

Federal Court



Cour fédérale

Date: 20250318

Docket: T-1044-24

Citation: 2025 FC 503

Ottawa, Ontario, March 18, 2025

PRESENT: The Honourable Madam Justice Blackhawk

BETWEEN:

MARLEN HORSE, ANDREA BEAR, JONAS THUNDERCHILD, DERRICK HORSE, MICHAEL LINKLATER, WALLY AWASIS, TAYLOR LINKLATER, CHRIS MOYAH, BRANDON BEAR, VIRGIL AWASIS, WILLIAM WEEKUSK, NOREEN MEETOOS, JAVEN JIMMY, DRAYTON ANGUS, GLORIA BADGER, YVETTE MCCALLUM, DONNA WAPASS, KENNETH AWASIS, SHELLEY ANGUS, ANDREA SEMAGANIS, HENRY JIMMY, LEIF HORSE, GERALDINE MEETOOS, WARREN MEETOOS, MELANIE PASKEMIN, MABEL ANGUS and THE BAND MEMBERS ALLIANCE AND ADVOCACY ASSOCIATION

Applicants

and

**THUNDERCHILD FIRST NATION,
as represented by its Chief and Headmen**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek orders pursuant to sections 10 and 11 of the *First Nations Financial Transparency Act*, SC 2013, c 7 [*FNFTA*] requiring the Respondent to carry out its duties set out at sections 7 and 8 of the *FNFTA*, within a period specified by this Court and directing continual and ongoing compliance with the *FNFTA*.

[2] The Respondent does not dispute that the financial records sought by the Applicants are owed, pursuant to the *FNFTA*.

[3] For the reasons that follow, this application is granted in part.

II. Background

[4] The individually named Applicants (“Individual Applicants”) are members of the Thunderchild First Nation (“Thunderchild”).

[5] The Band Members Alliance and Advocacy Association (“BMAAAC”) is a national not-for-profit society incorporated under the *Canada Not-for-profit Corporations Act*, SC 2009, c 23. The mission of BMAAAC is to assist band members in obtaining access to justice and ensuring good governance and financial accountability for First Nations in Canada.

[6] Thunderchild elected their current Chief and Council in October 2022. The terms of the current Chief and Council will expire in October 2026.

[7] The basis for the application is the failure of the Respondent to produce certain financial records, as required by the *FNFTA*:

- Audited consolidated financial statements, and auditor reports respecting the same, for fiscal years 2014–2015, 2020–2021, 2021–2022, and 2022–2023;
- Schedules of remuneration and expenses (“Schedule”), and auditor reports or review engagement reports respecting the same, for fiscal years 2013–2014, 2014–2015, 2015–2016, 2020–2021, 2021–2022, and 2022–2023; and
- Audited consolidated financial statements and Schedule for the 2023–2024 fiscal year, and the related auditors reports and/or review engagement reports (“Financial Records”).

[8] On April 4, 2024, legal counsel for the Applicants requested the Respondent disclose the Financial Records. The Respondent did not disclose the requested Financial Records or explain why they were unable to disclose them.

[9] The Applicants filed the notice of application on May 6, 2024.

[10] The Respondent has indicated and provided some evidence to illustrate that they are working to comply with the disclosure request of the Financial Records, however, Thunderchild indicated that more time is needed to prepare and audit the Financial Records.

III. Legislation

[11] The relevant portions of the *FNFTA* are:

Copies – members

7 (1) A First Nation must, on the request of any of its members, provide the member with copies of any of the following documents:

Copies : membres

7 (1) La première nation fournit à tout membre, sur demande, copie de l’un ou l’autre des documents suivants :

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| <p>(a) its audited consolidated financial statements;</p> | <p>a) ses états financiers consolidés vérifiés;</p> |
| <p>(b) the Schedule of Remuneration and Expenses;</p> | <p>b) l'annexe des rémunérations et des dépenses;</p> |
| <p>(c) the auditor's written report respecting the consolidated financial statements; and</p> | <p>c) le rapport écrit du vérificateur concernant les états financiers consolidés;</p> |
| <p>(d) the auditor's report or the review engagement report, as the case may be, respecting the Schedule of Remuneration and Expenses.</p> | <p>d) le rapport de mission de vérification ou d'examen, selon le cas, qui accompagne l'annexe des rémunérations et des dépenses.</p> |

