Federal Court  Cour fédérale

Date: 20200129

Docket: T-1927-19

Citation: 2020 FC 165

Ottawa, Ontario, January 29, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

CHIEF ADRIAN SINCLAIR, COUNCILLOR BRAD BEARDY, COUNCILLOR EMERGY STAGG, COUNCILLOR MAURICE TRAVERSE, COUNCILLOR CHRIS TRAVERSE, AND COUNCILLOR JULES BEARDY, IN THEIR PERSONAL AND REPRESENTATIVE CAPACITY AS REPRESENTATIVES OF LAKE ST MARTIN FIRST NATION, AND THE SAID LAKE ST MARTIN FIRST NATION AS REPRESENTATIVES FOR ALL ITS MEMBERS

Applicants

and

THE ATTORNEY GENERAL OF CANADA, THE HONOURABLE BILL BLAIR, MINISTER OF PUBLIC SAFETY, THE HONOURABLE MARC MILLER, MINISTER OF INDIGENOUS SERVICES CANADA, THE HONOURABLE CAROLYN BENNETT, MINSTER OF CROWN-INDIGENOUS RELATIONS AND NORTHERN AFFAIRS

Respondents

ORDER AND REASONS

[1] This is a motion brought by Chief Adrian Sinclair, and Councillors Brad Beardy, Emery Stagg, Maurice Traverse, Chris Traverse, and Jules Beardy, in their personal capacity and as representative of the Lake St Martin First Nation, and by Lake St Martin First Nation as representatives for all its members (collectively referred to as the "Applicants" or the "LSM First Nation"), on December 17, 2019, seeking an interlocutory injunction pursuant to s 44 of the *Federal Courts Act*, RSC 1985, c F-7 and Rule 373 of the *Federal Courts Rules*, SOR/98-106.

[2] Specifically, the relief sought is as follows:

> 1. An interlocutory injunction staying the operation of the decision terminating Red Cross evacuee status for Lake St. Martin evacuees who have no house to return to on the reserve, and whose housing needs on reserve have not meet met, such persons identified in schedule "A" to this motion;
>
> 2. An order directing that all parties, including the respondents and the Red Cross, abide by the stay, by reinstating or continuing full Red Cross flood evacuee benefits for those evacuees identified in schedule "A" until the earlier of:
>
> > a. The full and final disposition, of the origination proceedings (the Application); and
> >
> > b. A court determination is made that there is a place within a house on Reserve, ready for occupancy by them and their dependents, where they can obtain safe and secure accommodations (to a standard no less than the national Occupancy Standards).
>
> 3. In the alternative, if a mandatory injunction to reinstate Red Cross evacuee benefits is required, then an interlocutory injunction to that effect;
>
> 4. An order that the Applicants be relieved of any undertaking as to damages that might otherwise be required under Ruled 373(2).

5. An order of costs as this Honourable court may deem just.

6. Such further and other Oder as the Honourable Court may deem just.

[3] When appearing before me, the Applicants' counsel advised that item 2(b) above is not being pursued.

[4] To address this motion, it is first necessary to summarise the relevant factual background, which has led to the filing of the underlying application for judicial review and this related motion for an interlocutory injunction.

Background

[5] In 2011, as a result of extreme water levels, the government of Manitoba ("Manitoba") implemented emergency flood mitigation measures, including the diversion of water into Lake Manitoba. While there is debate between the parties as to the role of the government of Canada ("Canada") in that decision, that issue is not relevant to the motion for an injunction that I must decide, and I make no finding in the regard. What is not in dispute is that the diversion of water into Lake Manitoba led to devastating flooding in First Nation communities, one of which was LSM First Nation. The flooding forced the evacuation of LSM First Nation and caused the destruction of all houses and community infrastructure.

[6] On July 29, 2011, the Governor in Council promulgated Order in Council P.C. 2011-0843 ("OIC") which authorized the Minister of Public Safety and Emergency Preparedness ("Minister") to provide financial assistance, under s 4(1)(j) of the *Emergency Management Act*,

SC 2007, c 15, to Manitoba in respect of its declaration of a provincial emergency in relation to the 2011 Manitoba flooding.

[7] Since 2011, LSM First Nation evacuees have received monthly evacuee benefits to pay for rent and living expenses while living off reserve. The monthly evacuee benefits are paid to the head of each household, as identified by LSM First Nation, by a local aid agency. From 2011 to 2014, the Manitoba Association of Native Firefighters ("MANFF") administered the benefits. In or around 2014, the Canadian Red Cross ("CRC") replaced MANFF in the managing of support for evacuees. Both the MANFF, and then the CRC, paid or pay the evacuee benefits directly to the evacuees and were or will be reimbursed by Manitoba's Emergency Measures Organization, which, in turn, is able to claim reimbursement from Canada.

Evacuee List

[8] At the time that CRC replaced MANFF in the role of managing support for evacuees, Canada assumed responsibility for determining evacuee list eligibility.

[9] The 2014 CRC evacuee list identified approximately 1100 LSM First Nation evacuees.

[10] This number changed over time with the natural progression of lives. Children who were under the age of 18 at the time of the 2011 evacuation reached that age. Children were born to evacuees and evacuees passed away. In 2017, the evacuee list included 1297 persons.

Negotiations

[11] There have been ongoing discussions between Canada, Manitoba and LSM First Nation about the rebuilding of the community and the return home of the evacuees since 2011. Canada refers to its efforts to assist the LSM First Nation, and other evacuated First Nations, as "Operation Return Home".

[12] There was general agreement between the parties that the ultimate goal was to achieve a Comprehensive Settlement Agreement ("CSA") that would address all matters related to past and future high-level water events on LSM First Nation lands, including ongoing litigation, the re-establishment of the community and effecting the return of the evacuees to their homes.

[13] To that end, on July 14, 2014, the parties signed an Acknowledgement of the Fundamental Elements ("AFE"). This acknowledged that a comprehensive plan was needed to rebuild the LSM First Nation community and that the parties anticipated that a CSA would be based on the fundamental components set out in the AFE. The parties further acknowledged that the proposed CSA would be based on the terms set out in the AFE and that by the signing of the AFE the parties agreed to recommend the terms to their respective principals as the basis for further negations towards a final CSA. However, the parties also acknowledged that the AFE was not binding and did not create any legal obligation amongst them. The AFE addressed a number of matters, including easement lands and new reserve lands, infrastructure (roads, utilities, water treatment, schools, fire hall, band office, community centre etc.). Relevant to this motion was housing. The AFE states:

> 4) Housing
>
> a) The proposed CSA would contemplate addressing housing as follows:
>
> b) A financial contribution to a total maximum amount of $72.8 million by MB and Canada in respect of housing would be subject to completion on LSMFN of a Community Plan, compliance with the terms and conditions of any funding arrangements, tendering requirements, design specifications, detailed housing strategy and implementation plan;
>
> c) priority to be given to the 2011 evacuee members pursuant to the Red Cross evacuee list dated July 2, 2014, subject to such documentation as may be determined or required.
>
> i) LSMFN to prepare a detailed housing strategy and implementation/management plan; and …..

