

FEDERAL COURT

B E T W E E N :

ATTAWAPISKAT FIRST NATION
as represented by its Chief and Council

Applicant
(Moving Party)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
ATTORNEY GENERAL OF CANADA, and
MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT
CANADA

Respondents
(Respondents)

**AMENDED MEMORANDUM OF FACT AND LAW OF THE APPLICANT
(MOVING PARTY)**

MOTION FOR INTERLOCUTORY INJUNCTION – JANUARY 31, 2012

OVERVIEW

1. This is a motion for interlocutory relief pending an application for judicial review (the “Application”) scheduled for April 24, 2012. The Applicant, Attawapiskat First Nation (“First Nation”), seeks an order setting aside the decision of the Minister of Aboriginal Affairs and Northern Development Canada (“Minister” or “AANDC”) to impose a Third-Party Manager over the funding it receives under a Comprehensive Funding Agreement (the “CFA”). Alternatively, the Applicant seeks an interlocutory order restricting the authority of the Third-Party Manager to emergency funds authorized under s. 3.4 of the CFA.

2. The context of these proceedings is the serious and unprecedented housing crisis in the First Nation. Many members of the First Nation are now living in overcrowded, unsafe conditions, in uninsulated, unserviced dwellings. Some of these dwellings are mere tents and shacks. Others are once-usable premises that, because of

poor construction and chronic underfunding, are now mold-infested and unfit for habitation. As a result of the deterioration of conditions and the onset of winter, a state of emergency was declared by Grand Chief Stan Louttit of the Mushkegowuk Council in late October, 2011.

3. After numerous attempts by the First Nation at dialogue with AANDC officials, and increasing media attention and questioning in the House of Commons, on November 30, 2011, AANDC advised the First Nation that a Third-Party Manager was being appointed. No prior consultations or attempt by AANDC to implement the First Nation's remediation proposals preceded this unilateral decision.

4. Ultimately, the Application seeks a declaration that the Minister appointed a Third-Party Manager for irrelevant and extraneous reasons, and not for reasons authorized by the *Indian Act*; by the CFA; or by AANDC's own published policies on Third-Party Management. On this motion, the Applicant need only show (a) that there is a serious issue to be tried in this regard; (b) that irreparable harm will be caused to the First Nation in the absence of the requested order; and (c) that the balance of convenience favours the restoration of the *status quo*, rather than the imposition of the extraordinary intrusion of Third-Party Management of the First Nation's affairs.

5. On the first issue, the record discloses an ample basis to find a "serious issue". There is no record of any effort to consider alternatives to Third-Party Management. Nor is there any basis to conclude that mismanagement or inappropriate use of funds by the Applicant required such intervention. The context of events strongly suggests that Third-Party Management was imposed unreasonably, and/or for collateral or extraneous purposes during a period of intense public scrutiny of the Respondents' role in contributing to the state of emergency suffered by the Applicant.

6. There is inherent irreparable harm in imposing a Third-Party Manager. Such a step seizes control of a substantial proportion of the authority of Chief and Council – the lawful elected government of the people of Attawapiskat. Imposition of Third-Party Manager will constitute a lasting affront to the First Nation that will damage the relationship between it and AANDC. Moreover, it will impede ongoing efforts to

address the housing crisis now underway while eroding the First Nations's resources. The professional fees of the Third-Party Manager (an accountant with BDO Dunwoody) draw from the very funds available to resolve the urgent and time-sensitive housing crisis. And – in the weeks since this appointment was made – the Third-Party Manager has failed to even appoint a project manager to set the process underway. The First Nation, in the meantime, has taken active steps to organize an effective response, and has plans developed and ready to execute – but no capacity to control the funds necessary to do so.

7. Finally, the balance of convenience strongly favours the restoration of the *status quo*. The Applicant is prepared to proceed with the plans developed in cooperation with its own, highly-qualified project manager, whose time has been donated by De Beers Canada Inc. There is no evidence that the continued management by Chief and Council and the co-manager now in place presents any tangible risk, nor is there evidence that the presence of the Third-Party Manager will prevent a tangible risk. To the contrary, the Third-Party Managers's involvement will sap funds that would be better used to remediate the crisis and delay implementation as he educates himself about the unique challenges of managing a construction project in the far north in the midst of winter.

8. Completion of the project is time-sensitive not only because of the conditions that the people of Attawapiskat continue to live in, but because of the short window during which the “ice road” – the only overland means of transporting the modular housing that is to be installed – is open each winter. The Applicant asks that the interlocutory relief be granted, pending the argument of the Application on April 24, 2012.

PART I – STATEMENT OF FACTS

Attawapiskat First Nation

9. Attawapiskat First Nation is located at the mouth of the Attawapiskat River on James Bay. 1,929 of its members live on reserve, speaking Cree and English. The

reserve is accessible year-round by air and by winter “ice road” between late January and late March of most years.

Affidavit of Chief Teresa Spence, December 15, 2011 (First Spence Affidavit), para. 2-6

10. The First Nation has 300 housing units, most of which were built in the 1970s and 1980s, using mortgage funds borrowed by CMHC and guaranteed by what was then Indian and Northern Affairs and Development (“DIAND”). The funds guaranteed by DIAND were insufficient to build quality homes; instead, the homes built fell well below Provincial building codes and standards, let alone to standards appropriate to the extreme weather environment of Attiwapiskat. For example:

- Many units have been built with untreated wood as foundation material, leaving them prone to mould, rot and eventual collapse;
- Many units have been constructed using vinyl siding, which is prone to breakage in extreme cold;
- Many units have no provision for water, sewage or electricity; subsequent servicing of these units has led to structural or internal damage, and these homes are prone to sewage and water backups, compounding the mould issues;
- In some cases, as many as five families have resided in homes designed for one, accelerating the wear and tear on these homes.

