T-785-01

FEDERAL COURT OF CANADA-TRIAL DIVISION
PIKANGIKUM FIRST NATION
AS REPRESENTED BY CHIEF AND COUNCIL

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
AS REPRESENTED BY
THE MINISTER OF INDIAN AND NORTHERN AFFAIRS

Respondent

MEMORANDUM OF FACT AND LAW

PART I NATURE OF THE PROCEEDING

1. The Applicant seeks judicial review, pursuant to s. 18 of the *Federal Court Act*, of the decision of the Department of Indian Affairs and Northern Development ("DIAND") to require the Applicant to enter into a co-management agreement, failing which DIAND would withhold funding and deliver programs and services through an agent of the Minister.

PART II FACTS

Pikangikum

2. Pikangikum is a large First Nation in Northwestern Ontario with just over 2000 members living on reserve.

Affidavit of Chief Louis Quill, May 7, 2001, para. 26

3. Pikangikum receives approximately $12-14 M annually from DIAND. This funding pays for community services, including band employee salaries, education services and supplies (including a school for more than 600 children), operation and maintenance of community infrastructure such as water and sewer, administration of welfare recipient benefits and other things (hereinafter "services").

Affidavit of Chief Louis Quill, May 7, 2001, para. 4
Cross Examination of Roger Saltel, Q. 243-245

DIAND

4. DIAND is established under the *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c. I-6, s. 2. DIAND's broad mandate is carried out under the *DIAND Act*, the *Indian Act*, and an extensive legislative base.

5. DIAND is decentralized into Regions. Pikangikum First Nation deals with the Ontario Region. Ron Green is DIAND's Director, Funding Services, Ontario Region. Roger Saltel is DIAND's Senior Funding Officer in Sioux Lookout who deals with Pikangikum First Nation.

Affidavit of Ron Green, May 11, 2001, para. 1
Affidavit of Roger Saltel, May 24, 2001, para. 1

DIAND's Indian and Inuit Affairs Program: Statutory Mandate

6. In fiscal 2000-01 Parliament appropriated in excess of $4 B to support DIAND's Indian and Inuit Affairs program.

Appropriation Act Nos 1, 2, 3, 2000-01, S.C. 2000, c.C-30, C-42, S.C. 2001, c. C-20, sch. 1.3, 1.6, 1.7

7. The stated objectives of the Indian and Inuit Affairs program include: "To support Indians and Inuit in achieving their self-government, economic educational, cultural, social, and community development needs and aspiration". Ron Green understands this to be DIAND's objective.

Canada, *2000-01 Estimates, Part I*, p. 13-14
Cross Examination of Ron Green, Q. 95-99

8. DIAND transfers most of the funds appropriated for the Indian and Inuit Affairs program to First Nations in order "to enable Status Indians living on reserve to have access to basic services comparable to those available to other Canadian residents".

Canada, *2000-01 Estimates, Part III, Indian and Northern Affairs Canada Report on Plans and Priorities* (hereinafter "*RPP*"), p. 3
Cross Examination of Ron Green, Q. 147-149

9. In 2000-01 DIAND transferred eighty-five per cent of appropriated funds to First Nations in order that First Nations could "deliver almost all social and economic programs". This

is equally true in DIAND's Ontario Region.

RPP, p. 12
Cross Examination of Ron Green, Q. 257

10. In 2000-01 DIAND "directly administer[ed] only about six per cent of funds; most of this expenditure relate[d] to legal obligations to First Nations and Inuit people". The remaining nine per cent of program monies was transferred to the provinces.

RPP, p. 12

11. DIAND's policy is that First Nations should deliver social and economic programming directly. Program delivery by First Nations had risen from 67% in 1987-88 to 79% in 1992-3 to 85% in 2000-01.

RPP, p. 12
Cross Examination of Ron Green, Q. 240-242, 248

12. DIAND's policy that First Nations should directly deliver social and economic programming is in accordance with the policy of the Government of Canada as expressed in its 1998 policy, *Gathering Strength: Canada's Aboriginal Action Plan* ["*Gathering Strength*"]. *Gathering Strength* "outlines four key objectives for action to begin now". One of these four objectives is strengthening Aboriginal governments. "Strengthening Aboriginal Governance is about supporting Aboriginal people in their efforts to create effective and accountable governments..."

