

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

PIKANGIKUM FIRST NATION

Plaintiff
(Appellant)

- and -

ROBERT D. NAULT

First-Named Defendant
(Respondent)

-and-

THE ATTORNEY GENERAL OF CANADA

Second-Named Defendant
(Respondent)

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TABLE OF CONTENTS

TAB 1 Factum

PART I APPELLANT, PRIOR COURT AND RESULT	1
PART II OVERVIEW	1
PART III FACTS	2
Pikangikum’s Dispute with INAC and Nault	2
Nault Ordered Officials to Stall Pikangikum’s Projects to Force Withdrawal of Court Case	4
Nault Imposed Third Party Management to Force Withdrawal of Court Case	6
Pikangikum’s Projects	9
Water and Sewer	9
Generator Rehabilitation	11
School	12
Gridline	13
PART IV LAW AND ARGUMENT	14
Parliament’s “Indian and Inuit Affairs Program”	14
IIA Program Objectives	15
Intervention Procedure and its Objectives	15
Capital Projects	17
Health and Safety Projects	17
Issue 1 Nault’s March/April 2002 Intervention Constitutes Misfeasance	18
Issue 2 Nault’s Stalling Projects Constitutes Misfeasance	20
Omissions	20
Improper Purpose Doctrine	21
Improper Purposes and Omissions	22
Constituent Elements of the Tort	25
Knowledge of Unlawfulness	25
Knowledge of Harm	26
Issue 3 Nault’s Vicarious Admission by Skillen	27
Issue 4 Principles for Quantifying Intangible Benefits as Damages	28
Quantifying the Lost Benefits	29
Punitive Damages	33
Special Damages	34
PART V ORDERS REQUESTED	34

TAB 2 R. 61.11(1)(e) Certificate

TAB A Schedule A – *Authorities*

TAB B Schedule B – *Statutes & Regulations*

PART I APPELLANT, PRIOR COURT AND RESULT

1. Pikangikum First Nation [PFN] appeals the December 23, 2010 Superior Court judgment of J. deP. Wright J, dismissing the Appellant's claim against Robert D. Nault for misfeasance in public office while Nault was Minister of Indian Affairs.

PART II OVERVIEW

2. In 2000, PFN served Nault personally with a lawsuit at a business meeting PFN arranged for him. Nault reacted with angry words and threats. The meeting ended in "complete disaster."

3. After the meeting, Nault required officials to get his approval for all decisions about Pikangikum. He told officials that no PFN projects would be approved until PFN dropped its court case. PFN then had \$40 million of projects proceeding that required INAC approvals.

4. Pikangikum refused to drop its court case. In 2001, all of PFN's projects stalled. Ultimately, the \$40 million of projects failed.

5. In March and April 2002, Nault personally took control of the process to intervene in Pikangikum's financial administration. He required officials to impose third party management unless PFN dropped its court case and made media statements. PFN refused to do this. Nault thwarted the required process and imposed third party management.

6. This appeal raises four issues:

(a) **Nault's March/April 2002 Intervention Constitutes Misfeasance.** The Judge overlooked the events of March/April 2002. He made no findings or rulings about these acts of misfeasance whatsoever. Appellant says this is palpable and overriding error.

(b) **Nault's Stalling Projects Constitutes Misfeasance.** The Judge ruled: "Mr. Nault cannot be convicted of failing to act when he had no legal obligation to act. These projects involved millions of dollars of discretionary spending." The Judge made two errors. Nault did not fail to act; he acted to prohibit officials from following required

processes for project approval. Second, assuming any of Nault's conduct is a failure to act, misfeasance occurs if the discretion not to act is exercised for an improper purpose. The fact that Nault exercised his discretion not to approve PFN's projects in order to force withdrawal of PFN's court case, constitutes an improper purpose in light of the statutory regime.

(c) **Nault's Vicarious Admission by Skillen.** Nault's trusted employee, Patti Skillen, told a senior official that Nault directed that "no projects would proceed until the litigation pending before the Federal Court Trial Division had been withdrawn." The Judge ruled, without any reasons, that Skillen's statements were not vicarious admissions of Nault. Appellant says Skillen's statements fall squarely within the vicarious admission rules.

(d) **Principles for Quantifying Intangible Benefits as Damages.** The Judge departed from the principles recognized in the cases for quantifying intangible benefits and for awarding punitive damages.

PART III FACTS

Pikangikum's Dispute with INAC and Nault

7. **Dispute with INAC.** In March 2000, Pikangikum's fuel tanks failed. Oil inundated PFN's school. INAC and Pikangikum disputed which party was responsible for the spill and cleanup costs of \$1.6 Million.¹

8. In October 2000, Pikangikum's water treatment plant flooded. INAC and Pikangikum disputed who was responsible for the flood.

¹ *Pikangikum v. Nault*, 2010 ONSC 5122, Reasons for Judgment ("Judgment"), paras 29, 30, 34-35, Appeal Book and Compendium ("Appeal Book"), Vol 1, Tab 4, pg 22; Exhibit 139, Appeal Book, Vol 2, Tab 20, pg 543, Exhibit Book, pgs 1147-1148; Exhibit 150, Appeal Book, Tab 21, pg 545, Exhibit Book pgs 2680-2682. Before the spill, PFN gave top priority to replacing the tanks; INAC ordered PFN not to commission new tanks until lengthy bureaucratic conditions were met.

9. On November 17, 2000, INAC notified Pikangikum of its “decision to appoint a Third Party Manager”. The belief that Pikangikum caused the fuel spill and flood motivated INAC’s decision. Third party management is the most severe option INAC has to intervene in a First Nations’ financial affairs. Options to intervene come from Parliament’s “Intervention Procedure”.²

10. On May 18, 2001, INAC signed a third party management contract with A.D. Morrison Ltd., to run from May 1, 2001 until March 31, 2002.³

11. On March 28, 2002, INAC signed a second third party management contract for Pikangikum, to run from April 1, 2002 to March 31, 2003.⁴

12. Pikangikum challenged the November 17th and May 1st third party management appointments by judicial review applications in Federal Court. In November 2002, the Court declared the intervention decision “invalid”.⁵

13. **Dispute with Nault.** In November 2000, shortly after INAC’s third party management decision, Pikangikum turned for assistance to its MP, Minister of Indian Affairs, Nault. Nault agreed to help. A meeting was arranged in Winnipeg for December 9, 2000.⁶

² “Parliament’s Intervention Procedure” is described *infra*, at paras 68-76. The Intervention Procedure authorizes INAC to impose three levels of control over a First Nation’s management of funds that Parliament votes. INAC may intervene in specified circumstances. INAC must follow a detailed, obligatory procedure to intervene; if it does not the intervention is “invalid” (note 5 *infra*). For INAC’s belief see Exhibit 335, Appeal Book, Tab 27, pg 599, Exhibit Book, pgs 1231-1232; Transcript, pg 27, ln 22 – pg 28, ln 3, pg 28, ln 26, Appeal Book, Vol 1, Tab 9, pgs 135, 136; Transcript pg 1803, ln 23 – pg 1804, ln 4 Appeal Book, Vol 1, pg 327; Judgement, paras 49, 56, 59, 64-5, Appeal Book, Vol 1, Tab 4, pg 24, 25, 26.

³ Exhibit 599, Appeal Book, Vol 2, Tab 32, pg 608, Exhibit Book, pgs 216-221; Exhibit 600, Appeal Book, Vol 2, Tab 33, pg 614, Exhibit Book, pg 1328; Exhibit 618, Appeal Book, Vol 2, Tab 35, pg 617, Exhibit Book, pgs 1332-1333; Judgment, paras 88, 94, Appeal Book, Vol 1, Tab 4, pgs 28, 29.

⁴ Exhibit 1439, Appeal Book, Vol 3, Tab 71, pg 782, Exhibit Book, pgs 261-266; Exhibit 1430, Appeal Book, Vol 3, Tab 69, pg 779, Exhibit Book, pg 954.

⁵ *Pikangikum First Nation v. Canada (Minister of Indian and Northern Affairs)*, [2002] F.C.T. 1246, paras 1, 104, 108, Appellant’s Book of Authorities, Tab 25, pgs 158, 162 ; Judgment, paras 70, 92, Appeal Book, Vol 1, Tab 4, pgs 26, 29.

⁶ Exhibit 347, Appeal Book, Vol 2, Tab 28, pg 601, Exhibit Book, pg 1237; Judgment, paras 68-69, Appeal Book, Vol 1, Tab 4, pg 26.

14. This meeting went horribly wrong. Nault said third party management would not be imposed, but there would be a co-management arrangement for capital works. Pikangikum’s then lawyer served Nault personally with court papers.⁷

15. Nault was “shocked”. He felt “bushwacked,” “was very unhappy,” and became “extremely angry”. The meeting ended in “complete disaster.”⁸

16. Nault told PFN at the meeting: “if litigation was going to be an option then do it,” but “they should not expect anything other than an equally litigious response.”⁹

Nault Ordered Officials to Stall Pikangikum’s Projects to Force Withdrawal of Court Case

17. After the meeting Nault vented his anger to INAC’s most senior Ontario official, Regional Director General John Donnelly. Nault instructed Donnelly “to keep him [Nault] informed of everything that was going on and if there were decisions to be made, he had to be consulted beforehand as far as Pikangikum was concerned.”¹⁰

18. Nault instructed Donnelly that officials could not approve any project for Pikangikum without Nault’s say so, and that he would not approve any project unless Pikangikum first withdrew its court case.¹¹

Q. Was there a dispute?

A. Yes, there was a dispute. The Minister wanted them to withdraw their court action before he was prepared to undertake co-management or move ahead with anything.

Q. Sorry. Before – I didn’t hear. Before he wanted them to, before he, before he would agree to co-management or what did you say after?

⁷ Judgment, para 71, Appeal Book, Vol 1, Tab 4, pg 26; Exhibit 360, pg 1, Appeal Book, Vol 2, Tab 29, pg 602, Exhibit Book, pg 1408.

⁸ Judgment, para 71, Appeal Book, Vol 1, Tab 4, pg 26; Transcript, pg 84-85, Appeal Book, Vol 1, Tab 9, pgs 142, 142A; Transcript, pg 1122, ln 29, Appeal Book, Vol 1, Tab 10, pg 193; Transcript, pg 1123, ln 4, Appeal Book, Vol 1, Tab 10, pg 194; Skillen Transcript, December 14, 2009, pg 25, ln 5-8, 9-11, 24, Appeal Book, Vol 1, Tab 8, pg 123.

⁹ Skillen Transcript, December 14, 2009, pg 25, ln 15-20, Appeal Book, Vol 1, Tab 8, pg 123; Exhibit 360, pg 5, Appeal Book, Vol 2, Tab 29, pg 605, Exhibit Book, pg 1411; Judgment, paras 71, 273, Appeal Book and Compendium, Vol 1, Tab 4, pg 26, 55.

¹⁰ Transcript, pg 84, ln 26-28, Appeal Book, Vol 1, Tab 9, pg 142; Transcript, pg 1124, lns 8-13, Appeal Book, Vol 1, Tab 10, pg 195.

¹¹ Transcript, pg 143, ln 10 – pg 144, ln 11, Appeal Book, Vol 1, Tab 9, pg 156, 157; Transcript, pg 149, ln 3-7, pg 217, ln 11-14, Appeal Book, Vol 1, Tab 9, pg 162, 177.