The result is that most of the housing stock in Attawapiskat has reached or is near the end of its useful life.

First Spence Affidavit, para. 9-10

11. By December 2011, approximately 50 of the First Nation’s people were living in uninsulated tents or shacks, reliant for their washroom facilities on buckets that are then emptied into ditches. At that time, 92 of its people lived in trailers designed to house 50 workers, and 154 of its people resided in housing that visiting medical professionals consider to be a risk to their health and safety. As a result, many community members have begun to suffer from skin infections, respiratory and digestive illness, and other acute health conditions.

First Spence Affidavit, para. 15; Affidavit of Monique Sutherland, sworn January 14, 2012

AANDC Policy regarding Third-Party Management

12. AANDC has promulgated a policy on “Default Prevention and Management” (the “Policy”) effective June 2011, which applies to AANDC officials managing transfer payments. Section 5.2.1 of the Policy provides as follows:

The Department, through ongoing review of information available about the recipient’s management of funding and through other strategies, will, to the extent possible, assist recipients in their efforts to prevent the occurrence of circumstances that may give rise to defaults. Such assistance may include, but may not be limited to:

- Providing detailed explanation/analysis of the Department’s General Assessment to assist recipients in identifying circumstances that may lead to default;
- Listening to communities that have identified needs and priorities and responding to these in a manner that enables capacity development and increases their ability to self-manage effectively;
- The application of a proactive approach which includes early identification and tracking of the causes of deterioration of a problematic situation that may lead to a default and that will strengthen the community’s ability to improve their accountability processes, administrative and financial systems;
- Strategic use of expert resource pools to address the causes of defaults, and identify and develop necessary capacity to prevent the occurrence of circumstances that may give rise to a default; and/or
- Assisting with identification of capacity development actions and resources available to develop a voluntary Management Development Plan (MDP) targeted at increasing recipient capacity and preventing defaults.

Affidavit of Lauren Jones, sworn December 15, 2011 (“Jones Affidavit”), Exhibit “D”

13. Section 5.2.2 goes on to outline the steps which AANDC officials are obliged to (“must”) take prior to taking formal measures in a response to an alleged default:

When deciding what measures to take, the official must, to the degree that is prudent in the circumstances:

- take into account the risks and circumstances associated with the default,
- the degree of co-operation between the recipient and the Department,
- the willingness and ability of the recipient to remedy the default,
- insure the default management is progressive in nature and,
- allows the recipient the opportunity to remedy the default before more intrusive measures are taken.

Defaults will not automatically result in the need for formal measures.

...

The appointment of a Third Party Funding Agreement Manager would be instituted **as a last resort** to ensure the continued delivery of programs and services to community members.

Jones Affidavit, Exhibit "D"

Financial Management and Co-Management of Attawapiskat First Nation

14. The First Nation has been steadily improving its financial condition in conjunction with its co-manager, Clayton Kennedy. In 2009, the First Nation appointed BDO Dunwoody as its co-manager to assist in its financial management. BDO Dunwoody served this role until June 2010.¹ The evidence discloses that little progress was made in remediation of the First Nation's finances. Because of the First Nation's dissatisfaction with the lack of progress made by BDO Dunwoody (which was retained at a monthly fee averaging \$23,860.00), the First Nation terminated BDO Dunwoody's services.

Affidavit of Clayton Kennedy, sworn December 15, 2011 ("First Kennedy Affidavit"), para. 14-15

¹ BDO Dunwoody had also been retained in 2006 to manage the First Nation's Major Capital Expenditures Fund and for certain community projects.

15. After BDO's termination in June 2010, the First Nation retained Moo Shum Enterprises Ltd., and its principal, Clayton Kennedy, to provide co-management services. Kennedy has acted as co-manager and as Director of Finance since that time. In his evidence, he attests to the successful financial management that has occurred in that period, including:

- The establishment and maintenance of appropriate audit and financial reporting procedures;
- A cumulative reduction in debt carried by the First Nation of approximately \$3,000,000.00 by March 31, 2011;
- The successful negotiation of debt repayment plans with most of the First Nation's creditors;
- Successful implementation of tracking measures, which have led in turn to consistent conformance between budgeted and actual revenues and funding; and
- The ratification, in December 2010, of a Remedial Financial Plan, intended to ensure balanced revenues and expenditures, and prompt repayment of all outstanding debt, as quickly as possible.

First Kennedy Affidavit, paras. 8-9

16. The evidence demonstrates that the need for such measures arises not from mismanagement or profligacy, but from the financial burden of addressing a series of urgent crises. Over the past decade, the First Nation has been forced to respond to repeated such crises, including:

- In 2000, the school was condemned due, in part, to soil contamination, forcing the First Nation to remove students to portable trailers, where they remain;
- In 2004, Ontario Power Generation withdrew from supplying electricity to the area, forcing the First Nation to spend \$300,000 *per annum* to acquire its assets and maintain the power supply;

- In 2005, De Beers Canada Inc.² disposed of sewage sludge in the community's lift station, requiring extensive cleanup efforts;
- In 2006, an ice storm caused damage to power lines, forcing the evacuation of the community hospital in the absence of a back generator;
- In 2008, hundreds of members had to be evacuated from the community after the Attawapiskat River flooded;
- In 2009, eight homes suffered from sewage backups, rendering them uninhabitable and leaving ninety of the First Nation's people homeless. In this instance, DIAND refused to provide emergency assistance, and the First Nation was required to re-allocate \$555,000 from existing budget items to the emergency evacuation effort. Three of the First Nation's people died during the evacuation.