[14] The parties also agreed that if the LSM First Nation did not approve the AFE, then Canada and Manitoba would provide the listed "Basic Elements Only Package – Essentials to return evacuees". This states that it is understood that the AFE sets out the elements and items that form a reasonable basis of a CSA agreement, however, if the proposed AFE was not supported by the LSM First Nation, then Canada and Manitoba would provide the listed following basic requirements to return evacuees to the community. With respect to housing:

> i) In order to return evacuees as a Basic Element, a total financial contribution up to an amount of $47.3 million, from MB and Canada, to re-establish, on a priority basis, the LSMFN evacuees as per the Red Cross evacuee list dated July 2, 2014 and subject to such documentation as required.

[15] That financial contribution was subject to the stated conditions, including the completion by LSM First Nation of a community plan, detailed housing strategy and the other matters set out, which reflect the housing terms as set out in the AFE.

[16] On April 7, 2016, Canada, Manitoba and LSM First Nation signed a Project Approval Request ("PAR") for the construction of 150 housing units. Ultimately, a favourable tender permitted the construction of an additional 40 units, for a total of 190 units, referred to as Phase 1 of the project.

[17] On April 26, 2017, Canada, Manitoba and LSM First Nation signed an "Agreement in Principle toward conclusion of Comprehensive Settlement Agreement, dated April 25, 2017" ("AIP"). This acknowledged that, at that time, the majority of evacuees remained displaced from their community with partial repatriation scheduled for 2017 and the full repatriation by fall of 2018. Further, that the parties had met regularly to acknowledge and address the elements of rebuilding the community, including the construction of additional housing units and other elements of the agreement. The AIP was agreed to form the foundation of a CSA but is non-binding and was prepared on a specified without prejudice basis. The AIP states that there remained three categories of infrastructure left to complete and that the parties had agreed to manage them in a distinct manner at the request of the LSM First Nation. One of these was in regard to the funding of $36 million identified for an additional 130 housing units. The parties agreed that Canada would manage the funding after approval of the CSA under the terms of a specific PAR to be executed prior to the completion of the CSA. Canada and Manitoba agreed that that their respective cost shares would be made available to reimburse the current housing contractor, upon approval of LSM First Nation, for additional units up to the full amount of $36 million, even if this exceed 130 living units. This would allow LSM First Nation flexibility to consider multi-plex or higher density housing options, with LSM First Nation members' support, at a unit cost lower than single family dwellings.

[18] To date, a CSA has not been completed.

Repatriation of Evacuees

[19] The repatriation of evacuees began in the fall of 2017.

[20] At that time, Phase 1, the construction of 190 single-family dwelling living units, was nearing completion. Mr. Stephen Taylor, Manitoba Regional Director General ("RDG") of Indigenous Services Canada ("ISC") issued a "Lake St. Martin Decision Note - Repatriation Letter, decision by the Regional Director General Manitoba Region" dated November 1, 2017. The summary in the repatriation letter notes that LSM First Nation currently had 1297 evacuees and approximately 474 were expected to begin repatriation on November 3, 2017, at which time approximately 44 homes would be ready for occupancy, the remaining homes were anticipated to be ready in December 2017. Further, that a draft repatriation letter had been shared with the LSM First Nation Chief and Council who had agreed to sign it and send it to the evacuees. The letter explained that a housing unit had been assigned to them and was ready for immediate occupancy. On August 3, 2018, 40 households were advised that LSM Chief and Council had assigned them a housing unit that was ready for immediate occupancy.

[21] In spring of 2019, LSM Chief and Council submitted a Change Order Request to add 40 multiplex units instead of 10 single family homes. A May 24, 2019 joint letter from Canada and Manitoba indicated their support for the proposed change, and noted that the proposed cost of $5.8 million would result in a revised total project cost of $35.9 million, which was still within the current PAR authority of $36 million. Their support was subject to conditions listed, which

included that the inclusion of the multiplex units would not delay the completion of the base contract of the 120 single detached living units and that the substantial completion of the multiplex units would be no later than March 31, 2020 as funding could not be guaranteed in future fiscal years. The letter also noted that upon adding the base contract of 120 units to the previously completed 190 units of Phase 1, the community would have a total of 310 units available by the end of November 2019, and 350 units by the end of March 2020. The letter also states that:

> Financial support for all evacuees will be ending December 31, 2019 regardless if [*sic*] the additional units are not completed by this time. Furthermore, the increased number of units due for completion by the end of the fiscal year will not impact the expected return of evacuees by December 31, 2019.

[22] By letter of July 15, 2019, LSM First Nation Chief and Council expressed their dissatisfaction with the decision to end financial support for all evacuees on December 31, 2019. The letter states that Chief and Council had contacted the project manager, PM and Associates, who had advised that 310 units would be complete by November 30, 2019 and the remaining 40 units would not be completed until March 31, 2020. Chief and Council stated that the time line would result in an estimated 771 evacuees being rendered homeless and that they would be significantly impacted, physically and psychologically, if forced to return prematurely to the community, or to try to exist without continuing financial support. The letter requested that Canada and Manitoba revisit the decision.

[23] By Decision Note dated October 24, 2019, the RDG indicated that LSM First Nation currently had 991 evacuees and all were expected to return to their community by December 31, 2019. However, that an October winter storm had delayed construction such that completion of

100 of the 120 houses in Phase 2 would not occur until December 2019, and that the remaining 20 houses would not be ready for occupancy until mid-January 2020, at the earliest. Further, the note stated that CRC benefits could be terminated and remaining evacuees could return to the community. A draft repatriation letter had been prepared, similar in form to prior letters. It recommended that the repatriation letters be sent on or before October 31, 2019 to achieve a 60 day notice period for an effective cut off date of December 31, 2019. Repatriation letters were sent by the RDG on October 30, 2019. The letters stated that CRC benefits for LSM First Nation residents resulting from an evacuation that began in 2011 were set to end on December 31, 2019, and that recipients should contact the LSM First Nation Band Office for information on assignment of housing units.

[24] The letter also stated that new infrastructure including housing, water and waste water facilities, schools and a temporary Band office were in place, and that CRC was available to assist with the move.

[25] At a meeting held on November 12, 2019 between representatives of Canada and LSM Chief and Council Chief, the latter again expressed dissatisfaction with the decision to end evacuee benefits on December 31, 2019 and expressed concern about the housing units that would not be completed by that date.

[26] By email of November 22, 2019, Canada advised LSM First Nation that it had received the November 18, 2019 letter from LSM First Nation's counsel (described below) and that Canada had already acknowledged that not all of the housing units (70) would be ready by

December 31, 2019, as had been expected. The RDG had expressed that ISC wanted to work with Chief and Counsel to address the situation. Further, that Canada remained prepared to continue assistance past December 31, 2019 for evacuees allocated to those 70 incomplete housing units.

[27] By letter of December 17, 2019 counsel for Canada advised counsel for the LSN First Nation that Canada would, on a without prejudice basis, continue to fund evacuee benefits for the remaining evacuees, generally, until January 31, 2020. Canada would additionally continue to provide benefits for a specific subset of evacuees whose homes were not yet completed, until March 31, 2020, which agreement was not made on a without prejudice basis. The letter states that the author understood that counsel for the LSM First Nation was working to identify those individuals and would shortly provide that information. Further, that Canada required that information so that it could promptly notify all evacuees and accurately advise them of the correct date that their benefits will end.