Gathering Strength, p. 2

13. DIAND's policy is to work "closely with First Nations in assessing the type of funding arrangement that best matches their capacity to deliver programs and services...First Nations are striving to develop accountability frameworks based on the principles of transparency, disclosure and redress. DIAND is encouraging First Nations to interpret these principles in ways appropriate to their situation and culture when developing modern governance regimes".

RPP, p. 6
Cross Examination of Ron Green, Q. 165-66, 180-83

14. DIAND is accountable to Parliament for funds transferred "through audits prepared by independent accredited auditors". The audit is a principal tool in which Ministerial accountability for the effective use of transferred funds is accomplished. It is also the principal tool through which First Nations are held accountable to DIAND.

RPP, p. 6

Cross Examination of Ron Green, Q. 174, 253, 255

15. Where First Nations experience difficulties, DIAND has a range of tools to use to intervene in First Nations affairs. DIAND's policy is to intervene to the least extent possible in the circumstances by using the least intrusive tools.

Cross Examination of Ron Green, Q. 308-09

DIAND's Ontario Region Policy Directive

16. DIAND's does not usually deliver services directly in the Ontario Region. First Nations are the preferred administration agent. The facts on the ground in the Ontario region are that First Nations deliver most social and economic services, in keeping with national trends.

Cross Examination of Ron Green, Q. 296, 301-2

17. These facts are required by a "*Regional Directive*" dated May 26, 2000, issued by DIAND Ontario Region. This Directive "is the current guiding directive with respect to implementation of co-management and third party management". It is required to be observed by officers dealing with First Nations.

Cross Examination of Ron Green, Q. 513, 516

18. The reason why this directive must be observed is to ensure consistency in departmental intervention into First Nation's autonomy by means of co- and third party management.

Cross Examination of Ron Green, Q. 517

19. The *Regional Directive* provides at para. 5.1:

> The department maintains that the recipient should be responsible for the delivery of services as outlined in their funding arrangement. Every effort will be made to sustain the local autonomy and ensure essential services are provided without interruption...

This makes local autonomy for First Nations a DIAND "policy imperative".

Cross Examination of Ron Green, Q. 521

20. Paras. 5.2 and 5.3 of the *Directive* indicate a departmental preparedness to intervene in recipient affairs where leaders are unable or unwilling to remedy a default. Paras. 5.3 and 6.1 - 6.3 indicate a graduated intervention policy, with a preference for the least

intervention possible consistent with the circumstances.

Cross Examination of Ron Green, Q. 308-10

21. Para. 7 addresses procedural requirements for imposition of co-management. It requires official written notice signed by the Regional Director General to the recipient identifying the default and discussions with the recipient.

22. Para 8 addresses procedural requirements for imposition of third party management. It requires official written notice signed by the Regional Director General to the recipient identifying the default, preparation of a briefing for the Deputy Minister outlining the action taken and updates as required..

23. The *Directive* makes no provision for direct service delivery by an agent of the Minister. This situation is "highly unusual". It is singular in the Ontario region, in the sense that the Director of funding services has never before seen it imposed in his 27 years with DIAND, and does not know where the authority to impose it resides. This highly unusual, singular situation is what has been imposed on Pikangikum First Nation.

Cross Examination of Ron Green, Q. 334-339

Pikangikum's Comprehensive Funding Agreement

24. For many years, including 2000-01, Pikangikum, in common with the vast majority of First Nations in Ontario Northern Region, received its funding from DIAND pursuant to a Comprehensive Funding Agreement ("CFA").

Affidavit of Chief Louis Quill, para. 26
Cross Examination of Roger Saltel, Q. 362-64 (20 of 23 Bands have CFAs)

25. The CFA for 2000-01 requires financial reporting, including preparation of consolidated financial statements and an audit by an independent auditor (art. 2.4.3). DIAND is required to provide general comments on the audit within 30 days of receipt (art. 2.4.5). DIAND may request access to records relating to any terms of the CFA provided "this right is not exercised without reasonable cause" and Pikangikum is "notified in writing of such cause" (art. 3.3).

Affidavit of Chief Louis Quill, exhibit A

26. Art. 4 provides for default, which foresees three situations: the auditor gives a denial of opinion; the auditor indicates a cumulative deficit of more than 8% of total revenue; the health, safety or welfare of community members is being compromised. In the event of default, DIAND and Pikangikum must meet to review the situation (art. 4.2), and DIAND may require Pikangikum to take a variety of measures, "having regard to the nature and

extent of the default" (art. 4.3).