First Spence Affidavit, para. 20

17. Since the implementation of the financial remediation plan designed by Kennedy began in January 2011, AANDC officials have consistently expressed approval of the financial and operational course the First Nation is on. Certainly, there has been no suggestion of AANDC concern that this course is posing any threat to the First Nation's people.

First Spence Affidavit, para. 51

Comprehensive Funding Agreement ("CFA")

18. The Minister of AANDC³ and the First Nation signed a Comprehensive Funding Agreement ("CFA") effective April 1, 2011 until March 31, 2013 ("CFA"). The CFA, although signed by the First Nation, is not a negotiated instrument: its execution in the form supplied by AANDC is a pre-requisite to the receipt of funding.

² Since 2008, De Beers has operated a diamond mine within the traditional territory of the First Nation. Approximately 13% of its revenues are allocated to the Federal Crown, with less than 1% paid to the First Nation. See First Spence Affidavit, para. 7

³ At the time, still known as the Minister of Indian Affairs and Northern Development.

Because that funding is critical to the First Nation and the survival of its people, rejection of the CFA is not realistic option.

First Kennedy Affidavit, para. 10

19. 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.”

First Kennedy Affidavit, Exhibit “B”

20. Section 9.0 and 10.0 of the CFA contain its “default” provisions, which include the basis in the CFA for imposing a Third-Party Manager. They provide as follows:

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.

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 event 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.

...

First Kennedy Affidavit, Exhibit "B"

21. There is no authority in the Third-Party Funding Agreement Manager to obtain a different or better level of funding from that set out in the CFA apparent from a review of these relevant provisions. However, the First Nation's Council is entitled to seek and obtain further funding in "Exceptional Circumstances" as defined in the

agreement. As is apparent from the record, the First Nation is experiencing precisely such circumstances now. Section 3.4 of the CFA provides:

3.4 Exceptional Circumstances

3.4.1 In the event that exceptional circumstances occur during the term of this Agreement, the Council may return to the Federal Department that provides funding under this Agreement for programs, services or activities affected by the exceptional circumstances to seek changes to the level of funding or to obtain assistance.

3.4.2 Subsection 3.4.1 is intended to address exceptional circumstances (including but not limited to health, safety and socioeconomic issues) which were not reasonably foreseeable at the time this Agreement was entered into and which have a significant impact on the Council's performance of the terms and conditions of this Agreement. In the event that a Federal Department agrees to change the level of funding, that change will be made by way of a written amending agreement.

First Kennedy Affidavit, Exhibit "B"

Funding of Housing at Attawapiskat First Nation

22. The ability of the First Nation to address its housing shortage is severely constrained by the funding it receives for that purpose relative to costs. The total annual funds received by the First Nation in respect of housing amount to approximately \$580,000.00. This budget must cover housing policy and administration, renovations and repairs, and construction.

First Kennedy Affidavit, para. 12-13

23. Labour, materials and transportation costs in the far north are extremely expensive. Because of this cost differential, it costs approximately \$250,000.00 to build a single housing unit. In this light, it is not surprising that the housing budget in recent years has been consumed by renovation and repair rather than by new construction, with a view to keeping habitable the maximum possible proportion of housing stock.

First Kennedy Affidavit, para. 12-13

24. In 2010, based on then-expressed concerns about the state of the First Nation's finances (then most-recently under the co-management of BDO Dunwoody), AANDC declined to provide ministerial loan guarantees in respect of nine new housing units then proposed to be built. Based in part on the Financial Remediation Plan developed in collaboration with Mr. Kennedy and ratified in January 2011 by Chief and Council, AANDC approved loan guarantees for these nine units in July 2011. There was no suggestion, in giving these approvals, that AANDC maintained its old concerns about the state of the First Nation's financial management.

First Kennedy Affidavit, para. 17-19

State of Emergency and Dealings with Canada – Fall, 2011

25. In August 2011, the First Nation's Housing Manager expressed concern to Chief Spence that members were requesting construction materials to fortify their tents and shacks, and that no funds or resources were available for that purpose. It became quickly apparent that there was no means to reconcile the need for financial austerity within the available funding, and the need for resources to finance these most basic of repairs and construction.

First Spence Affidavit, para. 21-22

26. After consultation with the First Nation's Chief and Council, on October 28, 2011, Grand Chief Stan Louttit of the Mushkegowuk Council declared a state of emergency. Canada and Ontario were promptly notified.

First Spence Affidavit, para. 24

27. During this period, the First Nation worked to develop and implement a plan to safely house its people for the winter and communicated these plans to the Respondent. On November 4, 2011, the First Nation submitted a proposal for funds totalling \$499,500 to renovate between five and nine houses on reserve and render them safe and habitable. AANDC confirmed that it would advance funds totalling \$500,000 for that purpose on November 9, 2011, and authorized an emergency draw of \$350,000 from the existing funding.

First Spence Affidavit, Ex. "A" and "B"; First Kennedy Affidavit, para. 20

28. In late November, Kennedy had procured an estimate for the emergency production and purchase of 14 modular homes from EHL Homes in a nine-week period. Chief and Council secured technical assistance from Mushkegowuk Council in determining that, of the nine homes for which AANDC had authorized emergency renovation funding, only three such homes were suitable and capable of successful renovation. These three homes alone will require \$300,000 in repairs. In the interim, planning began to convert the Healing Lodge, approximately six kilometres from the main settlement, into a temporary shelter. Chief and Council's in-depth knowledge of the community's needs, local resources and conditions were essential to the development of these responses.

First Spence Affidavit, para. 27-28; 30; 32; First Kennedy Affidavit, para. 21-22; 24

29. By December 2, 2011, Kennedy had secured a formal quote from EHL Homes, for the production of 22 homes at a cost of \$2.4 million. Effective December 13, 2011, the First Nation and the Third-Party Manager (described below) executed a contract with EHL Homes for the production of these homes.