[28] By email dated December 23, 2019, counsel for the LSM First Nations provided counsel for Canada with a list of evacuee heads of household who have been allocated a house that was not ready for occupancy.

[29] By letters dated December 24, 2019, all remaining evacuee heads of household (496) were advised by the RDG that evacuee benefits were extended to January 31, 2020.

Appeal

[30] By letter of November 18, 2019, counsel for LSM First Nation wrote to counsel for Canada stating that most of the evacuees had no home to return to and expressing the view that the termination notices must be rescinded as they were premature. Counsel referenced an ISC webpage that contains Frequently Asked Questions – Information for 2011 Manitoba Flood Evacuees ("FAQs"). Counsel also stated the view that Canada had failed to advise evacuees how they could appeal the decision to be removed from the evacuee list or of the criteria that must exist in order for an appeal to be successful and asserted that this offended fairness and natural justice. Counsel asked Canada to immediately identify the appeal procedure promised to the evacuees, how and when appeal hearings would take place, and requested that Canada immediately confirm that the termination of benefits had been rescinded and would only be reissued after an appeal process. Failing this, LSM First Nation would seek judicial review and interlocutory relief. Counsel acknowledged this Court's decision in Dauphin River First Nation (*Stagg v Canada (Attorney General)*, 2019 FC 630 ("*Stagg*")), but stated its view that the factual circumstances differed.

[31] By letter of November 28, 2019, counsel for Canada responded to the November 18, 2019 letter from counsel for LSM First Nations. This referenced Canada's November 22, 2019 email, described above. It also acknowledged that counsel for LSM First Nation had provided a list of evacuees to whom Chief and Council had allocated houses that had been constructed, are under construction or are awaiting construction, and asked for information to help reconcile the houses that would not be complete as of December 31, 2019 with the affected band members.

The letter acknowledged LSM First Nation's concerns as to the number of houses that would be funded in excess of the 183 homes that had existed on the reserve in 2011, but noted that the level of housing was agreed by the parties in the AIP. As to evacuation benefits, those are provided under the Emergency Management Assistance Program until such time as the affected communities are restored to their pre-emergency state. ISC anticipated that the additional housing would be completed by December 31, 2019 (subject to those already noted), and that the authority and responsibility to make housing allocations rests with Chief and Council. The letter states that ISC respects and does not interfere with that authority. As to the reference made to the FAQs on an ISC webpage, the letter states that, as counsel for LSM First Nation would be aware from the evidence in another matter before this Court, the appeal referenced within the FAQs related to a decision about the eligibility of specific individuals on evacuation lists, and not in respect of a decision as to whether funding of evacuees benefits, writ large, are to end.

[32] By letter of December 9, 2019, counsel for LSM First Nations responded to a letter from counsel for Canada dated November 28, 2019 and stated that LSM First Nation counsel, on behalf of the individual LSM First Nation members who had been advised that their evacuee benefits were going to be terminated, sought to appeal the termination decision. Counsel expressed the view that those individuals had a right to an appeal process if they pursued it and that the Dauphin Nations case, which had been determined by the Court (*Stagg*), did not determine the availability of an appeal process. Counsel demanded that Canada inform LSM First Nation of the appeal procedure and process, and that Canada allow the appeal process to play out before providing notice of termination of evacuee benefits.

[33] By letter of December 16, 2019, counsel for Canada confirmed to counsel for LSM First Nation that there is no appeal process for individual evacuees with respect to Canada's termination of funding for evacuee benefits. Further, that the appeal process to which counsel for the LSM First Nation referred applied only to situations where an individual evacuee was determined to be ineligible for inclusion on the CRC evacuee list and wished to appeal their removal from that list. Counsel for Canada stated that that process does not apply to Canada's determination that it will no longer provide this component of the disaster assistance, previously provided pursuant to the OIC and authorizing assistance under the federal *Emergency Management Act*.

Proceedings before this Court

[34] LSM First Nation filed a Notice of Application for judicial review on November 29, 2019 challenging the October 30, 2019 decision providing notice of termination of evacuee benefits, to be effective December 31, 2019, for the remaining CRC evacuees.

[35] The subject motion was filed on December 17, 2019 and was heard at a special sitting in Winnipeg on Friday, January 24, 2020. Counsel advised at the hearing that, for practical purposes, a decision was needed in advance of the January 31, 2020 termination date for most evacuee benefits.

Evidence

[36] In support of this motion seeking an interlocutory injunction, the LSM First Nation has filed the following affidavits:

i. Affidavit of Chief Adrian Sinclair, Chief and member of LSM First Nation, affirmed on December 17, 2019. Also before me is the transcript of cross examination of Chief Sinclair on his affidavit;

ii. Affidavit of Chase Traverse, Phase 2 Housing Project Coordinator for LSM First Nation, affirmed on December 17, 2019. Also before me is the transcript of cross examination of Chase Traverse on his affidavit;

iii. Affidavit of Chris Traverse, a Band Councillor of LSM First Nation, affirmed on December 17, 2019. Also before me is the transcript of cross examination of Chase Traverse on his affidavit;

[37] In responding to the motion, Canada filed the following affidavits:

i. Affidavit of Eunice Gross, Acting Manger of Community Initiatives, ICS, affirmed on January 3, 2020. Also before me is the transcript of cross examination of Eunice Gross on her affidavit;

ii. Affidavit of Aaron O'Keefe, previously employed as a Manager of Community Initiatives, ICS, affirmed on January 3, 2020. Also before me is the transcript of cross examination of Aaron O'Keefe on his affidavit;

iii. Affidavit of Donny Buckingham P. Eng., Senior Engineer, Manitoba Region, ICS, affirmed on January 3, 2020. Also before me is the transcript of cross examination of Donny Buckingham on his affidavit;

iv. Affidavit of Louis Dion, Senior Engineer, Manager Claims Negotiations, Manitoba Region, ICS, affirmed on January 3, 2020. Also before me is the transcript of cross examination of Louis Dion on his affidavit;

Issues

[38] There are two questions to be answered on this motion. The first is a preliminary question of whether the injunction sought is properly characterized as mandatory or prohibitory. And,

having determined that, the second is whether the applicable test for injunctive relief as been met.

Preliminary Issue: Is the injunction sought properly characterized as mandatory or prohibitory?

LSM First Nation's Position

[39] LSM First Nation submits that whether the injunction is mandatory or prohibitory depends on the proper characterization of the injunctive relief sought. As indicted by the Supreme Court of Canada in *R v Canadian Broadcasting Corporation*, 2018 SCC 5 at para 5 ("*Canadian Broadcasting*"), the analysis required to determine this boils down to whether the injunction would require the defendant to do something or to refrain from doing something. In this case, the core of Applicant's relief sought, the injunction, is to quash a decision and temporarily refrain the RDG from "doing something" – that something being the removal of CRC evacuee status.