A. Or move ahead with any projects.¹²

19. Nault’s instruction to Donnelly overrode the authority vested in officials to approve Pikangikum’s capital projects.¹³

20. In 2001, all of Pikangikum’s projects stalled because Pikangikum refused to withdraw its court case.¹⁴ Nault admitted at trial that the projects stopped because of the court case:

Q. Okay. Now at discovery, were you asked these questions and did you give these answers at page 364, January 15, question 1564. Question: “This is where we disagree. You say the department stopped it [Pikangikum’s water and sewer infrastructure project], notwithstanding the EPA [effective project approval] was approved, the design was complete, the EPA was agreed to, the funding was in place, it was tendered. They stopped it because they were sued?” Answer: “All projects of Pikangikum stopped when the department was sued.” Question: “It’s very harsh, don’t you agree?” Answer: “Very. It’s very unfortunate that” – were you asked those questions and did you give those answers?

A. I did.

Q. And were those answers true?

A.

Q. Mr. Nault?

A. There’s another section in here where we talked about this – that’s why I was looking for it – which relates to the whole issue of this being reviewed and so it has to be attached to that to make some sense, in my view.

Q. We’re not talking about things being reviewed sir. You just gave the answer that all projects stopped.

A. They did for a certain period of time, yes.¹⁵

21. Nault’s 2004 discovery testimony – that department officials stopped Pikangikum’s water and sewer project pursuant to a policy – was fabricated. There is no such policy.¹⁶

22. Four years after Nault’s discovery testimony, the Court criticized Defendants for breaching court orders to produce documents.¹⁷ Defendants then produced Exhibit 1233, an

¹² Transcript, pg 120, ln 20-27, Appeal Book, Vol 1, Tab 9, pg 149. Skillen also testified that Nault made withdrawal of the court case a condition that had to be met before any project would be approved: Skillen Transcript, December 14, 2009, pg 25, ln 28, Appeal Book, Vol 1, Tab 8, pg 123.

¹³ But for Nault’s instruction, INAC’s RDG had authority to approve capital projects up to \$10M; INAC’s Associate RDG could approve projects up to \$6M; and INAC’s Director of Funding Services had authority up to \$4M. Transcript, pg 1289, ln 14-24, Appeal Book, Vol 1, Tab 10, pg 228.

¹⁴ Exhibit 1924, Appeal Book, Vol 3, Tab 80, pg 806, Exhibit Book, pg 1358; Exhibit 1236, Appeal Book, Vol 3, Tab 52, pg 690, Exhibit Book, pg 1092.

¹⁵ Transcript, pg 1538, ln 4-17, Appeal Book, Vol 1, Tab 10, pg 293.

¹⁶ Transcript, pg 1795, ln 22 – pg 1796, ln 8, Appeal Book, Vol 1, Tab 12, pg 321, 322; Transcript, pg 264, ln 21-265, ln 1, Appeal Book, Vol 1, Tab 9, pg 186; Transcript, pg 1528, ln 25, Appeal Book, Vol 1, Tab 10, pg 290.

email from Donnelly to Skillen, dated October 15, 2001, and other documents which showed Nault's prevarication about why the projects stalled.

Thunder Bay staff indicates Minister was very blunt in terms of Pikangikum and holding position. As you know we have a briefing note on proceeding with water and sewer project through third party. I take his remarks to mean he wants **no new initiatives or projects** in Pik until court action is completed. (Exhibit 1233, double emphasis in original)

23. After receiving Exhibit 1233, Skillen spoke with Donnelly by phone. She said that Nault will not allow projects to proceed until the court action is withdrawn.

MR. MAGNET: Q. ... Patti Skillen testified on December 14, '09, page 84, line nine, that she can't remember her answer. What did she respond?

A. She just said that she, there wasn't going to be anything going until the court action was dropped.

Q. I just want to make sure I'm clear about that. This, there is, you're talking about the water and sewer project.

A. Yes.

Q. And her response is the water and sewer project won't go, or nothing will go until the court action is withdrawn?

A. Nothing will go until the court action is.¹⁸

24. Justice Wright accepted that Nault ordered that no project will go until the court action is withdrawn,¹⁹ but ruled at paragraph 266 that this was not misfeasance:

Was it wrong for the Minister not to embark upon these projects when the legitimacy of those responsible for seeing to their execution was being challenged in courts? If it was wrong, was it a blatant wrong of the sort that this tort addresses? It was not!

Nault Imposed Third Party Management to Force Withdrawal of Court Case

25. **September - October 2001.** On September 10, 2001 Nault ordered Donnelly to tell Pikangikum it must suspend its court case and make a joint press release with INAC before INAC would meet PFN to discuss options under Parliament's Intervention Procedure.²⁰

¹⁷ Smith J., October 19, 2006, paras 8-9, Appeal Book, Vol 3, Tab 87, pg 973: ("It is admitted by the Defendants that they are in violation of my order dated June 14. I am not satisfied that all reasonable steps have been and are being taken to satisfy the undertakings given. I am concerned that the right of the Plaintiff to have this case adjudicated in a timely fashion may be compromised.")

¹⁸ Transcript, pg 226, ln 3-15, Appeal Book, Vol 1, Tab 9, pg 178; Transcript, pg 217, ln 11-14, Appeal Book, Vol 1, Tab 9, pg 177; Judgment, paras 150, 175, Appeal Book, Vol 1, Tab 4, pgs 38, 41.

¹⁹ Judgment, paras 175-176, 257, 150, 157, Appeal Book, Vol 1, Tab 4, pgs 41, 53, 38 (commenting on Transcript, pg 236, ln 2-10, Appeal Book, Vol 1, Tab 9, pg 179; Transcript, pg 147, Appeal Book, Vol 1, Tab 9, pg 160); Judgment paras 257-8, 260-1, 263, 266, 271, Appeal Book, Vol 1, Tab 4, pgs 53, 54, 55.

26. At discovery in 2004, Nault testified under oath that Donnelly imposed these conditions. At trial in 2010, Nault admitted that his 2004 answers were not true. Nault admitted that he, and not any official, imposed the conditions.²¹

27. On October 12, 2001 Pikangikum faxed INAC: “We are not prepared to suspend our court case, which you stated would be a requirement as a condition to agreeing to co-management. This would violate our fundamental rights.”²²

28. Nault instructed Donnelly not to meet with PFN unless the court action was suspended. Nault’s instruction overrode the authority vested in INAC officials to follow Parliament’s Intervention Procedure for determining what intervention, if any, was required.²³

29. Donnelly testified that after Sept. 13, 2001, he had “no authority to meet until court action was withdrawn, or suspended,” and that Nault’s instructions stayed consistent.²⁴

30. **March - April 2002.** INAC’s original third party management contract expired on March 31, 2002. On March 11, 2002, PFN asked officials for a meeting to discuss the possibility of co-management.²⁵

²⁰ Judgment, paras 129-135, Appeal Book, Vol 1, Tab 4, pgs 34, 35; “Parliament’s Intervention Procedure”: see note 5 supra.

²¹ Transcript, pg 1474, ln 12-17, Appeal Book, Vol 1, Tab 10, pg 276; Transcript, pg 1134, ln 5-17, Appeal Book, Vol 1, Tab 10, pg 196; Skillen, December 15, 2010, pg 38, ln 23-25, Appeal Book, Vol 1, Tab 8, pg 124; Transcript, pg 206, ln 27 - pg 207, ln 23, Appeal Book, Vol 1, Tab 8, pgs 170, 171; Transcript, pg 208, ln 23-30, Appeal Book, Vol 1, Tab 9, pg 172; Judgment, para 135, Appeal Book, Vol 1, Tab 4, pg 35. Nault was impeached as to inconsistent statements 18 times during the trial.

²² Exhibit 1236, Appeal Book, Vol 3, Tab 52, pg 689, Exhibit Book, pgs 1091-1093, PFN refused to withdraw the court case on Sept 10, 2001 also: Exhibit 1924, Appeal Book, Vol 3, Tab 80, pg 806, Exhibit Book, pg 1358; Transcript, pg 215, ln 14-15, Appeal Book, Vol 1, Tab 9, pg 175; Judgment, para 172, Appeal Book, Vol 1, Tab 4, pg 41.

²³ Judgment, para 173, Appeal Book, Vol 1, Tab 4, pg 41; Exhibit 1092, Appeal Book, Vol 2, Tab 42, pg 669, Exhibit Book, pgs 1356; Transcript, pg 216, ln 2 - pg 217, ln 14, Appeal Book, Vol 1, Tab 9, pgs 176, 177; Transcript, pg 82, ln 17 - pg 83, ln 7, Appeal Book, Vol 1, Tab 9, pgs 140, 141; Transcript, pg 1546, ln 26 - pg 1547, ln 3, Appeal Book, Vol 1, Tab 10, pg 297, (Nault admits he instructed Skillen to send Exhibit 1430, Appeal Book, Vol 3, Tab 69, pg 779, Exhibit Book, pg 954.)

²⁴ Transcript, pg 216, ln 29 - pg 217, ln 10, Appeal Book, Vol 1, Tab 9, pgs 175, 176.

²⁵ Exhibit 599, Appeal Book, Vol 2, Tab 32, pg 608, Exhibit Book, pgs 216-221; Exhibit 1399, Appeal Book, Vol 3, Tab 67, pg 773, Exhibit Book, pg 942.

31. On March 27, 2002, Nault approved the meeting.²⁶ Nault admitted he knew that the meeting was required by Parliament’s Intervention Procedure.²⁷
32. Prior to the meeting Nault instructed Skillen to send to all senior officials this email:
- Minister has asked me to clarify that no one has authority to make any deals with the First Nation. He anticipates that any official who meets with the First Nation will report back to him and seek direction before proceeding with financial or administrative arrangements of any kind.²⁸
33. INAC officials met with Pikangikum on April 5, 2002. At the meeting, PFN learned that the decision to intervene with third party management for a second year had already been made, and that a third party management contract for April 1, 2002 to March 31, 2003 had been signed.²⁹
34. Skillen ordered officials to accelerate PFN’s audit review and send it to the Minister’s Office.³⁰ Both Skillen and Nault admitted that prior to the meeting they received no information from the audit they ordered that would warrant intervention.³¹
35. Meeting notes record that Chief Quill asked officials: “what options do you have re co-management, requesting co-management.” Officials replied: “court case.”³²
36. Skillen admitted that at that meeting it was made a condition that Pikangikum had to drop its court case to get co-management.³³

²⁶ The meeting approval surprised officials. Donnelly wrote to his Associate that “the Minister had changed our response to Pik. No meetings were agreed to until they drop court action.” Exhibit 1449, Appeal Book, Vol 3, Tab 72, pg 788, Exhibit Book, pg 2697; Transcript, pg 212, ln 24-27, Appeal Book, Vol 1, Tab 9, pg 174; Exhibit 1451, Appeal Book, Vol 3, Tab 73, pg 789, Exhibit Book, pg 955.

²⁷ Exhibit 1434, Appeal Book, Vol 3, Tab 70, pg 780, Exhibit Book , pgs 1126-1127; Transcript, pg 1544, ln 12 - page1545, ln 6, Appeal Book, Vol 1, Tab 10, pgs 294, 295.

²⁸ Exhibit 1430, Appeal Book, Vol 3, Tab 69, pg 779, Exhibit Book, pg 954; Transcript, pg 1545, ln 26 – pg 1546, ln 3, Appeal Book, Vol 1, Tab 10, pgs 295, 296; Skillen, December 15, 2009, pg 49, ln 30, Appeal Book, Vol 1, Tab 8, pg 127.

