

FEDERAL COURT

BETWEEN:

ATTAWAPISKAT FIRST NATION
AS REPRESENTED BY CHIEF AND COUNSEL,
Applicant

and

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

AFFIDAVIT OF CHIEF THERESA SPENCE

I, Chief Theresa Spence, of Attawapiskat First Nation, in the Province of Ontario, make oath/affirm and say:

1. I am a member of Attawapiskat First Nation ("Attawapiskat"). I was elected Chief on August 27, 2010, and have held that office continuously since that time. I served as Deputy Chief from July 2007 to September 2010, and as an elected member of Council from 2002 to 2003.

Attawapiskat First Nation

2. Attawapiskat is located at the mouth of the Attawapiskat River on James Bay. The people of Attawapiskat speak Cree and English.
3. Attawapiskat is a member of the Mushkegowuk Council, a tribal council representing the James Bay Swampy Cree. The other member nations are Kashechewan, Fort Albany, Moose Cree, Taykwa Tagamou, Chapleau Cree and Missanabie Cree.

4. Attawapiskat currently has 2,800 members, 1,929 of whom live on reserve.
5. Our reserve is accessible by air year-round and by winter road from January to late March.
6. The people of Attawapiskat lived largely traditional lives on the land, until approximately the mid-1960s, when the majority of families moved onto what is now the main village at Attawapiskat.
7. A De Beers diamond mine has been in operation since 2008, 90 kilometers from the Attawapiskat reserve and within our traditional territory. The Crown receives 13% of revenues generated by that mine. Attawapiskat receives less than 1%.
8. Most of Attawapiskat's 300 existing housing units were built in the 1970s and 1980s, utilizing INAC on reserve housing programs. In 1985, the First Nation started the first of its section 95²² programs. They were built using mortgage funds from Canada Mortgage and Housing Corporation ("CMHC"), with loans guaranteed by the (then) Department of Indian and Northern Affairs and Development ("DIAND"). Units were built using untreated wood for foundation materials, which was prone to mould, rot and collapse, vinyl siding (prone to breakage in extreme climates), and generally very cheap construction. *These units were constructed to the the Indian On Reserve building code, and not the National Building Code J.S*
9. *Building Code* There was no space or provision from INAC for water, sewage and electricity in the houses built throughout the 1970s and 1980s, with the result that the installation of these services caused structural and other damage to the houses, and generally resulted in the loss of one room or more in square footage. This was due to the installation of a washroom in a building not designed for it. This reduced the overall housing available on the reserve. Because of their original design, which was not intended to accommodate water, sewage or electricity, the houses were and are prone to sewage and water backups, which results in flooding

and compounds the mould problems that naturally arise from cheap construction and poor design. The First Nation also paid for a portion of the development of a residential lot development in order to provide a site for houses and the new school project. The First Nation contributed \$2.6 million.

10. Since most of the on-reserve members at Attawapiskat began living at the village site by the mid-1960s, there has never been anything approaching sufficient housing for all on-reserve members. The resulting overcrowding, with as many as 5 families living in houses designed for one family, has resulted in further wear and tear on the housing stock. The combined effect of substandard construction and overcrowding is that most of the housing stock at Attawapiskat has or is approaching the end of its useful life.
11. Temperatures during the winter months (which are January, February, March and April range from -15 to -35 degrees.
12. As a result of overcrowded conditions in our existing housing stock, many families have resorted to living in uninsulated tents and shacks constructed of canvass, tarps, wood and whatever other material is available to the First Nation and them. Approximately 50 people are living in tents or shacks. None of these tents or shacks have electricity, sewage or running water. Many are heated by unsafe sources. Most use buckets for toilets and dump the waste in ditches.
13. 92 members currently live in trailers designed to house 50 workers, donated to the community by De Beers. The trailers are overcrowded and also in need of repair.
14. My housing director advises me, and I verily believe, that approximately 154 other people are living in housing that medical professionals who have visited the community consider to be a risk to their health and safety, because of mould, decay, ventilation, and general disrepair.

