Date: 20080616

Docket: T-2056-07

Citation: 2008 FC 741

Ottawa, Ontario, June 16, 2008

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

ERMINESKIN TRIBE

Applicant

and

**HER MAJESTY THE QUEEN
IN RIGHT OF CANADA, as represented by
Indian Affairs and Northern Affairs Canada**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Brief Overview

[1] Ermineskin Tribe (Ermineskin) is a Nation of aboriginal peoples who reside in central Alberta and adhered to Treaty No. 6.

[2] In April 2007, Ermineskin entered into a Comprehensive Funding Agreement (CFA) with Her Majesty the Queen in right of Canada as represented by the Minister of Indian Affairs and Northern Development (Minister). The CFA was to operate for the period from April 1, 2007 to

March 31, 2008. Under the CFA, Ermineskin agreed to deliver certain programs and services, including an income assistance program, in accordance with the terms of the CFA and the Indian and Northern Affairs Canada (INAC) Alberta Region Social Development Income Support Policy Manual (Manual). INAC agreed to pay to Ermineskin the sum of $544,578.00 to operate and administer the income assistance program. In addition, INAC agreed to pay to Ermineskin the actual verified expenditures incurred by Ermineskin for its payment of income assistance benefits to eligible persons residing on the Ermineskin reserve.

[3] For many years prior to this arrangement, Ermineskin and INAC had entered into multi-year funding agreements whereby Ermineskin was paid block funding for the provision of income assistance. Ermineskin could exercise its discretion as to how to disburse the funding in order to deliver the income assistance program. In contrast, under the CFA, Ermineskin was required to account to INAC for the monies it spent on the income assistance program, and INAC would then reimburse Ermineskin for income assistance benefits that it actually disbursed.

[4] In the summer of 2007, INAC informed Ermineskin of a number of “reporting concerns and general program issues.” Deductions were made by INAC from the expenditures that Ermineskin claimed for reimbursement. Over the summer and autumn of 2007, correspondence was exchanged between the parties, some meetings were held, and an onsite file review was undertaken.

[5] On November 22, 2007, INAC notified Ermineskin’s council (Council) that the income assistance program was not being delivered in accordance with the terms and conditions of the

CFA. Ermineskin was required to identify a consultant to work with and train its staff and to oversee and develop delivery of the income assistance program. As well, Ermineskin was told that, after the release of basic needs funding for the month of December 2007, such funding would be suspended until proper program administration was restored.

[6] On November 23, 2007, Ermineskin commenced this application for judicial review of the November 22, 2007 decision by INAC. The relief sought, as confirmed by Ermineskin's counsel during the hearing of this application, is:

- an order declaring that INAC has breached Treaty No. 6, discriminated contrary to subsection 15(1) of the Charter, and breached the terms of the CFA and the Manual;
- a writ of mandamus compelling INAC to comply with the terms of the CFA and the Manual (as read to be consistent with subsection 15(1) of the Charter and Treaty No. 6) and to verify the actual expenditures for income assistance; and
- costs.

[7] Counsel for Ermineskin confirmed at the hearing that Ermineskin no longer seeks a declaration of the amount of money owing to it.

[8] Submissions were also made by Ermineskin's counsel about the inadequacy of the income assistance benefits paid under the CFA. It is important to understand, however, that this matter is not in issue before the Court.

[9] In these reasons, I address:

1. Treaty No. 6 (paragraph 10)

2. The CFA and the Manual (paragraph 14)
3. The Facts (paragraph 20)
4. The standard of review to be applied to the November 22, 2007 decision (paragraph 38)
5. Was the file review conducted by INAC in compliance with the terms of the CFA and the Manual? (paragraph 44)
6. Was the November 22, 2007 decision reasonable? (paragraph 59)
7. Other Matters (paragraph 78)
    (a) Treaty No. 6 (paragraph 78)
    (b) Style of Cause (paragraph 83)
    (c) Living Allowance (paragraph 85)
    (d) Subsection 15(1) of the Charter (paragraph 91)
8. Conclusion and Costs (paragraph 97)

1. Treaty No. 6

[10] A copy of Treaty No. 6 is contained in the applicant's record. That record also includes an excerpt from a book entitled *Disease, Medicine and Canadian Plains Native People*, 1880-1940, (Lux, Maureen K., Toronto: University of Toronto Press, 2001), and the reasons for judgment of my colleague Justice Teitelbaum in *Ermineskin v. Her Majesty the Queen in Right of Canada*, [2005] F.C.J. No. 1992 (QL). Aside from that, no evidence was adduced by Ermineskin in respect of Treaty No. 6.

[11] Ermineskin relies upon the following terms of Treaty No. 6:

> That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.
>
> […]
>
> That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.

[12] The CFA refers to Treaty No. 6 in recital (k) of its preamble and in paragraphs 1.1(a) and (b). Those references are as follows:

> K. Nothing in this Arrangement is to be construed so as to abrogate or derogate from any existing aboriginal or treaty rights recognized and affirmed by section 35(1) of the Constitution Act, 1982, including without limitation Treaty No 6.
>
> […]
>
> 1.1 Nothing in this Agreement shall:
>
> (a) be construed to diminish, derogate from, or prejudice any treaty or aboriginal rights of the Ermineskin Tribe;
> (b) be construed as modifying Treaty No. 6 or creating a new treaty within the meaning of the *Constitution Act, 1982*;

[13] Subsection 1.1.1 of the Manual also states:

> Section 88 of the Indian Act states that the laws of general application apply on-reserve unless and to the extent that such laws conflict with the Indian Act, other federal legislation, and subject to the terms of any Treaty. Accordingly under section 88, First Nations persons on-reserve fall under the income assistance legislation of the reference province or territory as these are laws of general application. **It is, therefore, a matter of policy rather than as a statutory or treaty obligation that the Government of Canada**

> **provides certain social services to Registered Indians.** [emphasis in original]

2. The CFA and the Manual

[14] The parties agree that their respective rights and obligations under the CFA are contractual in nature and that the CFA, in effect, incorporates by reference the provisions of the Manual.