[40] LSM First Nation takes the position that if the injunction is granted it will not compel Canada to make payments to the evacuees as it is actually the CRC that pays the evacuee benefits. Manitoba reimburses the CRC and "then Canada might at a later date" reimburse Manitoba. According to the Applicants, Canada is not making those payments, rather what Canada is doing is making determinations of status of evacuees. That that determination of status is the core of the dispute. The LSM First Nation relies on *AC v Canada (Citizenship and Immigration)*, 2019 FC 1196 ("*AC*") and *West Moberly First Nations v British Columbia*, 2018 BCSC 1835 ("*West Moberly*") in support of their position that the injunction sought is

prohibitory as Canada is being asked to refrain from terminating evacuee status. It submits that the fact that Canada may reimburse the CRC for the payments to the evacuees is an incidental consequence of the interlocutory prohibition preventing the evacuee's status from being removed.

Canada's Position

[41] The named Respondents (referred collectively to as "Canada") submit that the LSM First Nation seeks a mandatory injunction. This is because, properly characterized, the relief sought seeks to compel Canada to do something (*Canadian Broadcasting* at para 16), that is, to continue or reinstate funding of evacuee benefits. This type of positive obligation is mandatory in nature as it would, if granted, "direct [the Respondents] to undertake a positive course of action, such as taking steps to restore the status quo, or to otherwise 'put the situation back to what it should be'" (*Canadian Broadcasting* at para 15; *Medical Laboratory Consultants Inc v Calgary Health Region*, 2003 ABQB 995 ("*Medical Laboratory*")). Canada also takes issue with the accuracy of LSM First Nation's characterization of the relief sought as a continuation of evacuee status. Canada submits that there is nothing to indicate that the CRC evacuee benefits would continue, given the termination by Canada and Manitoba of the program funding. This inaccuracy is demonstrated by the LSM First Nation's prayer of relief, which seeks an additional order for "[a]n order directing that all persons, including the respondents and the Red Cross, abide by the stay, by reinstating or continuing full Red Cross flood evacuee benefits for the evacuees identified in schedule A…". Canada submits that without this mandatory aspect of the injunction, LSM First Nations' entire argument respecting irreparable harm must fail as it is premised on financial hardship to the evacuees. Canada submits that characterizing the

requested mandatory order as alternative or ancillary relief does not assist the LSM First Nation as the "practical consequence" sought is the continuation of funding of the evacuee benefits by Canada.

Analysis

[42] The starting point in resolving this issue is the Supreme Court of Canada's decision in *Canadian Broadcasting*. There that Court discussed the test for a prohibitive injunction and the enhanced first stage test applicable to mandatory injunctions:

> [12] In *Manitoba (Attorney General) v. Metropolitan Stores Ltd.* and then again in *RJR — MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd*. At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
>
> [13] This general framework is, however, just that — general. (Indeed, in *RJR — MacDonald*, the Court identified two exceptions which may call for "an extensive review of the merits" at the first stage of the analysis.) In this case, the parties have at every level of court agreed that, where a mandatory interlocutory injunction is sought, the appropriate inquiry at the first stage of the *RJR — MacDonald* test is into whether the applicants have shown a strong prima facie case…
>
> …
>
> [15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test

is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong prima facie case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the status quo, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial". The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in RJR — MacDonald as "extensive review of the merits" at the interlocutory stage.

[16] A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions. While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR — MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take . . . positive actions". For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the . . . injunction are likely to be". In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to do something, or to refrain from doing something.

[Footnotes removed]

[43] Thus, when seeking a prohibitive injunction the party seeking the relief must establish that:

(a) there is a serious issue to be tried, in the sense that the application is neither frivolous nor vexatious

(b) the moving party would suffer irreparable harm if an injunction is refused; and

(c) the balance of convenience favours the moving party.

[44] When a mandatory injunction is sought, there is an enhanced first stage analysis. The party seeking the relief must establish that there is strong prima facie case that they will succeed on the underlying application.

[45] In either case, the test is conjunctive.

[46] The task on this preliminary issue is, therefore, to determine whether the motion sought by the LSM First Nation may be properly characterized as mandatory or prohibitory, looking past the language used in the order sought, to identify, in substance, whether the overall effect of the injunction would be to require Canada to do something, or to refrain from doing something.

[47] In order to properly characterize the injunction, it is helpful to first recall the legislative basis pursuant to which the funding of the evacuee benefits is provided, and the continuation of which benefits at issue. This is the *Emergency Management Act*. This legislation is very brief. It defines emergency management at s 2 as, “the prevention and mitigation of, preparedness for, response to and recovery from emergencies”. Section 2 also defines a provincial emergency as “an emergency occurring in a province if the province or a local authority in the province has the

primary responsibility for dealing with the emergency". The Minister is responsible for exercising leadership relating to emergency management in Canada by coordinating, among government institutions and in cooperation with the provinces and other entities, emergency management activities. This includes providing assistance to provinces:

> 4(1)(j) providing financial assistance to a province if
>
> (i) a provincial emergency in the province has been declared to be of concern to the federal government under section 7,
>
> (ii) the Minister is authorized under that section to provide the assistance, and
>
> (iii) the province has requested the assistance;

[48] The legislation also states that a federal government institution may not respond to a provincial emergency unless the government of the province requests assistance or there is an agreement with the province that requires or permits the assistance (s 6(3)). Here, the OIC demonstrates that Manitoba requested financial assistance from Canada and that, pursuant to s 7(c) and (d) of the *Emergency Management Act*, Canada declared the 2011 flooding in Manitoba to be a provincial emergency to be of concern to the federal government and authorized the Minister to provide financial assistance to Manitoba pursuant to s 4(1)(j).

[49] The evidence before me, including the Funding Agreement between Canada and the CRC and the affidavit evidence of Eunice Gross, confirms that the CRC administers the benefits currently being paid to evacuees, including those from the LSM First Nation, and is reimbursed by Manitoba which, in turn, is reimbursed by Canada. The funding for this is authorized and provided by the *Emergency Management Act*. Accordingly, while the LSM First Nation submits

that if the injunction is granted it will not compel Canada to make any payments to the evacuees, this is true only in the sense that Canada does not itself directly pay those benefits to the evacuees. Canada does, however, ultimately absorb that cost. And, in the absence of any evidence to suggest that the CRC would independently fund the evacuee benefits if the Funding Agreement were terminated, estimated by Canada to be $800,000 per month, it is clear that if the injunction is granted, Canada will be compelled to continue to fund those payments. Indeed, this would appear to be recognized by the LSM First Nation as it also seeks an order directing that all parties, including Canada and the CRC, reinstate or continue full evacuee benefits until the full and final disposition of the application for judicial review.

[50] I also note that the injunctive relief as framed by LSM First Nation is the staying of the operation of the decision terminating CRC "evacuee status". The LSM First Nation and Canada fundamentally disagree on what the RDG decided in October 2019. The LSM First Nation view is that the decision is a termination of individual's status as evacuees, while Canada asserts that the decision was that all CRC evacuee benefits would end on December 31, 2019 because all evacuees could then return to the reserve as housing commitments had been fulfilled and the evacuation emergency had therefore ended.

