Federal Court Cour fédérale

Date: 20120801

Docket: T-2037-11

Citation: 2012 FC 948

Ottawa, Ontario, August 1, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ATTAWAPISKAT FIRST NATION
AS REPRESENTED BY CHIEF AND
COUNCIL

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF
CANADA, AS REPRESENTED BY THE
MINISTER OF ABORIGINAL AFFAIRS AND
NORTHERN DEVELOPMENT CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. OVERVIEW

[1] The Applicant, Attawapiskat First Nation [AFN], seeks judicial review of the Respondent Minister of Aboriginal Affairs and Northern Development's [Minister] decision to appoint a Third-Party Manager [TPM] to AFN due to an alleged default by AFN under its Comprehensive Funding Agreement.

[2] This judicial review confirms, if such confirmation were needed, that decisions made in the glare of publicity and amidst politically charged debate do not always lead to a reasonable resolution of the relevant issue.

[3] The housing situation at Attawapiskat was extensively covered in the media. This case started with accusations of political motive and retribution by the federal government, in the person of the Prime Minister and some Cabinet Ministers, against the AFN for the public embarrassment the housing situation caused. Those allegations were largely withdrawn and to the extent that they linger, the Court finds that there is no evidence that the Prime Minister or the Cabinet engaged in such reprehensible conduct. The problem in this case does not lie at the feet of the political masters but in the hands of the bureaucracy.

[4] While there was a “default” under the Comprehensive Funding Agreement, the remedy selected – the appointment of a Third Party Manager – was unreasonable. The decision to appoint did not respond in a reasonable way to the root of the problems at Attawapiskat nor to the remedies available upon default under the Comprehensive Funding Agreement. The Respondent invoked a financial management remedy without considering more reasonable, more responsive or less invasive remedies available.

[5] The Applicant previously brought a Motion for several forms of interlocutory relief including an injunction against the Minister from appointing a TPM. By Order dated February 3, 2012, this Court dismissed the Applicant’s Motion subject to compliance by the Minister and his TPM with the terms of the Order.

[6] At the time of the injunction hearing, the most pressing matter was the movement of 22 “trailer” homes [modular homes] over a winter road and their installation. The Court’s Order refusing the injunction was conditioned by terms that were to make such movement and installation possible. Absent such conditions in the Order and compliance therewith, some form of injunctive relief would have been granted.

[7] Of significance to the injunction hearing and to this judicial review is that it was the AFN who obtained a quote for the modular homes and who had secured the assistance of De Beers Canada Ltd., the mining company operating a mine near the reserve and who are experienced in the installation of such housing, as project manager.

[8] On April 5, 2012, and effective April 19, 2012 (five days before the judicial review application was scheduled to be heard), the Respondent withdrew the TPM and subsequently brought a Motion to Dismiss on the basis that the judicial review was moot. That Motion was heard on the same day as the judicial review application, dismissed and the judicial review proceeded.

[9] The parties were advised that more fulsome reasons for dismissal of the Respondent’s Motion to Dismiss would be contained in the Reasons issued on the judicial review application. For the reasons that follow, the Court dismissed the Respondent’s Motion and concludes that the application for judicial review should be allowed.

II. BACKGROUND

[10] Attawapiskat First Nation is one of seven Mushkegowuk Cree communities near James Bay in northern Ontario. The AFN have 300 housing units, most of which have reached or are near the end of their useful life with the result that last year, the AFN experienced a serious and unprecedented housing crisis on the reserve.

[11] Many AFN members were living in overcrowded and unsafe conditions in uninsulated and unserviced dwellings or in tents where sanitation was a bucket and where mold was rampant. The Applicant filed numerous letters from medical professionals that address the types of diseases and other conditions on the Reserve due to the shortage of proper housing. The situation was an embarrassment to a country as rich, strong and generous as Canada.

[12] In August 2011, the AFN's Housing Manager expressed concern to the AFN Chief, Chief Spence, that band members were requesting construction materials to fortify their tents and shacks, and that no funds or resources were available for that purpose.

[13] On October 28, 2011, after consultation with AFN's Chief and Council, Grand Chief Stan Louttit of the Mushkegowuk Council declared a state of emergency as a result of the housing crisis developing in several Mushkegowuk First Nation communities including Attawapiskat, particularly in the face of the upcoming winter weather.

[14] Notably, five families living in tents in the Attawapiskat community were identified by the AFN Council as a priority. It would appear that officials assumed initially that these were the only

people facing a crisis whereas, to the AFN, they were not the only people in need but they were the most critical of those in need.

[15] By a letter dated November 4, 2011, the AFN submitted a proposal for emergency funding from Aboriginal Affairs and Northern Development Canada (AANDC) totaling $499,500 to renovate condemned houses on the reserve and render them safe and habitable for families that were living in tents and shacks.