²⁹ Exhibit 105, Appeal Book, Vol 2, Tab 19, pg 541, Exhibit Book, pgs 1392-1394; Exhibit 1439, Appeal Book, Vol 3, Tab 71, pg 782, Exhibit Book, pgs 261, 266.

³⁰ Exhibit 1388, Appeal Book, Vol 3, Tab 65, pg 771, Exhibit Book, pg 940.

³¹ Transcript, pg 1552, ln 19 - pg 1553, ln 1, Appeal Book, Vol 1, Tab 10, pg 298, 299; Exhibit 1393, Appeal Book, Vol 3, Tab 66, pg 772, Exhibit Book, pg 941; Skillen, December 15, 2009, pg 44, ln 22, Appeal Book, Vol 1, Tab 8, pg 126.

³² Exhibit 98, pg 5, Appeal Book, Vol 2, Tab 18, pg 540, Exhibit Book, pg 1462.

37. Nault’s initials are on Exhibit 1458. This contains meeting minutes which record that third party management will continue “until legal challenges are resolved”.

38. Exhibit 105 is Chief Quill’s letter to officials following the meeting:

On what basis do you propose to use our funding to pay consultants to manage our First Nation's affairs without asking us or even telling us? You informed us at our meeting that it was because of our court challenge against the Minister. This means you are denying us the opportunity to manage our own affairs, simply because we have exercised our right to challenge the Minister's decision through legal channels.

Pikangikum’s Projects

39. When Nault ordered that PFN must drop its court case before projects would be approved, Pikangikum had \$40 million of projects proceeding which required various INAC approvals.³⁴

Water and Sewer

40. Pikangikum developed a \$9.2 Million project to correct contamination of its water supply.³⁵

41. This project was ready to proceed in October, 2001. Wright J found as a fact that RDG Donnelly normally had authority to approve it, but that because of Nault’s instruction, the project had to go to Nault for approval.³⁶

42. INAC’s senior officials wanted to approve the project, but could not because of Nault’s instruction that all projects had to go to the Minister.

³³ Skillen, December 15, 2009, pg 54, ln 15 - 22, Appeal Book, Vol 1, Tab 8, pg 128.

³⁴ Transcript, pg 1205, ln 8-9, Appeal Book, Vol 1, Tab 10, pg 209.

³⁵ Exhibit 1202, Appeal Book, Vol 2, Tab 48, pg 675, Exhibit Book, pg 835-837; Exhibit 72, pg 23, Appeal Book, Vol 2, Tab 16, pg 470, Exhibit Book, pgs 679-742; Transcript, pg 250, ln 24-25, pg 251, ln 2-19, Appeal Book, Vol 1, Tab 9, pg 182, 183; Exhibits 1202, Appeal Book, Vol 2, Tab 48, pg 675, Exhibit Book, pg 835-837; Exhibit 1218, Appeal Book, Vol 3, Tab 49, pg 678, Exhibit Book, pg 1389; Transcript, pg 147, ln 9-12, Appeal Book, Vol 1, Tab 9, pg 160; Judgment, para 155, Appeal Book, Vol 1, Tab 4, pg 38; Exhibit 1227, Appeal Book, Vol 3, Tab 50, pg 681, Exhibit Book, pgs 1084-1087; Exhibit 1281, Appeal Book, Vol 3, Tab 55, pg 712, Exhibit Book, pgs 1375-1380; Judgment, paras 164, 168-169, 204, Appeal Book, Vol 1, Tab 4, pg 39, 40, 45.

³⁶ Judgment, paras 148, 151-152, Appeal Book, Vol 1, Tab 4, pg 38; Transcript, pg 143, ln 10 - pg 144, ln 11, Appeal Book, Vol 1, Tab 9, pg 156, 157.

Q. The letter, the cover letter says, in the second to the last line, "The Minister's office has lead on the Pikangikum file." What does that mean?

A. It means that all decisions in terms of programme and financial decisions, approvals, had to go to the Minister's office. He had the lead on the file and I was asking the Deputy to discuss it with him.

Q. Why can't you just approve them?

A. Because the approval is in the Minister's office at this point. He is, he has made, given us direction that all projects, all funding has to go through his office for approval.³⁷

43. Nault did not approve this project because of the court case.³⁸

44. Donnelly testified:

MR. MAGNET: Q. "However, these projects, if not proceeded, given the extraordinary circumstances and legal issues related to Pikangikum", what are you referring to?

A. I'm referring to the fact that the, the, all projects had to go to the Minister's office and he wasn't approving them until, 'til there were other, 'til the issue of the court case and that were resolved.

Q. Why is the court case relevant?

A. It wasn't to us. It was the Minister's view that he wanted it resolved.³⁹

45. Nault testified:

Q. Summary, first bullet. "The project was tendered and the effective project approval was submitted to Indian and Northern Affairs Canada, INAC, in October, 2001. See that? Mr. Nault, are we on the same page?

A. Yes, okay, I see it, yeah.

Q. The EPA process was delayed due to pending legal action by the First Nation regarding other financial management issues. See that?

A. Yes.

Q. And that's correct, right?

A. Well, it's sort of been what I've been saying, that there were some financial issues and the legal action...

Q. Right.

A. ...which caused other factors to occur.

Q. So this is correct and this is what you've been saying. The water and sewer project was delayed because of legal action over other financial management issues, right?

A. That's what it says, the department says.

³⁷ Transcript, pg 148, ln 28 - pg 149, ln 7, Appeal Book, Vol 1, Tab 9, pg 161, 162; Transcript, pg 138, ln 13 - pg 142, ln 17, Appeal Book, Vol 1, Tab 9, pg 151-155; Transcript, pg 146, ln 3, Appeal Book, Vol 1, Tab 9, pg 159; Exhibits 1202, Appeal Book, Vol 2, Tab 48, pg 675, Exhibit Book, pg 835-837; Exhibit 1218, Appeal Book, Vol 3, Tab 49, pg 678-680, Exhibit Book, Tab 254, pgs 1389-1391; Judgment, paras 156-58, Appeal Book, Vol 1, Tab 4, pg 38-39.

³⁸ Transcript, pg 190, ln 12-19, Appeal Book, Vol 1, Tab 9, pg 163.

³⁹ Transcript, pg 148, ln 18-27, Appeal Book, Vol 1, Tab 9, pg 161.

Q. But that's what you're saying.

A. That's what I've been saying, yes.

Q. Right. And if it were incorrect, you would've sent it back.

A. Yes.⁴⁰

46. But for Nault's order not to approve projects unless PFN dropped the court case, the contractor would have mobilized quickly and completed the water and sewer project within 1.5 to 2 years.⁴¹

Generator Rehabilitation

47. INAC officials expected PFN's diesel generators, the sole source of power for 2100 people, to fail in the winter of 2001-02, causing damage to PFN's people and facilities. Pikangikum developed a \$220,000 project to rehabilitate the generators.⁴²

48. Three INAC officials had authority and wanted to approve the project. All three deemed the project urgent. Because of Nault's instruction, none of the officials approved the project.⁴³

Q. Why didn't you approve it?...

A. Because we had been instructed that any commitments had to go through the Minister's office so we sent it up to him for his review and decision.

MR. MAGNET: Q. \$220,000.00?

A. Yes.

49. The project stalled with the Minister until the end of February, past the point where stalling the project threatened PFN's power supply for the winter.⁴⁴

⁴⁰ Exhibit 1642, Appeal Book, Vol 3, Tab 77, pg 801, Exhibit Book, pgs 1892-1893; Transcript, pg 1533, ln 20 - pg 1534, ln 10, Appeal Book, Vol 1, Tab 10, pg 291-292; Skillen, December 14, 2010, pg 15, ln 18-21, Appeal Book, Vol 1, Tab 8, pg 122.

⁴¹ Transcript, pg 190, ln 21-23, pg 191 ln 4-8, Appeal Book, Vol 1, Tab 8, pg 163, 164.

⁴² Exhibit 1183, Appeal Book, Vol 2, Tab 46, pg 673, Exhibit Book, pg 829; Exhibit 1196, Appeal Book, Vol 2, Tab 47, pg 674, Exhibit Book, pg 831; Exhibit 1283, Appeal Book, Vol 3, Tab 56, pgs 718-719, Exhibit Book, pgs 2694-2695; Judgment, paras 148, 154, Appeal Book, Vol 1, Tab 4, pgs 37, 38.

⁴³ Transcript, pg 135, ln 23, Appeal Book, Vol 1, Tab 9, pg 150; Transcript, pg 1289, ln 5-24, Appeal Book, Vol 1, Tab 9, pg 228, Judgment, paras 84, 151, Appeal Book, Vol 1, Tab 4, pgs 28, 38.

⁴⁴ Exhibit 1284, Appeal Book, Vol 3, Tab 57, pg 720, Exhibit Book, pg 771, dated Nov. 16 2001 states: The Gen. upgrade for \$220,800 was not rejected. Apparently it's on the Minister's desk." Judgment, para 148, Appeal Book, Vol 1, Tab 4, pg 38.

50. Nault’s refusal to approve this project in a timely way caused “a mutiny” by INAC officials in the Capital Management Committee. In September, 2001, senior officials pressured the RDG to ask the Deputy Minister personally to intervene with the Minister to get authority to proceed with the project which they deemed urgent.⁴⁵

51. Nault approved the project on February 27, 2002. Nault admitted that this was deep into the winter, beyond the time when the risk of failure was said to be certain to materialize. Nault admitted that this was at or about the time officials said the diesels would fail.⁴⁶

52. Nault admitted that normally his office did not approve minor capital projects. He could not explain why three officials, who could give approval, had to ask him for the approval.⁴⁷

School

53. Pikangikum developed a project to construct a new school valued at \$15-18 million. \$4.5 million was placed in INAC’s capital plan for the school in 2000-01.⁴⁸

54. Nault delayed the school project because of the court case.⁴⁹

55. Wright J said the school project “was delayed by bureaucratic lethargy fuelled by the refusal of the band to accept the previously agreed upon enrolment projections.”⁵⁰ While Nault said in examination in chief that the school project stopped because officials could not get agreement on enrolment figures, Nault admitted this was inaccurate in cross examination when

⁴⁵ Exhibit 1277, pg 4, Appeal Book, Vol 3, Tab 54, pg 712, Exhibit Book, pg 8877; Judgment, paras 156-158, Appeal Book, Vol 1, Tab 4, pg 38, 39.

⁴⁶ Exhibit 1380, Appeal Book, Vol 3, Tab 63, pg 769, Exhibit Book, pg 1388; Transcript, pg 1314, ln 11-29, Appeal Book, Vol 1, Tab 10, pg 234.

⁴⁷ Transcript, pg 1313, ln 24 - pg 1314, ln 1, Appeal Book, Vol 1, Tab 10, pg 233-234.

⁴⁸ Exhibit 934, Appeal Book, Vol 2, Tab 39, pg 664, Exhibit Book, pgs 787-789, Exhibit 72, p 23, Appeal Book, Vol 2, Tab 16, pg 470, Exhibit Book, pgs 679-742; Transcript, pg 252, ln 17-24, Appeal Book, Vol 1, Tab 9, pg 184.

⁴⁹ Donnelly testified: “Q. Did you stop providing reports at some point? A. Yes we did. Q. Why was that? A. Because we were not proceeding with the [school] project any further until other issues were resolved. Q. What were those other issues? A. Until the issue of the court case was resolved, the Minister instructed us we weren’t to proceed any further.” Transcript, pg 236, ln 2-10, Appeal Book, Vol 1, Tab 9, pg 179; Transcript, pg 1277, ln 5 - pg 1278 ln 11, Appeal Book, Vol 1, Tab 10, pg 224-225; Exhibit 1323, Appeal Book, Vol 3, Tab 60, pg 725, Exhibit Book, pg 889 (Skillen’s instruction to officials to stop providing monthly reports on school progress).