[51] I disagree with LSM First Nation's position that that the crux of this matter is the termination of individual evacuee "status". However, for the purposes of determining whether the injunction is prohibitory or mandatory, I note that if the decision challenged by LSM First Nation is one of individual evacuee status, and if that status is terminated, it follows that so too will be evacuee benefits. Similarly, if the RDG determined that the emergency had come to an

end and terminated all evacuee benefits on that basis, benefits will end. Thus, whether cast as an issue of status or the end of the emergency, the result is the same.

[52] As to the jurisprudence, although LSM First Nation refers to *AC*, I am not persuaded that it is of assistance to them. That case did not involve an interlocutory injunction (s 44 of the *Federal Courts Act*, Rule 373 of the *Federal Courts Rules*), but rather was concerned with a stay of removal of a failed refugee claimant by way of an interim order (s 18.2 of the *Federal Courts Act*). This Court deals with motions seeking to stay removal on a daily basis. It is well established that in order to succeed on a motion to stay the execution of a removal order, the applicant must meet the requirements of the tri-partite test as set out by the Federal Court of Appeal in *Toth v Canada (Minister of Employment and Immigration)*, 6 Imm LR (2d) 123, [1988] FCJ No 587 (CA) (QL/Lexis) and by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, [1994] SCJ No 17 (QL/Lexis) ("*RJR – MacDonald*") and *Canadian Broadcasting* at para 12, that: (a) there is a serious issue to be tried; (b) the applicant would suffer irreparable harm if removed at this time; and (c) the balance of convenience favours the applicant. I disagree with the Applicants' statement that in *AC* this Court "considered that the injunction sought was prohibitory. It sought to prevent Canada from changing the person's status. The injunction was granted". This entirely mischaracterizes *AC*. The Court did not hold that the injunction sought was prohibitory, indeed, as no injunction was sought. There is no discussion of mandatory or prohibitory injunctions in the case. Nor did Justice Pentney find that the matter before him concerned the revocation of refugee status. The issue before Justice Pentney was whether a removal order should be stayed pending determination of an underlying application for leave and judicial review of a decision dismissing

an application for permanent residence based on humanitarian and compassionate grounds. The applicants in that case had no status in Canada and the case was not concerned with a change of status.

[53] *West Moberly*, also relied upon by LSM First Nation, is of more assistance. There, the plaintiffs sought an injunction to prohibit the defendant from continuing certain work on a project site comprising a hydroelectric dam, generating station and associated infrastructure. The defendants argued that it amounted to a mandatory injunction because it required "a great deal of work to be done that would not otherwise have to be done", such as protecting excavated areas, managing acid rock drainage, and managing surface runoff.

[54] The British Columbia Supreme Court discussed the distinction between mandatory and prohibitive injunctions as addressed in *Canadian Broadcasting* and concluded that in the case before it the overall effect of the proposed order would be to prohibit further construction. Further:

> [235] It is true, as BC Hydro and British Columbia argue, that the proposed order has a mandatory aspect to it, insofar as BC Hydro would be compelled for all practical purposes to carry out the preservation activities and otherwise alter its construction plans. I also do not doubt that the additional work that would be required would be significant in absolute terms. Nevertheless, I find the mandatory aspect of the proposed order to be incidental. Its significance would be a function of the massive scale of the Project rather than the essential nature of the proposed order. It is the relative significance of what the defendants would have to "do" as compared to what they would have to "refrain from doing" that is more important in this regard. I find that the significance of the latter clearly outweighs that of the former.

[55] In *West Moberly*, the issue ultimately came down to whether the defendants were required to do or refrain from doing something, and where an obligation to do something was incidental to the injunction, the injunction itself was prohibitory. There, the incidental mandatory aspect of the relief sought was the resultant cost of taking project preservation measures. Here, it is not clear to me that the mandatory continued funding of evacuee benefits is similarly incidental in nature.

[56] Canada submits that that this motion is analogous to *Medical Laboratory*. There, the Alberta Court of Queen's Bench characterized the injunction sought as mandatory because it obligated the Calgary Health Region to make a continued payment of $40,000 per month to the applicants (*Medical Laboratory* at para 12). The injunction sought by the applicants in *Medical Laboratory* was an injunction to prohibit the termination of their funding from Calgary Health Region, the result of which was to mandate continued payment:

> [12] In this application, the Applicants seek an interlocutory injunction to prevent termination of MLC's funding pending a trial of the matter. In other words, the Applicants seek a mandatory injunction that would order the CHR to continue to pay MLC $40,000 per month until the Court renders a decision regarding the permanent injunction.

[57] While factually comparable, *Medical Laboratory* did not include an analysis of its finding in this regard.

[58] And, perhaps conversely, in *Best Theratronics Ltd v Canadian Nuclear Laboratories Ltd*, 2015 ONSC 7993, which was not referenced by the parties, the plaintiffs sought an injunction which would prevent the termination of a cobalt irradiation service agreement and would order

the continued supply of irradiated Cobalt-60 from the defendant. That Court characterized the injunction as prohibitory, explaining that although the defendants were forced to undertake a positive act, they were not seeking to establish a new right, but rather they were enforcing the terms of an existing agreement, making it prohibitory.

[59] If nothing else, these cases show that the distinction between mandatory and prohibitory injunctions is difficult to parse, as recognized by the Supreme Court.

[60] Here, on its face, the relief sought by the LSM First Nation is both prohibitory (enjoining the decision purportedly terminating CRC "evacuee status") and mandatory (requiring Canada and the CRC to continue to pay benefits). If the injunction is granted, the net effect or practical outcome will be that Canada will continue to fund evacuee benefits until the determination of the judicial review on the reasonableness of the RDG's decision. Thus, the substance of what LSM First Nation seeks is the continued payment of evacuee benefits.

[61] In *Canadian Council for Refugees v Canada*, 2006 FC 1046, this Court stated that:

> 13 An interlocutory injunction is typically sought so as to preserve matters as they are until the final determination of the issues in a proceeding at a full trial on the merits. In this way any relief granted following such a trial will not be meaningless. The injunction is granted usually to preserve the status quo.
>
> 14 A mandatory injunction sought before a full trial on the merits is somewhat different. It seeks to make one of the parties do something that it ordinarily would not do. It seeks to change the status quo. Again, the purpose is the same, to prevent any relief given following a trial from being meaningless…

[62] The use of "status quo" to distinguish a mandatory injunction from an interlocutory injunction is perhaps a helpful tool in this matter. In fact, it is the tie-breaker. The LSM First Nation evacuees are currently receiving benefits as such and have been receiving them for the last 9 years, since 2011. The benefits were originally scheduled to end on December 31, 2019 but were extended until the end of January 2020 for all evacuees, and until March 2010 for the subset of those evacuees whose homes are not yet completed. In this circumstance, the status quo is the receipt of benefits. In that context, Canada is not being asked to take positive steps to restore the status quo or to "put the situation back to what it should be" (*Canadian Broadcasting* at para 15; also see *Robert J. Sharpe, Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada, 2019) (e-loose-leaf), ch 1 at 1.10-1.30. The injunction sought by the LSM First Nation is an injunction to preserve that status quo, by preventing the termination – on whatever basis – of access to benefits. In my view, this means that the injunction sought is prohibitory. Indeed, Canada appears to acknowledge that the receipt of benefits is the status quo in their argument on balance of convenience.