[16] On November 9, 2011, AANDC confirmed that it would advance funds of approximately $500,000 for that purpose and authorized an emergency draw of $350,000 from the existing funding. AANDC requested that the AFN identify the names of the five families currently living in tents who would be the priority families to move into the renovated houses.

[17] On November 12, 2011, the AFN issued its own declaration of emergency with respect to the housing crisis.

[18] The AFN's plans and identified needs expanded over the period to the end of 2011 as further requirements arose. On November 21, 2011, Chief Spence advised AANDC officials that there were (in addition to those in tents) 17 families living in shacks whose needs had become urgent and she requested a further $1.5 million. In response, AANDC asked Chief Spence to submit a further proposal for funds.

[19] On November 25, 2011, during a conference call to discuss the declarations of emergency, Chief Spence informed AANDC officials that the Chief and Council lacked the resources and capacity to address the housing crisis. The evidence is that the Chief and Council meant that they did not have the operational capacity to handle the crisis, not that they could not manage the problem or that there was some issue of financial management.

[20] Finally, on November 28, 2011 (after officials had been invited by the Chief since November 4, 2011), AANDC officials visited Attawapiskat in order to assess the housing crisis. The following day, the Senior Assistant Deputy Minister [ADM] responsible for Regional Operations of AANDC emailed the AANDC Associate Regional Director who was still at the AFN Reserve and first referred to the possible appointment of a TPM to Attawapiskat. This was not made known to the AFN.

[21] At no time prior to the appointment of the TPM did departmental officials indicate that there was any problem with Band management. The Band was already under a co-management regime and no issue of Band management or financial administration was raised.

[22] On November 2, 2011 and then again on November 17, 21, 25, 28 and 29, 2011, the Minister and his Parliamentary Secretary were questioned in the House by Opposition members concerning the status of the Government’s response to the Attawapiskat housing crisis which, by that time, had attracted significant media attention and public criticism.

[23] This culminated in statements made by the Prime Minister in the House of Commons on November 30, 2011 to the effect that the government had invested more than $90 million in the Attawapiskat community and that the current results were unacceptable. The Prime Minister indicated that the government would take action to provide immediate assistance and to improve the long-term management of the community.

[24] Despite the comments about management, the Respondent has not produced evidence of mismanagement or incorrect spending. In fact, the reference by the Prime Minister as to the $90 million could not have related exclusively to the funds made available for housing repair or reconstruction.

[25] Further, despite the declaration of emergency, until the announcement of the appointment of the TPM, neither the Chief or Council were advised that there was a default under the Comprehensive Funding Agreement.

[26] It would be inaccurate to suggest that officials were insensitive or uncaring about the situation at Attawapiskat. The record shows that officials were concerned about the crisis and the need to address the housing situation. The problem seems to have been a lack of understanding of the AFN’s actual needs and an intention on the part of officials to be seen to be doing something.

[27] What is striking about this case is the paucity of contemporaneous records by the ADM. In an environment where note taking is a virtual art form, where the subject matter was caught in media headlights and Hansard is replete with Question Period behaviour, there is little written

evidence of the communications flowing from the ADM's office both up and down the chain of command.

[28] That same day, November 30, 2011, the ADM notified Chief Spence that the AFN was in default of its Comprehensive Funding Agreement and that a TPM had been appointed. The letter stated:

> I am writing to advise you of Aboriginal Affairs and Northern Development Canada's intent to proceed from your current co-management agreement to third-party management.
>
> The Department considers the Attawapiskat First Nation to be in default of its Aboriginal Recipient Funding Agreement per section 9.1(d) and, in particular, that the health, safety or welfare of members or recipients is at risk of being compromised.
>
> Section 10.2.1 of your 2011/12 funding agreement further states that in the event the Council is in default under this Agreement, Canada may 'appoint, upon providing notice to the Council, a Third Party Funding Agreement Manager.'
>
> This letter constitutes notice of Canada's intent to place you under third-party management. I will notify you once a third-party manager has been identified to ensure the delivery of AANDC programs and services and to ensure the health and safety of your community.

[29] Canada, through Aboriginal Affairs and Northern Development Canada, provides transfer payments to First Nations to enable them to deliver essential services, including housing, to their members. This funding is provided by way of a Comprehensive Funding Agreement signed by both Canada and the First Nation. The most recent Agreement with Attawapiskat was signed on March 14, 2011 and is effective April 1, 2011 to March 31, 2013 [CFA]. It was the CFA in effect at the time of the appointment of the TPM.