[15] Subsection 1.1.1 of the Manual explains federal funding authorities in the following terms:

> Federal Government spending authorities are specified by the Federal Government Treasury Board Terms and Conditions. The Terms and Conditions in the current Treasury Board Income Support spending authority state in part:
>
> "Objectives: To provide financial assistance to indigent residents on-reserve to:
>
> - meet basic daily living requirements;
>
> and,
>
> - provide social support programs which meet the special needs of infirm, chronically ill, and disabled persons at standards reasonably comparable to the relevant province / territory of residence."
>
> and
>
> "To be eligible for funding under this grant authority for income assistance, recipients must:
>
> - Be in need of basic social support (as defined by the benefit rates and eligibility criteria of the relevant province or territory and confirmed by an assessment covering employability, family composition and age, and financial resources available to the household).
> - Be ordinarily resident on a reserve, except reserve lands that have been designated for commercial leasing
>
> and

> Have a demonstrated requirement for income assistance and confirm they have no other source of funding to meet such need."
>
> […]
>
> Although administrative responsibility for providing Income Support may be assigned to a First Nation, Indian and Northern Affairs Canada (INAC) remains accountable to the Government of Canada and to Indian People for ensuring that INAC Income Support policy is adhered to and that benefits at authorized rates are provided to those determined eligible under policy.

[16] Part E of the CFA sets out, at paragraph 5.1.2, the income assistance program delivery and reporting requirements. That paragraph states:

> Delivery Requirements:
>
> The Council shall:
>
> (a) administer income assistance funds to provide for basic and special needs in accordance with the program standards described in the *DIAND Regional Income Assistance Policy and Procedures Manual* which may be amended from time to time; and
> (b) participate in a program review in accordance with the DIAND policy.
>
> Reporting Requirements:
>
> The Council shall submit Income Assistance Program Reports on a monthly basis using the forms, format and definitions prescribed in the *DIAND Regional Income Assistance Policy and Procedures Manual* which may be amended from time to time. (See RRG *Income Assistance Monthly Reports* – DCI#479818, #479782, #479814)

[17] Subsection 10.2.3 of the Manual sets out the time frames for the submission of forms and reports to INAC. While operating under a CFA, a First Nation is required to submit budget and decision forms, band posting sheets, and a band accounting summary sheet within 15 calendar days

from each month end. Corrections or re-submissions that are returned to a First Nation by INAC are to be corrected and returned to INAC within 30 days.

[18] Subsection 10.2.3 of the Manual requires INAC to return to a First Nation the supporting documentation, posting records, and summary sheets within 30 days after the review and approval process is complete. While the Manual does not specify a time frame within which INAC must complete its review, INAC states that it strives to achieve a 30-day service standard to review invoices and other documentation submitted by a First Nation. According to the evidence of INAC representatives, this standard is not always met because of various factors, including the availability of INAC personnel and the quality of the materials submitted for review. INAC is required to return a re-submission to a First Nation within 30 days.

[19] Part B of the CFA contains the general terms and conditions, including default provisions. Subsections 4.1 to 4.3 state:

> 4.1 The Council shall be in default of this Arrangement in the event:
>
> (a) the terms and conditions of this Arrangement, or any other Arrangement between the Council and the Minister, are not met by the Council;
>
> (b) the Council's auditor gives a denial of opinion or adverse opinion with respect to the financial statements of the Council in the course of conducting an audit pursuant to subsections 2.4.3 or 2.4.4 of Part B of this Arrangement or its predecessor;
>
> (c) Consolidated Audited Financial Statements of the Council, prepared in accordance with this Arrangement or its predecessor, indicate that the Council has incurred a cumulative operating deficit equivalent to eight (8) % or more of the Council's total annual operating revenues; or

> (d) the health, safety or welfare of First Nation Members is being compromised.
>
> 4.2 In the event the Council is in default the parties will communicate or meet to review the situation.
>
> 4.3 Notwithstanding section 4.2, in the event the Council is in default under this Arrangement, the Minister may take one or more of the following actions as may reasonably be necessary, having regard to the nature and extent of the default:
>
> (a) require the Council to develop and implement a Remedial Management Plan, within sixty (60) calendar days, or at such other time as the parties may agree upon and set out in writing;
>
> (b) require the Council to enter into a Co-Management Agreement with a Co-Manager;
>
> (c) appoint, upon providing notice to the Council, a Third Party Manager;
> (d) withhold any funds otherwise payable under this Arrangement;
>
> (e) require the Council to take any other reasonable action necessary to remedy the default;
>
> (f) take such other reasonable action as the Minister deems necessary; or
>
> (g) terminate this Arrangement. [emphasis added]

3. The Facts

[20] The competing submissions of the parties may only be addressed properly in the context of the facts that led to the impugned decision.

[21] Ermineskin did provide monthly reports to INAC of its expenditures under the income assistance program. It is INAC's evidence that those reports were submitted on the following dates:

Month	Date Submitted
April	May 31, 2007
May	July 25, 2007
June	August 10, 2007
July	August 20, 2007
August	September 17, 2007
September	October 16, 2007

[22] Ermineskin's evidence is generally consistent with this (see paragraph 9 of the affidavit of Mr. Craig Makinaw). It is understandable that some delay and difficulty would be encountered as Ermineskin moved to a differently administered income assistance scheme.

[23] On July 27, 2007, INAC informed Ermineskin of a number of "reporting concerns and general program issues." INAC reminded Ermineskin that its documentation was due on the fifteenth day of the following month. The reports for the months of April and May had been submitted late and the report for the month of June remained outstanding. INAC acknowledged that the expenditures reported by Ermineskin for the month of April totaled $381,705.00. However, it informed Ermineskin that $98,816.00 had already been deducted "for policy and administrative errors" and that the deduction could be higher as INAC's review was not yet complete. The "major error" identified by INAC was "the lack of signatures […] by the case workers and clients." INAC noted that all forms were "required to be signed by both parties" before any benefits could be issued under the income assistance program. INAC suggested that "some additional training may be required in the area of invoice submission."