Time limit

Délai

- | | |
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| <p>(2) The First Nation must provide the copies without delay, but has until 120 days after the end of the financial year in question to provide them if the request is received within those 120 days.</p> | <p>(2) Elle lui en transmet copie dès que possible, mais au plus tard cent vingt jours après la fin de l'exercice en question si elle reçoit la demande au cours de cette période.</p> |
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Fee

Frais

- | | |
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| <p>(3) A First Nation may charge a fee for providing the copies, but the fee must not exceed the cost of the service.</p> | <p>(3) La première nation peut exiger, pour l'obtention de tout document, le paiement de droits dont le montant ne dépasse pas les coûts engendrés par la prestation du service.</p> |
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Internet site – First Nation

Site Internet : première nation

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| <p>8 (1) A First Nation must publish the documents referred to in paragraphs 7(1)(a) to (d) on its Internet site, or cause those documents to be published on an Internet</p> | <p>8 (1) La première nation publie les documents visés aux alinéas 7(1)a) à d) dans son site Internet — ou les fait publier dans un autre site Internet —, dans les cent vingt</p> |
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site, within 120 days after the end of each financial year.

jours suivant la fin de chaque exercice.

Documents archived

Conservation des documents

(2) The documents referred to in subsection (1) must remain accessible to the public, on an Internet site, for at least 10 years.

(2) Ces documents doivent demeurer accessibles au public, dans un tel site, pendant au moins dix ans.

Discharging duty

Réserve

(3) Publishing any document on an Internet site is insufficient to discharge the First Nation's duty to make copies of it available to its members who request that document.

(3) La seule publication d'un document dans un site Internet ne relève pas la première nation de son obligation d'en fournir copie au membre qui le demande.

...

[...]

Application by member of First Nation

Demande : membre de la première nation

10 If a First Nation fails to provide copies of any document under section 7, any member of that First Nation may apply to a superior court for an order requiring the council to carry out the duties under that section within the period specified by the court.

10 En cas d'inexécution de toute obligation prévue à l'article 7, tout membre de la première nation peut demander à une cour supérieure de rendre une ordonnance enjoignant au conseil de s'en acquitter dans le délai qu'elle fixe.

Application by any person

Demande : toute personne

11 If a First Nation fails to publish any document under section 8, any person, including the Minister, may apply to a superior court for an order requiring the council to carry out the duties under that section within the period specified by the court.

11 En cas d'inexécution de toute obligation prévue à l'article 8, toute personne, y compris le ministre, peut demander à une cour supérieure de rendre une ordonnance enjoignant au conseil de s'en acquitter dans le délai qu'elle fixe.

IV. Issues

[12] The application raises the following issues:

- A. Has the Respondent complied with its obligations pursuant to sections 7 and 8 of the *FNFTA*? If not, within what period ought the Respondent be required to comply with its obligations?
- B. Can this Court make an order with respect to the 2023–2024 Financial Records?
- C. Can this Court make an order for ongoing and continuing disclosure of Financial Records?
- D. What is the appropriate remedy?

V. Discussion

A. *Has the Respondent complied with its obligations pursuant to the FNFTA?*

(1) Jurisdiction of this Court

[13] Section 10 of the *FNFTA* provides that any member may apply to a superior court for an order to require a council to fulfill its duties under section 7. Similarly, section 11 of the *FNFTA* provides that any person may apply to a superior court for an order to require a council to fulfill its duties under section 8.

[14] For the purposes of the *FNFTA*, the Federal Court is a superior court. Accordingly, this Court has the jurisdiction to grant the orders sought by the Applicants.

(2) Requirements pursuant to the *FNFTA*

[15] Sections 5 and 6 of the *FNFTA* require that First Nations prepare audited consolidated financial statements and schedules of remuneration paid, and expenses reimbursed to chief and council and entities consolidated with the First Nation, in accordance with generally accepted accounting principles.

[16] Section 7 requires that a First Nation provide copies of certain enumerated financial documents on request to its members. Section 8 requires that a First Nation publish the same financial documents on its internet site or cause the documents to be published on another internet site.