First Kennedy Affidavit para. 22-23

Imposition of Third-Party Management

30. On November 2, 2011, and then again on November 17, 21, 25, 28 and 29, 2011, the Minister and his Parliamentary Secretary were repeatedly 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. On November 30, 2011, the Prime Minister of Canada rose to speak in the House on this issue in his Minister's stead, saying:

Right Hon. Stephen Harper (Prime Minister, CPC): Mr. Speaker, as I said yesterday, the government has invested more than \$90 million in this community, and these results are unacceptable. That is why we are taking immediate action to

help these people, who are in need of immediate assistance. The government will also take action to improve long-term management in the community. The minister will make an announcement about that later.

...

Right Hon. Stephen Harper (Prime Minister, CPC): Mr. Speaker, it is the government that is taking action and the opposition that is voting against investments in this community. I will say it again: this government has invested more than \$90 million. The results are unacceptable, and we will take other steps to obtain better results.

...

Right Hon. Stephen Harper (Prime Minister, CPC): Mr. Speaker, this government has invested more than \$90 million in this community since coming to office. Obviously the results are not satisfactory.

That is why the government has people on the ground taking additional emergency action. It is also why we will be announcing additional steps to deal with management problems in this community.

Affidavit of Mirielle Giroux, sworn December 15, 2011 (“Giroux Affidavit”), Exhibit “G” and Exhibits “A” through “F”

31. That same day, Chief Spence was interrupted during an emergency planning meeting with the First Nation EMO and the Red Cross by the hand-delivery of a letter from Joanne Wilkinson, Regional Director-General (Ontario Region) of AANDC. The person delivering the letter then immediately left the community. The letter stated as follows:

The Department considers Attawapiskat First Nation to be in default of its Aboriginal Recipient Funding Agreement per s. 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 that 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.

First Spence Affidavit, para. 35, 50 and Exhibit “C”

32. Prior to the date of the Prime Minister’s statements in the House, and the receipt of the letter from Ms. Wilkinson, neither the Minister nor AANDC officials had expressed such concerns to the First Nation, or had pointed to any alleged error, shortcoming or failure on the part of the First Nation in its response to the housing crisis.

First Spence Affidavit, para. 50

33. The First Nation’s Chief and Council promptly objected to AANDC’s imposition of Third-Party Management by Band Council Resolution and by letter dated December 2, 2011. In that letter, the First Nation not only objected to what it asserted was an improper purpose in appointing a Third-Party Manager, but invited immediate discussions, as required by s. 10.1 of the CFA, with a view to seeking proper administration by Chief and Council. In response, AANDC asserted that its “escalated intervention” was “a direct result of AANDC taking into account your declaration of the state of emergency on November 12, 2011”.

First Spence Affidavit, Exhibits “C”, “D” and “E”

34. AANDC further advised that the appointed Third-Party Manager was to be Mr. Jacques Marion from the firm of BDO Dunwoody – the same firm that the First Nation had fired in 2010 for its ineffective co-management services.

First Spence Affidavit, Exhibit “E”

35. The parties corresponded further, but the Minister declined to withdraw his appointment of a Third-Party Manager. The First Nation therefore brought this Application for judicial review and motion for interim and interlocutory relief on December 15, 2011.

First Spence Affidavit, Exhibits “G”, “H” and “I”

36. After commencing the Application, the parties engaged in Court-sponsored mediation efforts under a confidentiality order. These negotiations were unsuccessful and, on January 23, 2012, Prothonotary Milczynski was appointed to manage scheduling in this matter.

Events Subsequent to the Commencement of Litigation

37. On December 11, 2011, the Minister for AANDC announced that his department would provide 22 modular homes, consistent with the work done by the First Nation's co-manager, Clayton Kennedy, to secure quotes for that purpose. On December 13, 2011, in recognition of the Third-Party Manager's mandate, Kennedy and AANDC officials signed a Project Brief Approval to facilitate the purchase, transport and installation of these 22 modular homes from EHL Homes.

Second Kennedy Affidavit, Exhibit "E"

38. The Project Brief Approval outlined the broad scope of what was necessary to bring this project to prompt completion in the difficult circumstances faced in winter in the far north, which present unique challenges to construction projects of this nature. At the heart of the Project Brief Approval was the need to retain a Project Manager competent to develop and execute a plan to take account of the inter-related and time-sensitive tasks of transporting and installing 22 residences in the midst of winter. It is obvious on the face of the Project Brief Approval that little can occur before a Project Manager is engaged.

Second Kennedy Affidavit, Exhibit "E"

39. Although it is a key responsibility of the Third-Party Manager to contract and liaise with the Project Manager, the First Nation has no information to suggest that the Third-Party Manager has even taken the first step of *identifying* a suitable Project Manager – now nearly six weeks later.

Second Kennedy Affidavit, para. 11

40. Instead, the First Nation has obtained the services of an expert Project Manager whose services have been donated by De Beers Canada Inc. at its own expense. This Project Manager (Mr. Doug Scott) has expertise in managing construction projects in the far north. Since December, 2011, working with Mr. Kennedy, he has prepared a complete scope of work and GANTT chart which outlines in detail the steps that must be taken both at Attawapiskat and elsewhere in order to bring the project to fruition. While a review of the GANTT chart is essential to appreciate the scale and urgency of steps required, in summary, these steps include the complex inter-related steps involved in:

- (a) Site preparation, including the additional measures required to be taken in the dead of winter, when construction in the far north is usually performed during the summer months;
- (b) Servicing of the sites, including provision of water and sewer, culverts and hydroelectric servicing;
- (c) Labour associated with placing the homes on the serviced lots, installing utility connections, levelling, cribbing and skirting the assembly of the entry stairs necessary to permit access; and
- (d) Transportation of the mobile homes during the short period when the “ice road” is open to permit overland transport.