⁵⁰ Judgment, para 275, Appeal Book, Vol 1, Tab 4, pg 56.

confronted with a report stating officials are in agreement with the enrolment projections. Wright J ignored Nault’s retraction in cross. He cited nothing else. There is no evidence to support the finding, which is palpable and overriding error.⁵¹

56. But for Nault’s order not to approve projects unless PFN dropped the court case, the school project would have continued to move through official processes to construction.⁵²

Gridline

57. Pikangikum started construction of an electrical gridline in 1999 at a cost of about \$16 million.⁵³ Construction stalled in 2000,⁵⁴ with about 35% of the grid line constructed.⁵⁵ Financing for the project was the problem.

58. In 2001, Nault took control of all PFN projects and required his approval for all gridline decisions.⁵⁶

59. In the summer of 2001, INAC senior officials crafted a plan to get the project back on track with funds from INAC’s economic development envelope.⁵⁷ INAC would allocate \$2.8

⁵¹ Transcript, pg 1153, ln 7-17, Appeal Book, Vol 1, Tab 10, pg 199, Exhibit 671, Appeal Book, Vol 2, Tab 37, pg 658, Exhibit Book, pgs 1385-1387; Transcript, pg 1259, ln 6-17, Appeal Book, Vol 1, Tab 10, pg 219; Transcript, pg 1264, ln 30 - pg 1265, ln 24, Appeal Book, Vol 1, Tab 10, pg 220-221, Wright J noted Exhibit 671 at para 104, Appeal Book, Vol 1, Tab 4, pg 31, but ignored it when making his finding. As to “bureaucratic lethargy,”: Nault complained about this in Chief; Transcript, pg 1152, ln 30 - pg 1153, ln 21, Appeal Book, Vol 1, Tab 10, pg 198-199. In cross, he was taken through monthly Briefing Notes officials sent to him at his request, showing steady progress, including agreement on school enrolments (Exhibit 671, May 23, 2001, Appeal Book, Vol 2, Tab 37, pg 658, Exhibit Book, pgs 1385-1387), school planning study completed (Exhibit 1300, Nov 26, 2001, Appeal Book, Vol 3, Tab 59, pg 722, Exhibit Book, pgs 870-881), INAC comments on study (Exhibit 1410, Feb 11, 2002, Appeal Book, Vol 3, Tab 68, pg 774, Exhibit Book, pgs 1870-1883) and PFN response to INAC’s comments (Exhibit 1410, Mar 18, 2002, Appeal Book, Vol 3, Tab 68, pg 774, Exhibit Book, pgs 1870-1883; Transcript, pg 1259, ln 3-18, Appeal Book, Vol 1, Tab 10, pg 219; Transcript, pg 1266, ln 7-26, Appeal Book, Vol 1, Tab 10, pg 222; Transcript, pg 1279, ln 28 - pg 1280, ln 7, Appeal Book, Vol 1, Tab 10, pg 226. Wright J does not comment on these exhibits or the lengthy exchange in cross at all.

⁵² The project was moving well, as the monthly reports Nault reviewed show: supra note 51. Transcript, pg 238, ln 2-9, Appeal Book, Vol 1, Tab 9, pg 180; Transcript, pg 239, ln 9-11, Appeal Book, Vol 1, Tab 9, pg 181.

⁵³ Transcript, pg 252, ln 4-16, Appeal Book, Vol 1, Tab 9, pg 184, Direct Examination John Donnelly.

⁵⁴ Transcript, pg 191, ln 14-21, Appeal Book, Vol 1, Tab 9, pg 144.

⁵⁵ Judgment, at para 28, Appeal Book, Vol 1, Tab 4, pg 21.

⁵⁶ Exhibit 612, Appeal Book, Vol 2, Tab 34, pg 615, Exhibit Book, pg 763; Judgment, at para 79, 148, Appeal Book, Vol 1, Tab 4, pg 27, 37; Transcript, pg 192, ln 16-22, Appeal Book, Vol 1, Tab 9, pg 165, Direct Examination John Donnelly.

⁵⁷ Transcript, pg 194, ln 6-10, Appeal Book, Vol 1, Tab 9, pg 167.

million in funds, which would make other funds available from FedNor. The plan would enable construction to resume by August 15, 2001.⁵⁸ The plan was contingent on Nault’s approval.⁵⁹

60. Donnelly testified that Exhibits 1047 and 1067 correctly show why the grid did not restart: as of August 22, 2001, despite other issues being resolved, the project could not proceed because the “Minister will not approve the funds”:

Q. What are the results?

A. Well it’s, the Minister’s not prepared to proceed at the present. Consider other options to have the grid extended. It’s...

Q. Could you go forward with it then, as a capital project, after that?

A. No.⁶⁰

61. The issue is why Nault “was not prepared to proceed” with INAC’s plan. The trial evidence was that, with financing issues resolved, the grid project could restart by August 15, 2001 but for Nault withholding his approval. The evidence was that Nault refused to give any approvals unless Pikangikum dropped its court case.⁶¹

PART IV LAW AND ARGUMENT

Parliament’s “Indian and Inuit Affairs Program”

62. In 2000-01 Parliament voted \$4.14 billion to INAC for the Indian and Inuit Affairs Program [IIA Program].⁶² The objectives of the IIA program are set out in the *Estimates*, which have statutory force.⁶³ These objectives are binding on INAC, INAC officials and INAC’s Minister.⁶⁴

⁵⁸ Transcript, pg 192, ln 22 - pg 193, ln 6, Appeal Book, Vol 1, Tab 9, pg 165, 166.

⁵⁹ Transcript, pg 195, ln 8-14, Appeal Book, Vol 1, Tab 9, pg 168.

⁶⁰ Transcript, pg 195, ln 21 - 196, ln 4, Appeal Book, Vol 1, Tab 9, pg 168, 169.

⁶¹ *Supra*, paras 22-28

⁶² *Appropriation Acts Nos. 1, 2, 3, 2000-01*, 2nd sess, 36th Parl, Sch 1, Appellant’s Book of Authorities, Tab 1, pgs 1-18.

⁶³ The *Estimates* include the *Main Estimates* which “directly support the *Appropriations Act*” by identifying the spending authorities (votes); and the Departmental Plans divided into *Report on Plans and Priorities* [RPP] and *Departmental Performance Report* [DPR]. *2000-01 Estimates*, Exhibit 28, pg vi, pg 1-6, Appeal Book, Vol 1, Tab 13, pg 334, 335-340, Exhibit Book, pages, 633, 634-639. These documents tell Parliament what objectives the funds are for, and account to Parliament for INAC’s results with these objectives *2000 – 01 Estimates*, Exhibit 29, Appeal

IIA Program Objectives

63. The IIA Program objectives are: to enhance the capacity of First Nation governments to provide services, and to build infrastructure on First Nation reserves so that First Nation people will enjoy services comparable to those other Canadians receive.⁶⁵

Intervention Procedure and its Objectives

64. Parliament pursues the objective of enhancing the capacity of First Nation governments by directing INAC to transfer funds to First Nations “for the delivery of programmes or capital programmes on reserves.”⁶⁶

65. Parliament intends that First Nations should self-administer the funds transferred in order to build capacity and develop a sense of ownership and responsibility.⁶⁷

Book, Vol 2, Tab 14, pg 358, Exhibit Book, pgs 657-668, Part III, INAC *RPP*, opening page, unnumbered; Transcript, pg 13-14, Appeal Book, Vol 1, Tab 9, pg 131, 132. Sections 3 and 4 of the *Appropriation Acts*, Appellant’s Book of Authorities, Tab 1, pg 3, provide for incorporation of the conditions, terms and purposes of the *Estimates*, which give the objectives stated therein statutory force. The workings of the *Appropriation Acts* and *Estimates* is described in Canada, Parliament, *House of Commons Procedure and Practice* (2nd 2009), §18 Financial procedures/The Business of Supply/Main Estimates

online:<http://www.parl.gc.ca/procedure-book-livre/Document.aspx?sbdid=F26EB116-B0B6-490C-B410-33D985BC9B6B&sbpid=1&Language=E&Mode=1>, Appellant’s Book of Authorities, Tab 39, pg 230.

⁶⁴ Transcript, pg 15, ln 13, Appeal Book, Vol 1, Tab 9, pg 133; Transcript, pg 1206, ln 25 - pg 1207 ln 13, Appeal Book, Vol 1, Tab 10, pg 211; Transcript, pg 1438, ln 27 – pg 1439, ln 7, Appeal Book, Vol 1, Tab 10, pg 268, 269.

⁶⁵ These objectives are stated in Exhibit 29, which is INAC, *Report on Plans and Priorities*, 2000-01, pp. 3, 11-12, 15, Appeal Book, Vol 2, Tab 14, pg 411, 419-420, Exhibit Book, pgs 667, 675-676 as “to enhance the capacity of Aboriginal governments and organizations to run accountable, responsive government systems” and “to enable Status Indians living on reserve to have access to basic services comparable to those available to other Canadians.” Under the heading “Objectives”, the business ln description of the IIA Program is to address “the discrepancies in living standards between First Nations and Inuit and non-Aboriginal people; and [to] promote enhanced skills and expertise leading to more sustainable and accountable First Nations and Inuit governments.” See also Exhibit 28, Canada, *Main Estimates*, 2000-01, ch 13, p 13-4, Appeal Book, Vol 1, Tab 13, pg 351, Exhibit Book, pg 650, and Exhibit 29-b, INAC *Departmental Performance Report*, 2000-01, p 9, 11, Appeal Book, Vol 2, Tab 14, pg 416, 419, Exhibit Book, pgs 569, 571.

⁶⁶ Exhibit 28, p 13-2, Appeal Book, Vol 1, Tab 13, pg 349, Exhibit Book, pg 648; The \$4.14 B Parliament voted for the IIA Program in 2000-01 is by “vote 15,” which is a “transfer vote”.

⁶⁷ *Appropriation Act No. 2, 2000-2001*, Schedule 1, Appellant’s Book of Authorities, Tab 1, pg 12; Transcript, pg 7, ln 31, Appeal Book, Vol 1, Tab 9, pg 130; Transcript, pg 5, ln 30, Appeal Book, Vol 1, Tab 9, pg 129; Transcript, pg 33, ln 21, Appeal Book, Vol 1, Tab 9, pg 138; *RPP*, Exhibit 29, pg 11, Appeal Book, Vol 2, Tab 14, pg 374, Exhibit Book, pg 657-668.

66. Parliament directed INAC to hold First Nations accountable for the \$4.14 billion transferred for the IIA Program. INAC reported to Parliament that it uses an “Intervention Procedure” to hold First Nations accountable.⁶⁸

67. The Intervention Procedure authorizes INAC to intervene in First Nation administration of funds transferred in problem circumstances according to a strict legal procedure.⁶⁹

68. The Intervention Procedure is implemented by National and Regional *Directives*. These are legally obligatory. Failure to comply with them renders intervention invalid and unlawful.⁷⁰

69. The objectives of the Intervention *Directives* are to protect funds transferred to First Nations by authorizing INAC to intervene in problem situations, and also to enhance First Nation capacity by requiring the minimum intervention possible under the circumstances.⁷¹

70. The *Directives* set out very precise criteria that warrant intervention and strict procedures that must be followed to intervene.⁷² The procedures include a meeting between INAC officials and the First Nation concerned, exchange of information, INAC assessment of the circumstances, and INAC selection of the minimum intervention possible.⁷³

⁶⁸ Exhibit 29, INAC *RPP 2000-01*, pg 6, 12, 18-19, Appeal Book, Vol 2, Tab 14, pg 369, 375, 381-382, Exhibit Book, pgs 657-668; Exhibit 29B, INAC *DPR 2000-01*, pg 18, Appeal Book, Vol 2, Tab 15, pg 426, Exhibit Book, pg 585.