[30] Section 9.0 of the CFA contains the default provisions. In this instance, the Respondent relied on section 9.1(d):

> **9.0 Default**
>
> 9.1 The Council will be in default of this Agreement in the event:
>
> (a) the Council defaults on any of its obligations set out in this Agreement or any other agreement through which a Federal Department provides funding to the Council;
>
> (b) the auditor of the Council gives a denial of opinion or adverse opinion on the Consolidated Audited Financial Statements of the Council in the course of conducting an audit under section 4.4 (Reporting) or section 10.3 (Where Financial Statements Not Provided) of this Agreement or the corresponding clauses in its predecessor;
>
> (c) in the opinion of the Minister of Indian Affairs and Northern Development or any other Minister that represents Her Majesty the Queen in Right of Canada in this Agreement, having regard to Council's financial statements and any other financial information relating to the Council reviewed by the Minister, the financial position of the Council is such that the delivery of any program, service or activity for which funding is provided under this Agreement is at risk;
>
> **(d) in the opinion of the Minister of Indian Affairs and Northern Development or any other Minister that represents Her Majesty the Queen in Right of Canada in this Agreement, the health, safety or welfare of Members or Recipients is at risk of being compromised.**
>
> (Emphasis by Court)

[31] In the event of default the Minister has a number of remedies from which to choose as set out in section 10.0:

10.0 Remedies on Default

10.1 Parties Will Meet

10.1.1 Without limiting any remedy or other action Canada may take under this Agreement, in the even the council is in default, the parties will communicate or meet to review the situation.

10.2 Actions Canada May Take

10.2.1 In the event the Council is in default under this Agreement, Canada may take one or more of the following actions as may reasonably be necessary, having regard to the nature and extent of the default:

(a) require the Council to develop and implement a Management Action Plan within sixty (60) calendar days, or at such other time as the parties may agree upon and set out in writing;

(b) require the Council to seek advisory support acceptable to Canada;

(c) appoint, upon providing notice to the Council, a Third Party Funding Agreement Manager;

(d) withhold any funds otherwise payable under this Agreement;

(e) require the Council to take any other reasonable action necessary to remedy the default;

(f) take such other reasonable action as Canada deems necessary, including any remedies which may be set out in any Schedule;

(g) terminate the Agreement.

[32] Section 1.1.1 of the CFA defines “Third Party Funding Agreement Manager” as “a third party, appointed by Canada, that administers funding otherwise payable to the Council and the Council’s obligations under this Agreement, in whole or in part, and that may assist the Council to remedy default under the Agreement.”

[33] Decisions regarding the imposition of Third-Party Management are normally made by the Regional Director General because they are familiar with the details of default prevention and management for a specific First Nation. However, in this case, the ADM's evidence is that he alone made the decision given the exigent circumstances and his knowledge of the file.

[34] In the ADM's subsequent explanation of his rationale for appointment of a TPM, he relied on the fact that the AFN was already in co-management and therefore the next level of intervention (according to corporate policy) was third party management. The ADM did not refer to, rely upon or contemplate the remedies available under Clause 10 of the CFA, including requiring the Council to seek advisory support acceptable to the government.

[35] The Chief and Council immediately objected to AANDC's appointment of a TPM by Band Council Resolution and by letter dated December 2, 2011. The AFN also invited immediate discussions.

[36] In response, AANDC asserted that its decision to appoint a TPM was a direct result of AANDC taking into account the AFN declaration of the state of emergency and the ensuing AANDC assessment which had determined that urgent health and safety issues demand immediate action.

[37] The Respondent appointed as TPM a person who had been an advisor to the AFN previously but who had been fired by the Council. There appears to be no consideration of the

reaction this particular appointment would have on the AFN – a reaction that ought to have been contemplated.

[38] The suitability of the particular person is not a relevant issue here. However, it does explain, in part, the atmosphere of distrust and animosity surrounding the whole TPM process.

[39] More germane to the issues in this case is that the TPM had financial management experience but none relevant to the handling of this housing crisis. Moreover, the mandate of the TPM was that of financial control (approval of invoices and similar matters) in a situation where financial management was not an issue.

[40] In December 2011, the Applicant brought this application for judicial review of the Minister's decision to appoint a TPM. In their submissions, they allege that the Minister erred when he found the AFN to be in default of the CFA and thus appointed a TPM without first finding the Council to be at fault with respect to compromising the health, safety or welfare of AFN members, which the Applicant argues the Minister was required to do in accordance with s 9.1(d). Alternatively, they argue that the Minister erred in choosing to appoint a TPM as a remedy to the housing crisis.

III. PRELIMINARY ISSUE

[41] On April 5, 2012, the Respondent notified the AFN of its intention to withdraw the TPM, effective April 19, 2012. The Respondent subsequently filed a Motion to Dismiss on the basis that the judicial review application was moot.