Second Kennedy Affidavit, paras. 2-5, Exhibits “A”, “B”, “C” and “D”

41. To meet a reasonable timetable for completion, these steps must be taken on a “staged” basis. Once an initial group of sites is prepared and serviced, such that an initial group of homes can be transported and installed, tradespeople and labourers must immediately move to prepare and service the next group of sites.

Second Kennedy Affidavit, paras. 2-5

42. Although this planning was completed before mid-January, the evidence at this time is that the Third-Party Manager has yet to approve any expenditures associated with the commencement of the project other than a single payment to EHL Homes, the manufacturer. According to Mr. Kennedy, by the second week of January, work

should have commenced on preparing the sites, which will require on-site workers to dig significantly deeper to break ground below the frost-line, and to acquire additional gravel as fill, as compared to a summer construction.⁴

Second Kennedy Affidavit, para. 9-12

43. There is no evidence that the Third-Party Manager from BDO Dunwoody has any suitable expertise to manage or direct a project of this nature. The principal difference that the Third-Party Manager's presence appears to make to the execution of the plans developed by the First Nation appear to be to cause further delay and expense. Delay is caused by (a) the need for the Third-Party Manager to become educated on the steps involved in managing the project; (b) the need for the First Nation to await Third-Party Manager approval of any funding decisions; and (c) the need to await the transfer of funds. Expense is caused by the fact that the Third-Party Manager must be paid from funds which, but for his appointment, could have been used to remediate the housing crisis rather than paying for oversight.

Second Kennedy Affidavit, para. 12-13

44. The Government has continued to emphasize by way of innuendo in its members' statements in the House of Commons that the cause of the housing crisis is mismanagement by the First Nation, rather than chronic underfunding and short-sighted decision-making by AANDC and its predecessor ministries. It has also argued that the Third-Party Manager is actively improving the situation rather than, as appears from the evidence tendered by the First Nation, doing little while the First Nation's professional, realistic remediation plans remain unused.

Giroux Affidavit, Ex. "H" through "Q"

45. In the meantime, the "ice road" is now expected to be open to allow ground transport, but, consistent with most years, it is expected to be closed by March 2012.

⁴ As described above, inattention to the demands of the far north environment in previous, DIAND-sponsored construction has been a major contributor to the housing crisis in the first place.

Second Kennedy Affidavit, para. 8

PART II – STATEMENT OF POINTS IN ISSUE

46. This motion raises the following issues:
- (a) Is interlocutory injunctive relief available against the Crown in an application for judicial review?
 - (b) Does the First Nation’s request for an interlocutory injunction removing the Third-Party Manager and restoring funding control to Chief and Council meet the requisite test, *i.e.*, (i) does it raise a serious issue to be tried? (ii) will there be irreparable harm if the injunction is not granted? And (iii) does the balance of convenience favour the granting or denial of the injunction?
 - (c) Alternatively, does the First Nation’s alternative request that the Third-Party Manager’s mandate be limited solely to managing funds provided under the “Exceptional Circumstances” provision of the CFA, meet that test?

PART III - SUBMISSIONS

A. Availability of Interlocutory Injunctive Relief

47. The traditional view is that a declaration, and not an injunction, is the appropriate form of mandatory order where the Crown is concerned, as Her Majesty may be expected to comply with the law as declared by her Courts.⁵

P. Hogg & P. Monaghan, *Liability of the Crown*, 3rd ed., (Scarborough, ON: Thomson Canada Limited, 2000), §2.3.

⁵ It must be noted that, while traditionally sound, this expectation may be thrown into some doubt by the Minister of Agriculture’s recent action in proceeding to openly take steps contrary to a declaration of right issued by this Court in *Friends of the Canadian Wheat Board v. Canada (Minister of Agriculture)*, 2011 FC 1432

48. Nevertheless, this Court has repeatedly held that interim or interlocutory injunctive relief is available against the Crown and its agents in circumstances where:

- (a) There is evidence that the Minister or a Crown agency acted outside the scope of his or its statutory authority; or
- (b) Where necessary in order to preserve the *status quo* between the parties pending the resolution of the pending claims.

Lodge v. Canada (Minister of Employment & Immigration), [1979] 25 N.R. 437; *Lac Seul First Nation v. Canada (Minister of Indian Affairs & Northern Development)*, 2004 FC 1183; *North of Smokey Fishermans' Assn. v. Canada (Attorney-General)*, 2003 FCT 33

49. Furthermore, there is little question that interlocutory injunctive relief – or, indeed, final injunctive relief – is certainly available in a judicial review proceeding under s. 18.1 of the *Federal Courts Act*, such as the instant application. In *Zenon Environmental Inc. v. Canada*, this Court held:

At common law it was well established that injunctions could issue against public officials in such circumstances. (See e.g. Sharpe, *supra* at 349-55; Hogg and Monahan, *Liability of the Crown*, 3rded. Carswell 2000 at 31-34; *Pacific Salmon Industries Inc. et al v. The Queen*, [1985] 1 F.C. 504 at 512 (T.D.)) Further, in the *Federal Court Act*, sections 18 and 18.1 it is specifically provided that by judicial review one may seek an injunction against any public official exercising authority under an Act of Parliament where, *inter alia*, it is alleged that such officer is exceeding his or her jurisdiction.