15. Medical professionals have told our members, and Chief and Council, that many of our members suffer from skin infections, respiratory and digestive illnesses, and other acute health conditions as a direct result of their housing. Social ills, already acute because of the aftermath of residential schools, are compounded by overcrowding. This year, we have noted an increase in domestic violence and substance abuse that we attribute to overcrowded housing conditions.

16. The condition of housing at Attawapiskat has been a longstanding concern to Attawapiskat's members and its leadership. In 2007, for example, then Chief Mike Carpenter requested funding from the Province of Ontario to address Attawapiskat's housing shortage, which was refused on the basis that First Nations' housing is a matter of federal concern. At that time, Chief and Council estimated that the community required approximately 300 further housing units to ensure the health and safety of its members.

17. Since 2007, 53 housing units have been built at Attawapiskat. Much of the funding for those units has come from non-governmental sources. The on-reserve population has grown from approximately 1700 to 1880, with the result that the 2007 estimate of a 300 unit shortfall in housing has not been reduced. There has also been further deterioration of existing housing stock, for the reasons outlined above. Overcrowding and unsafe housing conditions have

grown worse. THE FIRST NATION HAS BUILT THESE UNITS WITH MORTGAGES PROVIDED BY CMHC WITH THE ISSUANCE OF A MINISTERIAL GUARANTEE FROM AANDC. FUNDS TO COMPLETE THESE PROJECTS OVER THE AMOUNTS RECEIVED FROM CMHC WERE OBTAINED BY MINOR CAPITAL FUNDING FROM AANDC, FIRST NATION RESOURCES, INCLUDING ALLOCATION FROM ITS IBA TRUST FUND. JS

18. In January 2011, Attawapiskat implemented a financial remediation plan developed by Attawapiskat's Co-Manager, Clayton Kennedy. The objective of the plan was to ensure that:

- a) Spending did not exceed available funds and no further debt was incurred;
- b) Spending and revenue was tracked and general accounting practices were maintained; and
- c) Debt was repaid or plans for repayment in a timely period were negotiated and adhered to.

19. The long-term plan expressed by Council, together with the Co-Manager, was to ensure that Attawapiskat remained solvent and that the large amounts of money currently dedicated to debt repayment be directed to housing, infrastructure and other sorely needed spending.

20. In the past, when crises or problems arose, the Attawapiskat often dedicated money and resources intended for other budget items to ameliorate the suffering of our members and ensure the operation and survival of the community and its members. These crises included:

- a) In 2000, the school was condemned because of soil contamination (among other reasons) and students were moved into portable trailers (where they remain today);
- b) In 2004, the First Nation purchased certain assets from Hydro One in order to ensure the security of its electrical supply by constructing a transmission line. The purchase of the assets was facilitated by \$3 million minor capital allowance from INAC, of which the First Nation has repaid \$600,000.00.
- c) In March 2005, DeBeers disposed of sewage sludge in the community's lift station, requiring extensive clean up;
- d) In April 2006, ice damaged power lines, forcing the evacuation of the community's hospital, because no backup generator was available;
- e) In May 2008, hundreds of members were evacuated from the community due to flooding of the Attawapiskat River;

- f) In 2009, a sewage backup into our members' homes rendered 8 homes, which housed 90 people, uninhabitable. Chief and Council requested assistance in evacuation of members to ensure their safety, due to unsanitary housing and the lack of shelter available for them within the community. DIAND refused to assist with the evacuation, with the result that Attawapiskat spent approximately \$555,000.00 of money designated for other budget items on evacuation efforts and which resulted in a large budgetary shortfall. Three members also died during the evacuation;

Current Housing Concerns at Attawapiskat First Nation

21. In August 2011, Monique Sutherland, Attawapiskat's housing manager, approached me to express her concern that many members were asking for more construction materials to repair their houses or to fortify tents and shacks. There were no funds or other resources available to provide the building material that members were requesting.
22. Ms. Sutherland expressed the concern, which I shared, that once the cold weather arrived in October and November, the health and safety of our members, already at risk, would be further jeopardized by uninsulated housing and otherwise unsafe conditions. Council and Attawapiskat staff began to try to develop further ways of addressing these issues, but it became apparent to us in September and October that there was no way of reconciling the need for financial austerity within the funding available to us and the need for further spending on the most basic of repairs and construction, i.e., the fortification of tents and shacks to withstand extreme cold weather.
23. Concerns were expressed by myself, my staff and Grand Chief Stan Louttit of Mushkegowuk Council, verbally and in writing to AANDC throughout September and October, 2011, about current housing conditions, the effects of oncoming cold weather, and the safety and well-being of our members. No plans were put

forward by AANDC to address these concerns.