[42] The leading authority on the issue of mootness is *Borowski v Canada (Attorney General),* [1989] 1 SCR 342 (available on QL) [*Borowski*]:

> **15** The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> **16** The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[43] According to *Borowski*, above, it is necessary to consider, first, whether the proceeding is moot and then, if it is moot, whether a decision should be rendered despite the mootness. A proceeding becomes moot when circumstances have changed so that there is no longer a “live controversy” between the parties that can be resolved by a decision in that proceeding.

[44] Relying on the fact that the TPM had been withdrawn, the Respondent argued that there can be no practical effect to any order that the appointment be set aside and declaratory relief would be similarly meaningless. The Court disagrees.

[45] While a significant element of the relief previously sought is no longer at issue given the withdrawal of the TPM, this Court's determination of the legality of the Minister's decision to appoint the TPM will have a "practical effect" on the rights of the parties, for example, with respect to who should undertake the fees drawn by the TPM from the AFN's CFA funding for the provision of management services. And, as the Applicant notes, a TPM was appointed and he did, in fact, administer the AFN's funds between December 5, 2011 and April 19, 2012. The legality of his actions on behalf of the AFN during this period may be affected by this Court's decision.

[46] Further, the proper interpretation of the CFA, and particularly the default and remedy provisions which the Applicant has put directly in issue, remains a live controversy given the fact that the parties to this application continue to be parties to the CFA and will administer their respective rights and obligations under that agreement.

[47] It is also of note that other funding agreements between the Government and First Nations contain similar or identical provisions to those at issue here, thus magnifying the importance of resolving the interpretation issues. As the Applicant put it, "the resolution of these issues will condition the legal relationships for many First Nations and for Canada, and may well have a significant impact on the language of future agreements as well as the interpretation of existing

ones". However, the Court cautions that its conclusions are limited to this CFA in the context of the specific facts of the case.

[48] For the foregoing reasons, the proceeding is not moot simply because the TPM has been withdrawn and the Court dismisses the Respondent's Motion. Even if this proceeding were technically moot, for the above reasons, the Court exercises its discretion to determine this judicial review.

IV. ISSUES

[49] The issues raised in this application are as follows:

1. Is judicial review available?
2. If so, what is the standard of review?
3. Did the Minister err in his interpretation of the CFA?
4. Did the Minister err in appointing a TPM?

V. LEGAL ANALYSIS

A. *Is judicial review available?*

[50] The Respondent argues that judicial review is not available in the circumstances of this case because the dispute is fundamentally contractual in nature, despite the fact that a public authority is involved. As such, the law of contract is applicable. They further argue that the power of the Minister to find the AFN in default and to appoint a TPM derives entirely from the CFA itself and that if the AFN seeks to have determined that Canada's appointment of a TPM constitutes a breach of the CFA, it must do so under s 17 of the *Federal Courts Act,* which provides for relief against the

Crown, by way of an action, rather than by way of a judicial review. They say that given the exercise of the contractual right to appoint a TPM is not an exercise of delegated statutory authority, there is no legitimate public law purpose to justify the substantive review of the reasonableness of the decision. However, for the following reasons, the Respondent takes too narrow a view of the relationship of the parties, the nature of the CFA and the unique circumstances of the Crown in relation to natives – the *sui generis* nature of Crown-native dealings.

[51] In *Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116, [2010] 2 FCR 488 [*Irving Shipbuilding*], relied upon by the Respondent, the issue was whether a subcontractor, Irving et al, of an unsuccessful bidder for a government procurement contract may apply for judicial review to challenge the fairness of the process for awarding the contract when the unsuccessful bidder decides not to litigate. At the Federal Court, Harrington J. dismissed the application for judicial review rejecting the argument put forward by Irving et al that the award of the contract to another bidder was vitiated by procedural unfairness.

[52] In the course of dismissing the appeal, the Federal Court of Appeal agreed with the parties that the award of a public contract, in this case a contract for the maintenance and servicing of Canadian Navy submarines, can be the subject of an application for judicial review. However, the circumstances in which the Court should grant relief requires a consideration of other factors. The Court explained as follows:

> **21** The fact that the power of the Minister, a public official, to award the contract is statutory, and that this large contract for the maintenance and servicing of the Canadian Navy's submarines is a matter of public interest, indicate that it can be the subject of an application for judicial review under section 18.1, a public law proceeding to challenge the exercise of public power. However, the

> fact that the Minister's broad statutory power is a delegation of the contractual capacity of the Crown as a corporation sole, and that its exercise by the Minister involves considerable discretion and is governed in large part by the private law of contract, may limit the circumstances in which the Court should grant relief on an application for judicial review challenging the legality of the award of a contract.

[53] On the issue of whether the appellants in that case had a right to procedural fairness arising from the common law in respect of administrative action, the Court of Appeal explained:

> **46** The context of the present dispute is essentially commercial, despite the fact that the Government is the purchaser. PWGSC has made the contract pursuant to a statutory power and the goods and services purchased are related to national defence. In my view, it will normally be inappropriate to import into a predominantly commercial relationship, governed by contract, a public law duty developed in the context of the performance of governmental functions pursuant to powers derived solely from statute.