Zenon Environmental Inc. v. Canada, 2005 FC 210 at para. 16; see also *Musqueam Indian Band v. Canada (Governor in Council)*, 2004 FC 579

50. Section 18.2 of the *Federal Courts Act* makes the point plainly:

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.2

51. This is an application for judicial review. In this application, the apparent authority of the Minister resides not only in the CFA, but in s. 66 and 69 of the *Indian*

Act and by virtue of s. 4 of the *Department of Indian Affairs and Northern Development Act*. Each of these powers is itself conditioned by the over-riding duty of the Minister – as an officer of the Crown – to discharge the *sui generis* fiduciary duty it owes, and maintain the honour of the Crown that is applicable to “all its dealings with aboriginal peoples.”

Guerin v. Canada, [1984] 2 S.C.R. 335; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 17; *Indian Act*, R.S.C. 1985, c. I-5, ss. 66, 69; *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c. I-6, s. 4

52. As set out below, the Applicant takes the position that the Minister has acted outside of the scope of his authority by making his decision to impose Third-Party Management either unreasonably, or for irrelevant, extraneous and/or improper purposes. In such circumstances, there can be no doubt as to the availability of interlocutory injunctive relief.

B. Should an Interlocutory Injunction be Issued Setting Aside the Decision to Impose a Third-Party Manager, pending the disposition of the Application?

53. The test for an interlocutory injunction is well-established. The moving party must show (a) a serious issue to be tried; (b) irreparable harm that would be caused in the absence of the injunction; and (c) that the balance of convenience favours granting, rather than withholding, the injunction.

RJR-MacDonald Inc. v. Canada (Attorney-General), [1994] 1 S.C.R. 311

(i) Serious Issue to be Tried

54. The threshold of a “serious issue” is not high; the moving party need only show that there is an issue that is capable of adjudication and that its claims are not “frivolous and vexatious”.

RJR-MacDonald, supra

55. In this case, the existence of a serious issue as to the legality of the Minister's decision to impose Third-Party Management is clear, and there are two sound legal bases on which to challenge that decision.

56. Firstly, this Court has established that the substance of a decision to appoint a Third-Party Manager is reviewable (*albeit* on a "reasonableness" standard of review) on judicial review under s. 18.1 of the *Federal Courts Act*.

Kehewin Cree Nation v. Canada, 2011 FC 364; *Tobique Indian Band v. Canada*, 2010 FC 67

57. Secondly, the First Nation asserts that the Minister exercised this power for an improper purpose, collateral to the purpose for which his powers are granted, and taking extraneous or irrelevant factors into account. This is a well-established basis to set any administrative decision aside at common law.

See, e.g., *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29; *C.U.P.E. v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 at p. 237

58. In this case, there is no serious evidentiary basis to claim that present or recent "mismanagement of funds" by the First Nation was the reason for Third-Party Management (as the Prime Minister of Canada has insinuated in the House of Commons). Throughout 2011, AANDC officials expressed no concerns, and indeed voiced their support, for the financial management efforts of the First Nation and its co-manager, Mr. Kennedy.

59. With respect to any effort by the Respondents to claim that the First Nation was in default due to the "health, safety and welfare of members of the Attawapiskat First Nation was at risk of being compromised", the Respondents failed to follow the mandatory steps in their own Policy, and as embodied in the terms of the CFA to address such circumstances:

- (a) There is no evidence showing that AANDC or the Minister took into account the risks and circumstances associated with the default, the degree of co-operation between the recipient and the department, the

willingness and ability of the recipient to remedy the default, or to allow an opportunity to remedy the default; nor is there evidence that AANDC or the Minister treat the Third-Party Manager as a “last resort”, all as required by their own Policy, set out above.

- (b) There is no evidence showing that Canada complied with s. 10.1.1 of the CFA, which imposes a mandatory obligation on the parties to “communicate or meet to review the situation” before Third-Party Management is imposed;
- (c) There is no evidence to show that Canada provided “notice to the Council” prior to deciding to appoint the Third-Party Manager, as required by s. 10.2.1(c) of the CFA.

60. Such failure to follow his own Departmental policy and contractual commitments calls into question the procedural propriety of the Minister’s decision-making, in view of the legitimate expectations the First Nation held as a result of the Policy and the terms of the CFA. Such expectations, engendered by the clear policies promulgated by AANDC, can give rise to relief on judicial review. These facts also provide a further basis to question whether the stated reasons for imposing Third-Party Management are worthy of credit or whether, in fact, the true motivation was to divert attention from the Minister and towards alleged misconduct or mismanagement by the First Nation and its Chief and Council.

See *C.U.P.E. v. Ontario (Minister of Labour)*, *supra* para. 131

61. In any event, the First Nation respectfully submits that the power to appoint a Third-Party Manager based on the Minister’s assessment of an imminent risk of compromising the health and safety of members of the First Nation must be interpreted *contra proferentem*, as the CFA is plainly a contract of adhesion. The First Nation submits that such a provision must be intended to require some connection to be shown between poor management or mismanagement of funding by the First Nation and the urgent health or safety risks in question. In this case, there is no such connection; in fact, the evidence establishes the contrary.

See, e.g., *Somersall v. Friedman*, 2002 SCC 59 at para. 47

62. Furthermore, the evidence of activity in the period since this litigation was commenced, and the Third-Party Manager was imposed, does not suggest that AANDC or the Minister are deeply engaged in ensuring remediation of the housing crisis at Attawapiskat. To the contrary, the evidence discloses the First Nation continuing to exert intense effort to pursue a remediation plan – with the support of third parties such as De Beers Canada Inc., the Red Cross and others – while the Third-Party Manager and AANDC have done little to move these efforts forward.

63. It is necessarily difficult for the First Nation to prove beyond doubt the intentions of the Minister, absent the opportunity to complete cross-examinations and, if need be, examinations of further witnesses on the application for judicial review. At this stage, in view of the requirement only that an issue that is not “frivolous and vexatious” be shown to exist for adjudication, it is respectfully submitted that at least two serious issues exist – the *reasonableness* of the decision, and the *purpose* of the decision – and that the first stage of the *RJR-MacDonald* test is met.