[24] INAC also noted that it had undertaken a preliminary review of the report submitted for the month of May. Again, INAC noted a number of errors and omissions on the part of Ermineskin. INAC concluded that the invoices for the month of May were unacceptable and returned them to Ermineskin for "correction and re-submission."

[25] On August 8, 2007, INAC provided Ermineskin with its formal income support review for the month of April. INAC accepted the invoice provided by Ermineskin, but reduced the reimbursement amount by $134,884.16 for posting and policy errors. A comment sheet was provided to Ermineskin with "further information regarding [the] deductions and changes to [its] financial record."

[26] On September 28, 2007, Ermineskin submitted corrections to its report for the month of April.

[27] On October 3, 2007, INAC confirmed by way of letter its meetings with Ermineskin on September 28 and October 2, 2007. INAC also confirmed that its officers would be doing "a training session with the income support workers on the May submission on Thursday, October 4, 2007 at Ermineskin."

[28] On October 4, 2007, INAC again wrote to Ermineskin regarding its meeting of September 28, 2007. INAC noted its commitment "to coming out to Ermineskin Tribe to work with, and provide training to the First Nation. This would include developing an 'action plan' for problem

areas." The problem areas identified included unsigned forms. A separate letter was to be sent with respect to the April invoice review.

[29] That letter was sent on October 5, 2007. INAC noted that a further review of the re-submitted corrections for April showed there were still issues such as incorrect rates, no client or issuing authority signatures on invoices, and no dates provided with the budget and decision sheets. INAC further noted that its staff had arranged to go on site on October 2, 2007, in order to provide training and obtain further clarification. However, when INAC staff arrived, they were told to put their request in writing. When the request was put in writing, it was refused because Ermineskin staff were said to be on vacation on October 4, 2007. INAC's letter noted that "[n]ormal regional practice in such instances is to return all unacceptable invoices to the First Nation for correction by the staff. However, this would not be in keeping with our commitment to work with the Ermineskin Tribe to conclude the review process. Therefore, I am directing regional staff to make the necessary arrangements to work with the Ermineskin Tribe income support staff to undertake an onsite file review during the week of October 15-19, 2007 to ensure the certainty of the data to conclude the review process."

[30] On October 19, 2007, INAC informed Ermineskin that it had reviewed the corrections Ermineskin had filed on September 28, 2007, in respect of the month of April. However, INAC noted that "the same errors [were] reappearing as those identified in [its] initial submission." INAC informed Ermineskin that, after reviewing approximately one half of its submissions, only $3,403.07 of the requested $131,912.16 reimbursement "was realized." Information was also

requested by INAC about monthly living allowances paid to members of Ermineskin. INAC recommended that the remaining forms be "reviewed jointly onsite" with Ermineskin staff. After noting that the service delivery funding under the CFA allowed Ermineskin to employ qualified staff to administer the income assistance program, INAC expressed its expectation that Ermineskin staff would "participate in available training income assistance programs that are designed to enhance administrative and service delivery skills."

[31] On October 23, 2007, a meeting was held between INAC and Ermineskin. At that time, it was agreed that staff from INAC would attend and participate in an "onsite" review of the documentation that had been submitted by Ermineskin to INAC for the month of April. Upon conclusion of that review and a follow-up meeting, any outstanding amounts would be funded to, or collected from, Ermineskin.

[32] Between October 30 and November 8, 2007, staff from INAC conducted an onsite review at the Ermineskin reserve. The review lasted more than five working days. Invitations to participate in the review were extended to the Ermineskin staff, and they participated for approximately five of forty-one working hours.

[33] On November 22, 2007, INAC informed Ermineskin of the outcome of the file review. INAC indicated that:

- it had "serious concerns" about the delivery of the income assistance program;
- it was confident that "significantly few files" were acceptable for reimbursement; and

- there were “major deficiencies” in the administration of the income assistance program.

[34] INAC attached two appendices outlining its concerns. Those concerns arose from the documentation submitted by Ermineskin for the month of April and from Ermineskin’s documentation for the month of September. INAC specifically noted that, of the more than nine hundred applications it had reviewed, only nine had been properly completed. INAC noted that the application form was “the basis for determining eligibility and benefits” and that a “properly executed application [was] a precondition to receipt of any benefits.”

[35] INAC also informed Ermineskin that the income assistance program was not being delivered in accordance with the CFA. Accordingly, Ermineskin was said to be in default. INAC requested that Ermineskin immediately identify and engage a consultant to train its staff and oversee delivery of the program. INAC requested that it be informed of this mutually-agreeable individual by December 6, 2007.

[36] INAC further informed Ermineskin that it was suspending funding under the income assistance program “until such time as proper supports [were] secured to restore proper program administration.”

[37] On November 23, 2007, Ermineskin commenced this application for judicial review of INAC’s decision to suspend funding under the income assistance program.

4. The standard of review to be applied to the November 22, 2007 decision

[38] Ermineskin argued orally that the applicable standard of review is correctness. Referencing the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 (QL), Ermineskin argued that the interpretation of law is always contextual and that courts must continue to substitute their own view of the correct answer where the question at issue is one of general law that is both outside the decision-maker's area of expertise and the question is of central importance to the legal system as a whole. See: *Dunsmuir* at paragraphs 74 and 60. According to Ermineskin, the matter before the Court is strictly "constitutional and contractual," involving the interpretation of Treaty No. 6 and the CFA. The decision of the Minister's delegate therefore ought to attract review on the correctness standard.

[39] Ermineskin says that this case is analogous to that analyzed by Madam Justice Deschamps at paragraph 168 of *Dunsmuir*. Specifically, the Minister's delegate is said to have no expertise in interpreting treaties or contracts, and the question at issue is said to be one of law alone. Accordingly, it is submitted that no deference is due by the Court.