27. Denial of opinion and deficit over 8% of revenue are objective conditions which are not controversial. By contrast, compromise of health, safety or welfare of community members requires a judgment call, which in turn requires gathering information, consultation within the department, consideration of departmental policies and subjective opinion.

Cross Examination of Ron Green, Q. 369-75

Pikangikum's Legitimate Expectation

28. CFA's run from year to year and are renewable. DIAND's conduct, experience and expectation is that if a First Nation does not go into default under a CFA, the First Nation will be offered a new CFA for the following year.

Cross Examination of Roger Saltel, Q. 394
Cross Examination of Ron Green, Q. 730, 738-39

Pikangikum's Management/Financial History

29. Pikangikum experienced accounting difficulties in 1996. In that year the following deficits and surpluses were recorded in its accounts:

Social Services	$511,973 deficit
Operations and Maintenance	$449,361 surplus
Band Management	$833,773 deficit
Economic Development	$200,948 deficit
Operating	$187,188 deficit

Cross Examination of Roger Saltel, Exhibit 1 and Q. 35-39

30. The auditor could not confirm the origin of accumulated surpluses and deficits in 1996, or verify the amounts. The auditor's 1996 and 1997 reports stated, "... we are unable to satisfy ourselves that all revenue and expenditures of the First Nation had been recorded, nor are we able to satisfy ourselves that the recorded transactions were proper. As a result, we are unable to determine whether adjustments were required in respect of recorded or unrecorded assets, recorded or unrecorded liabilities and the components making up the statements of revenue, expenditure and surplus deficit and changes in financial position."

Cross Examination of Roger Saltel, Exhibit 1 and Q. 39 & 51

31. As a result, the cumulative deficit and surplus figures originating as far back as 1996 and carried through to the 2000 financial statements cannot be verified. The actual amounts

could be substantially more or substantially less than what is recorded in the financial statements.

Cross Examination of Roger Saltel, Q. 56-84

32. DIAND required Pikangikum to undertake a Remedial Management Plan and agree to co-management in 1997, in order to improve financial control. Due to the cost-cutting efforts of the First Nation, program deficits were reduced between 1997 and 2000, and overall surpluses achieved in 1999 and 2000. Individual accounts in these years still show surpluses and deficits but these are carry forwards from the unreliable numbers of 1996. By 2000, the First Nation was out of co-management and "doing much better" financially.

Cross Examination of Roger Saltel, Q. 131-132, 186-87, 297-299

33. In 1999, the First Nation reported a consolidated surplus of $8,001; in 2000, the First Nation reported a consolidated surplus of $232,379. In both years, Pikangikum's auditor gave an unqualified opinion, confirming that the financial statements gave an accurate accounting of the First Nation's finances.

Affidavit of Wayne Chiarella, paragraphs 2-3

34. Pikangikum submitted their audit, which was unqualified and showing a substantial surplus of $232,379, for the 1999-2000 fiscal year to DIAND. DIAND did not, as required under the terms of the CFA, provide the First Nation with general comments on the audit within 30 days of receipt, or indeed, at any time thereafter. Neither did DIAND request access to written records of the First Nation, as the Department may do under the terms of the Comprehensive Funding Arrangement.

Cross Examination of Roger Saltel, Q. 9-33

The Impugned Decisions

35. Pikangikum and DIAND entered into a CFA commencing on April 1, 2000 and terminating on March 31, 2001.

36. In a letter dated November 17, 2000, DIAND announced that a "decision to appoint a Third Party Manager has been made". The letter specified that Pikangikum was in default of the CFA para 4.1.4 because "the health, safety or welfare of community members is being compromised". This letter specified two reasons:

> (a) the departments concern with the First Nations ability to effectively manage the existing community infrastructure facilities...

(b) the concern that the First Nation has the technical capacity to manage the major capital projects..

Affidavit of Chief Louis Quill, Exhibit B

37. The letter did not specify why or in what respect the department was concerned Pikangikum could manage the community infrastructure or the major capital projects. Nor was the decision to impose third party management - the most severe form of intervention contemplated under the CFA - preceded by oral or written warnings or expressions of concern, or any type of notice and opportunity for comment whatever. Nor, in the period since the decision to impose third party management, were the bases of this concern ever articulated, developed or discussed with the First Nation.