⁶⁹ Exhibit 29, INAC *RPP 2000-01*, p. 6, 12, 18-19, Appeal Book, Vol 2, Tab 14, pg 369, 375, 381-382, Exhibit Book, pg 657-668; Exhibit 29B, INAC *DPR 2000-01*, pg 18, Appeal Book, Vol 2, Tab 15, pg 426, Exhibit Book, pg 585.

⁷⁰ Exhibit 208 (Regional Directive), Appeal Book, Vol 2, Tab 23, pg 552, Exhibit Book, pgs 1523-1532; Exhibit 1489 (National Directive), Appeal Book, Vol 3, Tab 76, pg 800, Exhibit Book, pg 2698. Legally obligatory: see Transcript, pg 33, ln 5-10, Appeal Book, Vol 1, Tab 9, pg 138; *Pikangikum First Nation v. Canada (Minister of Indian and Northern Affairs)*, [2002] F.C.T. 1246, at paras 94, 108, 110, Appellant’s Book of Authorities, Tab 25, pg 159, 162: “...the directive is meant to be followed in all cases so that consistency will result.”)

⁷¹ The National Intervention Policy states specifically at para 6.2 that officials must apply “the minimum intervention required by Canada in the circumstances.” Exhibit 1253, p.3, Appeal Book, Vol 3, Tab 53, pg 694, Exhibit Book, pg 1853.

⁷² The National Directive authorizes intervention for: recipient default under the funding agreement, deficit over 8%, denial of auditor’s opinion and “Canada has a reasonable belief, based on material evidence, that the health, safety or welfare of the Recipient’s community members is being compromised.” Exhibit 1253, s. 7.1(a), Appeal Book, Vol 3, Tab 53, pg 694, Exhibit Book, pg 1853.

⁷³ S. 7.2 of the National Directive and secs. 6-8 of the Regional Directive require meticulously detailed procedures, Appeal Book, Vol 3, Tab 53, pg 694-697, Exhibit Book, pgs 1853-1856.

71. The Intervention Procedures are obligatory. Neither INAC nor its Minister can add conditions to them or depart from their requirements.⁷⁴

72. Pikangikum’s funding agreements run from year to year. Where, as in this case, INAC considers extending the intervention from one year to another, the Intervention Procedure must be repeated. Each year intervention is considered there must meet a meeting, exchange of information, discussion and assessment before INAC can decide whether to continue intervention and if so, what level of intervention to apply.⁷⁵

Capital Projects

73. INAC’s “Capital Plan” prioritizes which projects will be built for First Nations from available funds and gives first priority to health and safety projects.⁷⁶ INAC’s National Priority Ranking also requires priority for health and safety projects.⁷⁷

74. Pikangikum’s Water and Sewer, Generator and School projects are health and safety projects.⁷⁸

Health and Safety Projects

75. While INAC’s audit review policy allows capital projects to be stopped when First Nations have audit problems, health and safety projects are exempt and must continue.⁷⁹

⁷⁴ Transcript, pg 39, ln 19, Appeal Book, Vol 1, Tab 9, pg 139; Transcript, pg 1793, ln 20, Appeal Book, Vol 1, Tab 12, pg 319; Transcript, pg 1794, ln 5 - pg 1795, Appeal Book, Vol 1, Tab 12, pg 320-321; Transcript, pg 1790, ln 14 - pg 1791, ln 14, Appeal Book, Vol 1, Tab 12, pg 317-318; *Pikangikum First Nation v. Canada (Minister of Indian and Northern Affairs)*, [2002] F.C.T. 1246, paragraph, 94, Appellant’s Book of Authorities, Tab 25, pg 159.

⁷⁵ Transcript, pg 1786, ln 11, Appeal Book, Vol 1, Tab 12, pg 316; Transcript, pg 1800, ln 28 – 1801, ln 11, Appeal Book, Vol 1, Tab 12, pgs 323-324; Transcript, pg 1802, ln 5-32, Appeal Book, Vol 1, Tab 12, pg 325.

⁷⁶ Transcript, pg 32, ln 6-20, Appeal Book, Vol 1, Tab 9, pg 137. INAC reports water and sewer projects as health and safety projects in its *RPP* and *DPR*.

⁷⁷ This relates to the voted authorities by which INAC receives its funds for the IIA program. Transcript, pg 104 ln 16 - pg 105, ln 27, Appeal Book, Vol 1, Tab 9, pgs 147-148

⁷⁸ Judgment, paras 148, 154 (Generator), Appeal Book, Vol 1, Tab 4, pgs 37, 38; Transcript, pg 32, ln 1-20, Appeal Book, Vol 1, Tab 9, pg 137; Transcript, pg 104, ln 16 - pg 105 ln 27 (Water and Sewer), Appeal Book, Vol 1, Tab 9, pg 147-148; Exhibit 1183, Appeal Book, Vol 2, Tab 46, pg 673, Exhibit Book, pg 829; Exhibit 1196, Appeal Book, Vol 2, Tab 47, pg 674, Exhibit Book, pg 831; Exhibit 1283, Appeal Book, Vol 3, Tab 56, pgs 718-719, Exhibit Book, pgs 2694-2695; Exhibit 161, Appeal Book, Vol 2, Tab 22, pgs 548-551, Exhibit Book, pgs 1379-1382; Transcript, pg 1250 ln 11 -pg 1251, ln 5, Appeal Book, Vol 1, Tab 10, pgs 217-218 (School: Nault admitted that the school portables that the school project would replace raised health and safety concerns.)

Issue 1 Nault's March/April 2002 Intervention Constitutes Misfeasance

76. Wright J ruled:

[208] I do not accept that the intervention by third party manager was the decision of Mr. Nault although he eventually accepted it. The evidence is that it was initiated and brought to its conclusion by his department.

[211] Even if the appointment of the manager was wrongful it was the action of the department and there is no independent action against the Crown for the actions of the department.

77. There is no mention in Wright J's reasons that the Intervention Procedure was applied in March/April of 2002.⁸⁰ He made no findings of fact or rulings of law concerning this issue. He ignored, overlooked or forgot about Appellant's principal claim.⁸¹ This is a palpable and overriding error.⁸²

78. The findings which should be made are at paragraphs 34-42, *supra*. All of the testimony comes from the Defendants' witnesses on cross-examination. The evidence is un-contradicted.

79. Nault took control of the intervention process and corrupted it to force Pikangikum to drop its court case. Under Nault's direct control, officials imposed and signed a contract for third party management without following the required procedures of holding a meeting, exchanging information or making the necessary assessments. Nault then authorized a sham meeting at which officials offered lesser intervention if PFN would drop its court case.

⁷⁹ Exhibit 1765, Appeal Book, Vol 3, Tab 79, pg 805, Exhibit Book, pg 1886.

⁸⁰ Judgment, para 209, Appeal Book, Vol 1, Tab 4, pg 47, Wright J wrote: "By ... November 2002 there had been three moves towards intervention: the notice of Nov 17 2000 (doc 335) ...; the notice of May 1 2001 (doc 600) ... and the notice of May 10 2001 (Doc 618) ..." Nowhere does Wright J mention the fourth move to intervention, in March/April, 2002.

⁸¹ At trial, Plaintiff's *Written Argument*, para 228, Appeal Book, Vol 3, Tab 88, pg 1016, reads: "Mr. Nault bargained with the Intervention Policy in March/April, 2002 to force Pikangikum to withdraw its court case and make statements in the media favourable to Nault. Use of the Intervention Policy to achieve objectives collateral to the policy is unlawful, and Mr. Nault knew that." When this issue was developed at trial, Wright J observed: "This is important" (Transcript, pg 1802, ln 10, Appeal Book, Vol 1, Tab 12, pg 325) and himself questioned Defendants' witness to clarify that the procedures must be repeated each year intervention was contemplated (Transcript, pg 1786, ln 11-30, pg 1802, ln 5-32, Appeal Book, Vol 1, Tab 12, pgs 316, 325).

⁸² *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras 1, 8, 10, 25, 36, Appellant's Book of Authorities, Tab 17, pgs 118-121; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014 at para 15, Appellant's Book of Authorities, Tab 34, pg 210: palpable and overriding error requires error "that gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion."

80. The ruling which should be made is that bargaining levels of intervention for dropping court cases is an unlawful use of the Intervention Power for two reasons. It violates the National and Regional *Directives* which require precise criteria for intervention, and it violates the strict procedure for assessing the minimum intervention possible each year. It also deviates from the statutory purpose to build First Nation capacity as much as circumstances allow and pursues Nault’s improper private purpose.

81. Correct implementation of the procedure could have affected the intervention decision.⁸³

82. Wright J also ruled that Nault could lawfully require Pikangikum to make media statements before INAC officials were allowed to meet PFN and apply the intervention policy according to Parliamentary requirements.

[141] Even if the Minister wanted some positive press that was not a tortious demand. It was natural for him to want some closure on the public relations front....

[268] ...*the Band had resorted to the court of public opinion and through its media releases, interviews, publicity attention-getting marches etc. had invoked the need for some closure on the media front* (emphasis added).

83. Contrary to Wright J’s rulings, Pikangikum did not “invoke the need for some closure on the media front”. What PFN did was to protest the Minister’s actions by exercising its constitutionally protected rights to speak, to demonstrate, and to go to court.

84. Wright J is of the opinion that the political advantage of the Minister supersedes the powers and duties of INAC officials pursuant to the Intervention Procedure. He criticized INAC officials for failing to prioritize Nault’s political benefits and liabilities ahead of the officials’ powers and duties under the Intervention Procedure.⁸⁴ This is an error of law.

85. Wright J ruled that it was lawful for Nault to require PFN to make media statements and withdraw its court case before he would allow officials to make the assessments the intervention

⁸³ Transcript, pg 1801, ln 6-13, Appeal Book, Vol 1, Tab 12, pg 324; Transcript, pg 1806, ln 4-10, Appeal Book, Vol 1, Tab 12, pg 329.

⁸⁴ Judgment, paras 47 and 59, Appeal Book, Vol 1, Tab 4, pgs 24, 25.

procedure required and to apply the minimum intervention possible (paragraphs 141, 260). This is error of law. Intervention must be based on the required assessments only, not on extraneous private criteria of media statements and withdrawing court cases.

Issue 2 Nault’s Stalling Projects Constitutes Misfeasance

86. Justice Wright ruled:

[193] Liability may arise as a result of an action or as a result of a failure to act but failure to act can amount to misfeasance in a public office only in those circumstances in which the public officer is under a legal obligation to act. [*Odhavji Estate v. Woodhouse*, [2003] 3 SCR 263 ¶24]

[195] The plaintiff admits that ... these projects are not mandatory....

[196] Mr. Nault cannot be convicted of failing to act when he had no legal obligation to act.