[40] The Minister argued that the decision should be reviewed on the standard of reasonableness.

[41] For the following reasons, I conclude that the decision should be reviewed on the standard of reasonableness.

[42] First, *Dunsmuir* instructs that the existing jurisprudence should be reviewed in order to see if the degree of deference to be accorded to a particular category of question has already been determined. See: *Dunsmuir* at paragraphs 57 and 62. In *Pikangikum First Nation v. Canada (Minister of Indian and Northern Affairs)*, [2002] F.C.J. No. 1701 (QL), at paragraph 85, the Court considered the standard of review to be applied to a decision of the Minister to appoint a co-manager under a CFA. After reviewing the relevant factors, the Court concluded that the decision should only be disturbed if patently unreasonable. In my view, the Court properly determined that deference is to be afforded to decisions of this nature.

[43] Second, I have considered the factors listed by the Supreme Court of Canada at paragraphs 55 and 64 in *Dunsmuir*. I particularly note that, in the present case, the decision is not protected by a privative clause, the nature of the decision touches upon the Minister's discretion to allow a First Nation to administer a publicly-funded program, the Minister has expertise working with First Nations and administering assistance programs, and the question of the existence of any default under the CFA is one of mixed fact and law that is very heavily informed by matters of fact. These factors, considered together, point to the standard of reasonableness.

5. Was the file review conducted by INAC in compliance with the terms of the CFA and the Manual?

[44] A substantial portion of Ermineskin's argument is directed to its assertions that INAC agreed, at the October 23, 2007 meeting, to conduct a "program review" of all of Ermineskin's income assistance claims made to the end of September 2007, and that the following onsite review was in fact a program review. From this, Ermineskin argues that INAC failed to follow the

procedures prescribed in section 10.3 of the Manual and annex C to the "Income Assistance Program – National Manual" (National Manual). Specifically, Ermineskin claims that, in breach of the prescribed procedure, INAC failed to provide it with any preliminary results of the review, a final report of the review, or a remedial action plan. In the result, Ermineskin was not given any opportunity to address any concerns that resulted from the program review.

[45] The Minister responds that no "program review" was conducted. Rather, INAC says that an "on-site file review" was conducted and the process set forth in the Manual and the National Manual was not applicable. The Minister further responds that the issue is irrelevant because this judicial review only challenges the decision of November 22, 2007 – not the propriety of any asserted program review. Finally, the Minister responds, in the alternative, that the requirements of the Manual and the National Manual were complied with.

[46] In view of the importance that Ermineskin places on this issue, and its relevance to Ermineskin's submission that it was not afforded any opportunity to deal with INAC's concerns, I think the issue should be determined on its merits.

[47] Ermineskin points to the following evidence that supports its contention that a formal program review was conducted:

- The cross examination of K. Chipeniuk, the Skills Development Coordinator with INAC. Mr. Chipeniuk agreed with Ermineskin's counsel's suggestion that a program review was conducted in this case.

- Exhibits 5, 6, 7, 8 and 9 to the cross-examination of Y. Attobrah (dated, respectively, September 13, 2007, September 10, 2007, September 25, 2007, September 27, 2007 and October 1, 2007). Those documents consist of internal INAC e-mails and a note prepared by Ms. Attobrah. In these documents, Ms. Attobrah speaks of her wish for a program review, future options were listed that included an onsite program review, Mr. Chipeniuk spoke of a general consensus about the need for a re-audit, Ms. Attobrah reiterated the need for a program review, and Ms. Attobrah recorded that, at a September 28, 2007 meeting with Ermineskin, a commitment was made "to do a program review and provide additional training to staff."

[48] I have considered this evidence carefully.

[49] Mr. Chipeniuk's apparent agreement with the suggestion that a formal program review was conducted must be viewed in light of:

- his evidence that he was not the team leader of the review conducted in late October and early November of 2007;
- his evidence that he had direct responsibility to provide advice and guidance to the INAC staff who were working with Ermineskin only for the period from mid-May to mid-August of 2007; and,
- his e-mail of September 25, 2007 (Exhibit 7 to the examination of Ms. Attobrah), which confirmed that by that date he had no role in program delivery.

[50] The portions of the cross-examination of Ms. Attobrah, and the exhibits thereto, relied upon by Ermineskin must be seen in the context that they all deal with the period that pre-dated the meeting of October 23, 2007 at which agreement was reached to conduct the onsite review (see paragraph 31 above).

[51] Exhibit 9, Ms. Attobrah's e-mail of October 1, 2007 to her supervisor, did confirm that, at a meeting on September 28, 2007, a commitment was made to Ermineskin to conduct a program

review. Interestingly, neither the October 3, 2007 letter nor the October 4, 2007 letter sent by INAC to Ermineskin following that meeting referred to any program review.

[52] The October 3, 2007 letter stated:

> As part of the commitment from the meeting of September 28, 2007, the social program officers at INAC will be doing a training session with the income support workers on the May submission on Thursday October 4, 2007 at Ermineskin. We hope that the additional training that will be provided will ensure that the September and subsequent invoice submissions will be done in the appropriate format. Also, that deductions for policy and administrative errors, will be significantly reduced. In addition, the social officer, Yaa Attobrah, will be meeting with the income support director and the assisted living coordinator on the assisted living program. [emphasis added]

[53] The October 4, 2007 letter stated:

> In regards to Social, a separate letter will be forthcoming. However, some of the main issues discussed were as follows:
>
> - Invoices for April and May, 2007, to be reviewed with the results conveyed to May Ermineskin by October 5, 2007.
> - Subsequent months to then be reviewed in a timely manner with May Ermineskin again contacted regarding the results.
> - INAC committed to coming out to Ermineskin Tribe to work with, and provide training to the First Nation. This would include developing an "action plan" for problem areas.
> - Problem areas identified in invoices already reviewed include unsigned Budget & Decision (B&D) forms, and clarification regarding Per Capita Distributions (PCDs). [emphasis added]