(3) Reasonable time to produce outstanding Financial Records

[17] The Respondent did not dispute that these duties are owed or outstanding in respect of the Financial Records. They stated that while this Court has discretion to require performance of these duties “within [a] period specified,” they argued that they are working diligently to comply and requested an extended period to comply. They argued this is necessary to ensure that the requested Financial Records are accurate.

[18] The Respondent asserted that they are simply unable to fulfill their obligations within a brief 30-day window, as requested by the Applicants at the hearing. They submit that the process involved in preparing and auditing multiple years of financial documents is time-consuming, particularly when viewed in the context of other tasks involved in governing the Thunderchild community.

[19] In their memorandum, the Respondent submitted that October 18, 2025, was a reasonable and appropriate date for this Court to order Thunderchild's retroactive compliance with its *FNFTA* duties for the 2013–2014, 2014–2015, 2015–2016, 2020–2021, 2021–2022, and 2022–2023 years.

[20] At the hearing of this application on February 27, the Respondent submitted an affidavit dated February 26 from Ms. Trixi McNulty, the Chief Financial Officer of Thunderchild. They did not provide an explanation for why this affidavit was so late. Notwithstanding its extreme tardiness, I exercised my discretion to permit the admission of the affidavit, even though the Applicants did not have an opportunity to cross-examine Ms. McNulty.

[21] Ms. McNulty acknowledged the backlog in record-keeping and accounting. She attested that Thunderchild has completed the following Financial Records: a Schedule for 2013–2014, audited consolidated financial statements and a Schedule for 2014–2015, and a Schedule for 2015–2016. She also indicated that those Financial Records have been sent to Indigenous Services Canada for posting on their website.

[22] For the outstanding Financial Records for the 2020–2021, 2021–2022, 2022–2023, and 2023–2024 fiscal years, Ms. McNulty advised that Thunderchild has retained MNP, a chartered professional accounting firm, to complete the necessary audits required under the *FNFTA*. She stated she has been advised that the Financial Records must be completed in chronological order and cannot be completed simultaneously. She also stated that she anticipates completion of this work will take “many months, or even possibly one year.”

[23] The Respondent noted that the current Chief and Council were only elected to office in October 2022. Therefore, the current Chief and Council are not responsible for the multiple years of non-compliance.

[24] I accept that the auditing process must be completed sequentially, meaning that the records for one fiscal year must be completed before the next fiscal year, and that the process cannot be completed out of order or concurrently. That said, I do not accept that the process to complete all the outstanding Financial Records will take an additional year, until March 2026, to complete.

[25] I appreciate that Thunderchild is working to clear its reporting backlog, which was created, at least in part, by previous councils. I understand that they have worked to disclose the Financial Records as they become available. However, given they have been aware that the Applicants have sought access to these Financial Records since April 2024, it is not acceptable that the Respondent is requesting almost two full years to become compliant with the *FNFTA*.

[26] At the hearing of this application, counsel for the Respondent suggested that “rolling disclosure” as records became available and “ongoing reporting” may be a way to ensure that Thunderchild remains diligent and on-track with their obligations.

[27] The evidence from Ms. McNulty does not provide when Thunderchild retained the services of MNP, or when Thunderchild expanded its internal team working on compliance. While the affidavit indicated that compliance is a priority for Thunderchild, the affidavit also pointed to other priority work related to the administration of Thunderchild. I accept that Thunderchild has many competing priorities and limited resources, however, compliance with

their statutory obligations under the *FNFTA* must be paramount, given the long outstanding history.

[28] Finally, the Respondent argued that publication of the Financial Records cannot precede a General Band Meeting, pursuant to the *Thunderchild First Nation Constitution*. The affidavit of Ms. McNulty sets out that the *Thunderchild First Nation Constitution* requires annual audited financial reports be presented at a General Band Meeting. She indicated that Thunderchild intends to post the audited consolidated financial statements for the 2020–2021 fiscal year online following a meeting tentatively scheduled for March or April 2025.

[29] The Respondent did not previously provide or reference the *Thunderchild First Nation Constitution* as part of the record for this proceeding. However, at the hearing they offered to provide a copy to the Court and the Applicants. I exercised my discretion to permit the late disclosure of this document, as it is an important contextual fact relevant to this proceeding.