Declaration of the State of Emergency and Subsequent Events

24. On October 28, 2011, Council and I reluctantly concluded that we had no option but to declare a State of Emergency and request emergency assistance from Canada and Ontario in order to ensure the health and safety of our members. Grand Chief Stan Louttit, in consultation with Attawapiskat's Council, declared a State of Emergency.
25. Pursuant to the decision to declare a State of Emergency, we submitted a proposal for funds from AANDC to pay for renovations to 5 and possibly 9 houses on reserve, to render them safe and inhabitable (although families were already living in them). Attached hereto and marked as Exhibit "A" to this my affidavit is a copy of my letter to AANDC requesting assistance, dated November 4, 2011.
26. On November 9, 2011, we received confirmation from AANDC that funding in the amount of approximately \$500,000 would be provided for that purpose. Attached hereto and marked as Exhibit "B" to this my affidavit is a copy of a letter from the Regional Office of AANDC confirming that such funding would be provided.
27. In the meantime, Attawapiskat's staff worked with Council to identify other measures that would quickly and effectively address the housing shortage. Modular homes were identified as a quick and relatively cost-effective means of procuring housing on the reserve. At Council's direction, our Co-Manager, Clayton Kennedy and our Executive Director, Wayne Turner, researched potential sources of such housing. In late November, they obtained an estimate from EHL Housing whereby 14 or more modular homes would be produced for our members' use for shelter within a matter of weeks.

28. During this time, we also sought and received assistance from Mushkegowuk Council's Technical Services to assess existing homes for renovation to render them safe and habitable. That agency ultimately determined that of the 9 homes designated for renovation from the \$500,000 to be provided by AANDC, only three were worth renovating.
29. Mushkegowuk Council's Technical Services also assessed the De Beers' trailers as being in need of repairs and as being insufficiently equipped to house those currently living in them.
30. Also in late November, planning began to convert a much-needed Healing Lodge, six kilometers from our town site, to a temporary residence. Supplies and materials have now been ordered to permit the conversion of the Lodge to a temporary shelter.
31. These measures, we believe, will together ensure the safe housing of our members this winter. While some of the measures are temporary, many of them will represent a substantial and intermediate-term improvement in Attawapiskat's housing stock.
32. Each of the measures outlined above was identified, developed and approved by Council and members of Attawapiskat's staff and is based on our in-depth knowledge of our communities needs, existing resources and conditions.
33. Our difficulty, of course, is that we are already significantly underfunded. The cumulative effect of chronic underfunding is that the First Nation suffers from a heavy debt-burden, and a deep and wide deficit in infrastructure and housing.
34. Members of the First Nation receive far less in the way of funding for government services than Canadians, who are generally serviced by three levels of government (municipal, provincial and federal), rather than just the federal

government. Attawapiskat receives an average of approximately \$10,000.00 ^{per capita} every year in funding from Canada to provide for the First Nation's administration, social services, education services, infrastructure, housing, and all other government-funded services. It is my understanding that this amount is substantially less than the government's funding for services dedicated to Canadians living off-reserve.

Imposition of Third Party Management

35. On November 30, 2011, at an emergency planning meeting with the First Nation, EMO and Red Cross, ^{was interrupted by the hand delivery of} a letter was handed to Chief Spence by Yves Chenier, a funding services officer with AANDC. ^{At which point, Yves Chenier left the} The letter was addressed to Chief and ^{commonly} Council for Attawapiskat First Nation, from Joanne Wilkinson, Regional Director General, Ontario Region, Indian and Northern Affairs Canada, and dated November 30, 2011. In that letter, which is attached and marked as Exhibit "C" to this my affidavit, Ms. Wilkinson states that she is providing notice of "Canada's intent to place you under third party management". The letter does not describe any specific reasons for the imposition of third party management, beyond a statement that "the health, safety or welfare of members or recipients is as risk of being compromised."
36. On December 2, 2011, Attawapiskat's Council resolved to object to and challenge Canada's decision to impose third party management, on the basis that co-management services initiated on July 16, 2011, and the First Nation's financial management practices, policies, and internal controls, and an approved management action plan, were each sufficient to address any and all concerns that may have existed with respect to the First Nation's management of its resources and finances. Attached hereto and marked as Exhibit "D" to this my affidavit is a copy of the Band Council Resolution reflecting this decision.