[54] What is clear is that the review scheduled at the September 28, 2007 meeting for October 4, 2007, never proceeded. INAC's letter of October 5, 2007, described what happened:

> Yaa Attobrah and Pauline White, Social Development Officers, called and spoke with Ms. Yvonne Babich, Interim Director of the

> income support program, on the afternoon of Tuesday, October 2, 2007. Yaa advised her that she and Pauline would like to come on site that afternoon to provide training and seek clarification of the invoices. This was due to the difficulty we were experiencing with reviewing the April invoices. She agreed to our request.
>
> However, when Pauline and Yaa arrived at the Ermineskin Tribe Income Support office, they were advised by Ms. Babich that Councillor Craig Mackinaw and Ms. May Ermineskin requested to see them before they could proceed any further. Yaa and Pauline went to Ms. Ermineskin's office and explained some of the issues with the b&ds [budget and decision forms], and the need to clarify and also provide training to the staff. May advised them to put this request in writing as she needed to share this information with Council, as this was not one of the commitments arising from the September 28, 2007 meeting.
>
> Our request was provided in a letter of October 3, 2007. On that same day, we received a faxed response from Councillor Craig Mackinaw advising us their staff would not be available for training on October 4, 2007 due to vacations. This was unexpected because the October 4th meeting with the Ermineskin Tribe Interim Director and the Assisted Living Coordinator had been pre-arranged with Yaa on September 28, 2007. During our discussions on September 28, 2007, providing support and training on site did not appear to be an inconvenience.

[55] On October 19, 2007, INAC again wrote to Ermineskin. INAC recommended that "the entire resubmission package or alternatively, only the remaining 50% of the B & D [budget and decision] forms be reviewed jointly onsite with the INAC program officers and the income support staff."

[56] This letter was followed by the October 23, 2007 meeting between INAC officials and Ermineskin. Ms. Attobrah was present at that meeting and testified that, at the request of Ermineskin, it was agreed that a "joint review on site" would be carried out. Ms. Attobrah also

testified that the review was not a “program review” because such reviews are “not joint” and the “process is different.” According to Ms. Attobrah, the review in question arose out of the meeting of October 23, 2007, and was similar to others that had been undertaken with other First Nations. Such reviews were said to be based “informally” on the general relationship between INAC and the First Nations administering the program.

[57] Ms. Attobrah’s evidence on this point was not impeached on cross-examination. Her evidence is also consistent with:

- INAC’s letter of November 2, 2007, which confirmed a number of understandings arising from the October 23, 2007 meeting with Ermineskin. Of relevance are the following extract:
    - INAC staff will conduct a joint on-site file review with the Ermineskin Tribe Income Support staff.
    - A meeting will be scheduled upon conclusion of the review to substantiate and finalize the annual cashflow required.
    - Upon the conclusion of the on-site review, and the above meeting, any outstanding amounts pertaining to the Social Assistance program will be funded to or collect from the Ermineskin Tribe.

- Ermineskin’s letter of November 9, 2007 to INAC, which stated that the “agreement with INAC was that they would attend Ermineskin to review the files and assist Ermineskin by reviewing all claims for April, May, June, July, August and September, 2007 within 30 days”;

- The draft “Ermineskin Tribe-Income Support Program Briefing” document, which was prepared on November 16, 2007; and

- The November 22, 2007 letter from INAC that refers to “our understanding from the meeting of October 23, 2007 that the onsite review was to be conducted jointly with the Ermineskin Tribe Social Development Staff.”

[58] On the basis of Ms. Attobrah's evidence on cross-examination, as supported by the four documents described above (including one sent by Ermineskin), I find as a fact that INAC did not undertake on October 23, 2007, to conduct a formal program review and, accordingly, it was not required to comply with section 10.3 of the Manual and annex C to the National Manual. Rather, what was conducted was an informal review of Ermineskin's files that was agreed upon by the parties and intended to be conducted jointly.

6. Was the November 22, 2007 decision reasonable?

[59] There are two aspects of the decision to consider. First, was it reasonable for the Minister to conclude "that the program is not being delivered in accordance with subsection 5.1.2 of the CFA Terms and Conditions, and accordingly, as per paragraph 4.1(a) the Tribe is in default of their 2007-2008 CFA"? Second, if Ermineskin was in default, was the Minister's choice of remedy reasonable?

[60] For ease of reference, subsection 5.1.2 of Part E of the CFA, and paragraph 4.1(a) and section 4.3 of Part B of the CFA are repeated:

> 5.1.2
> Delivery Requirements:
>
> The Council shall:
>
> (a) administer income assistance funds to provide for basic and special needs in accordance with the program standards described in the *DIAND Regional Income Assistance Policy and Procedures Manual* which may be amended from time to time; and
>
> (b) participate in a program review in accordance with the DIAND policy.

Reporting Requirements:

The Council shall submit Income Assistance Program Reports on a monthly basis using the forms, format and definitions prescribed in the *DIAND Regional Income Assistance Policy and Procedures Manual* which may be amended from time to time. (See RRG *Income Assistance Monthly Reports* – DCI#479818, #479782, #479814)

[…]

4.1 The Council shall be in default of this Arrangement in the event:

(a) the terms and conditions of this Arrangement, or any other Arrangement between the Council and the Minister, are not met by the Council;

[…]

4.3 Notwithstanding section 4.2, in the event the Council is in default under this Arrangement, the Minister may take one or more of the following actions as may reasonably be necessary, having regard to the nature and extent of the default:

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

(b) require the Council to enter into a Co-Management Agreement with a Co-Manager;

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

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

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

(f) take such other reasonable action as the Minister deems necessary; or

(g) terminate this Arrangement.