Omissions

87. This ruling erroneously characterizes Nault’s conduct as omissions.

88. INAC has an elaborate process for authorizing major capital projects which includes a feasibility study, preliminary project approval and effective project approval. INAC has a simpler process for authorizing minor capital projects. The process for capital projects is controlled by regional officials far removed from the Minister.⁸⁵

89. Nault took control of the approval process. Nault prevented officials from doing their duties according to objectives of the IIA program and its implementing *Directives*. Instead, Nault instructed officials not to approve projects until PFN dropped its court case.

90. Nault’s actions were positive and deliberate: he took control and gave orders. He did not omit to act in the sense explained in *Odhavji*, paragraph 24.⁸⁶

91. Nault interrupted the ordinary processing of PFN projects by INAC officials. Nault admitted that the Minister would never see the generator project or be involved in its approval.⁸⁷

⁸⁵ Transcript, pg 100, ln 27 - pg 102, ln 28, Appeal Book, Vol 1, Tab 9, pg 143-144.

⁸⁶ See *infra* para 102.

⁸⁷ Transcript, pg 1313, ln 24 - pg 1314, ln 1, Appeal Book, Vol 1, Tab 10, pgs 233-234.

INAC officials had authority to approve the generator and water and sewer projects and deemed it urgent to do so.⁸⁸ Nault had to act to stall them.

92. Nault acted positively and deliberately to stall the school project by requiring officials to withhold approvals until PFN agreed to withdraw/suspend the court case. Eventually the school would require Treasury Board approval.⁸⁹ This is irrelevant to the events of 2001, when Nault acted to stall it.

93. Nault's actions were deliberate, unlawful actions. They were not omissions to act.

Improper Purpose Doctrine

94. In *Three Rivers DC v. Bank of England* the House of Lords fully reviewed the history of the misfeasance tort, and set out its underlying rationale and constituent elements.⁹⁰ All of the Law Lords agreed that official power exercised for an improper purpose makes the exercise of power unlawful:

Every power granted to a public official is granted for a public purpose. For him to exercise it for his own private purposes, whether out of spite, malice, revenge, or merely self-advancement, is an abuse of the power. It is immaterial in such a case whether the official exceeds his powers or acts according to the letter of the power.⁹¹

Lord Steyn said:

[t]he rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes.⁹²

⁸⁸ Judgment, para 151, Appeal Book, Vol 1, Tab 4, pg 38.

⁸⁹ Judgment, para 196, Appeal Book, Vol 1, Tab 4, pg 43.

⁹⁰ *Three Rivers DC v. Bank of England*, [2000] 3 All E.R. 1 [*Three Rivers*], Appellant's Book of Authorities, Tab 33, pgs 193-208. The proceeding adjourned to hear further submissions on the pleaded allegation, before deciding what order to make. The major doctrine concerning the misfeasance tort is in the first, adjourned proceeding. In *Three Rivers (No 3)*, [2001] 2 All E.R. 513 the Law Lords made further, summary-type comments about the misfeasance tort.

⁹¹ *Three Rivers*, pg 49, Appellant's Book of Authorities, Tab 33, pg 206, per Lord Millett.

⁹² *Three Rivers*, pg 7, Appellant's Book of Authorities, Tab 33, pg 195; see also: Lord Hope, pg 12, Appellant's Book of Authorities, Tab 33, pg 197; Lord Hutton, pg 40, Appellant's Book of Authorities, Tab 33, pgs 198-199; Lord Hobhouse, pg 43, Appellant's Book of Authorities, Tab 33, pgs 200-201.

95. This Court observed that the *Three Rivers* decision “was largely adopted into Canadian law through the Supreme Court decision in *Odhavji Estate v. Woodhouse*.”⁹³ In *Odhavji*, the Supreme Court expressly adopted the *Three Rivers* improper purpose doctrine.⁹⁴

96. The improper purpose doctrine is long standing Canadian law. The seminal case, *Roncarelli v. Duplessis*, explained that a purpose is improper if official conduct is motivated by reasons irrelevant to the objects and purposes of the statute: “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.”⁹⁵

97. Like *Three Rivers*, *Roncarelli* teaches that discretionary power must be confined to the objects and purposes of the statute which creates it. The use of public power for other purposes is *unlawful*.

98. In *Montréal v. Montreal Port Authority*, the Supreme Court of Canada explained:

... in a country founded on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness. While this discretion does of course exist, it must be exercised within a specific legal framework.⁹⁶

Improper Purposes and Omissions

99. The improper purpose doctrine is overarching; it applies to failures to act as well as to deliberate actions. Duplessis’ revocation of Roncarelli’s liquor licence – *his action* – became unlawful because Duplessis’ purpose for acting was enmity towards Jehovah’s Witnesses, an improper purpose even though the *Quebec Liquor Act*,⁹⁷ granted power to “cancel any permit at ... discretion”.

⁹³ *O’Dwyer v. Ontario (Racing Commission)* 2008 ONCA 446, 293 D.L.R. (4th) 559 [*O’Dwyer*], para 43. Appellant’s Book of Authorities, Tab 24, pgs 155-156.

⁹⁴ *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 [*Odhavji*], para 26, Appellant’s Book of Authorities, Tab 23, pg 147.

⁹⁵ *Roncarelli v. Duplessis*, [1959] S.C.R. 121, pg 140, Appellant’s Book of Authorities, Tab 29, pg 181.

⁹⁶ *Montréal v. Montreal Port Authority*, 2010 SCC 14, para 33, Appellant’s Book of Authorities, Tab 17, pg 115.

⁹⁷ *Roncarelli v. Duplessis*, [1959] S.C.R. 121, para. 31, Appellant’s Book of Authorities, Tab 29, pg.

100. Duplessis stated “no future licence would ever issue to [Roncarelli]”. Duplessis’ subsequent choice not to grant a licence to Roncarelli – *his omission* – also would be unlawful because the purpose for the exercise of discretion would be the same improper purpose of enmity.

101. *Odhavji* accepted that omissions can satisfy the element of unlawful conduct required by the misfeasance tort.⁹⁸ This is the case where an official has a duty to act and does not act, as Lord Millet pointed out in *Three Rivers*.⁹⁹ The choice of an official to do nothing, where the official has discretionary power to act, will also satisfy the requirement for unlawful conduct where the official’s discretionary choice is motivated by an improper purpose.

102. Whether “a legal obligation to act” is present does not end the inquiry in this case. To be lawful, the reason for Nault’s discretionary choice not to act must be consistent with the purposes of the IIA program.

103. To the extent any of Nault’s behaviour can be characterized as an omission, the issue becomes: why did Nault fail to act when he had discretion to act or not to act? Was his motivating purpose to further the objectives of the IIA program, or was it to pursue some improper private purpose?

104. Nault’s order to withhold project approvals until PFN dropped the court case was unlawful, whether or not there was a statutory duty to build the projects. Nault’s order became unlawful when his purpose departed from the objectives of the IIA program – to build

⁹⁸ *Odhavji*, para 24, Appellant’s Book of Authorities, Tab 23, pg 146. The Supreme Court referred to the speeches in *Three River*. Lord Hutton stated, p. 41: “ I agree with the opinion of Clarke J ([1996] 3 All ER 558 at 583), that the tort can be constituted by an omission by a public officer as well as by acts on his part. As Brennan J stated in Mengel’s case ((1995) 185 CLR 307 at 355): ‘Any act or omission done or made by a public official in purported performance of the functions of the office can found an action for misfeasance in public office.’ But whether the public officer is sued in respect of an act or an omission, it must be a deliberate one involving an actual decision and liability will not arise from injury suffered by mere inadvertence or oversight.” See also Lord Hobhouse, p 43 and Lord Millet p 50.

⁹⁹ *Three Rivers*, pg 50, Appellant’s Book of Authorities, Tab 33, pg 208.

infrastructure on reserve so that First Nations people will enjoy services comparable to other Canadians. Justice Wright erred when he failed to consider whether the purpose of Nault’s alleged omissions were proper or improper in light of IIA program objectives.

105. Justice Wright ruled that “setting aside of the litigation were [sic] not unreasonable” as a condition of proceeding with the projects.

[257] Mr. Nault did not cancel any project. At most, he deferred it pending complete resolution of the existing dispute. This was unfortunate for Pikangikum but understandable...

[260] Mr. Nault’s request for the setting aside of the litigation were not unreasonable; (*sic*). Unfortunately, the litigation had taken on a life of its own. It had come to symbolize the power struggle being engaged in by both parties.

[266] Was it wrong for the Minister not to embark upon these projects when the legitimacy of those responsible for seeing to their execution was being challenged in the courts? If it was wrong, was it a blatant wrong of the sort that this tort addresses? It was not!

106. Nault’s order that PFN drop its court case before capital projects could go forward is inconsistent with the purposes of the IIA program. Those purposes are to provide First Nation people with services equal to non-Aboriginal people; and to “develop Aboriginal governments” by transferring to First Nations funds and responsibility for program delivery on reserves”.¹⁰⁰ PFN had valid reasons to challenge third party management, including responsibility for \$1.6 million in “polluter pays” costs for the fuel spill. PFN has a fundamental right to go to court to demand justification for official decisions.¹⁰¹

107. Nault’s condition of dropping/suspending the court case before capital projects could go forward is not “reasonable” or “understandable” as Wright J stated. It is unlawful as the improper purpose precedents state.

¹⁰⁰ *Supra*, paras 67, 73.

¹⁰¹ *B.C.G.E.U. v. B.C. (A.G.)*, [1988] 2 S.C.R. 214, Appellant’s Book of Authorities, Tab 5, pgs 31-33: per Dickson J at para 26: “the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. ... Any action that interferes with such access by any person or groups of persons will rally the court’s powers to ensure the citizen of his or her day in court.” See McIntyre J at para 75.

108. Nault acted unlawfully when he held up Pikangikum’s capital projects because PFN would not drop its court case. Assuming, *arguendo*, that any of Nault’s conduct can be characterized as an omission, the improper reason for the omission makes Nault’s discretionary choice not to act unlawful.

Constituent Elements of the Tort

109. Misfeasance in public office requires: a public officer, exercising public powers, an unlawful act, knowledge the act is unlawful, and knowledge that harm to the plaintiff is likely.¹⁰² It is admitted that Nault was a public officer exercising public powers.¹⁰³ Corrupting the intervention procedure and stalling projects are unlawful acts.

110. Because Wright J ruled, erroneously, Nault committed no unlawful acts, he did not consider Nault’s knowledge of unlawfulness or likely harm. This Court should find that Nault knew his acts were unlawful and likely to cause harm.

Knowledge of Unlawfulness

111. Nault admitted that he was aware of the legal objectives of the IIA program and that these were binding on him as Minister.¹⁰⁴

112. Nault admitted that the April 5, 2002 meeting was pursuant to the Intervention Procedure and he admitted he knew what the Intervention Procedure required.¹⁰⁵ Nault admitted that he did not tell the truth when he testified at discovery that Donnelly imposed the conditions to abandon

¹⁰² *Odhavji*, para 32, Appellant’s Book of Authorities, Tab 23, pg 148; *O’Dwyer*, Appellant’s Book of Authorities, Tab 24, pgs 151-156.

¹⁰³ *Statement of Claim*, paras 3 & 4, Appeal Book, Vol 1, Tab 5, pg 68; *Statement of Defence*, para 2, Appeal Book, Vol 1, Tab 6, pg 89.