[54] In finding against the appellants, the Court further explained " . . . when the Crown enters into a contract, its rights and duties, and the available remedies, are generally to be determined by the law of contract" (at para 60).

[55] More recently, in *Air Canada v Toronto Port Authority*, 2011 FCA 347, 426 NR 131[*Air Canada*], the Federal Court of Appeal addressed the issue of determining whether a matter is public or private for the purposes of judicial review. Beginning at paragraph 60, the Court explained as follows:

> **60** In determining the public-private issue, all of the circumstances must be weighed: *Cairns v. Farm Credit Corp.*, [1992] 2 F.C. 115 (T.D.); *Jackson v. Canada (Attorney General)* (1997), 141 F.T.R. 1 (T.D.). There are a number of relevant factors relevant to the determination whether a matter is coloured with a public element, flavour or character sufficient to bring it within the

purview of public law. Whether or not any one factor or a combination of particular factors tips the balance and makes a matter "public" depends on the facts of the case and the overall impression registered upon the Court. Some of the relevant factors disclosed by the cases are as follows:

- *The character of the matter for which review is sought.* Is it a private, commercial matter, or is it of broader import to members of the public? See *DRL v. Halifax Port Authority*, *supra*; *Peace Hills Trust Co. v. Moccasin*, 2005 FC 1364 at paragraph 61, 281 F.T.R. 201 (T.D.) ("[a]dministrative law principles should not be applied to the resolution of what is, essentially, a matter of private commercial law...").
- *The nature of the decision-maker and its responsibilities.* Is the decision-maker public in nature, such as a Crown agent or a statutorily-recognized administrative body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?
- *The extent to which a decision is founded in and shaped by law as opposed to private discretion.* If the particular decision is authorized by or emanates directly from a public source of law such as statute, regulation or order, a court will be more willing to find that the matter is public: *Mavi*, *supra*; *Scheerer v. Waldbillig* (2006), 208 O.A.C. 29, 265 D.L.R. (4th) 749 (Div. Ct.); *Aeric, Inc. v. Canada Post Corp.*, [1985] 1 F.C. 127 (T.D.). This is all the more the case if that public source of law supplies the criteria upon which the decision is made: *Scheerer v. Waldbillig*, *supra* at paragraph 19; *R. v. Hampshire Farmer's Markets Ltd.*, [2004] 1 W.L.R. 233 at page 240 (C.A.), cited with approval in *MacDonald v. Anishinabek Police Service* (2006), 83 O.R. (3d) 132 (Div. Ct.). Matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review: *Irving Shipbuilding Inc, supra*; *Devil's Gap Cottager (1982) Ltd. v. Rat Portage Band No. 38B*, 2008 FC 812 at paragraphs 45-46, [2009] 2 F.C.R. 267.
- *The body's relationship to other statutory schemes or other parts of government*. If the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter: *Onuschuk v. Canadian Society of Immigration*, 2009 FC 1135 at paragraph 23, 357 F.T.R. 22; *Certified General Accountants Association of Canada v. Canadian Public Accountability Board* (2008), 233 O.A.C. 129 (Div. Ct.); *R. v. Panel on Take-overs and Mergers; Ex Parte Datafin plc.*, [1987] Q.B. 815

(C.A.); *Volker Stevin N.W.T. ('92) Ltd. v. Northwest Territories (Commissioner)*, [1994] N.W.T.R. 97, 22 Admin. L.R. (2d) 251 (C.A.); *R. v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan*, [1993] 2 All E.R. 853 at page 874 (C.A.); *R. v. Hampshire Farmer's Markets Ltd.*, *supra* at page 240 (C.A.). Mere mention in a statute, without more, may not be enough: *Ripley v. Pommier* (1990), 99 N.S.R. (2d) 338, [1990] N.S.J. No. 295 (S.C.).

- *The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity.* For example, private persons retained by government to conduct an investigation into whether a public official misconducted himself may be regarded as exercising an authority that is public in nature: *Masters v. Ontario* (1993), 16 O.R. (3d) 439, [1993] O.J. No. 3091 (Div. Ct.). A requirement that policies, by-laws or other matters be approved or reviewed by government may be relevant: *Aeric, supra*; *Canadian Centre for Ethics in Sport v. Russell*, [2007] O.J. No. 2234 (S.C.J.).
- *The suitability of public law remedies.* If the nature of the matter is such that public law remedies would be useful, courts are more inclined to regard it as public in nature: *Dunsmuir*, *supra*; *Irving Shipbuilding*, *supra* at paragraphs 51-54.
- *The existence of compulsory power.* The existence of compulsory power over the public at large or over a defined group, such as a profession, may be an indicator that the decision is public in nature. This is to be contrasted with situations where parties consensually submit to jurisdiction. See *Chyz v. Appraisal Institute of Canada* (1984), 36 Sask. R. 266 (Q.B.); *Volker Stevin*, *supra*; *Datafin*, *supra*.
- *An "exceptional" category of cases where the conduct has attained a serious public dimension*. Where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public, it may be reviewable: *Aga Khan*, *supra* at pages 867 and 873; see also Paul Craig, "Public Law and Control Over Private Power" in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 196. This may include cases where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment: *Irving Shipbuilding*, *supra* at paragraphs 61-62.