[61] “Default” under the CFA is defined to include an event where Ermineskin fails to meet the "terms and conditions of this Arrangement." The Articles of Agreement refer to the CFA as a whole as the "Arrangement" and Article 1.1 specifies that the Arrangement consists of Parts A through I. Under Part B, paragraph 1.1(b) states that Ermineskin is to abide by the program or service delivery and reporting requirements set out in Part E. Part E contains subsection 5.1.2 set out above.

[62] In my view, the Minister's decision that the income assistance program was not being delivered in accordance with subsection 5.1.2 of Part E of the CFA was reasonable.

[63] Before setting out the evidence that leads me to this conclusion, I note that Ermineskin is correct when it notes that the November 22, 2007 letter is in error when it states that section 5.1.2 is found in the general terms and conditions (Part B) of the CFA. It is in Part E. In my view, nothing turns on this. The only section numbered 5.1.2 in the CFA is found in Part E. The November 22, 2007 letter referred to default in the delivery of the program. Part E of the CFA deals with program and service delivery and reporting requirements. In my view, there is no substance to the submission that, because of this error, Ermineskin was unable to respond to the allegation of default. When the letter of November 22, 2007 is read as a whole, including the appendices, the concerns of INAC are sufficiently clear.

[64] Turning to the evidence relevant to the reasonableness of the decision about the existence of default, I note the following:

- The required monthly reports submitted by Ermineskin were materially late for the months of April, May and June. The monthly reports for July, August, and September were also late, but not materially so.

- In its April report, Ermineskin sought reimbursement in the amount of $381,705.00 An initial review of Ermineskin's submissions by INAC resulted in the reduction of that amount by $98,816.00 for policy and administrative errors. Errors identified included: the failure to have budget and decision sheets signed by both the client and caseworker; a lack of notices of assessment for adult learners; and a lack of substantiation for youth learners. The reduction of the amount claimed was later increased to $134,884.16.

- The May report submitted by Ermineskin was not acceptable and returned on July 27, 2008, for correction and re-submission. Deficiencies included: the absence of a band accounting summary; an additional missing form; unsigned budget and decision forms; the inclusion of assisted learning invoices (they were supposed to be the subject of a separate report); earnings replacement benefits were incorrectly posted; notices of assessment were not provided for adult learners; and clarifications were required to continuing budget and decision forms.

- A preliminary review of the July report, conducted on September 27, 2007, showed that there were still some unsigned budget and decision forms and that adult assisted living was still incorrectly being reported on those forms.

- Ermineskin re-submitted the April report on September 28, 2007. The same types of errors were identified therein as existed in the original submission.

- As described above, the October 4, 2007 review and onsite training session that had been scheduled at the September 28, 2007 meeting was cancelled by Ermineskin.

- On October 19, 2007, INAC provided its detailed findings for the review of the April reports that had been re-submitted on September 28, 2007. The errors identified in the initial submission continued to be present. After reviewing one-half of the re-submission, only $3,403.07 was realized from a potential reimbursement of $131,912.16. INAC staff had spent 37.5 hours reviewing one-half of the re-submission and had generated 20 pages of corrections.

- At the onsite review, deficiencies were noted with respect to the April report. They were summarized in Appendix B to the November 22, 2007 letter. Deficiencies included: 341 budget and decision forms were not signed and dated; budget and decision forms were incomplete, leaving unresolved issues of income and assets; utility payments were included in the client requirements but not issued to the client; adult care costs were improperly included with income assistance invoices; clients who were expected to work and who were working full or part-time did not (except

in two (2) out of twenty-six (26) cases) declare any resources; and some clients did not have employment readiness assessments (which were required before eligibility and benefits could be determined).

- At the onsite review, after the review of the April files was completed, a decision was made to review the September documentation because Ermineskin staff advised that there had been a change in the system so that an improvement in the quality of documentation was expected in that month's report. A summary of findings with respect to the onsite review of the September reports was contained in Appendix A to the November 22, 2007 letter. Deficiencies noted included: incomplete information was recorded about income and assets; incomplete information was provided with respect to past and present employment, shelter costs, and number of persons in the home; and information contained on the budget and decision forms was inconsistent with information recorded on the application for assistance forms.

- At the onsite review, application forms were reviewed for the first time. Out of a total of 910 client application forms reviewed, only nine were signed by both the client and the caseworker. Of the remaining forms, the applications were signed only by the client or there was no signature at all, and/or the form contained incomplete information. Subsection 2.3.2 of the Manual deals with the procedure for determining eligibility and provides:

  > The application form is a legal document used by the applicant and the issuing authority to enter into a contractual agreement in which each party has rights and obligations.
  >
  > Assistance may be provided to a person only after an Application for Income Support form has been completed and signed by the applicant and duly witnessed.
  >
  > Every question on the Application for Income Support form must be answered and "NIL" used when the question is not applicable to the applicant.

- Based on the review of the April documentation conducted at the onsite review, monthly funding was justified at the level of only $63,066.00 for a 12-month total of $756,792.00. In contrast, the sum of $1,911,661.00 had been budgeted and released to Ermineskin.

[65] Ermineskin does not attack the substance of this evidence, except in one respect. It submits that there is no requirement under the income assistance program for application forms to be signed

by caseworkers. Ermineskin submits that the Minister's finding of default is therefore without basis. In response, the Minister argues that such forms are "crucial" to determining a person's eligibility for benefits and must be properly (and fully) completed.

[66] In my view, the Minister's position that application forms must be signed by the caseworker is supported by the Manual:

- Subsection 2.3.2 of the Manual is express that the application form is "a legal document" that gives rise to a contractual agreement between the applicant and Ermineskin. Benefits may be provided to an applicant "only after" the form is "completed and signed by the applicant and duly witnessed."
- Subsection 10.1.1 of the Manual requires that each file contain an application form "completed and signed by the applicant, their partner if applicable and the Issuing Authority." By virtue of the CFA, Ermineskin is the issuing authority.