Cross Examination of Ron Green, Q. 576-604

38. Pikangikum attempted to demonstrate by affidavit material in this application that it had management of community infrastructure and major capital projects well in hand. In the absence of any indication from DIAND why it was concerned with Pikangikum's ability to manage, this affidavit material has had to speculate. A professional engineering affidavit demonstrated that any assumed or conceivable problems "were not the result of mismanagement by Pikangikum". The major points made by the engineer were:

a. In May 2000, the school in Pikangikum required remediation of a fuel spill and correction of mould problems, both of which the First Nation undertook, with the assistance of an engineering firm. The school re-opened January 10, 2001.

Affidavit of Georg Voelkel, paragraphs 10-14

b. The water treatment plant, constructed in 1996, was never completed and commissioned as designed, leaving it vulnerable to accidental flooding. The First Nation addressed this by retrofitting the water treatment plant with new equipment.

Cross Examination of Georg Voelkel, Q. 64-90
Affidavit of Georg Voelkel, paragraphs 4-9

c. Pikangikum has undertaken the construction of an electrical grid line from Red Lake to the First Nation, with project management by an engineering firm, DIAND, the First Nation and the general contractor.
Cross Examination of Georg Voelkel, Q. 184-187
Affidavit of Georg Voelkel, paragraphs 15-16

d. The second phase of water and sewer installation has been pursued to provide badly needed sewer and water infrastructure for the community. A portion of the

construction materials are already on the reserve, and the First Nation owns all the heavy equipment required to undertake the project. *Affidavit of Georg Voelkel*, paragraphs 17-20

e. The First Nation's own electrical utility corporation maintains and operates the power system in the community. It recently upgraded its generators in 1997-98 to provide additional power to accommodate the second phase of the water and sewer servicing.

Cross Examination of Georg Voelkel, Q. 188-191
Affidavit of Georg Voelkel, paragraph 17

39. DIAND never responded to this affidavit. Instead, DIAND delivered an affidavit deposed by Roger Saltel, dated June 29, 2001, in which totally different reasons seem to be advanced. These new reasons are DIAND's new, changed practice to consider management and administrative capacity before ending co-management arrangements. It is hard to see how this concern relating to terminating co-management - never previously revealed to the First Nation - is relevant to the impugned decisions, given that Pikangikum was not then in co-management. But even taking these new practices for ending co-management at face value, the implication of weak management and administrative capacity implicit in Mr. Saltel's affidavit was revealed on cross examination to be thin and insubstantial, for the following reasons:

a. Out of 23 First Nations under Mr. Saltel's supervision, 22 of them completed Accountability and Management Assessments (AMA's) in 2000. Out of the 22 AMA's submitted, all 22 identified management and administrative weaknesses. No evidence has been provided to demonstrate whether the weaknesses in the Pikangikum AMA were more or less serious than those identified in the 21 other First Nations.

Cross Examination of Roger Saltel, Q. 319-322

b. Of its own initiative, and when it was no longer under co-management, Pikangikum undertook significant training of its employees in the area of financial administration, including accounting and record-keeping. The training followed up on the recommendations of the AMA, and was undertaken between April 2000 and March 2001 by Aboriginal Strategies.

Cross Examination of Roger Saltel, Exhibit 2 and Q. 323-333

c. DIAND was not aware of Pikangikum's current application to CMHC for housing funds. There may be a variety of reasons that First Nations do not apply to particular DIAND programs; a failure to apply is not necessarily an indication of weak management and administrative capacity.

Cross Examination of Roger Saltel, Q. 335-338

d. The surpluses and deficits relied on by DIAND to illustrate the weak management and administrative capacity of Pikangikum are unreliable numbers because they originated in years when the auditor was unable to provide a clear opinion. The actual numbers may be substantially higher or lower.

Cross Examination of Roger Saltel, Q. 30-106

40. At some point between November 17 and December 7, 2000, DIAND changed its mind about third party management . DIAND decided that co-management would be acceptable, but nothing less than co-management would suffice. DIAND announced that decision at a meeting with Pikangikum on Dec. 7, in Winnipeg.

Cross Examination of Ron Green, Q. 617-20

41. DIAND did not tell Pikangikum of the reasons for the decision at the Dec. 7, 2000 meeting.

Affidavit of Louis Quill, May 7, 2001 paras. 17, 22
Affidavit of Louis Quill, May 22, 2001 para. 9
Cross Examination of Ron Green, Q. 606-608, 626

42. DIAND never provided Pikangikum with written notice of this decision, nor the reasons for it (contrary to s. 7.1 of *Regional Directive*), nor what its concerns were.