[63] I would also note that in paragraph 16 of *Canadian Broadcasting* the Supreme Court identified two main rationales for drawing a distinction between mandatory and prohibitory orders. First, it was seen as potentially unfair to resolve the action at an interlocutory stage and grant relief tantamount to a final judgement on the merits when the plaintiff could get restorative relief later, after both parties had the opportunity to present their cases more fully at trial. Second, forcing the defendant to take positive action, such as restoring the status quo ante, may, for that reason or otherwise, be unduly burdensome for the defendant. The first of these considerations is not at play here and the continuing of the funding of evacuee benefits for a

short time until the resolution of the underlying application for judicial review is not, in these particular circumstances, unduly burdensome for Canada. Conversely, if valid, the LSM First Nation position that the evacuees have no homes to return to and no means to sustain themselves if evacuee benefits are termination is a potentially severe consequence.

Issue: Has the LSM First Nation met the test for a prohibitory injunction?

(i) Is there a serious issue to be tried?

LSM First Nation's Position

[64] In their submissions the LSM First Nation took the position that they need only demonstrate a serious issue to be tried, however, as a precautionary measure, they made submissions in support of their view that they have a strong *prima facie* case.

[65] The LSM First Nation take the position that the decision to terminate their benefits is unreasonable for four reasons:

- The factors used by this Court in *Stagg* to assess the reasonableness of such a decision are absent in this case. And, although this Court in *Stagg* found the decision to terminate evacuee benefits to be reasonable, it can be distinguished on its facts.
- The October 24, 2019 decision note is found only in draft form. Further, because the cross examination of Eunice Gross on her affidavit indicated that she gathered materials for the CTR that she believed were relevant, it should be inferred that the RDG did not considerer significant material found in the CTR, considered irrelevant materials in the CTR such as the AFE and AIP, and considered unidentified irrelevant material not found thein the CTR.
- The decision lacks procedural fairness because individual LSM First Nation members have been denied an appeal process with respect to the termination of their evacuee benefits.

- The decision was made in contravention of the duty to consult.

Canada's Position

[66] Canada's submissions were based on its view that the applicable test is whether there is a strong *prima facie* case. It submitted that this cannot be met, primarily as a result of this Court's decision in *Stagg*, which considered a near identical application for judicial review brought by a different First Nation affected by the 2011 flood wherein this Court found the RDG's decision to terminate evacuee benefit funding to be reasonable. Further, Canada's ability to provide disaster assistance funding is governed by the *Emergency Management Act*, and the preconditions set out within it, being that there is an emergency of federal concern, federal assistance is authorized and the province has requested assistance (ss 4(1)(j), 7(c) and (d)). When an emergency ends or the province rescinds its request, the statutory authority for assistance also ends. It is implicit from ss 4(j)(i) and 7(c) that the Minister has the discretion to determine when an emergency has ended.

[67] In practice, emergency management activities relating to First Nation reserves are implemented by ISC pursuant to s 6 of the *Emergency Management Act* and ISC's Emergency Management Assistance Program. ISC has policies that provide guidance as to when an emergency has ended, in the context of recovery activities. These all speak to the restoration of a community to its pre-disaster or pre-emergency condition as the basis or objective for this type of disaster assistance. Canada submits that the evidence in the record supports the conclusion that the emergency was over. Further, that the RDG's decision was effectively recorded in the letter of October 31, 2019, which also provided the rational for the decision. Canada submits that

individual evacuees were only entitled to a minimal degree of procedural fairness, and individuals were not entitled to an individual appeal mechanism pertaining to the overall decision to terminate assistance on the basis that the emergency had ended. Finally, Canada submits that decision did not trigger the duty to consult.

Analysis

[68] As I have characterized the injunction sought as prohibitory, the first step of the injunction test is whether there is a serious issue to be tried. This is not a stringent requirement. There is a serious issue to be tried so long as the application is not frivolous or vexatious (*Canadian Broadcasting* at para 12). When this is the first stage of the test, a "prolonged examination of the merits is generally neither necessary nor desirable" (*RJR – Macdonald* at para 50).

[69] In my view, certain of the LSM First Nation's arguments are doomed to failure as essentially the same arguments were made and were determined by Justice Grammond in *Stagg*. I agree with Justice Grammond's reasoning and conclusions.

[70] For example, here the LSN First Nation argues that the decision on whether to extend or terminate evacuee benefits is extrinsically linked to its treaty rights to the enjoyment of its reserve and traditional lands and attracted a duty of deep consultation. This was dealt with by Justice Grammond in *Stagg* and the LSM First Nation's submissions do not suggest any basis for distinguishing the finding in this matter:

> [130] DRFN also argues that it has aboriginal and treaty rights with respect to the use and enjoyment of its reserve lands or harvesting rights on its traditional territory. Some of those rights have been consolidated and merged in the *Constitution Act*, 1930. It follows, says DRFN, that ISC had a duty to consult DRFN before engaging in conduct that might affect the exercise of those rights. In this connection, it argues that the termination of evacuee benefits is linked to those constitutionally-protected rights.
>
> [131] Even assuming the existence of those rights, and that the evacuation made it more difficult for DRFN members to exercise them, it does not follow that a duty to consult was triggered by the decision to terminate evacuee benefits. Those benefits are aimed at helping DRFN members who needed to relocate, most of them to Winnipeg, as a result of the flood. The termination of those benefits may render life in Winnipeg more difficult for those affected. However, it does not impair their practical ability to exercise their constitutionally-protected rights. Conversely, continuing those benefits will not facilitate the exercise of those rights if no additional housing is made available in the community and the affected persons must remain in Winnipeg.

[71] However, the core of the LSM First Nation's submissions are that the decision to terminate benefits is unreasonable is because there is not enough housing space in their new community to accommodate the evacuees, and that the decision maker knew or ought to have known this. This submission is comprised primarily of efforts to distinguish this matter on its facts from Justice Grammond's decision in *Stagg*. Regardless of the ultimate merits of those submissions, they cannot on their face be found to not raise a serious issue, as this would require an examination of the merits, including based on a factual comparison with *Stagg* and Justice Grammond's reasons, which sort of analysis is "generally neither necessary nor desirable" in the first step of a prohibitory injunction motion.

[72] Accordingly, I conclude that LSM First Nation has met the first step of the tri partite test.

[73] However, even if I am wrong in the characterizing of the injunction as prohibitory and even if the LSN First Nation could not have met the strong *prima facie* test of a mandatory injunction as Canada submits, it matters not, as in my view, the LSM First Nation has failed to establish the second part of the test, irreparable harm.

(ii) Will the LSM First Nation suffer irreparable harm if an injunction is refused?

LSM First Nation's Position

[74] LSM First Nation submits that the First Nation and its members will suffer irreparable harm because there would be a decline in income assistance and because the potential for ineligibility for evacuee benefits will cause emotional and psychological stress, anxiety, depression and other ailments. Individual evacuees are reliant on the evacuee benefits and are especially vulnerable to even small changes in the resources available to meet their basic needs which demonstrates irreparable harm (*Simon v Canada*, 2012 FC 387; aff'd 2012 FCA 312 ("*Simon*")). Band members with no place to live on the reserve will become homeless; children will have their schooling disrupted as families will not be able to afford their current homes; and, money for food and the necessities of life, currently funded as part of evacuee benefits will no longer be available. Further, the right of First Nations' people to live together will be lost in respect of those evacuees that have no home on reserve.