[67] Thus, the Manual requires that application forms be "completed" and that completion includes a signature from a representative of Ermineskin. Beyond the obvious legal reasons for insisting that application forms be signed by caseworkers, such signatures also serve the important purpose of accountability. Maintaining a system of accountability was an obligation expressly undertaken by Ermineskin in paragraph 1.1(c) of Part B and Part C of the CFA.

[68] A brief review of the application forms in question establishes that the deficiencies extended beyond omitted signatures. They included failing to disclose assets, to list Indian status number, to include prior addresses, education programs or employers, and to obtain the signature of a witness.

[69] What I take from the evidence cited above is that the April documentation submitted by Ermineskin contained a number of errors that were of a material nature. Those errors continued even when the April reports were re-submitted. The May reports were returned for correction because of errors similar to those found in the April reports. A preliminary review of the July reports disclosed many of the same errors. As of the onsite review in late October, the problems with the April documentation had not been resolved. While Ermineskin advised that steps had been taken to improve the quality of its documentation, deficiencies were found on a preliminary review of the September documentation.

[70] Prior to the finding of default, INAC had made a number of efforts to assist Ermineskin in remedying the errors INAC had identified with the delivery of the income assistance program. INAC provided an initial training session and detailed responses to the reports submitted by Ermineskin. Representatives from INAC attended a number of meetings with Ermineskin regarding the administration of the program. INAC staff attempted to assist Ermineskin's staff by participating in the joint onsite file review. Under the CFA, Ermineskin was also paid $544,578.00 for the specific purpose of service delivery.

[71] However, Ermineskin had cancelled the scheduled October 4, 2007 training/onsite review session. While the onsite file review conducted in late October 2007 was to have been a joint review, Ermineskin staff only participated in the review for a total of five hours and 40 minutes. INAC staff, on the other hand, spent 41 hours conducting the onsite review.

[72] I find the decision that Ermineskin was in default of its obligation under the CFA to be justifiable and intelligible on the evidence before the Minister. Given the facts before the Minister and the terms of the CFA, the decision was defensible in fact and law and within the range of acceptable outcomes. The decision was, therefore, reasonable.

[73] Ermineskin points to one consideration that is said to have rendered the decision unreasonable. Ermineskin submits that the decision is unreasonable because INAC did not review its claims for the months of May through October 2007. Ermineskin submits that default cannot be declared on the basis of a review of only one month's report.

[74] In my view, this submission is not supported by the evidence. As set out above, INAC reviewed the May report and returned it to Ermineskin for correction and re-submission. The April report continued to be deficient even after its correction and re-submission on September 28, 2007. Further deficiencies were found in a preliminary review of the July report and in the onsite review of the September documentation. The onsite review also revealed deficiencies in the application forms, which formed the basis for determining income assistance entitlement.

[75] INAC’s review of Ermineskin's program reports extended well beyond a review of just the April report. It cannot fairly be concluded that INAC only reviewed the April report and then applied its findings to all subsequent months without regard to the content of those reports.

[76] As for the reasonableness of the Minister's choice of remedy, subsection 4.3 of the CFA provided a number of options, up to and including termination of the CFA. The remedy selected by the Minister:

- required Ermineskin to retain and "advise the Department by December 6, 2007" of a mutually-agreeable consultant who would work with its staff and oversee the delivery of the income assistance program;
- released funding in the amount of $391,352.00 for the month of December;
- suspended subsequent funding "until such time as proper supports [were] secured to restore proper program administration"; and
- committed to settling funding levels for the months in question when "comprehensive information" had been received from the consultant regarding the eligibility of recipients.

[77] Given the nature and extent of the default, and the apparent lack of progress in curing the problems, I find that the choice of remedy was within the range of acceptable outcomes. It was, therefore, reasonable.

7. Other Matters

(a) *Treaty No. 6*

[78] During oral argument, counsel for Ermineskin advised that nothing in the CFA had been identified as being contrary to the provisions of Treaty No. 6. However, it was submitted that the CFA must be interpreted in a manner that is consistent with Treaty No. 6. Treaty No. 6 is said to oblige the payment of income assistance, just as the CFA does. Reviewing only the April report before declaring Ermineskin to be in default is said to be inconsistent with the CFA and, in turn,

Treaty No. 6. According to Ermineskin, the Minister was required “to look at every month’s submission.”

[79] I have already dealt with Ermineskin's submission that the Minister was not entitled to find it to be in default solely on the basis of INAC's review of the April report. The submission was rejected because it is contrary to the weight of the evidence before the Court.

[80] I do not understand Ermineskin in this proceeding to base any claim to income assistance benefits on any source other than the CFA (nor could it, as a matter of law, in an application for judicial review of a decision made under the CFA). Thus, I see no independent issue to be decided under Treaty No. 6.

[81] I have also carefully reviewed the portion of Justice Teitelbaum's decision relied upon by Ermineskin to establish the factual foundation of its Treaty No. 6 claim (identified as being paragraphs 105-153, 170, 203 and 204). Much of those paragraphs consist of a narrative of the evidence received, as opposed to findings of fact. For example, at paragraph 112, Justice Teitelbaum wrote:

> According to Jackes, the third day of talks ended after Mista-wa-sis stated that the Indians did not want food everyday, but only when they began farming, and in case of famine or calamity. Ah-tuk-a-kup reiterated this request and then asked for an adjournment (S-4, p. 213). Morris included a similar, albeit truncated, version in his report and noted,
>
> The whole day was occupied with this discussion on the food question, and it was the turning point with regard to the treaty.

> The Indians were, as they had been for some time past, full of uneasiness.
>
> They saw the buffalo, the only means of their support, passing away. They were anxious to learn to support themselves by agriculture, but felt too ignorant to do so, and they dreaded that during the transition period they would be swept off by disease or famine -- already they have suffered terribly from the ravages of measles, scarlet fever and small-pox.
>
> It was impossible to listen to them without interest, they were not exacting, but they were very apprehensive of their future, and thankful, as one of them put it, "a new life was dawning upon them."