Cross Examination of Ron Green, Q. 592 - 604

43. Nor, with one exception, did DIAND ever provide any oral notice of the reasons for co-management or of DIAND's concerns, nor afford Pikangikum an opportunity to comment orally or in writing.

Affidavit of Louis Quill, May 7, 2001 paras. 17, 22
Affidavit of Louis Quill, May 22, 2001 para. 9
Cross Examination of Ron Green, Q. 606-608, 626

44. The one exception relates to a meeting on April 18, 2001 between Pikangikum and DIAND officials, Roger Saltel and Joseph Young. At that meeting Young and Saltel stated that DIAND wanted a say in the forestry initiatives Pikangikum had in progress with the Province of Ontario.

Affidavit of Louis Quill, May 7, 2001 para. 18 (This is uncontradicted in all the extensive evidence of record.)

45. Applicant submits, as developed below, that DIAND's attempt to use its power under s. 4 of the CFA to gain an advantage in negotiations with Ontario is a clear departure from statutory discretion and policy imperatives, an egregious abuse of discretion and abuse of power. CFA s. 4 is confined to power to intervene in the First Nation's financial affairs for CFA defaults.

46. Pikangikum's CFA expired on March 31, 2001. Pikangikum received a letter from Roger Saltel on April 6, 2001 (dated April 2) informing the First Nation that "funding for the new year will be released once the co-management agreement is signed." 2001-02 funding was withheld. The result was considerable disruption in the Pikangikum community.

Affidavit of Louis Quill, May 7, 2001 paras. 14-15

47. On consent, this Court (Blanchard J.) ordered DIAND to provide $1.53 million in funding to Pikangikum for April 2001.

48. By letter of May 1, 2001, signed by Joseph Young for Ron Green, DIAND stated that it would not execute a CFA for the current year without a co-manager, and in default of co-management, the department would "immediately commence the delivery of programs and services directly". A letter from Ron Green of May 10, 2001 elaborated that the direct delivery of services would be through a company, and that "The company will be acting as agent for the Minister, and not in any way as a co manager, receiver-manager or third party administrator of the First Nation".

Affidavit of Ron Green, May 11, 2001 Exhibit E
Affidavit of Ron Green, May 11, 2001 Exhibit H

49. Pikangikum has not agreed to co-management. An agent of the Minister has been appointed to deliver services. This is the highly unusual, singular situation referred to in para. 23, *supra*.

50. On Sept. 7, 2001 DIAND added further conditions to its willingness *even to discuss co-management*. These included: "All legal actions and reference to funding arrangements are suspended"; and "A joint press release is drafted on co-management". Applicant submits, as developed below, that DIAND's attempt to force Pikangikum to give up its civil right to bring this application is an egregious abuse of its discretion to cut off Pikangikum's funding and intervene in Pikangikum's affairs. This application is Pikangikum's fundamental civil right to hold DIAND to account. DIAND has equally abused its discretion by using its power to force Pikangikum to make unspecified statements in the media, presumably damaging to the public positions Pikangikum has taken.

Cross Examination of Ron Green, Q. 645-649

51. The impact of the impugned decision is that:

i. the program and service infrastructure at Pikangikum First Nation is not operating normally;

Cross Examination of Roger Saltel, Q. 407

ii. the First Nation has been removed from any input into the development of its major capital infrastructure;

Cross Examination of Ron Green, Q. 712-714

iii. the First Nation does not have the funds to deliver departmental services;

Cross Examination of Ron Green, Q. 720

iv. the First Nation's local autonomy is impaired; and

Cross Examination of Ron Green, Q. 721

v. the First Nation's progress towards self reliance is stalled.

Cross Examination of Ron Green, Q. 727

52. The impugned decision is not subject to appeal within the department or to a court.

Cross Examination of Ron Green, Q. 740

53. The process for making the decision is opaque, in that senior staff discussed the decision, but the Director of Funding Services does not know who made the decision, who agreed with or disagreed with it, or where the authority to make the decision resides; and the senior funding officer, who says he agrees with the decision, doesn't even understand the nature of the decision that was made.

Cross Examination of Ron Green, Q. 339, 340-46, 349, 351
Cross Examination of Roger Saltel, Q. 358, 365-367, 373-74, 378-79, 391

54. The relationship between the decision maker, DIAND, and the affected party, Pikangikum First Nation, is trust-like and fiduciary, and is characterized by dependency.