Canada's Position

[75] Canada acknowledges that the termination of funding could affect individual evacuees. Further, where there is an adequate evidentiary record, cases such as *Simon* have found that the

termination of social assistance, or other forms of government benefits, may demonstrably cause financial impact that establishes irreparable harm. However, in this matter the record falls short of demonstrating such harm. This requires evidence that demonstrates with particularity the actual existence or real probability of harm (*Stoney First Nation v Shotclose*, 2011 FCA 232, at paras 48 ("*Shotclose*"), and simple assertions of harm are insufficient (*United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7 ("*United States Steel*"). The moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 24 ("*Janssen*")).

[76] Here, there are only general assertions that the housing has been allocated "in the most efficient way", or in an attempt to "utilize every bedroom in the house". As a result, the Court is unable to assess how the houses have been allocated, or the amount of housing space that is available for the remaining evacuees. There will be 1191 bedrooms in the community upon completion of the housing project and an evacuee complement of 1297. According to the Respondents, this suggests there is sufficient housing, particularly given cohabitating evacuees and the unknown number who will not return.

Analysis

[77] In *RJR – MacDonald*, the Supreme Court of Canada stated that "'[i]rreparable' refers to the nature of the harm suffered rather than to its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured" (*RJR–MacDonald* at para 59).

[78] The Federal Court of Appeal in *Simon* found that, "even small changes in the resources available to the poorest and most vulnerable of Canadians to meet their basic essential needs can result in serious harm" (at para 38), and that this met the irreparable harm test from *RJR – Macdonald*.

[79] And, in *Shotclose*, the Federal Court of Appeal in held that for the second step of the *RJR– Macdonald* test, the moving party must demonstrate with particularity, not just assert with generality, the actual existence or real probability of harm that cannot be repaired later. It is not enough to merely use broad, expressive terms to describe the harm (at para 48). To do this, the moving party must provide evidence that is concrete enough or particular enough to allow the Court to be persuaded on the matter (*Shotclose* at para 49). The Federal Court of Appeal in *United States Steel* noted that its jurisprudence holds that a moving party must adduce clear and non-speculative evidence that irreparable harm will follow if the motion (for a stay in that case) is denied (at para 7; also see *Janssen* at para 24).

[80] In this matter, there can be no doubt that if evacuee benefits were simply ended, leaving the evacuees with no homes on the reserve to which they could return, and rendering them essentially homeless, that this would amount to irreparable harm. However, I agree with Canada that this has not been established on the evidence before me.

[81] The affidavit evidence of Eunice Gross states that according to the data maintained in the Indian Registry System, which is based on reports submitted by the LSM First Nation, there

were 1391 band members living on the LSM First Nation reserve prior to 2011, out of a total membership of 2260.

[82] It is not in dispute that at the time of the 2011 flood there were 182 homes on the LSM First Nation Reserve. This would result in an occupancy rate of 7.5 persons per house based on an on-reserve population of 1391 people. The AFE, while non-binding, serves as a contemporaneous record of agreed housing needs for the LSM First Nation at the time of its signature. Based on the evidence before me, I accept that this was understood to be 280 single family homes at an estimated average cost of $260,000 per home ($72.8 million). This evidence includes the cross-examination evidence of Chief Sinclair (transcript pages 28 and 46), the affidavit evidence of Louis Dion (at paras 9, 12 and 13 and exhibit B, Scoping Document pages 12, 17, 18) and the affidavit of Donny Buckingham (para 10, exhibit D, Project Approval Request, s 4.4). The Basic Elements Only Package, which would have been effected if agreement on the AFE could not have been be achieved, anticipated $47.3 million intended to construct 182 houses replacing the 182 destroyed, to re-establish on a priority basis the repatriation of the LSM First Nation evacuees.

[83] The 2014 CRC evacuee list identified approximately 1100 evacuees.

[84] In 2017, the evacuee list identified 1297 evacuees. On cross-examination, Chief Sinclair confirmed that this was the number of people on the CRC list in 2017. He stated that this did not include people who were added after 2017, such as children returned from Anishinaabe Child and Family Services (ACFS) and those who had turned 18, but he could not answer how many

additional people this would be. Nor is there any evidence before me that any persons sought to be added to the list after 2017.

[85] In early 2018, the first wave of repatriation began as the Phase 1 construction of 190 new homes neared completion. Between January and June of 2018, all 190 new single family homes were delivered. In each case, a letter was sent advising that Chief and Council had assigned the recipient a housing unit that was available for immediate occupancy and to contact the Band Council to make arrangements in that regard. By November 2019, Phase 2 was nearing completion. Once that was achieved there would be an additional 120 single dwelling housing units, being 310 in total, plus 40 apartments. In total, 350 housing units. The affidavit of Eunice Gross indicates that this is 71% more homes than existed on the reserve prior to the 2011 flood.

[86] Canada points out that this significantly exceeds the pre-flood housing of 182 homes and submits that it was on this basis that the determination was made that there was sufficient housing to accommodate all evacuated residents, as well as children born since 2011, and that benefits could therefore be ended as of December 31, 2019 (as extended generally to January 31, 2019 and to March 2020 for specified subset of evacuees).

[87] Indeed, I note that not considering the multiplex apartments, and based on an evacuee list of 1297 people, this results in an occupancy of about 4.2 persons per house. Including the 40 apartments, this drops to approximately 4.0 persons per house.

[88] Looked at in another way, there will now be 1191 bedrooms available for 1297 evacuees, their children born since 2011, and children who have since turned 18. It is reasonable to think that some of these evacuees will be couples who will share a bedroom and small children who will be able to do the same. I would also note that the initial project approval request, or PAR, was signed by Chief Sinclair on August 5, 2014. On cross-examination he confirmed that the PAR contemplated that Phase 1 would provide an adequate number of residential lots to return the on-reserve population of 1400 with an average housing occupancy rate of 5 persons per house. The PAR is attached as an exhibit to Chief Sinclair's affidavit and Section 4.4 states:

> 4.4 The proposed site layout will provide an adequate number of residential lots to return the on-reserve population of approximately 1400 persons with included the approximately 1100 persons who were evacuated in 2011. Using an average housing occupancy rate of 5 persons per house (number used by the Chief Federal Negotiator), up to 280 house may be required. The proposed site layout includes 285 residential lots.

[89] The LSM First Nation now asserts that there is simply not enough housing to accommodate the remaining evacuees, that Canada was involved in the housing allocation, and therefore, Canada is aware of the housing shortage. In *Stagg*, Justice Grammond stated that, "The federal government plays no role in the allocation of housing in First Nation communities" (*Stagg* at para 8). I would also note that the allocation of housing to families is an important aspect of self-governance by Chief and Councils of First Nations. It is difficult to see how Canada could make such family assignments or to imagine that Chief and Councils of First Nations' would want the federal government assuming management of their affairs on that level.

