review proceedings brought pursuant to section 18 of the *Federal Court Act.*

> ***Moktari v. Canada (Minister of Citizenship and Immigration)* (C.A.), 1999 CanLII 9385 (F.C.A.), Paragraph 4.**

284. As stated by the Supreme Court in *Solosky*, the test for declaratory relief is:

> The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.
>
> ***Solosky v. R,* [1980] 1 S.C.R. 821, at page 830 [*Solosky*].**

285. The discretionary nature of declaratory relief, as stated in *Solosky*, is mediated when a decision-maker decides constitutional questions: declaratory relief is mandatory in these circumstances. In *Nunavut Tunngavik Inc. v. Attorney General (Canada)*, the Court found that an administrative decision-maker must respect the *Constitution*: "If [the decision] violates constitutionally-protected rights, this Court has a duty to step in and provide a remedy to the applicant".

> ***Nunavut Tunngavik Inc. v. Attorney General (Canada),* 2004 FC 85, Paragraphs 15-16.**

286. The case of *King v. Shuniah Financial Services Ltd.* sets a precedent for giving declaratory relief in the circumstances of this Application. In *King*, declaratory relief was granted when the fiduciary duty owed to a First Nation was engaged through the appointment of a TPM:

> It is declared that the Minister of Indian and Northern Affairs Canada owes a fiduciary duty to Gull Bay to require that a Third Party Manager make sufficient and prompt disclosure to Gull Bay of information relating to its management of funds to it in accordance with the Agreement so as to satisfy the reasonable concerns of Gull Bay, even if such disclosure goes beyond the terms of the Third Party Management Agreement.

***King*, Paragraph 3 of the Judgement, also see Paragraph 29.**

287. The real issue as between the ABL and the Minister is the extent to which the Minister has outstanding obligations to the ABL arising out of the Special Provisions, the MOMI and the Trilateral Agreement. The Applicants do not request that this Honourable Court order or declare that the Minister simply honour these agreements; but rather that this Honourable Court issue an order or a declaration that the Minister, if he is to apply the NI Policy to ABL, negotiate in good faith with the ABL the outstanding obligations arising out of the aforesaid agreements, with a view to clarifying the financial position of the ABL. As was stated in *Solosky*:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.

***Solosky,* at 830.**

288. In the circumstance of this case, a declaration that the Minister owes a fiduciary duty or that the honour of the Crown is engaged, and that these constitutional obligations require the Minister to negotiate in good faith with the ABL the fulfillment of the Special Provisions, the MOMI and the Trilateral Agreement, has the potential to settle the issues between the ABL and the Minister. Therefore, a declaratory remedy is appropriate.

PART IV: RELIEF SOUGHT

262. The Applicants request that the Judge make the following orders and / or directions:

a. An order to quash or set aside the decision of the Minister of July 12, 2006, appointing a Third Party Manager for the First Nation, and to

refer the matter back to the Minister with the direction that he clarify the financial position of the First Nation, before proceeding with the decision to appoint a Third Party Manager;

b. An order or a declaration that the Minister, with a view to clarifying the financial position of the First Nation, negotiate in good faith with the First Nation the fulfillment of the following agreements, which the Minister has thus far unlawfully failed or refused to do or has unreasonably delayed in doing, namely:

i. The Special Provisions, which have been a part of every Contribution Arrangement the First Nation has signed with the Minister since 1997;

ii. The Memorandum of Mutual Intent, entered into between the First Nation and the Department of Indian Affairs and Northern Development ("Department") on October 21, 1997; and

iii. The Trilateral Agreement, entered into between the First Nation, the government of Quebec and the government of Canada in August 1991, and extended by the said parties.

c. An order for costs on a solicitor-client basis.

c. Any other order that this Honourable Court may deem just and reasonable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated in Rama First Nation, this 17th day of March 2008.

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PART V: LIST OF AUTHORITIES

STATUTES AND REGULATIONS

The *Federal Court Act,* 1985, c F 8, section 18.1

The *Federal Court Rules*

The *Indian Act*, R.S.C.1985, as amended, s. 2(1), s. 74

The *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985 as amended

The *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s.35(1)

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Pikangikum First Nation v. Canada (Minister of Indian and Northern Affairs) [2002] F.C.J. No. 1701.

Dunsmuir v. New Brunswick, 2008 SCC 9

LaLonde v. Ontario [1999] O.J. No. 4488

Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511

Giroux v. Swan River First Nation

Paul v. British Columbia (Forest Appeals Commission) [2003] 2 S.C.R., 2003 SCC 55.

Law Society of New Brunswick v. Ryan [2003] 1 S.C.R. 247

Delgammukw v. British Columbia [1997] 3 S.C.R. 1010.

R. v. Van Der Peet, [1996] 2 S.C.R. 507

Bone v. Sioux Valley Indian Band No. 290, [1996] F.C.J. No. 150

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King v. Shuniah Financial Services Ltd. [2006] F.C.J. No. 799.

Raza v. Canada (Minister of Citizenship and Immigration) (1998) 157 F.T.R. 161 (F.C.T.D.)

Gwala v. Canada [1999] 3 F.C. 404.

R. v. Sparrow [1990] 1 S.C.R. 1075.

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Apotex Inc. v. Canada (Attorney General) [2004] 4 F.C. 264.

Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services) [2001] S.C.J. No. 43. Note cited as 2001 SCC 41 at para 223.

Committee for Justice and Liberty et al. v. National Energy Board [1978] 1 S.C.R. 369.

Newfoundland Telephone Co.Ltd. v. Board of Commissioners of Public Utilities [1992] 1 S.C.R. 623.

Bell Canada v. C.T.E.A. [2003] 1 S.C.R. 884.

I.W.A. v. Consolidated- Bathurst Packaging Ltd. [1990] 1 S.C.R. 282.

Metropolitan Properties Co (F.G.C.), Ltd. v. *Lannon and Others*, [1968] 3 All E.R. 304

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Lazavera v. Canada (Minister of Citizenship and Immigration) [2004] F.C.J. No. 1661.

Moktari v. Canada (Minister of Citizenship and Immigration) (C.A.), 1999 CanLII 9385 (F.C.A.)

Solosky v. R, [1980] 1 S.C.R. 821.

Nunavut Tunngavik Inc. v. Attorney General (Canada), 2004 FC 85,