[30] Article 11 of the *Thunderchild First Nation Constitution* states:

11.01 The Council shall cause the following reports to be made or given to the Citizens:

(a) Annual audited financial reports for the Thunderchild First Nation and its empowered entities shall be presented at a General Band Meeting;

(b) Annual portfolio or program reports shall be presented at a General Band Meeting.

[31] While the *Thunderchild First Nation Constitution* indicates that financial reports shall be presented at a General Band Meeting, it does not require that such a meeting precede publication of the reports, as is required pursuant to the *FNFTA*. I appreciate Thunderchild must present the Financial Records at a General Band Meeting, however, they may not delay the publication of

the long overdue documents so they can hold a General Band Meeting that has not yet been scheduled.

B. *2023–2024 fiscal year Financial Records*

[32] The Respondent argued that because the Applicants filed this application on May 6, 2024, they are not in-time to request relief related to the 2023–2024 fiscal year. They submit that the requested relief in respect of the 2023–2024 fiscal year is outside the scope of the pleadings and should be dismissed.

[33] Section 12 of the *FNFTA* states that an application for an order in respect of documents referenced in section 7 of the *FNFTA* for the most recent fiscal year may only be made after the expiry of 120 days after the end of that financial year.

[34] It is trite that the purpose of pleading is to define the issues for the parties and the Court. Proper pleadings permit efficient use of scarce judicial resources (*Johnny v Dease River First Nation*, 2024 FC 1636 [*Dease River*] at para 47, citing *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 16).

[35] The scope of an application is determined by the notice of application. Rule 301 of the *Federal Courts Rules*, SOR/98-106 sets out the content of an application and highlights that “a complete and concise statement of the grounds intended to be argued” must be set out in the notice of application (Rule 301(e)). The Court has clarified that a notice of application should not be reviewed with the same vigour as a statement of claim (*Dease River* at para 48, citing *Simpson Strong-Tie Company, Inc v Peak Innovations Inc*, 2008 FC 52; *Testawich v Duncan’s First Nation*, 2014 FC 1052).

[36] The present notice of application was filed on May 6, 2024. At paragraph 17(a), the Applicants requested that the Respondent provide Thunderchild’s audited consolidated financial statement and Schedule for the 2023–2024 fiscal year ending March 31, 2024, and the related auditor’s reports or review engagement reports. The Respondent did not attempt to strike this portion of the application.

[37] An analogy can be drawn with this Court’s jurisprudence in respect of amendments to a notice of application. The Court has permitted amendments “at any stage for the purpose of determining the real questions in controversy between the parties, provided that such late amendments serve the interests of justice and would not result in an injustice to the other party” (*Dease River* at para 52, citing *GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2020 FC 348 at para 66 and *Musqueam Indian Band v Canada (Governor in Council)*, 2004 FC 1564 at para 15).

[38] The Respondent understands the Applicants are seeking disclosure of the Financial Records, pursuant to the *FNFTA*. The Respondent also acknowledged that there is a statutory duty to produce the Financial Records, and that such records are outstanding.

[39] While the application was filed ahead of the 120-day period (*FNFTA*, s 12), the facts are that the Applicants have made a request for these documents, the Respondent has a duty to disclose the records with 120 days of the fiscal year end but failed to do so, and they are now overdue. The Respondent has been aware that the Applicants seek disclosure of these records since at least May 2024.

[40] In view of the circumstances of this application, the Respondent is not prejudiced by the inclusion of the 2023–2024 fiscal year. Further, failure to address this outstanding fiscal year

would unduly “stymie the timely and effective resolution” of this matter and may result in “an endless merry-go-round” scenario denounced by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paragraph 142. In my view, the additional delay that would result in requiring a further application for this now outstanding fiscal year would not be in the interests of justice.

C. *Ongoing obligation to produce*

[41] In addition to seeking retroactive compliance with sections 7 and 8 of the *FNFTA*, the Applicants request that this Court order the Respondent’s continual and ongoing compliance with its obligations going forward.