[90] In any event, for purposes of this second step of this injunction motion, I need not address many of the allegations of the LSM First Nation as to alleged promises made by Canada

concerning housing or whether Canada participated in the day-to-day allocation of homes to specific evacuees. I must determine if irreparable harm will result if evacuee benefits are terminated on January 31, 2020.

[91] The difficulty I am faced with is that there is little evidence to support the LSM First Nation's position that evacuees have nowhere to return to on the reserve and will be rendered homeless if evacuees benefits are terminated. Based on a returning evacuee population of 1400, LSM First Nation previously was satisfied that 280 homes would be needed based on a 5 person per house occupancy rate. When Phase 2 is complete, there will be 310 homes, all 3 bedrooms or more, plus 40 single bedroom apartments, as reflected in the agreed non-binding AIP.

[92] At the hearing before me, counsel for LSM First Nation pointed to an email from Chief Sinclair to Mr. Buckingham dated May 25, 2017 attaching "the list for the housing". This list concerns the allocation for the 190 Phase 1 homes. It identifies the name of the person to whom the home was allocated, their age, the home address, and the number of bedrooms in the house. Dependent evacuees are also listed. However, in my view, this list is significant. The very first home on the list is allocated to a 35 year old male with no listed evacuee dependents. It is a three bedroom home. All of the homes in Phase 1 are 3 or more bedrooms. By my count, there are more than 60 of the 190 homes similarly allocated to a single individual with no listed evacuee family members. The next list entry is a 4 bedroom home allocated to couple, ages 81 and 73, with no listed evacuee family members. Without further relevant evidence, this document would appear to illustrate that not every bedroom in Phase 1 is filled with an evacuee.

[93] Other than this list pertaining to Phase 1, counsel for LSM First Nation was unable to point the Court to any other lists containing information identifying the dependent evacuees connected to the evacuee head of household to whom a home was assigned by Chief and Council.

[94] In his affidavit, Chase Traverse, the Phase 2 Housing Coordinator for LSM First Nation, stated that his job included receiving and reviewing housing applications from evacuee band members and providing information to Chief and Council in order for them to assign homes for the applicant and their family. When cross-examined on his affidavit, Mr. Traverse confirmed that he had no knowledge of Phase 1. Attached as an exhibit to his cross-examination is a document entitled Lake St Martin Turnovers (50) which pertains to Phase 2 and lists 50 tenant names, addresses and house type. Only one individual is identified under each tenant name. Mr. Traverse confirmed that it was not possible to tell from the document how many dependents will be moving with that person. He also could not say if there were currently empty bedrooms on the reserve and could not say that there was not vacant space in the Phase 1 houses.

[95] In my view, it would have been very easy for the LSM First Nation affiants to include accurate and current information as to who has been allocated each house and identifying who and how many evacuee dependents reside there with them. However, they have chosen not to do so. Such evidence could have served to demonstrate, with clear and convincing evidence, that all housing units have been efficiently allocated and are or will be only occupied by returning evacuees. And, while LSM First Nation asserts that there are now many more evacuees due to marriages, births and children turning 18, they provided no evidence to substantiate this.

[96] Moreover, the affidavit of Eunice Gross indicates that, based on information received from Huilian Xie, Funding Services Officer with ISC, that she believes that there are approximately 100 families on the CRC evacuee list that may want to stay in Winnipeg, rather than returning to the LSM First Nation reserve. Further, that LSM First Nation's Recipient Appointed Advisor (a co-manager of LSM First Nation appointed by its leadership) reached out to Huilian Xie to discuss setting up an information session on transitioning those evacuees who chose not to return to the reservation to available provincial social services. The Recipient Advisor subsequently advised that LSM First Nation Chief and Council did not want to share this information with those families. Based on this, Ms. Gross stated her belief that there may be a significant number of evacuees on the list who will not return to the reserve and that LSM First Nation Chief and Council is resistant to sharing this information. On cross examination on his affidavit, Chief Sinclair confirmed that he was aware that as many as 100 LSM First Nation evacuee families and others now living in Winnipeg are planning to remain in the city and not to return to the reserve.

[97] This further serves to illustrate that LSM First Nation has not met its burden of establishing irreparable harm resulting from its claim that there is insufficient housing to accommodate the remaining returning evacuees who will, therefore, be rendered homeless if evacuee benefits are terminated. LSM First Nation did not meet this burden because it failed to provide evidence that clearly addresses the allocation of housing to the returning evacuees and their dependent evacuees who will be living with them, it failed to account for marriages, births, deaths, children who have turned 18, and it failed to account for evacuees who will not be returning to the reserve at this time.

[98] Finally, while it was also suggested that many of the people now living in the allocated homes are not evacuees, it must be recalled that the priority for housing was to be given to evacuees. They are receiving evacuee benefits pursuant to the above described legislative scheme so that they can afford off reserve housing and other living expenses while they are displaced from their community. To the extent that other LSM First Nation non-evacuee members have chosen to move back to the reserve and Chief and Council have chosen to permit them to occupy bedrooms in homes assigned to single evacuees with no identified evacuee dependents, this does not alter the fact that space could be made available to evacuees – 1191 bedrooms for approximately 1297 evacuees. Rather, this is an issue of allocation by Chief and Council.

[99] Based on the number of available bedrooms and the number of people on the CRC 2017 evacuee list, and in the absence of clear evidence from LSM First Nation as to the actual allocation of the 350 housing units, I am unable to conclude that the remaining LSM First Nation evacuees will be rendered homeless and therefore at risk of irreparable harm if evacuee benefits are ended on January 31, 2020. Canada has already agreed to extend the benefits for a small subset of evacuees who will be without homes until March 2020.

[100] While this disposes of the question, I would add that upon return of the evacuees to allocated homes, the evacuee benefits intended to pay for rental accommodations in Winnipeg will no longer be required. Further, that there is no evidence before me that those evacuees who will still require income assistance upon return to the reserve will not be able to obtain this support from other sources.

[101] This branch of the tripartite test has not been met.

(iii) Balance of convenience

[102] In its submissions, Canada concedes that the balance of convenience, and the maintenance of the status quo, favours LSM First Nation.

Conclusion

[103] As the test of an injunction is conjunctive, the LSM First Nation cannot succeed because it has failed to meet its burden of establishing irreparable harm. The motion is therefore denied.

ORDER in T-1927-19

THIS COURT ORDERS that:

1. LSM First Nation's motion for an interlocutory injunction, pursuant to s 44 of the *Federal Courts Act*, is dismissed.

2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1927-19
STYLE OF CAUSE:	CHIEF ADRIAN SINCLAIR, ET AL v ATTORNEY GENERAL OF CANADA, ET AL
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	JANUARY 24, 2020
ORDER AND REASONS:	STRICKLAND J.
DATED:	JANUARY 29, 2020

APPEARANCES:

HARLEY SCHACHTER KAITLYN LEWIS	FOR THE APPLICANTS
SCOTT FARLINGER AND SYDNEY PILEK	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

DUBOFF EDWARDS HAIGHT & SCHACHTER LAW CORPORATION WINNIPEG, MANITOBA	FOR THE APPLICANTS
ATTORNEY GENERAL OF CANADA WINNIPEG, MANITOBA	FOR THE RESPONDENTS