(ii) Irreparable Harm

64. “Irreparable harm” refers to the nature of the harm, and not its magnitude. The ordinary approach to this part of the test is to ask whether the harm threatened by inaction could be cured by the payment of money damages.

RJR-MacDonald, supra; Edgard v. Kitsoo Band Council, 2003 FCT
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65. The imposition of Third-Party Management, in this case, irreparably harms the Applicant by its very nature. By depriving the First Nation’s lawful government of control over the funds to which it is entitled under the CFA, the Applicant is deprived of both dignity, self-determination and the ability to remediate serious and urgent risks to its membership. As noted in the *Prince* case (a case dealing with the removal of Band Councillors from elected office), such action means that the Applicant cannot fully speak for and act on behalf of those by whom they were elected. This harms not only the Applicant, but all those individuals who elected Chief and Council as their representatives.

Prince v. Sucker Creek First Nation, 2008 FC 479; See also Affidavit of Theresa Spence sworn January 14, 2012 (“Second Spence Affidavit”)

66. This action also subverts the integrity and sanctitude of the federal Crown and its *sui generis* fiduciary duty to the Applicant and its people, relationships that are protected at common law and by the Constitution. Harm to the level of trust implicit in any fiduciary relationship is inherently not curable by money damages. The imposition not merely of a Third-Party Manager, but of *the very firm the First Nation terminated due to a lack of measurable progress in remediating its finances two years ago*, only adds emphasis to the disregard of the Band’s autonomy and thus to the irreparable damage risked by the continued presence of the Third-Party Manager.

See Second Spence Affidavit; *Guerin, supra*; *Constitution Act, 1982*, s. 35

67. More concretely, the only evidence is that the continued presence of the Third-Party Manager is obstructing, not aiding, the First Nation’s urgent efforts to respond to the needs of its community members. The Respondents acknowledge that the threats to human life and safety are real and legitimate (indeed, the Respondents relied on those threats as the basis for their allegation of “default” by the First Nation). The First Nation, working with its co-manager Mr. Kennedy and project manager Mr. Scott, has developed and has been prepared to implement remediation plans that will see 22 modular housing units installed. The Third-Party Manager has neither developed similar plans nor authorized the expenditures needed to implement these ones.⁶

68. If these plans are not executed immediately, there is a serious and increasing risk that all of the necessary modular housing units cannot arrive before March, when it is ordinarily anticipated that the ice road – the only means of overland transport - will close and overland transport cease until the winter of 2013. Delivery of the

⁶ Other than an initial payment to the manufacturer, EHL Homes. As described in the record, however, the purchase of the modular homes is of no assistance without provision for site preparation and servicing, transportation and installation.

modular housing units will be delayed at least until that time if they cannot pass along the ice road this season. The irreparable harm risked by members of the First Nation in the meantime is self-evident.

69. Finally, the continued presence of the Third-Party Manager means that urgently-needed funds that could, and ought, to be used to implement the response to the housing crisis, are instead drawn down to pay his accounts. The First Nation cannot afford the time or money needed to bring the Third-Party Manager up to speed in order to oversee a project that is ready to go. On the evidence, the Third-Party Manager adds nothing, and simply delays implementation of plans that are urgent and time-sensitive by their very nature and due to their very purpose.

(iii) Balance of Convenience

70. The question of the “balance of convenience” is really a determination of “which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits”.

Manitoba (Attorney-General) v. Metropolitan Stores (MTS Ltd.),
[1987] 1 S.C.R. 110 at p. 129; *RJR-MacDonald*, *supra*

71. For the reasons set out above, the longer implementation of the remediation plan is delayed or obstructed, the greater the risk that it cannot be implemented at all. The First Nation’s membership face the concrete risk of spending another year without adequate housing, if the ice road closure precludes delivery and installation of the existing mobile homes. It faces the concrete, daily erosion of funds intended to be used to serve the urgent and ongoing needs of its members, because of their diversion to compensate the Third-Party Manager. The First Nation also faces the less tangible, but no less genuine, continued harm in its partial loss of self-determination and legitimate, representative government, in favour of supervision by a Ministerial appointee from a private accounting and consulting firm that has already been terminated by its elected officials on a prior occasion. The “inconvenience” or threatened harm to the First Nation is clear and established by evidence.

72. By contrast, the Respondents face *no* potential harms. Nothing will be lost or suffered by Canada, the Minister or AANDC, if the Third-Party Manager's appointment is set aside on an interlocutory basis in order to allow the First Nation to execute the remediation plan that it has developed. No evidence has been placed before the Court to show what prejudice or genuine detriment any of the Respondents will suffer if the appointed Third-Party Manager must stand aside pending the determination of the application for judicial review.

73. It is respectfully submitted that the balance of convenience falls unequivocally in favour of granting the injunction.

C. In the Alternative, Should the Third-Party Manager's Mandate be Limited to the Emergency Funds Allocated for the Purpose of Responding to the Housing Crisis?

74. The First Nation respectfully submits, in the alternative, that any justification for the appointment of the Third-Party Manager is, on the facts of this case, restricted to the specific funds allocated on an emergency basis under s. 3.4 ("Exceptional Circumstances") of the CFA. Given the Respondents' stated desire to respond to the immediate health and safety concerns of the First Nation being manifested through this exceptional funding allocation, the Minister's stated intention of appointing a Third-Party Manager for the benefit of the First Nation should be viewed as restricted to the specific funding associated with that purpose.