Sparrow

Delgamuukw

55. Notwithstanding the statutory mandate of the Indian and Inuit Affairs program and its own internal policies, in the affidavit material DIAND produced before this Court, DIAND claims an absolute and unconstrained discretion to determine the funding mechanism it will use to deliver programs.

Affidavit of Ron Green, May 11, 2001, paras. 7, 12, 13

PART III LAW

Procedural Fairness

56. Public bodies whose powers are derived from statute are subject to a general duty to act fairly depending on "(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights".

Bd. of Educ. of Indian Head School Division v. Knight, [1990] 1 S.C.R. 653

57. "The purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker".

Baker v. Canada, [1999] 2 S.C.R. 817, para. 17

58. The content of the duty of procedural fairness depends on

a. "the nature of the decision being made and the process followed in making it";
b. "the nature of the statutory scheme ... greater procedural protections will be required when no appeal procedure is provided within the statute or when the decision is determinative of the issue and further requests cannot be submitted";
c. "the importance of the decision to the individuals affected";
d. "the legitimate expectations of the person challenging the decision"; and
e. "the choices of procedure made by the agency itself".

Baker v. Canada, [1999] 2 S.C.R. 817, paras. 18-22

59. Procedural fairness requires that a person affected by the exercise of administrative power be given adequate notice of the proposed action. Adequate notice must include sufficient particularity as to enable the person proposed to be affected to respond. "The notice, in order that it be a fair notice ... should have included, at least, a comprehensive listing of the available material to be considered and a summary of the contents of such material. I say "at least" because otherwise, Chester or any other inmate who is such a candidate will not know that to which he (or she) is to respond".

R. v. Chester, [1984] O.J. No., 1174, (1984), 5 Admin. L.R. 111 (Ont. H.C.), para. 53 (transfer of inmate to S.H.U. requires adequate notice of matters prison will consider and opportunity to respond in writing)

Legitimate Expectation

60. The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness which may afford a party affected by the decision of a public official an opportunity to make representation in circumstances in which there otherwise would be no such opportunity".

> *Minister of Health and Social Services v. Mount Sinai Hospital Centre*, [2001] S.C.C. 41, para. 32

61. The doctrine of legitimate expectation also "can increase the procedural content of the duty of fairness beyond that which it otherwise would have had".

> *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264, para. 113 (C.A.), citing *Baker v. Canada*, supra., para 21

62. The duty of procedural fairness arising from a legitimate expectation is not limited to the making of representations only. Procedure is a broad term ("in some cases it is difficult to distinguish the procedural from the substantive"). Procedural rights include whatever procedural remedies might be appropriate on the facts of a particular case.

> *Minister of Health and Social Services v. Mount Sinai Hospital Centre*, [2001] S.C.C. 41, paras. 32, 35

63. Legitimate expectations may arise from a public body's conduct, its regular practices, its non-statutory procedural directives, detrimental reliance of an affected individual (though this is not necessary) or otherwise.

> *Baker v. Canada*, [1999] 2 S.C.R. 817, paras. 21
> *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264, para. 122
>
> *Minister of Health and Social Services v. Mount Sinai Hospital Centre*, [2001] S.C.C. 41, para. 29

64. The focus of the doctrine of legitimate expectation is on promoting regularity, predictability and certainty in government's dealing with the public. When a legitimate expectation arises from an agency's past practice, or non-statutory procedural guidelines, it serves to preclude procedural arbitrariness.

> *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264, para. 122
> *Minister of Health and Social Services v. Mount Sinai Hospital Centre*, [2001] S.C.C. 41, para. 29-30

Reasons for the Decision

65. *Baker* made an important departure in requiring that, "in cases such as this where the decision has important significance for the individual some form of reasons should be required". The *Baker* requirement was imposed in recognition that reasons reduce to a considerable degree the chances of arbitrary or capricious decisions, reinforce public confidence in the judgment and fairness of administrative tribunals, foster better decision making by insuring that issues and reasoning are well articulated and therefore, more carefully thought out, enable parties to see that the applicable issues have been carefully considered, and make those affected likely to feel they were treated fairly and appropriately.