37. Also on December 2, 2011, at the direction of Council, I sent a letter to Ms. Wilkinson stating that Attawapiskat did "not believe that this attempt to use the terms of the agreement between Canada and Attawapiskat to impose third party management is a legitimate attempt to implement the agreement or its goals."
38. I wrote, further, that Attawapiskat thought that the imposition of third party management was "an attempt to punish us for speaking out for some of the poorest people in this country, and to blame us in the eyes of the Canadian public for the poverty in our community towards which your government has turned a blind eye." I requested that Ms. Wilkinson and her department immediately enter into discussions with Attawapiskat with a view to reinstating the First Nation's administration by its legitimate elected leadership, "based on adequate funding and administration plans to allow the Attawapiskat First Nation to work towards service for our people that (is) equal to those received by other Canadians." Attached hereto and marked as Exhibit "E" to this my affidavit is a copy of my letter dated December 2, 2011.
39. On December 5, 2011, a further letter from Ms. Wilkinson was received by Attawapiskat, dated December 5, 2011, addressed to Chief and Council. In the letter, Ms. Wilkinson attributed the Department's decision to impose Third Party Management to Attawapiskat's "declaration of the state of emergency on November 12, 2011, and the ensuing AANDC on-the-ground assessment which has determined that urgent health and safety issues demand immediate action." The letter went on to identify the Third Party Manager ("TPM") appointed by the Department as Jacques Marion of BDO Dunwoody. The letter specified that the 'primary role of the (TPM) will be to focus on financial management services and may also include advisory/capacity development with (Attawapiskat's) Council.'" The letter was hand delivered by Leigh Tessen who presented the letter to the acting Chief, as I was attending the national meeting of the AFN. Although she was aware that I was not in the community, she chartered to the community with Yves Chenier, along with two representatives of BDO.

40. The letter makes it clear that the third party manager is not being appointed to address the health and safety concerns of the people of Attawapiskat, but rather, solely to appropriate control of the First Nation's financial resources. Attached hereto and marked as Exhibit "F" to this my affidavit is a copy of Ms. Wilkinson's letter of December 5, 2011.
41. On December 7, 2011, I met with Minister of Aboriginal Affairs and Northern Development, John Duncan, in Ottawa. During that meeting, the Minister was alternately contemptuous and dismissive of the concerns I raised to him concerning his and the Ministry's response to the plight of my people. On the same date, we received a letter from Minister Duncan, dated December 7, 2011. In that letter, Minister Duncan stated that assistance (in the form of the purchase of modular homes, the retrofitting of a healing lodge, and the evacuation of residents) would only be provided to the community if Attawapiskat agreed to work with a Third Party Manager. Attached hereto and marked as Exhibit "G" to this my affidavit is a copy of Minister Duncan's letter dated December 7, 2011.
42. On December 9, 2011, we delivered a letter to Minister Duncan, which thanked the Minister for his Ministry's efforts to date. The letter continued on to outline the reasons for Chief and Council's decision to reject third party management, which are based on the existing capacity and knowledge of the First Nation's own personnel, and further, the concern that a Third Party Manager would impose "solutions" that would ultimately harm the community and its members. Attached hereto and marked as Exhibit "H" to this my affidavit is a copy of my letter dated December 9, 2011.
43. On December 12, 2011, I received a letter from the Regional Director of AANDC "again offer(ing) AANDC assistance in supporting community priorities." Attached hereto and marked as Exhibit "I" to this my affidavit is a copy of the letter received December 12, 2011.