75. Thus, the First Nation submits that the Court could alternatively conclude that there is only a serious issue and irreparable harm occasioned in so far as the Third-Party Manager has been granted the authority to manage all of the funds payable to the First Nation under the CFA. To the extent that Ministerial and Departmental decision-making has been associated with the need to independently manage emergency funds, the Court could alternatively conclude that the scope of any injunction should be limited to the ordinary allocation under the CFA.

76. To be clear, the First Nation's position is that the entirety of the Third-Party Manager's role is contrary to law on the facts of this case. However, should the Court

be concerned that the Respondents have rebutted the Applicant's record and established the legitimacy of Third-Party Manager activity with respect to emergency funds, the First Nation accepts that the Court has jurisdiction to suitably limit the scope its interlocutory relief and simply restrict the mandate of the Third-Party Manager to these limits. Such a conclusion, however, would require the Court to conclude that the Respondents had established a basis to overcome the First Nation's position on one of the three elements of the *RJR-MacDonald* test, specifically with respect to emergency funding.

PART IV – ORDER REQUESTED

77. For all these reasons, the Applicant respectfully requests the following Order on an interlocutory basis:

- (a) An interlocutory injunction, pending the hearing of the Application herein, setting aside the decision of the Minister and/or AANDC to appoint a Third-Party Funding Agreement Manager pursuant to the CFA;
- (b) An interlocutory injunction, pending the hearing of the Application herein, prohibiting the Minister from re-appointing or appointing any other such Third-Party Funding Agreement Manager;
- (c) In the alternative, an interlocutory injunction directing the Respondents to limit the scope of authority of the Third-Party Funding Agreement Manager to funds allocated by the Respondents for emergency purposes under s. 3.4 of the CFA, and directing the Respondents to remit to the First Nation, in the ordinary course, all other funds due and payable under the CFA, pending the hearing of the Application herein;
- (d) The costs of this Motion;

- (e) An order validating the service and filing of this motion and all materials filed herein, and dispensing with any further service or filing requirements such that the motion is properly returnable this day; and
- (f) Such further and other relief as counsel may advise and this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of January, 2012



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SCHEDULE “A” – LIST OF AUTHORITIES

1. P. Hogg & P. Monaghan, *Liability of the Crown*, 3rd ed., (Scarborough, ON: Thomson Canada Limited, 2000), at §2.3.
2. *Lodge v. Canada (Minister of Employment & Immigration)*, [1979] 25 N.R. 437
3. *Lac Seul First Nation v. Canada (Minister of Indian Affairs & Northern Development)*, 2004 FC 1183
4. *North of Smokey Fishermans’ Assn. v. Canada (Attorney-General)*, 2003 FCT 33
5. *Zenon Environmental Inc. v. Canada*, 2005 FC 210
6. *Musqueam Indian Band v. Canada (Governor in Council)*, 2004 FC 579
7. *Guerin v. Canada*, [1984] 2 S.C.R. 335
8. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73
9. *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311
10. *Kehewin Cree Nation v. Canada*, 2011 FC 364
11. *Tobique Indian Band v. Canada*, 2010 FC 67
12. *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29
13. *C.U.P.E. v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227
14. *Somersall v. Friedman*, 2002 SCC 59
15. *Edgard v. Kitasoo Band Council*, 2003 FCT 166
16. *Prince v. Sucker Creek First Nation*, 2008 FC 479
17. *Manitoba (Attorney-General) v. Metropolitan Stores (MTS Ltd.)*, [1987] 1 S.C.R. 110

SCHEDULE “B” – STATUTORY PROVISIONS CITED

1. *Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.2*

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

2. *Indian Act, R.S.C. 1985, c. I-5, ss. 66, 69*

66. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band.

(2) The Minister may make expenditures out of the revenue moneys of the band to assist sick, disabled, aged or destitute Indians of the band, to provide for the burial of deceased indigent members of the band and to provide for the payment of contributions under the *Employment Insurance Act* on behalf of employed persons who are paid in respect of their employment out of moneys of the band.

(2.1) The Minister may make expenditures out of the revenue moneys of a band in accordance with by-laws made pursuant to paragraph 81(1)(p.3) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the revenue moneys.

(3) The Minister may authorize the expenditure of revenue moneys of the band for all or any of the following purposes, namely,

(a) for the destruction of noxious weeds and the prevention of the spreading or prevalence of insects, pests or diseases that may destroy or injure vegetation on Indian reserves;

(b) to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable;

(c) to provide for the inspection of premises on reserves and the destruction, alteration or renovation thereof;

(d) to prevent overcrowding of premises on reserves used as dwellings;

(e) to provide for sanitary conditions in private premises on reserves as well as in public places on reserves; and

(f) for the construction and maintenance of boundary fences.

...

69. (1) The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.

(2) The Governor in Council may make regulations to give effect to subsection (1) and may declare therein the extent to which this Act and the *Financial Administration Act* shall not apply to a band to which an order made under subsection (1) applies.

3. *Department of Indian Affairs and Northern Development Act, R.S.C. 1985, c. I-6, s. 4*

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

(a) Indian affairs;

(b) Yukon, the Northwest Territories and Nunavut and their resources and affairs; and

(c) Inuit affairs.

4. *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 35*

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

FEDERAL COURT

B E T W E E N :

ATTAWAPISKAT FIRST NATION
as represented by its Chief & Council
Applicant (Moving Party)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
ATTORNEY GENERAL OF CANADA and MINISTER
OF ABORIGINAL AFFAIRS AND NORTHERN
DEVELOPMENT CANADA
Respondents (Respondents)

**AMENDED MEMORANDUM OF FACT AND LAW
OF THE APPLICANT**

*MOTION FOR INTERLOCUTORY INJUNCTION –
JANUARY 31, 2012*

(Filed this 25th day of January, 2012)

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