Baker v. Canada, [1999] 2 S.C.R. 817, paras. 33-34, 38

Abuse of Discretion

66. In the seminal case of *Roncarelli v. Duplessis*, Rand J. wrote these classic words:

> It is a matter of vital importance that ... the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.
>
> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. ..."Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.
>
> ...That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.

Roncarelli v. Duplessis, [1959] S.C.R. 121, 142

67. This principle makes the exercise of a discretionary power by a Minister reviewable in Court. Since *Roncarelli* the Supreme Court has consistently reaffirmed and expanded this principle.

CUPE v. Ontario (*Minister of Labour*) (2000), 51 O.R. (3d) 416 (C.A.), paras. 51-3, 104

Application to this Case

68. Pikangikum is entitled to procedural rights of a high order before its self-governing autonomy is eroded by the imposition of co-management or an Indian agent. The nature of its interest – local self governing autonomy – is jealously guarded by all recent Federal policy and is vital to the health, security and dignity of the First Nation. Pikangikum is dependant on DIAND. DIAND's relationship to Pikangikum is trust-like and fiduciary. DIAND has set out no clear procedural code, nor has it followed the one it has. There is no appeal of DIAND's decision, either within the Department or to a court. DIAND's past practice of offering CFA's year after year created expectations, which increase the procedural obligations DIAND owes to Pikangikum.

69. Pikangikum had a legitimate expectation that it would be offered a CFA for 2001-02 if not in default. This intensifies Pikangikum's procedural rights. Before refusing Pikangikum a CFA, DIAND had a duty to give Pikangikum reasonable written notice why it thought default had occurred. The notice needed to contain adequate information and sufficient particularity to allow Pikangikum to put forward its own views and evidence. DIAND did not fulfill this duty by merely reciting the language of CFA s. 4.1.4 that "health, safety and welfare of community members was being compromised." Similarly, vague expressions of concern about Pikangikum's ability to manage community infrastructure and major capital projects did not fulfill this duty.

70. DIAND was required to inform Pikangikum of the process by which it intended to consider Pikangikum's comments, evidence and suggestions. It never did this.

71. Following notice, Pikangikum was entitled to have its views and evidence fully and fairly considered by DIAND before DIAND concluded that Pikangikum was in default. This is particularly true given the subjective nature of default provision relied on by DIAND in this situation and the importance of the decision. This required at least written, and probably oral exchange of technical data, neither of which ever occurred. A full exchange would promote a better informed and more accurate decision on a matter of vital importance.

72. In any event, Pikangikum received no written or oral notice, with any particularity, of the reasons for which DIAND was requiring co-management. Pikangikum was not informed of any process for commenting on DIAND's co-management "decision". Nor was Pikangikum given any opportunity to comment on DIAND's reasons for the imposition of co-management. The only communication Pikangikum received was the November 17, 2000 letter which announced a "decision" to impose "third party management". This letter did not relate to the impugned decision for co-management, and it was opaque as to reasons why Pikangikum was alleged to be in default, in any event. It was not the start of a notice and comment procedure but the end point of a "decision" which was being announced.

73. Because of the significance of DIAND's decision to Pikangikum, DIAND ought to have provided Pikangikum with written reasons for the decision. It did not. Had DIAND done so, Pikangikum could have assessed if it was being treated appropriately. Reasons for the decision might have turned aside Pikangikum's suspicion of arbitrary or improper action. If DIAND had grappled with the basis for its action by justifying it in written reasons it might have become persuaded that less severe intervention was warranted. This is precisely the type of situation that was foreseen by the Supreme Court in *Baker*, when it required that substantial reasons be provided for important decisions.

74. DIAND's decision was not an emergency situation. It had lots of time to devise and implement a suitable notice and comment regime. Were it truly concerned about the health safety and welfare of community members, DIAND had many tools available to it to address the situation. It could have quickly imposed third party management under the CFA, following a short notice and comment procedure. DIAND could have also required a remedial management plan. The fact of the matter is that DIAND did none of these things for five and a half months, from Nov. 17, 2000 until April 30, 2001.

75. DIAND's choice was to let the existing CFA expire so that it could exert maximum intervention on Pikangikum – seemingly to teach Pikangikum a lesson. The Department was after co-management (Ron Green, Cross Q. 627-28, 637-38). It could not get Pikangikum to agree (Ron Green, Cross Q. 628). Contrary to all Government of Canada, DIAND national, and DIAND Ontario policies, DIAND did not select the least intrusive tool. DIAND waited for its opportunity to select the most intrusive tool, a tool that was without precedent in its use. DIAND took the singular, highly unusual step of bypassing Pikangikum altogether and hiring an Indian agent to deliver DIAND's programs and services.