[56] Despite the Respondent's reliance on the above cases, the context of the present dispute cannot be said to be "essentially commercial" or to be a private matter in all of the circumstances. Indeed, taking into consideration what is being acquired by the government through the CFA as well as the nature of the relationship between the parties, it is clear that the present dispute is far from private for the purposes of judicial review.

[57] Here, the CFA was an agreement for the provision of funding for essential services, such as housing, to members of a First Nation living in the isolated and hostile environment of the north. These members live on reserves created by treaty where such services are the life blood of the community. This is clearly distinct from a contract for the maintenance and servicing of submarines as in *Irving Shipbuilding*, above, or the buying of pencils or computers for government operations.

[58] Further, the relationship between the Government and a First Nation is unique and cannot be analogized to the relationship between the Government and a company bidding on a government contract. Indeed, given the current situation of many First Nations members, it is questionable whether they could return to their traditional lifestyle for survival if the government did not assist in supplying some essential services like housing. While treaty rights are not directly at issue, treaty and Crown relationship plays an underlying role. This situation is one that engages the honour of the Crown. As such, the dispute is imbued with public law elements.

[59] Further, the AFN relies on funding from the government through the CFA to provide essential services to its members and as a result, the CFA is essentially an adhesion contract imposed on the AFN as a condition of receiving funding despite the fact that the AFN consents to

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

[60] This Court has, in several cases, issued decisions on judicial review of issues similar to those in this case. In *Elders Council of Mitchikanibokok Inik v Canada (Minister of Indian Affairs and Northern Development*, 2009 FC 374, 343 FTR 298, the Court dealt with management and financial issues. In *Kehewin Cree Nation v Canada*, 2011 FC 364 (available on QL), the Court, in judicial review proceedings, dealt with a band's failure to provide financial and other reports to government as part of funding arrangements.

[61] Applying the principles or factors in *Air Canada*, above, the Court concludes:

- the character of the matter in issue is broader than simply commercial. The matter impacts the AFN's ability to operate and manage its affairs as a "people".
- the nature of the decision-maker is as the delegate of the Minister carrying out responsibilities of a public nature owed to a group of First Nations people.
- the decision at issue is founded by a provision that speaks directly to the "health, safety or welfare" of these people. It is a provision of public welfare not commercial enterprise.
- the Minister's relationship to the AFN is intertwined with constitutional and statutory schemes. It is a relationship of one government to another.
- there is no issue that the decision-maker is an agent of the federal government directed by statute, regulation and governmental policy.

- public law remedies such as declaration, injunction and *certiorari* would adequately address the challenge to the decision to appoint a TPM.
- the AFN are in a compulsory relationship with the Crown by virtue of the constitution and legislation. This is not a consensual submission to jurisdiction.
- there is no doubt that given the public, media and political profile of the housing crisis, the issues in this matter had a serious public dimension.

[62] Ultimately, the Court concludes that judicial review is available in the circumstances of this case.

B. *Standard of Review*

[63] On the first issue regarding the Minister's interpretation of the CFA, and specifically whether the risk of compromise to the health, safety or welfare of AFN members must be caused by the Council before the Council can be found in default of the CFA (and the Minister can seek a remedy of appointing a TPM), the applicable standard of review is correctness.

[64] The Minister, in interpreting the CFA, and his powers under the CFA, does not enjoy the deference that an adjudicative tribunal interpreting its statute enjoys for the reasons given by the Federal Court of Appeal in *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40, (*sub nom Georgia Strait Alliance v Canada (Minister of Fisheries and Oceans)*), 427 NR 110 [*David Suzuki*].