[42] In support of this position, the Applicants relied on *Onion Lake Cree Nation v Stick*, 2020 SKCA 101 [*Onion Lake*], wherein they stated the Saskatchewan Court of Appeal left open the possibility that an order for ongoing compliance may be granted (see paras 72–82).

[43] The Respondent argued that *Onion Lake* is distinguishable as that matter involved the interpretation of a compliance order, which is distinct from the facts in this application. Further, the relevant financial documents had already been prepared in *Onion Lake*, hence why the 30-day window to comply was reasonable. Finally, they noted that the Saskatchewan Court of Appeal did not determine if they could make an order for ongoing compliance.

[44] It is a well-established approach to statutory interpretation that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21; Ruth Sullivan, *The*

Construction of Statutes, 7th ed (Toronto: LexisNexis Canada, 2022) at 7; *Interpretation Act*, RSC 1985, c I-21, s 10).

[45] Sections 7 and 8 of the *FNFTA* clearly stipulate that First Nations have 120 days from fiscal year end to prepare and produce records. Sections 10 and 11 of the *FNFTA* state that if a First Nation fails to comply with sections 7 and 8, members or anyone may apply to a superior court for an order.

[46] I am persuaded that the *FNFTA* scheme does not contemplate the Court granting an order that imposes a continuous and ongoing obligation to produce records upon a First Nation. First, this appears to fly in the face of the role of the Court as a court of review. Second, an order of this nature is somewhat heavy-handed and will burden future Thunderchild councils until such time as the order is amended or repealed at some unknown date. Finally, in my view, an order of this nature is not necessary. The *FNFTA* clearly requires ongoing compliance, and an order of this nature serves no practical purpose, nor will it have any practical effect.

D. *Remedy*

[47] Both parties sought their costs of this application.

[48] The Applicants requested that the Respondent be ordered to pay the Applicants' disbursements, totaling \$1,238.12.

[49] The Respondent requested an award of costs against the Applicants to be fixed at double Column III of Tariff B.

[50] The Respondent argued that the requested award is merited because of the result of the proceeding, the importance and complexity of the issues, the amount of work, and the conduct of

the parties. The Respondent noted that it has acknowledged its outstanding obligations and has undertaken to fulfill their obligations as soon as possible. They argue that the Applicants unnecessarily created complexity and additional work.

[51] The general and longstanding practice is that costs follow the event for a successful party (*Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 at paras 2–4, 7–9).

[52] The principal objectives of an award of costs are to provide indemnification to the successful party, penalize a party refusing a reasonable settlement, and sanction behavior that increases the expense of litigation or is otherwise unreasonable or vexatious (*Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at paras 19–20).

[53] I am of the view that it is appropriate to order costs in this matter for the Applicants. Having regard to Rules 400, 401, 407, including the factors articulated in Rule 400(3), I am exercising my discretion and awarding the Applicants a lump sum award in the amount of \$1,238.12, payable by the Respondent forthwith.

[54] Despite the Respondent's admissions that its *FNFTA* obligations are owed and are outstanding, the Respondent does not appear to have made efforts to work with the Applicants to develop a schedule for disclosure of the Financial Records to resolve the matter out of court. The Respondent did not provide an explanation for the many years of non-compliance with the *FNFTA*, other than that the history of non-compliance started under prior administrations. In addition, the Respondent did not comply with the court-ordered timetable for this application and the provision of materials, filing new evidence on the day of the hearing, and referencing materials not in evidence in their submissions on costs.

[55] The Respondent has not persuaded me that it is appropriate to make an award of costs in their favour. In addition, the Respondent argued that the Applicants made baseless allegations concerning fear of reprisals or possible acts of retaliation against members of Thunderchild who sought the Financial Records, and that the Applicants did not demonstrate that BMAAAC was a public interest litigant.

[56] At the outset of the hearing, I found that BMAAAC was a proper party to this matter as, pursuant to section 11 of the *FNFTA*, “any person” could bring an application. Further, as noted by the Applicants at the hearing, the Respondent chose not to cross-examine the Applicants’ affiants. Accordingly, it is too late to attempt to challenge that evidence. Finally, I note that the Respondent’s cost submissions attempt to rely on a letter that is not part of the record of this proceeding. I have not considered this new evidence at this stage.