44. I and my Council welcome and have indeed repeatedly requested such assistance.

Concerns Regarding the Imposition of a Third Party Manager

45. While Attawapiskat, like any government or organization, can always improve its fiscal management policies and practices, it is the cumulative effects of underfunding, combined with the effects of arbitrary, inefficient and often harmful policies, requirements, and decision-making from off-site bureaucrats that has resulted in our current circumstances.
46. Attawapiskat already has plans in place that represent the best, most effective, and most cost-effective route to ensuring the safety and well-being of our members. We have received no assurances that the proposed Third Party Manager will adopt our proposals or plans, or knows enough about our community to assess the validity of our underlying concerns (quickly or at all), or the measures that are necessary to ensure the health and safety of our members. He has never been to Attawapiskat, aside from his unannounced charter to the community.
47. In the meantime, time is running out for families with infants, children and elders already suffering from health conditions that are the result of overcrowding and inadequate housing. As these vulnerable people face ever colder temperatures, the Minister asks that we dedicate our critically limited time, resources and money to educating, persuading and *paying* a Third Party Manager to implement a program that Attawapiskat has already developed, or to reject that plan and either start from scratch in planning or leave our members to perish in subzero temperatures.
48. It was Attawapiskat that identified the risks to the health and safety of its members, Attawapiskat that developed a comprehensive plan to ensure our members' health and well-being, and ultimately, it is Attawapiskat that will bear

the consequences of the decisions that are made and steps that are taken over the next week and month. It is Attawapiskat that should implement the plan.

49. The Minister's decision to impose a Third Party Manager has exposed the people of Attawapiskat to criticism, distrust, and even hateful words on the part of the Canadian public. I have reviewed online comments and heard public debate through the media that have accused me and my Council of laziness, stupidity and corruption. I have heard and read Canadians call for the dissolution of Attawapiskat, the imposition of forced birth control and abortion and the removal of all our children. These comments arose in public discussions concerning the Minister's decision to impose Third Party Management. I believe they were, at least in part, a result of that decision. At the very least, the Minister's decision reinforces inaccurate and often racist assumptions and stereotypes about Indigenous people generally, and the people of Attawapiskat, in particular.

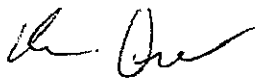
50. After we declared a State of Emergency, media coverage of our circumstances increased throughout the month of November. The media began to question the Minister and the government's handling of our request for assistance. It was only after his government was called to account in Parliament and through the press that Minister Duncan decided to impose Third Party Management. Prior to November 30, neither Minister nor his office had expressed concern for the health and safety of the citizens of Attawapiskat. Nor were concerns expressed about Attawapiskat's emerging plan to handle the crisis, or our current financial remediation plan.

51. At no time after October 28, 2011 did AANDC officials request a meeting with me or my Council to point out shortcomings in our approach to the crisis, or otherwise raise any concerns about our handling of the First Nation's housing situation or its finances. At no time since the implementation of our financial remediation plan in January 2011, has AANDC expressed anything other than approval for the financial and operational course identified by Attawapiskat's

Council. Had any concerns been identified by AANDC officials, we would have been happy to meet with them to discuss these concerns, and identified a method of addressing them.

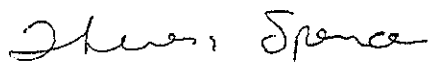
52. My first and only concern, and the first and only concern identified by my Council to me is the health, safety and well-being of the people of Attawapiskat. We do not understand how the appointment of a Third Party Manager could possibly be necessary, under the circumstances, to address the health and safety concerns identified by our Council.
53. Our community is on a razor's edge, and our members face immediate and grave risks. We do not have the time, money, or energy to deal with the Minister's apparently and exclusively political agenda. Any time, money or energy so diverted will reduce the resources we have available to meet our community members' immediate needs. It will further imperil our members.
54. I make this affidavit in good faith believing it to be true, in support of Attawapiskat's application for judicial review and motion for interim relief, and for no other or improper purpose.

Sworn before me at the City of Thunder Bay, in the Thunder Bay District, Ontario, on Thursday, December 15, 2011.



Commissioner for Taking Affidavits

(or as the case may be) **KAREN DRAKE**
Barrister and Solicitor



Chief Theresa Spence