¹⁰⁴ Transcript, pg 1171, ln 16-24, Appeal Book, Vol 1, Tab 10, pg 200; Transcript, pg 1206, ln 25 - pg 1207 ln 13, Appeal Book, Vol 1, Tab 10, pg 210-211; Transcript, pg 1172, ln 18-27, Appeal Book, Vol 1, Tab 10, pg 201; Transcript, pg 1172, ln 31 - pg 1174, ln 6, Appeal Book, Vol 1, Tab 10, pg 201-203.

¹⁰⁵ Transcript, pg 1178, ln 15 - pg 1179, ln 3, Appeal Book, Vol 1, Tab 10, pg 205-206; Transcript, pg 1238, ln 18 – pg 1239, ln 1, Appeal Book, Vol 1, Tab 10, pg 215-216; Transcript, pg 1239, ln 11-18, Appeal Book, Vol 1, Tab 10, pg 216; Transcript, pg 1544, ln 10-25, Appeal Book, Vol 1, Tab 10, pg 294.

the court case and make media statements to get co-management. This suggests, on a balance of probabilities, that Nault prevaricated to hide something he knew was wrong.

113. Nault was aware of the capacity building objectives attached to vote 15 funds and that the funds for PFN’s projects were vote 15 funds.¹⁰⁶

114. Nault admitted specifically that he knew that he had no power to stop capital projects that were health and safety projects, and that to do so would be “unlawful”.¹⁰⁷

Knowledge of Harm

115. Nault admitted that “nobody in their right mind would stop a water and sewer project in Pikangikum.”¹⁰⁸

116. Nault received and reviewed Exhibits 1227 and 1281. Exhibit 1227 describes the risk of harm the water and sewer project will prevent. Exhibit 1281 describes the actual harm PFN was experiencing from contaminated water and showed how the water and sewer project, if allowed to start, would eliminate the source of contamination to PFN’s water supply.¹⁰⁹

117. Nault admitted that he knew the new school project PFN had underway would replace a situation that raised health and safety concerns for Pikangikum’s children.¹¹⁰

118. Exhibits 1329 and 1218 brought to Nault’s attention the risk of likely harm associated with delay of the generator project. Nault personally answered Exhibit 1329.¹¹¹

119. Nault admitted that he knew that PFN’s \$40 million of capital projects were to address challenging conditions on PFN’s reserve.¹¹²

¹⁰⁶ Transcript , p 15, ln 13, Appeal Book, Vol 1, Tab 9, pg 113 ; Transcript, pg 1206, ln 25 - pg 1207, ln 13, Appeal Book, Vol 1, Tab 10, pg 210-211; Transcript, pg 1438, ln 27 – pg 1439, ln 7, Appeal Book, Vol 1, Tab 10, pg 268-269.

¹⁰⁷ Transcript, pg 1173, ln 27 - pg 1174, ln 22, Appeal Book, Vol 1, Tab 10, pgs 202-203.

¹⁰⁸ Transcript, pg 1534, ln 21-29, Appeal Book, Vol 1, Tab 10, pg 292.

¹⁰⁹ Nault denied the initials on 1227 were his. Wright J found that the initials were Nault’s, and that Nault received both exhibits and reviewed them: Judgment, paras 161, 164, 204, Appeal Book, Vol 1, Tab 4, pg 39, 45.

¹¹⁰ Exhibit 161, Appeal Book, Vol 2, Tab 22, pgs 548-551, Exhibit Book, pgs 1379-1382; Transcript, pg 1250, ln 11 - pg 1251, ln 5, Appeal Book, Vol 1, Tab 10, pgs 217-218.

¹¹¹ Exhibit 1380, Appeal Book, Vol 3, Tab 63, pg 769, Exhibit Book, pg 1388.

120. Nault knew that third party management was detrimental to Pikangikum, and would harm PFN's opportunity to build its capacity.¹¹³

121. All elements of the tort of misfeasance in public office are satisfied.

Issue 3 Nault's Vicarious Admission by Skillen

122. Wright J stated:

[150] Mr. Donnelly says that on several occasions Ms. Skillen told him that the Minister had said that no projects would proceed until the litigation pending before the Federal Court Trial Division had been withdrawn. This is not direct evidence the Minister actually said this. I do not accept that Ms. Skillen, as close as she was to the Minister, and notwithstanding that the bureaucracy accepted that her word was the word of the Minister, should be accepted as an agent whose testimony binds the Minister. However, again, the fact that she said this is a fact which, taken with other facts, may lead to an inference.

123. Wright J gave no reasons for rejecting the submission that Skillen's statement is a vicarious admission of Nault as satisfying the criteria of the cases.

124. Statements of a party's representative bind as admissions of the party if agency/employment is proved and the agent's/employee's admission is made within the scope of her authority during the subsistence of the agency/employment.¹¹⁴

125. Skillen's statement to Donnelly should be admitted for the truth of its contents as satisfying the conditions of the vicarious admissions hearsay exception. Skillen was a trusted and loyal employee, acting in the course of her employment, making a statement against interest, without any motivation to lie.

¹¹² Transcript, pg 1196, ln 19-24, Appeal Book, Vol 1, Tab 10, pg 208B

¹¹³ Transcript, pg 1118, ln 19 – pg 1119, ln 3, Appeal Book, Vol 1, Tab 10, pg 191, 192.

¹¹⁴ *R. v. Strand Electric Ltd.*, [1969] 1 O.R. 190, (Ont. CA), Appellant's Book of Authorities, Tab 28, pgs 171-173, per Laskin J.A., dissenting. Laskin JA's dissent was approved in *Morrison-Knudsen Co. v. B.C. Hydro & Power Authority* (1973), 36 D.L.R. (3d) 95 (B.C.S.C.), Appellant's Book of Authorities, Tab 22, pgs 139-142; *Christensen (Estate) v. Proprietary Industries Inc.* [2004] A.J. No. 763 at para 44 (Q.B.), Appellant's Book of Authorities, Tab 11, pg 89. *Ault v. Canada (Attorney General)*, [2007] O.J. No. 4924 at para 27 (Sup. Ct. Jus.), Appellant's Book of Authorities, Tab 4, pg 29; Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (3d 2009), pg 380, §6.458, Appellant's Book of Authorities, Tab 37, pg 225; Paciocco & Stuesser, *The Law of Evidence* (6th 2011), p. 152-153, Appellant's Book of Authorities, Tab 36, pgs 222-223.

126. In the alternative, the fact Skillen made the statement, combined with the totality of the evidence, leads to the inference Justice Wright independently drew that Nault allowed no projects to proceed until Pikangikum withdrew its court case.

Issue 4 Principles for Quantifying Intangible Benefits as Damages

127. The basic principle of tort law is that “damages must seek to put the plaintiff in the position he or she would have been in but for the tort for which the defendant is liable.”¹¹⁵

128. Misfeasance in public office is an intentional tort.¹¹⁶ The principles of foreseeability and remoteness of damages do not apply in intentional torts as they do in negligence.¹¹⁷ Damages for intentional torts extend to all consequences of the defendant’s wrong, not just to the foreseeable consequences.¹¹⁸

...where there is an intentional tort, any and all damage is recoverable if it results from the wrongful act, whether or not it is foreseeable. The limiting principle of foreseeability and remoteness is not applicable to intentional torts.¹¹⁹

129. The reason why foreseeability does not limit damages is because the defendant intended his actions and must be responsible for the consequences, foreseeable or not.

130. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage.¹²⁰

131. Nault knew that if he ordered PFN’s projects to be stalled until PFN dropped its court case, the projects’ benefits would be lost to Pikangikum for some period of time, and they were.

¹¹⁵ *Blackwater v. Plint*, [2005] 3 S.C.R. 3, para 81, Appellant’s Book of Authorities, Tab 9, pg 73; *Barber v. Molson Sport & Entertainment Inc.*, 2010 ONCA 570, para 86, Appellant’s Book of Authorities, Tab 7, pg 51.

¹¹⁶ *Odhavji*, para 38, Appellant’s Book of Authorities, Tab 23, pg 149.

¹¹⁷ *Allan et. al. v. New Mount Sinai Hospital et. al.* (1981) 125 D.L.R. (3d) 276 (Ont. C.A.) [Allan], Appellant’s Book of Authorities, Tab 3, pg 25.

¹¹⁸ *Bettel v. Yim* (1978), 20 O.R. (2d) 617 (Co. Ct.), Appellant’s Book of Authorities, Tab 8, pgs 52-66, approved in *Allan*, Appellant’s Book of Authorities, Tab 3, pg 25.

¹¹⁹ *Predovich v. Armstrong*, [1997] O.J. No. 2425 at para 55, Appellant’s Book of Authorities, Tab 27, pg 170.

¹²⁰ *Gershman v. Manitoba (Vegetable Producers’ Marketing Board)*, [1976] M.J. No. 129 (Man. C.A.) at para 24, citing *Quinn v. Leathem*, [1901] A.C. 495 at 537, Appellant’s Book of Authorities, Tab 13, pg 94.

132. Pikangikum is entitled to recover the lost benefits that the projects would have delivered, but for Nault's order.

Quantifying the Lost Benefits

133. Pikangikum led evidence about the monetary equivalent of the projects' benefits that were lost when Nault stalled the projects. Prof. Hosios, Chair of the Department of Economics, University of Toronto, testified that a delayed project means a loss of benefits for some time. He quantified the delayed benefits for the appropriate time by applying a basic principle of economics, which is: economic activities will not be undertaken unless their expected benefits exceed their costs.

134. Prof. Hosios testified that while the actual value of the benefit may be unknowable, the minimum value of the benefit cannot be less than the project's cost.¹²¹

135. The costs of the stalled projects were in evidence. This allowed Prof. Hosios to solve for the minimum value of the benefits PFN lost because Nault ordered the projects stalled.¹²²

136. The defendants provided no evidence on quantification of lost benefits.

137. Wright J. cited three reasons for rejecting Prof. Hosios' cost/benefit approach. The first reason was that there was "no evidence that a cost/benefit study was ever done prior to the initiation of these projects."¹²³

138. Whether an actual cost-benefit analysis was done is irrelevant. The issue is whether a cost/benefit model is an appropriate principle for quantifying damages.

139. There is no evidence that an actual cost/benefit analysis is a prerequisite for the model to be sound. Quite the reverse: the model works from a basic economics theorem. If it is not sound

¹²¹ Judgment, para 300, Appeal Book, Vol 1, Tab 4, pg 60.

¹²² Judgment, para 301, Appeal Book, Vol 1, Tab 4, pg 60: water and sewer - \$14,262,179; Grid - \$8,641,102; Housing - \$1,220,060; School -\$29,045,068.

¹²³ Judgment, para 302, Appeal Book, Vol 1, Tab 4, pg 60.

in this case, evidence, or a competing model, must show why. Wright J. did not address whether Prof. Hosios’ model is appropriate to calculate intangible benefits. Instead, he insisted on irrelevant evidence of an actual cost/benefit analysis.

140. Wright J. ignored the evidence of the defendants’ own expert that the cost/benefit model is a valid economic tool for the calculation of damages.¹²⁴

141. Wright J ignored evidence showing that benefits to PFN were appraised in advance.¹²⁵

142. The second reason Wright J. cited for rejecting the cost/benefit approach was that it is “a matter of common knowledge, and in this case there is evidence, that when politically motivated decisions are being made the construction costs may exceed the social and other benefits which may accrue from the project.”¹²⁶

143. There was no direct evidence that the costs exceeded the benefits for Pikangikum’s projects, or that the inspiration for the projects was politically motivated rather than rigorous application of the IIA program principles. This fact cannot be the subject of “common knowledge” or judicial notice. It is palpable and overriding error to judicially notice or assume this fact without evidence.