VI. Conclusion and Deposition

[57] The record for this application illustrates that the Respondent has not been compliant with their obligations under the *FNFTA*.

[58] Counsel for the Respondent indicated that they are open to rolling disclosure of the Financial Records as they are completed and reporting on progress.

[59] It is simply unacceptable that the Respondent did not anticipate being able to fully comply with their disclosure obligations for at least another 12 months. However, I am not persuaded that the extreme remedy of ordering disclosure within 30 days of this order, as suggested by the Applicants, is an appropriate remedy.

[60] I agree with the Respondent that it is imperative that the Financial Records are accurate. It serves no purpose to order a deadline that the Respondent is unable to comply with, or that requires them to cut corners at the expense of completeness and/or accuracy. It is in the interest of both the Applicants and the Respondent that the Financial Records be complete and accurate.

[61] The application is granted in part. A schedule of reporting is included in my judgment.

JUDGMENT in T-1044-24

THIS COURT'S JUDGMENT is that:

1. The Respondent shall publish on their website, within 14 days of this Order, the following Financial Records disclosed to the Applicants' counsel on December 19, 2024:
 - Audited Consolidated Financial Statements for the 2014–2015 fiscal year, prepared by MNP on November 5, 2015;
 - Schedule of Remuneration and Expenses for fiscal year 2013–2014;
 - Schedule of Remuneration and Expenses for fiscal year 2014–2015; and
 - Schedule of Remuneration and Expenses for fiscal year 2015–2016.

2. The Respondent shall publish on their website, within 14 days of this Order, the following Financial Records disclosed to the Applicants' counsel on February 20, 2025:
 - Audited Consolidated Financial Statements for the 2020–2021 fiscal year prepared by MNP on February 19, 2025.

3. The Respondent shall prepare a schedule of remuneration and expenses for the 2020–2021 fiscal year, provide copies to the Applicants, and publish the schedule on their website within 30 days of this Order.

4. The Respondent shall provide copies of the Audited Consolidated Financial Statements for the 2021–2022 fiscal year and a Schedule of Remuneration and

- Expenses for the 2021–2022 fiscal year to the Applicants within 120 days of this Order.
5. The Respondent shall publish the Audited Consolidated Financial Statements and a Schedule of Remuneration and Expenses for the 2021–2022 fiscal year within 14 days of disclosure of the reports as set out at #4.
 6. The Respondent shall provide copies of the Audited Consolidated Financial Statements for the 2022–2023 fiscal year and a Schedule of Remuneration and Expenses for the 2022–2023 fiscal year to the Applicants within 265 days of this Order.
 7. The Respondent shall publish the Audited Consolidated Financial Statements and a Schedule of Remuneration and Expenses for the 2022–2023 fiscal year within 14 days of disclosure of the reports as set out at #6.
 8. The Respondent shall provide copies of the Audited Consolidated Financial Statements for the 2023–2024 fiscal year and a Schedule of Remuneration and Expenses for the 2023–2024 fiscal year to the Applicants within 390 days of this Order.
 9. The Respondent shall publish the Audited Consolidated Financial Statements and a Schedule of Remuneration and Expenses for the 2023–2024 fiscal year within 14 days of disclosure of the reports as set out at #8.
 10. The Respondent shall provide an update to the Court and the Applicants every 90 days on their progress with respect to compliance with the schedule set out above.

11. The Applicants are awarded a lumpsum of \$1,238.12, payable forthwith.

“Julie Blackhawk”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1044-24

STYLE OF CAUSE: MARLEN HORSE ET AL. v THUNDERCHILD
FIRST NATION

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: FEBRUARY 27, 2025

JUDGMENT AND REASONS: BLACKHAWK J.

DATED: MARCH 18, 2025

APPEARANCES:

Marleigh Dick FOR THE APPLICANTS
Maeve O'Neill Sanger

Rob Normey FOR THE RESPONDENT
Anjalika Rogers
Shane Varjassy

SOLICITORS OF RECORD:

OSLER, HOSKIN & FOR THE APPLICANTS
HARCOURT LLP
Barristers and Solicitors
Toronto, Ontario

MAURICE LAW FOR THE RESPONDENT
Barristers and Solicitors
Calgary, Alberta