[82] Other evidence recited by Justice Teitelbaum included evidence that the Commissioner "rejected the Cree's request for provisions for the poor, blind and lame." See: paragraph 117. Additional evidence would, in my respectful view, be required to ground submissions as to the existence of independent rights in respect of social assistance or income assistance based upon Treaty No. 6.

(b) *Style of Cause*

[83] At the beginning of the hearing, I dealt with the Minister's submission that the proper respondent to the application was the Minister of Indian Affairs and Northern Development, and that neither Her Majesty the Queen nor a government department were proper respondents. The parties agreed to an order being made adding the Minister of Indian Affairs and Northern Development as a respondent and such an order shall issue.

[84] The Minister also submitted that the proper respondent to any claim based upon Treaty No. 6 is Her Majesty the Queen in right of Canada. After hearing the submissions of counsel, I advised that whether Her Majesty the Queen in right of Canada would be added as a party would depend upon whether I found substantial rights to arise in this proceeding out of Treaty No. 6. As I have not, Her Majesty the Queen in right of Canada is not added as a party.

(c) *Living Allowance*

[85] A dispute exists about whether a living allowance paid by Ermineskin to its members should be deducted from income assistance payment calculations. A related issue is whether living allowances paid by Ermineskin directly to Niwihcihaw Acceptance Corporation on account of loans owed by its members should be deducted from the calculation of income assistance payments.

[86] In my view, such concerns are not properly before the Court in this proceeding. Ermineskin is not seeking judicial review of INAC's letter of June 14, 2007, which set out the position of INAC in respect of Ermineskin's per capita distributions (living allowances) and loan payments to the Niwihcihaw Acceptance Corporation.

[87] This application for judicial review is concerned with the legality of the Minister's finding that Ermineskin was in default of the terms of the CFA and, in turn, his decision to suspend funding under the income assistance program. The basis for the Minister's decision was not the failure of Ermineskin to include per capita distributions or living allowances in its assessment of recipients' income under the income assistance program. The only reference to those matters in the decision

was a request by INAC for "clarification concerning living allowances or per capita distributions." The evidence sought by INAC appears to have been provided by Ermineskin, for the first time, on judicial review. In my view, the issues surrounding the per capita distributions and living allowances are irrelevant for the purpose of the application currently before the Court. It is also to be remembered that Ermineskin, properly in my view, no longer seeks a declaration as to the amount owing to it by INAC in this application for judicial review. This further shows that the issue of the treatment of any living allowance need not be decided on this application.

[88] Further, the Minister has expressed concern that the information relied upon by Ermineskin to support its submissions on these points is exhibited to an affidavit sworn by a legal assistant employed by Ermineskin's counsel. It is not provided by a representative of Ermineskin with knowledge of the relevant facts. The consequences of such an approach are obvious from the transcript of the deponent's cross-examination:

> Q: So again, to be clear on this, you have no role in the band whatsoever, either with respect to the income support program or the assisted living program?
>
> A: That's correct.
>
> […]
>
> Q: Do you know anything about the content of the documents, how –
>
> A: No
>
> Q: – the figures that are contained in the documents were calculated?
>
> A: No, I do not.

[89] Rule 81 of the *Federal Courts Rules*, SOR/98-106 (Rules), provides that affidavits must be confined to facts within the personal knowledge of the deponent. The deponent does not have such knowledge.

[90] Because of the lack of relevance of the issues to the underlying judicial review and the frailty of the evidentiary record, I make no decision on these disputed issues.

(d) *Subsection 15(1) of the Charter*

[91] Subparagraph 3.1.2(B)(1)(iii) of the Manual provides:

> Effective July 26, 2005, cash gifts and Per Capita Distributions (PCD) are exempt if:
>
> a. the total combined amount of the cash gift and PCD does not exceed $900 each calendar year (January-December) for each member of the household unit (see Example 1, and Example 3 below), and
> b. the gift or PCD is non-recurring in nature (i.e., not issued/received month after month) (see Example 2 below).
> c. the PCD is not from Specific Claims (Surrenders).
>
> NOTE
> Income Support exemptions for Specific Claims PCDs are generally negotiated during the claim settlement process, or a request for exemption is made by the First Nation in writing to the Provincial Minister of Human Resources and Employment. Exemptions are considered for land settlements and in circumstances where a settlement is issued as redress for wrongdoing on the part of the government.

[92] This provision is said by Ermineskin to be contrary to subsection 15(1) of the Charter.

[93] For the reasons given above with respect to the relevance of the living allowance dispute to this proceeding, I find that this issue is not properly before the Court in this proceeding. Put simply, the decision at issue did not concern the proper construction of subparagraph 3.1.2(B)(1)(iii) of the Manual.

[94] Further, Charter issues are not to be decided in a factual vacuum. See: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at paragraphs 8-9.

[95] I find that Ermineskin has not referred the Court to anything in the record which would permit it to properly engage the factors identified by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. In substance, the alleged infringement of the Charter is not explained beyond the bare assertion that an infringement exists. To illustrate, it was only during oral argument, in response to questions from the Court, that Ermineskin identified the comparator group (other Indians who receive per capita distributions that are paid differently so as to be exempt under the Manual).

[96] Such an important issue ought not to be decided on this record.

8. Conclusion and Costs

[97] For the above reasons, the application for judicial review will be dismissed.

[98] Counsel agreed that costs should follow the event, and that the relevant circumstances do not remove this matter from the ambit of Rule 407. Accordingly, Ermineskin shall pay to the respondent Minister costs, as more particularly set out below.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Minister of Indian Affairs and Northern Development is added as a respondent to this proceeding.
2. The application for judicial review is dismissed.
3. Ermineskin shall pay to the Minister of Indian Affairs and Northern Development costs. If not agreed, such costs shall be assessed in accordance with the top end of Column III of the Table to Tariff B of the Rules.

"Eleanor R. Dawson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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