144. Assuming, *arguendo*, there was evidence that the costs of PFN’s projects exceeded their expected benefits, at most, this might provide a basis to reduce the quantum of damages based on realistic contingencies – as the trial judge did in *Guerin*.¹²⁷ It does not provide a basis for rejecting the cost/benefit analysis as a principled method.

145. The third reason cited by Wright J. for rejecting Prof. Hosios’ cost/benefit approach was that “In applying the cost/benefit analysis approach it is the aggregate benefits of the project that

¹²⁴ Transcript, pg 1631, ln 15-18, Appeal Book, Vol 1, Tab 11, pg 302. What Prof. Townley disputed was whether the method had been carried out effectively.

¹²⁵ Exhibit 1346, pg 13, Appeal Book, Vol 3, Tab 62, pg 739.

¹²⁶ Judgment, para 302, Appeal Book, Vol 1, Tab 4, pg 60.

¹²⁷ *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [Guerin], para 54, Appellant’s Book of Authorities, Tab 14, pg 98.

are weighted in the balance. This includes the benefit to every resident on the reserve and visitor to the reserve. But this case is not brought on behalf of such people. It is brought on behalf of the Band only.”¹²⁸

146. The fact that Wright J. was dissatisfied that the cost/benefit approach may over-compensate for benefits accruing only to the Band is not a reason to reject a principled approach, but rather to modify the result based on what was probable.

147. Having cited these reasons for rejecting the trial evidence, Wright J. assessed the lost benefits to the band by guessing: he pulled numbers out of thin air without evidence or justification, and then manipulated them for years of benefits lost and discount rate.¹²⁹

148. The following principles govern quantification of tort damages:

- (a) Plaintiff must prove damages adequately,¹³⁰ including a coherent theory of damages, a method suitable for their assessment, and supporting evidence;¹³¹
- (b) Where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances;¹³² and
- (c) Where the plaintiff has or should have evidence available to prove a loss, the court cannot create or manufacture a figure for damages.¹³³

¹²⁸ Judgment, para 302, Appeal Book, Vol 1, Tab 4, pg 60.

¹²⁹ Judgment, para 306-312, Appeal Book, Vol 1, Tab 4, pgs 61-62.

¹³⁰ *Perrin v. Commonwealth Holiday Inns of Canada Ltd.* (1985), 37 Man. R. (2d) 227 (Man. Q.B.), Appellant’s Book of Authorities, Tab 26, pgs 163-167; affirmed (1986), 40 Man. R. (2d) 239 (Man. C.A.); *Gulf Canada Ltd. v. Lundrigan* (1985), 57 Nfld. & P.E.I.R. 325 (Nfld. Dist. Ct.), Appellant’s Book of Authorities, Tab 15, pgs 99-103; but see *Sturrock v. Ancona Petroleum Ltd.* (1990), 75 Alta. L.R. (2d) 216 (Alta. Q.B.), Appellant’s Book of Authorities, Tab 31, pgs 186-189, (court applying “wholesome” rule where defendants making it impossible for plaintiff to prove exact amount of damages; court accepting plaintiff’s estimate of value absent evidence to contrary).

¹³¹ *British Columbia v. Canadian Forest Products Ltd.* (2004), 2004 Carswell BC 1278 (S.C.C.) [*British Columbia*], para 12, Appellant’s Book of Authorities, Tab 10, pg 86.

¹³² *Martin v. Goldfarb*, [1998] O.J. No. 3403, para 75, Appellant’s Book of Authorities, Tab 19, pg 130.

¹³³ *Service Associates Ltd. v. Legere* (1977), 24 N.B.R. (2d) 271 (N.B. Co. Ct.), Appellant’s Book of Authorities, Tab 30, pgs 182-185; *British Columbia*, Appellant’s Book of Authorities, Tab 10, pgs 76-86, (action by province for damages due to forest fire); see also *Michelin Tires (Canada) Ltd. v. Bourgeois* (1980), 32 N.B.R. (2d) 421 (N.B. Q.B.), Appellant’s Book of Authorities, Tab 20, pgs 131-134; *Taylor v. Eisner*, [1993] 4 W.W.R. 98 (Sask. C.A.),

(d) Where the defendant intended to do harm, or is morally wrong, the defendant's interests are accorded substantially less weight in opposition to the plaintiff's claim. "More liberal rules are applied as to ... the type of damage for which recovery is to be permitted, as well as the measure of compensation."¹³⁴

149. Wright J.'s figure for damages is arbitrary – a pure guess. It lacks support from any principle. A pure guess is an error of law. It is also a palpable and overriding error of fact as it is not based on any evidence.

150. The defendants could have assisted the court significantly by leading their own evidence as to the quantum of damages. They chose not to do so.¹³⁵

151. In *Guerin*, Collier J. reduced the plaintiff's proposed quantum, after accounting for certain realistic contingencies. The Supreme Court of Canada supported this approach:

The trial judge was entitled to treat the termination of the lease by the club as a contingency tending towards diminution of the Band's damages and it is not for this Court to substitute the value it would have put upon that contingency for his. I would not, therefore, interfere with the *quantum*.¹³⁶

152. The final quantum in *Guerin* was established on the principled approach proposed by the plaintiffs and with guesswork in accounting for realistic contingencies. In the present case, Wright J. simply pulled values out of thin air, without reference to principle or to any probable or realistic contingencies available in the evidence. Collier J. correctly began with a principled approach and guessed at contingencies. Wright J. erroneously began and ended with a guess.

153. This is not the principled approach endorsed by the Supreme Court in *Guerin*. It is a palpable and overriding error to substitute a subjective guess for the quantum in evidence,

Appellant's Book of Authorities, Tab 32, pg 190-192, (inappropriate for trial judge to excuse lack of evidence of damages and make arbitrary assessment of damages).

¹³⁴ Prosser & Keeton, *Law of Torts* (5th 1984), pg 37, Appellant's Book of Authorities, Tab 38, pg 228.

¹³⁵ *Eastern Power Ltd. v. Ontario Electricity Financial Corp.*, (2010) 101 O.R. (3d), para 39, Appellant's Book of Authorities, Tab 12, pg 91.

¹³⁶ *Guerin*, para 54, Appellant's Book of Authorities, Tab 14, pg 98.

instead of modifying the quantum in evidence to account for realistic contingencies – even if the modification required some guesswork.

154. Pikangikum seeks an award of damages consistent with the quantum yielded by Prof. Hosios’ cost/benefit method. In the alternative, Pikangikum seeks an Order setting aside the judgment below as it relates to damages, and ordering a new trial or reference limited to the assessment of damages.

Punitive Damages

155. In *Hill* and in *Whiten*¹³⁷ the Supreme Court of Canada approved punitive damages awards of \$1,000,000 and \$800,000. The Court explained that “retribution, denunciation and deterrence are the recognized justification for punitive damages,” and that a proper award must be proportionate to these ends (*Whiten*, para 111).

156. The Supreme Court set out six factors to test proportionality of punitive awards: level of blameworthiness (seven enumerated factors influence this level), plaintiff’s vulnerability, harm directed at the plaintiff, need for deterrence, other penalties, and advantages the defendant gained.¹³⁸

157. Punitive damage awards are most appropriate for the misuse of public power.¹³⁹

158. Wright J. did not cite *Whiten*, or follow its refined method for creating a proportionate award. He stated at paragraph 316: “Only the serious ramifications to this community justify potential punitive damages which I fix at \$30,000.”

159. This assessment departs from the *Whiten* factors, all of which are engaged here save for Nault profiting from his unlawful conduct. Nault’s conduct was outrageously blameworthy;

¹³⁷ *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 [Whiten], Appellant’s Book of Authorities, Tab 35, pgs 211-220; *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, para 199-202, Appellant’s Book of Authorities, Tab 16, pgs 104-116.

¹³⁸ *Whiten*, paras 112-125, Appellant’s Book of Authorities, Tab 35, pgs 218-220.

¹³⁹ *Kuddus v Chief Constable of Leicestershire Constabulary*, [2002] 2 AC 122 (HL), Appellant’s Book of Authorities, Tab 18, pgs 99-104.

Pikangikum is a vulnerable community; Nault delayed clean water and safe sewer projects he knew would harm 2100 people for spiteful, illegal purposes; he subjected PFN to a risk of losing power in the winter; he acted over the protest of eleven senior INAC officials;¹⁴⁰ he intentionally misused the public power of a Cabinet office.

160. Wright J. erred in failing to consider the *Whiten* criteria, and their indication for a large punitive damages award.

Special Damages

161. Wright J. noted at paragraph 287 that the parties agreed on amounts for special damages.

162. At paragraphs 288-296 he proposed to award additional amounts for special damages for water pipe, interest on Northwest Company debt and electricity costs had he found liability. The Appellant supports the award of additional special damages for the water pipe and North West Company debt.

PART V ORDERS REQUESTED

163. Appellant asks this Honourable Court to allow the appeal, set aside the judgment below and in its place issue a judgment:

- (a) Awarding the Appellant damages in the amount of \$51,948,349.00;¹⁴¹
- (b) Awarding the Appellant special damages in the amount of \$1,874,938;¹⁴²

¹⁴⁰ Exhibit 1277, pg 3, Appeal Book, Vol 3, Tab 54, pg 711, Exhibit Book, Tab 99, pg 876. Exhibit lists ten officials who asked the RDG to request the Deputy Minister to see Nault to try to persuade Nault to approve the Water and Sewer and Generator Rehabilitation projects. The RDG agreed and sent Exhibit 1218, Appeal Book, Vol 3, Tab 49, pg 678-680, Exhibit Book, Tab 254, pgs 1389-1391, to the Deputy Minister. Donnelly testified that the Deputy Minister said he made Nault aware of Exhibit 1218.

¹⁴¹ Exhibit 1932, Appeal Book, Vol 3, Tab 86, pg 971A, Exhibit Book, pgs 1040, Prof. Hosio's Cost Benefits Calculation, excluding interest: \$14,262,179 (2002 – 2010, Water & Sewer) + \$8,642,102 (2002-2010, Gridline) + \$29,045,068 (2002 – 2010, School).

¹⁴² Judgment, paras 287-289, Appeal Book, Vol 1, Tab 4, pgs 58, 59: costs paid to A.D. Morrison & Associates for third party manager services (2002-2005) \$455,809; costs paid to Aboriginal Strategies Inc. in connection with third party manager services of A.D. Morrison & Associates (2002-2005) \$485,479; costs paid to Holukoff Chiarella Chartered Accountants for auditing third party manager transactions of A.D. Morrison & Associates (2002-2005) \$116,299; cost of unused stocked piled water pipe \$272,000; interest paid on debt to Northwest Company \$545,351.03 (rounded down).

- (c) Awarding the Appellant punitive damages in the amount of \$1,000,000;
- (d) In the alternative, Ordering a new trial or reference limited to the assessment of damages;
- (e) Granting the Appellant costs of the trial on a full indemnity basis;
- (f) Granting the Appellant costs of this appeal;
- (g) Granting the Appellant pre and post judgment interest;
- (h) For such further and other relief as counsel may advise and this Honourable Court permit.

164. Should this Honourable Court allow the appeal, due to extenuating circumstances, the Appellant requests an opportunity for the parties to file additional materials and submissions with respect to costs of both the trial and the appeal.

RESPECTFULLY SUBMITTED this 24th day of January 2012.

JOSEPH ELIOT MAGNET
Counsel for the Plaintiff



WILLIAM J. MAJOR
Co-counsel for the Plaintiff