[65] In *David Suzuki*, above, the Minister of Fisheries and Oceans appealed a judgment of the Federal Court that declared that ministerial discretion does not "legally protect" critical habit under section 58 of the *Species at Risk Act* [SARA] and that it was unlawful for the Minister to have cited discretionary provisions of the *Fisheries Act* in a protection statement. In his first ground of appeal concerning the standard of review, the Minister argued that Parliament made him responsible for the administration of the regulatory schemes of the SARA and of the *Fisheries Act*; hence, his interpretation of their provisions is entitled to deference. In rejecting this position, the Federal Court of Appeal referred to recent Supreme Court of Canada jurisprudence beginning with *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], that established that, unless the situation is exceptional, the interpretation by an adjudicative tribunal of its enabling statute or of statutes closely related to its functions should be presumed to be a question of statutory interpretation subject to deference on judicial review. The Court then explained as follows:

> **96** … By empowering an administrative tribunal to adjudicate a matter between parties, Parliament is presumed to have restricted judicial review of that tribunal's interpretation of its enabling statute and of statutes closely connected to its adjudicative functions. That presumption may however be rebutted if it can be found that Parliament's intent is inconsistent with the presumption.
>
> **97** The Minister is inviting this Court to expand the above-described *Dunsmuir* analytical framework and presumption to all administrative decision makers who are responsible for the administration of a federal statute. I do not believe that *Dunsmuir* and the decisions of the Supreme Court of Canada which followed *Dunsmuir* stand for this proposition.
>
> **98** What the Minister is basically arguing is that the interpretation of the SARA and of the *Fisheries Act* favoured by his Department and by the government's central agencies, such as the Department of Justice, should prevail. The Minister thus seeks to establish a new constitutional paradigm under which the Executive's interpretation of Parliament's laws would prevail insofar as such interpretation is not unreasonable. This harks back to the time before the *Bill of Rights* of 1689 where the Crown

> reserved the right to interpret and apply Parliament's laws to suit its own policy objectives. It would take a very explicit grant of authority from Parliament in order for this Court to reach such a far-reaching conclusion.
>
> **99** The issues in this appeal concern the interpretation of a statute by a minister who is not acting as an adjudicator and who thus has no implicit power to decide questions of law. Of course, the Minister must take a view on what the statute means in order to act. But this is not the same as having a power delegated by Parliament to decide questions of law. The presumption of deference resulting from *Dunsmuir*, which was reiterated in *Alberta Teachers' Association* at paras. 34 and 41, does not extend to these circumstances. The standard of review analysis set out at paragraphs 63 and 64 of *Dunsmuir* must thus be carried out in the circumstances of this case in order to ascertain Parliament's intent.

[66] After conducting a standard of review analysis, the Court of Appeal ultimately determined that the issues of statutory interpretation raised by the appeal should be reviewed on a standard of correctness.

[67] In this case, it is similarly the Minister's interpretation, albeit of an agreement and not a statute, that is at issue, not that of an adjudicative tribunal. As noted in *David Suzuki*, above, while the Minister must "take a view" on what particular provisions of the CFA mean in order to act, this is not the same as having a power delegated by Parliament to decide questions of law. In light of the fact that the question at issue is a question of law, that the Minister acts in an administrative capacity, and not as an adjudicator, and that the Minister does not have expertise in the interpretation of contracts, the standard of correctness is applicable.

[68] On the second issue - of the choice of remedy, the parties agree and I would concur that the applicable standard of review is reasonableness (see, for example, *Tobique Indian Band v Canada*,

2010 FC 67, 361 FTR 202; *Ermineskin Tribe v Canada (Indian Affairs and Northern Affairs*), 2008 FC 741, 334 FTR 126).

C. *Did the Minister err in his interpretation of the CFA?*

[69] The Applicant alleges that the correct interpretation of s 9.1(d) of the CFA requires that the risk of compromise to the health, safety or welfare of AFN members be caused by some action, or failure to act, attributable to the Council before the Council can be found to be in default and the Minister can invoke the remedy of appointing a TPM. They say that the Minister erred as he did not turn his mind to the causes of the housing crisis and the specific question of whether the Council was at fault. The Court disagrees.

[70] Section 9.1(d) reads as follows:

> The Council will be in default of this Agreement in the event:
>
> . . .
>
> (d) in the opinion of the Minister of Indian Affairs and Northern Development or any other Minister that represents Her Majesty the Queen in Right of Canada in this Agreement, the health, safety or welfare of Members or Recipients is at risk of being compromised.

[71] A plain reading of s 9.1(d) of the CFA does not support the Applicant's argument. Rather, the provision is clear that once the Minister is reasonably of the opinion that the health, safety or welfare of members of the AFN is at risk of being compromised, the Council can be found to be in default of the CFA. The Court agrees with the Respondent that s 9.1(d) functions as a deeming provision.

[72] The Applicant equates “default” with “fault” where the two words are not synonymous. This is particularly the case where the events of “default” are of a type where fault may not necessarily be attributable to a party. One can easily contemplate a threat to health or safety (for example) that arises from entirely external forces but which require remedial action.

[73] The Applicant expresses concern that this community and many other native communities constantly live in a situation where health, safety and welfare are <u>at risk of being compromised</u>. This may well be true and is a sad reflection of that life but the ability of the Minister to “swoop in” and take control of native governments under CFAs is limited by the requirement of “reasonableness”.