76. Why did DIAND do this? The only reason that appears in the record is a disturbing one: for DIAND to gain a foothold in Pikangikum's dealings with the Province of Ontario respecting a valuable sustainable forestry initiative. This allegation remains uncontradicted in the record. This reason is a clear abuse of discretion and an abuse of power.

77. DIAND's discretion to intervene in Pikangikum's affairs by requiring remedial management plans and appointing co-managers, third party administrators and Indian agents is constrained by the objects and purposes of the Indian and Inuit Affairs program, the local autonomy imperative of DIAND's own *Regional Directive* and the objective to enhance Aboriginal self government stated in *Gathering Strength*. Generally, these objects and purposes are to support local self government and local autonomy for Aboriginal people living on reserve, and to provide Aboriginal people living on reserve with services comparable to other Canadians.

78. It is deeply offensive to these objects and purposes – a clear abuse of discretion – for DIAND to use its financial and administrative power under the Indian and Inuit program to attempt to force Pikangikum to give up its civil right to bring this application. This application is a matter of fundamental civil right, enabling Pikangikum to hold DIAND to account for its administration. DIAND has equally abused its discretion by using its power to attempt to force Pikangikum to make unspecified statements in the media, presumably damaging to the public positions Pikangikum has taken. This abuse of discretion is aggravated by independently offending the free speech and liberty values that undergird the *Canadian Charter of Rights and Freedoms*. These values equally constrain DIAND's legal discretion.

> *CUPE v. Ontario* (*Minister of Labour*) (2000), 51 O.R. (3d) 416 (C.A.), para. 53

Remedy

79. In many cases it would be sufficient for this Court to quash the impugned decision for want of adequate consultation. The parties would return to the *status quo ante*, the public authority would be free to devise a notice and comment regime for consultation with the affected party, and to make a new decision following proper consultation. *Nicholson v. Haldimand-Norfolk*, [1979] 1 S.C.R. 311, *Knight*, supra. and *Baker*, supra. are all examples of such a situation.

80. That solution is not possible in this case. Quashing the decision, without more, leaves Pikangikum in chaos, with an expired CFA, no funding where funding is required, gives DIAND a free hand to intrude as deeply into Pikangikum's affairs as it wishes. Such a solution promotes exactly the reverse of what a proper administrative law remedy is meant to achieve.

81. In order to make the remedy of quashing the impugned decision effective, it is necessary that the remedy have ancillary or interim procedural features attached to it – a situation foreseen by the Supreme Court of Canada in *Mount Sinai*, para. 32, where Binnie J. observed that relief was not limited "just to the making of representations but was intended to include whatever procedural remedies might be appropriate on the facts".

82. The correct ancillary procedure on these facts is to require DIAND to enable Pikangikum to deliver interim programs and services identical to those covered by the now expired CFA, pending DIAND's devising a suitable notice and comment regime and holding consultations with Pikangikum. This ancillary or interim procedure is necessary to make the quashing remedy effective, without producing further chaos. Such a remedy is in keeping with the intention of Parliament under the business line description of the Indian and Inuit Affairs program and the intentions of the Government of Canada as expressed in such policies as *Gathering Strength*. The ancillary procedure of requiring DIAND to allow Pikangikum to deliver programs and services in the interim, pending proper

consultation, would be a proper means for the Court to carry Parliament's and the Government's presumed intention into effect.

PART IV ORDER REQUESTED

83. The Applicant asks this honourable Court for an order:

a. quashing the decision of DIAND to require Pikangikum to enter into a co-management agreement failing which DIAND will directly deliver programs and services through an agent of the Minister;

b. requiring DIAND to enable Pikangikum, as from May 1, 2001, to deliver interim programs and services identical to those covered by the now expired CFA, 2000-01, pending DIAND's devising a suitable notice and comment regime, holding consultations with Pikangikum and delivering proper reasons for its decision to Pikangikum which justify a decision founded upon considerations squarely within the four corners of DIAND's statutory mandate;

c. for pre- and post-judgment interest on any amounts due to Pikangikum under the expired (or interim) CFA;

d. for Pikangikum's costs on a solicitor and client basis; and

e. for such further and other relief as counsel may advise and this Honourable Court permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 30th day of October, 2001.

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