[74] However, even if the Minister could reasonably conclude that the health, safety or welfare of AFN members were at risk of being compromised, the real issue at stake is whether his choice of remedy was reasonable.

D. *<u>Did the Minister err in appointing a TPM?</u>*

[75] The Respondent argues that the appointment of a TPM as a remedy to the housing crisis was reasonable. They say that due to the AFN’s demonstrated and admitted inability to deal with the housing crisis, the TPM was appointed in good faith and temporarily to support the goal of addressing the urgent health and safety needs of the families living in tents and sheds. They allege that the reasonableness of the decision is evidenced by its consistency with AANDC policies on default management.

[76] The Courts must not interfere with the choice of remedy invoked by the Minister where that choice is reasonable in falling within a reasonable set of outcomes given the facts. The Minister is entitled to a degree of deference in the choice of remedies.

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

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

[79] Indeed, when AANDC officials visited the AFN reserve on November 28, 2011, Chief Spence explained that the Band had not invoked its Emergency Plan because it lacked the necessary equipment, for example, cots, blankets and other supplies and they requested assistance to work on their plan and obtain the necessary equipment.

[80] The AFN had also been able to identify nine homes which could be renovated, with five earmarked for those families living in tent frames. At the time that AANDC officials visited the reserve, the AFN were awaiting final quotes and planned to be able to start working on the houses before Christmas with move-in by the middle of January. The AFN was also in the process of developing their second funding proposal for the remaining homes.

[81] Throughout this process and the period leading up to the appointment of the TPM, AANDC did not express any concern with the AFN's financial management. Indeed, there was little in the way of any contemporaneous notes in the record showing how the ADM arrived at his decision to appoint a TPM at all. However, rather than provide material assistance to help the AFN remedy any alleged default, the ADM instead opted to appoint a TPM, whose expertise is financial in nature.

[82] The Court has already referred to the ADM's concentration on the level of intervention rising from co-management to TPM rather than focusing on the range of remedies available. The concentration on internal policies detracted from the attention to be paid to the remedies under the CFA.

[83] One of the factors relied upon by the ADM in appointing a TPM was the supposed "failure of the First Nation to accurately identify how many and which members were in need of assistance, as demonstrated by the late identification of 17 families in need of assistance" (paragraph 54 of ADM's Affidavit).

[84] The ADM failed to appreciate that there was no failure in this respect but rather, that Chief and Council had simply assigned as a "priority" for attention those five families living in tents. What the ADM took to be a failure was not a failure at all but merely a reasonable assignment of action priority.

[85] There was no attempt to clarify what the ADM saw as a dichotomy between the five families living in tents and 17 families in sheds despite the Mushkegowuk First Nation's statement of emergency which referred to both situations.

[86] The ADM had been advised by his officials that the problems faced by the AFN in addressing the housing crisis were not financial management in nature but due to lack of resources and equipment. (Applicant's Record, Vol 4, p 92-93)

[87] Despite choosing what was essentially a financial management remedy in the form of a TPM and the mandate given, the ADM admitted that at the time of the crisis, financial management was not the problem. In fact, the AFN was making progress on the implementation of a 2011 remedial management plan.

[88] The evidence shows that the ADM never looked at any remedy other than the appointment of a TPM despite the indications of problems with resources and equipment.

[89] Ultimately, while the ADM concluded that the appointment of a TPM was a reasonable and necessary remedy in light of the AFN's lack of capacity to address the housing crisis, the remedy he chose failed to deal with the problem at hand, which was not financial in nature. Although courts must show deference to the Minister's choice of remedy and specifically, his decision to appoint a TPM, where the remedy chosen does not respond to the problem, it is not reasonable.

[90] Therefore, the Court must conclude that the Respondent’s decision to appoint a TPM was unreasonable in all the circumstances of this case.

[91] The Applicant is entitled to a declaration to that effect. There is no appointment to be quashed nor actions to be enjoined. The Applicant is entitled to costs on the usual scale.

JUDGMENT

THIS COURT ADJUDGES AND DECLARES that the appointment of the Third Party Manager on November 30, 2011 was contrary to law. The judicial review is granted with costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2037-11
STYLE OF CAUSE:	ATTAWAPISKAT FIRST NATION AS REPRESENTED BY CHIEF AND COUNCIL and HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 24 and 25, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	August 1, 2012

APPEARANCES:

Ms. Katherine Hensel Ms. Maria Golarz Mr. Brendan Van Niejenhuis Mr. Benjamin Kates	FOR THE APPLICANT
Mr. Gary Penner Mr. Michael Beggs	FOR THE RESPONDENT

SOLICITORS OF RECORD:

HENSEL BARRISTERS Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
STOCKWOODS LLP Barristers Toronto, Ontario	
MR. MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT