Federal Court		Cour fédérale

Date: 20120402

Docket: T-1649-11

Citation: 2012 FC 387

BETWEEN:

CHIEF JESSE JOHN SIMON and
COUNCILLORS
FOSTER NOWLEN AUGUSTINE,
STEPHEN PETER AUGUSTINE,
ROBERT LEO FRANCIS,
MARY LAURA LEVI,
ROBERT LLOYD LEVY,
JOSEPH DWAYNE MILLIEA,
JOSEPH JAMES LUCKIE TYRONE MILLIER,
MARY-JANE MILLIER,
JOSEPH DARRELL SIMON,
ARREN JAMES SOCK,
JONATHAN CRAIG SOCK AND
MARVIN JOSEPH SOCK on behalf of
themselves and the members of the
ELSIPOGTOG FIRST NATION, and on behalf
of the MI'GMAG FIRST NATIONS OF NEW
BRUNSWICK, and on behalf of the MEMBERS
OF THE MI'GMAG FIRST NATIONS OF
NEW BRUNSWICK

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

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REASONS FOR PREVIOUS ORDER ISSUED ON MARCH 30, 2012

SIMPSON J.

INTRODUCTION

[1] The applicants have brought a representative action. Chief Jesse John Simon and twelve Councillors of Elsipogtog First Nation bring this motion on behalf of themselves and the members of Elsipogtog First Nation. They also move on behalf of the Mi'gmag First Nations of New Brunswick and their members [the Applicants]. This motion [the Motion] is brought pursuant to section 18.2 of the *Federal Courts Act*, RSC, 1985, c F-7 [the Act] and Rule 373 of the *Federal Court Rules* (SOR/98-106) for an interlocutory injunction restraining the implementation of a decision of the Minister of Aboriginal Affairs and Northern Development Canada [the Minister and AANDC]. The decision requires First Nations governments administering income assistance to First Nations people living on *Indian Act* reserves in the provinces of Prince Edward Island, Nova Scotia and New Brunswick [Atlantic Canada] to do so at rates and standards identical to those set by the provinces in which the First Nations are located. The injunction is to be in force until the final disposition of the Applicants' underlying application for judicial review pursuant to sections 18 and 18.1 of the Act [the Application].

[2] Elsipogtog First Nation [Elsipogtog] is an Indian Band as defined in the *Indian Act*, 1985 RSC c I-5. It is situated on reserve land also known as Richibucto Reserve No. 15 in rural New Brunswick. Members of Elsipogtog confront severe poverty, with approximately 85% of the community receiving some form of social assistance. On-reserve recipients of income assistance

will be referred to as “Recipients”. There are 2,390 registered Indians currently living on-reserve in Elsipogtog.

PROCEDURAL HISTORY

[3] This matter has proceeded as follows:

- Notice of Application for Judicial Review filed on October 7, 2011;
- Amended Notice of Application filed on February 7, 2012;
- On February 20, 2012 the Applicants filed their Notice of Motion seeking an injunction;
- The Motion was heard on March 21, 2012 and the record was completed on March 26, 2012, with the submission of further material from the Respondent at the Court’s request;
- April 1, 2012 is the date of the event the Applicants seek to enjoin.

[4] The following evidence was filed for the Motion:

- Two affidavits of Chief Jesse Simon, Chief of the Elsipogtog First Nation, sworn on January 28, 2012 and February 23, 2012. Chief Simon is also the Mi’gmaq Co-Chair of the Assembly of First Nations’ Chiefs of New Brunswick Inc. [the N.B. Chiefs], a not-for-profit society representing thirteen First Nations in New Brunswick, and a member of the Atlantic Policy Congress of First Nations Chiefs [the APC], a policy and research advocacy secretariat for thirty-eight Chiefs, First Nations, and communities in Atlantic Canada, Quebec, and Maine;
- Two affidavits of Suzanne Brown, a self-employed consultant to First Nations governments, sworn on January 30, 2012 and February 22, 2012. Ms. Brown’s clients include the Kingsclear First Nation and the Eel Ground First Nation, both located in New Brunswick. Applicants’ counsel stated at the hearing that Ms. Brown does not consult for the Elsipogtog First Nation. Prior to April 2008, Ms. Brown was employed in the Atlantic Regional Office of AANDC;

- The affidavit of Lawrence Dedam, Director of Social Development for the Elsipogtog First Nation, sworn on January 28, 2012. The Social Development department is responsible for delivering income assistance;

- The affidavit of Dougal MacDonald, Associate Regional Director General for the Atlantic Region, AANDC, sworn March 8, 2012. Mr. MacDonald is responsible for overall management and accountability for the delivery of AANDC programs to First Nations in Atlantic Canada;

- The affidavit of Barbara Robinson, Manager of Social Programs, AANDC, sworn March 8, 2012. Ms. Robinson is responsible for the management of the federal Income Assistance Program for First Nations in the Atlantic Region;

- Other than general evidence in the above-noted affidavits, there is no evidence in the record from the other First Nations represented in this Application.

BACKGROUND

[5] The starting point is a letter from Treasury Board to the Deputy Minister of Citizenship and Immigration (Indian Affairs Branch) of July 23, 1964 which, when read together with the related request to Treasury Board dated June 16, 1964, says that income assistance to First Nations' people on reserves across Canada is to be provided using the standards (i.e. the rates and regulations) for income assistance in force in the province or municipality in which the reserves are located [the Directive].

[6] In Atlantic Canada, there has been non-compliance with the Directive since at least 1991 and although non-compliance has also been a problem in other provinces, it has now been corrected. The non-compliance occurred because, instead of using the provincial rates as required by the Directive, AANDC and First Nations, have used rates and standards that were "reasonably comparable" to those in the province. This means that, at present, some individual Recipients of

income assistance on reserves in Atlantic Canada are treated differently in terms of benefits and eligibility requirements than are the recipients of provincial income assistance.

THE DECISION

[7] It became apparent, during the hearing of the Motion, that the parties do not agree about the decision at issue in the Application.

[8] As originally filed, the Notice of the Application described the Minister's decision as one which changed income assistance rates. The amended Application altered the description so that the decision is now described as one which unilaterally imposes provincial social assistance rates and standards. In my view, there is no doubt that the Applicants are seeking to set aside AANDC's initiative to enforce compliance with the Directive but they are not seeking to set aside the Directive itself.

[9] The issue raised by Respondent's counsel during the hearing of the Motion is whether that initiative is properly characterized as a decision. The Respondent says that the Directive is the only decision and that the initiative to enforce the Directive which I will refer to as the "Policy" is not a decision.

[10] The difficulty is that this issue was not developed in the Respondent's submissions during the hearing of the Motion and is not discussed in its memorandum. Accordingly, for the purposes of this Motion, the Policy will be treated as a decision.

THE DELIVERY OF INCOME ASSISTANCE – THE MANUALS

[11] From 1964, when the Directive was issued, until the late 1970s, the federal government administered income assistance and made payments directly to Recipients. Then federal policy began to place greater emphasis on First Nations' autonomy and further to this policy shift, they began to administer income assistance programs.

[12] Since 1991, AANDC has provided regional and national program manuals which identify policy priorities and establish the rates and eligibility criteria for income assistance on reserves. Some First Nations have also developed their own policy manuals.

[13] In 1991, AANDC developed a regional manual called the Atlantic Office Social Assistance Manual for New Brunswick. It required First Nations to administer income assistance at provincial rates and standards but, contrary to the Directive, the suggested rates were not identical to those in the provinces.

[14] In 1994, Elsipogtog prepared its own income assistance program manual called the Etpiiteneoei Manual. It lists rates and standards and the Applicants' evidence is that Elsipogtog has been using it to administer income assistance on-reserve since 1994.

[15] The earliest AANDC National Manual is a draft dated February 16, 2004. Contrary to the Directive, it said in section 1.5 that, as a general principle, income assistance would be delivered at

standards reasonably comparable to those applied in the province or territory where the reserve was located.

[16] Subsequent National Manuals were published in July 2006 and January 2007. Under the heading “Program Principles”, in section 1.5.5., the manuals state that:

> [T]he terms and conditions from Treasury Board state that INAC must deliver the Income Assistance Program at rates and eligibility criteria reasonably comparable to the host province or territory. As a result, these rates and eligibility criteria are taken from the provincial or territorial income assistance legislation.
>
> [my emphasis]

[17] On July 11, 2011, AANDC prepared a draft Atlantic Region Social Programs Manual [the Atlantic Manual] which applies to income assistance as well as other social programs on-reserve in the Atlantic Region. This manual reflects the Policy in that it does not speak of “reasonable comparability”. Instead, it stipulates that “[t]he Income Assistance program on a reserve is administered using the same rate structure and eligibility criteria as the parallel program administered by the province for off reserve residents.” It also provides that “[b]asic needs should follow the standards and rate schedules of the province.” However, in January 2012, AANDC advised that this manual would not be used and would be replaced by a revised National Manual.

[18] According to Dougal MacDonald, the replacement was the National Manual (2012). It was provided to the Chiefs and Councillors in Atlantic Canada sometime in the three week period before March 15 and, in mid-February 2012, it was given to attendees at an AANDC “How To” Workshop which will be described later in these reasons. The manual provides that the income assistance

program is funded so that "programs will be delivered at standards reasonably comparable to those of the reference province/territory of residence". However, the "amounts payable for income assistance will be equivalent to the rates of the reference province or territory". Accordingly, this manual implements the Policy as far as rates are concerned but appears to suggest that, contrary to the Directive, provincial eligibility criteria need not be precisely followed.

CONSULTATION

[19] The record discloses that four different First Nations' groups were involved in communications and/or consultations with AANDC. The APC, the N.B. Chiefs, the Assembly of Nova Scotia Mi'kmaq Chiefs [the N.S. Chiefs] and Elsipogtog. There is significant overlap in the membership of these bodies. For example, in addition to his position as Chief of Elsipogtog, Chief Simon is a member of both the APC and the N.B. Chiefs. Nevertheless, in spite of the overlaps, these groups sometimes adopted inconsistent positions.

[20] On April 19, 2011, having learned of the Policy, Chief Simon sent a letter on behalf of the N.B. Chiefs to the Minister setting out detailed concerns and urging collaboration between AANDC and the N.B. Chiefs. Chief Simon sent a brief follow-up letter on July 19, 2011, but the N.B. Chiefs received no response to either letter.

[21] On May 19, 2011, AANDC officials held a meeting with APC and advised that (1) a draft Atlantic Manual was being finalized and (2) compliance with provincial rates and standards would

be mandatory, effective November 1, 2011. There is no evidence that this meeting afforded an opportunity for consultation.

[22] On September 15, 2011, the N.S. Chiefs passed a motion in opposition to the implementation of the National Manual (2012) which provided that income assistance payments would be "equivalent" to provincial rates. Since this manual was not finalized and distributed until 2012, I have concluded that the motion was based on a draft of the manual.

[23] On September 19, 2011, the N.B. Chiefs passed a resolution saying, in part, that they would not assist AANDC in implementing cuts to social welfare programs. This refusal to assist was said to endure until such time as the Government of Canada's elected representatives met with elected representatives of the N.B. Chiefs to discuss social policy in good faith. They also resolved to take all legal means to resist the Policy.

[24] On September 20, 2011, AANDC hosted an information meeting in Fredericton about the draft Atlantic Manual. Chief Simon decided not to send a representative from Elsipogtog to the information session for the following reasons:

- Elsipogtog was given the draft manual only two weeks before the meeting.
- AANDC was not collaborating with the N.B. Chiefs.
- The meeting was to give First Nations information – feedback from First Nations was not sought.
- Since the implementation date for the Policy was November 1, 2011, it was obvious that implementation would occur regardless of First Nations concerns.
- Chief Simon feared that if Elsipogtog members attended, AANDC would say that the First Nation had been fully consulted.

[25] By this time, the N.B. and N.S. Chiefs were united in their opposition to the Policy and were, in my view, justifiably annoyed. Chief Simon's letters inviting collaboration had been ignored and, although there had been a presentation to the APC, there had been no effort to consult directly with any First Nations about the Policy or its implementation.

[26] On September 21, 2011, AANDC's Assistant Deputy Minister Ron Hallman met with the APC's Executive Director John Paul in Ottawa to discuss concerns about on-reserve income assistance rates. In my view, this was the first and only consultation about the Policy.

[27] On September 28, 2011, Dougal MacDonald of AANDC delivered a presentation about the Policy to the APC. However, there is no evidence to suggest that the Chiefs' views were solicited or discussed.

[28] On September 29, 2011, the APC passed a resolution to the effect that it was angry and disappointed with AANDC and was supporting the N.S. and N.B. Chiefs in their opposition to the Policy. However, and importantly, the APC also called for the creation of a joint working group on social assistance involving representatives of APC and AANDC [the Working Group] to discuss the implementation of the Policy [the APC Resolution]. It said in part:

> BE IT FURTHER RESOLVED Chiefs and AANDC establish a joint committee comprised of 6 Chiefs and Senior AANDC staff to develop a comprehensive work plan and budget <u>to address all issues related to the implementation</u> of the AANDC Social Policy Manual for Income Assistance.
>
> [my emphasis]

[29] In my view, the APC Resolution shows that APC had decided that, since it appeared inevitable that the Policy would be implemented on November 1, 2011, it made sense to establish the Working Group to help AANDC understand and hopefully mitigate the impact of the implementation.

[30] October 7, 2011, the Applicants filed their Application for judicial review of the Policy.

[31] A Steering Committee of the Working Group [the Steering Committee] met on Wednesday, October 19, 2011. Three representatives from Elsipogtog attended the meeting. The minutes show that draft terms of reference for the Working Group were discussed and that the implementation of the Policy and not its merits was to be the focus of the discussions. The Working Group was to assemble data to allow all parties to understand the impact of the Policy. In particular, AANDC wanted to identify funding gaps so it could consider how to address them with other support programmes. In this context, shelter was expected to be an important issue. It is clear from the minutes that the November 1st implementation date troubled the attendees. Discussions about the date led to a statement by Sheilagh Murphy of AANDC indicating that it needed to clarify the meaning of the November 1st date. At the conclusion of the meeting, Regional Chief Morley Googoo said he intended to ask the Minister to confirm that the results of the Working Group's efforts would be considered prior to implementation. In other words, he intended to ask for an extension of the implementation date.

[32] On Monday, October 24, 2011, the Working Group met in Cole Harbour, Nova Scotia. However, Chief Simon instructed his staff not to send a representative from Elsipogtog to this

meeting because he feared that their participation would be used to justify consultation when the Policy was not being considered. At the Working Group meeting, agreement was reached, *inter alia*, about tasks to be undertaken and about how to collect data showing the impact of the Policy. During the meeting, AANDC confirmed that the Wording Group would have until April 1, 2012 to complete its work. The Working Group agreed to finish data collection in November 2011 so that final recommendations could be ready by the end of February 2012.

[33] However, on October 27, 2011, three events derailed the process:

(i) The N.S. Chiefs abandoned the Working Group;

(ii) The Minister failed to provide a meaningful new deadline; and

(iii) The APC halted the Working Group process.

I will discuss these events in turn.

[34] On October 27, 2011, the N.S. Chiefs resolved not to participate or engage with AANDC and the APC regarding implementation of the Policy until the APC confirmed that the Working Group was [not] directed at changing the social assistance rates and terms applicable in Nova Scotia and was not intended as a process to implement the National Manual (2012). This resolution effectively meant that the N.S. Chiefs were withdrawing from the Working Group. The reason for the N.S. Chiefs' decision appears in a letter dated November 16, 2011 from John Paul of APC to the Minister. It shows that the N.S. Chiefs were concerned that participation in the Working Group would be viewed by AANDC as acceptance and support of the Policy. The Minister was asked to confirm that AANDC would not take that view and he was told that the Working Group could not begin its work until an assurance to that effect [the Assurance] was given.

[35] On October 27, 2011, the Minister sent a letter indicating his support for the Working Group. Regarding the date for implementation he said:

> Please accept my assurances that it is not the Department's intention to undertake compliance activities on Income Assistance Program delivery while this collaborative work is underway. However, it is necessary to ensure that these activities are completed in a timely manner. I believe that the remainder of the current fiscal year, which ends on March 31, 2012, will provide sufficient time to both conduct the work of the Steering Committee and complete the full implementation of provincial standards for Income assistance.

[36] In my view, this letter was not clear. It appears to say that implementation would proceed to completion while the Working Group prepared its recommendations. This suggests to me that AANDC would not necessarily take the Working Group's conclusions into account before full implementation of the Policy.

[37] On October 27, 2011, APC Executive Director John Paul told AANDC that he had put an immediate halt to all discussions between APC and AANDC regarding income assistance because the N.S. Chiefs had withdrawn their support from the Working Group process.

[38] On October 28, 2011, the Minister met with John Paul of the APC in Halifax. Unfortunately, there is no evidence about this meeting.

[39] On November 16, 2011, John Paul wrote to the Minister asking for the Assurance. That letter is described above.

[40] On November 18, 2011, the N.B. Chiefs wrote to the Minister noting their opposition to the Policy and saying:

> Further, we are not currently supportive of the "APC/AANDC joint work." We have not received the terms of reference or mandate of the working group and cannot endorse a process without knowing its goals, objectives or operating procedures. It appears there are a number of divergent views of the purpose and intent of the "APC/AANDC joint work." The matter needs clarification.

[41] In my view, this request for clarification was not made in good faith. Chief Simon acknowledges in his affidavit that he had the minutes of the Working Group meeting which set out the proposed tasks and timetables. Further, his representatives were at the Steering Group meeting when the draft terms of reference were discussed. Finally, the Working Group had been established pursuant to the APC Resolution to deal with the "implementation" of the Policy. It is not credible, in these circumstances, that the N.B. Chiefs needed the clarifications they sought.

[42] On December 20, 2011, the Minister wrote to the APC asking them to participate again in the Working Group and advising that "mandatory compliance" with provincial rates and standards would be effective April 1, 2012. This extension was meaningful because, if the Group had started work in November 2011 as planned, it would have had time to complete its data collection and recommendations before the implementation date. However, because of the delay, the time was tight and eventually a further extension of one or two months might have been required.

[43] In this letter, the Minister also encouraged APC to return to the Working Group and he provided the Assurance sought by the N.S. Chiefs. He said:

> […] The gathering of information on income assistance caseloads and demographic trends, as well as the exploration of best practices

> in the area of active measures and income assistance reform, are activities which I hope can still be jointly undertaken by departmental officials and First Nation leaders. The participation of any First Nation in this information gathering exercise would not be interpreted by the Department as an expression of support for the implementation of provincial eligibility criteria and rates.

[44] On December 28, 2011, the Minister wrote to the N.B. Chiefs confirming the April 1, 2012 implementation date and responding to their request for information. He said:

> […]
>
> The […] Steering Committee was still in the early stages of development at the time its activities were interrupted, and as such, a work plan and terms of reference were not finalized. I understand that representatives from New Brunswick First Nations did attend the Steering Committee meeting on October 19, 2011, and that these representatives did have an opportunity to provide input into the draft terms of reference. There are a number of divergent views on the Steering Committee's process; however, the Department is open to working with willing partners within the context of this process or alternative mechanisms.

[45] The Minister also invited the N.B. Chiefs to identify an alternative to the Working Group as a means to engage on implementation issues.

[46] By year end 2011, all the First Nations' concerns about the Working Group had been addressed. The deadline for implementation had been extended to April 1, the Assurance was given and the Minister had responded to the N.B. Chiefs' request for clarification. In my view, the AANDC was willing to continue consultations and the First Nations failed to participate. There is no evidence to explain why the Working Group did not reconvene in early January 2012.

[47] It is my conclusion that the First Nations' Chiefs decided that consultation on implementation was politically unpalatable because they could not explain to Recipients why they were helping AANDC implement a Policy when they believed, in the words of Applicant's counse, that it would "make poor people poorer".

[48] The last interaction occurred on February 15 and 16, 2012. On those dates, AANDC held a "How To" workshop for social development administrators [SDAs] in Fredericton to work through the implementation of provincial rates and standards according to the National Manual (2012). Attendees at the meeting were provided with a copy of the National Manual (2012) but, it does not appear that this was an opportunity for consultation.

[49] In my view, given all this evidence, the First Nations are not in a position to complain that they were not consulted about the implementation of the Policy. They were consulted and chose to abandon the process. Whether they did so for good reason need not be addressed on this Motion because, it is also clear that there was never meaningful consultation about the merits of the Policy before it was developed. Further, there was never any suggestion that the results of the Working Group's study of impact could delay or prevent the implementation of the Policy.

MOOTNESS

[50] To understand this submission, it is important to know that AANDC provides funds to First Nations to cover expenditures for activities such as Education, Social Development (including a

budget for income assistance) and community Infrastructure (including a capital budget). This funding is provided pursuant to an agreement called a Block Funding Arrangement [BFA].

[51] Elsipogtog entered into its current five-year BFA on March 20 2007 [the First Elsipogtog BFA]. On March 2, 2012, Elsipogtog signed a new two-year BFA beginning April 1, 2012 [the Second Elsipogtog BFA]. It is noteworthy that the Policy will not reduce the funding available to First Nations for income assistance under the second BFA.

[52] The Respondent argues that this Motion is moot because Elsipogtog gave an express commitment in both the First Elsipogtog BFA and Second Elsipogtog BFA to deliver on-reserve income assistance in accordance with New Brunswick's rates and standards.

[53] Clause 4.4 of the First Elsipogtog BFA states:

> 4.0 Council's Responsibilities
> …
> 4.4 Responsibility for an the Provision of Block Funded Services and Targeted Programs
>
> 4.4.1 The Council will provide the Block Funded Services and Targeted Programs in accordance with the terms and conditions of this Agreement, including the Delivery Standards set out in the Schedules, applicable laws, and any written standards the Council may develop in accordance with subsection 4.4.2.
>
> 4.4.2 The Council may develop its own written standards for the delivery of Block Funded Services which standards will, at a minimum, meet the Delivery Standards set out in Schedule 4 of this Agreement.
>
> [my emphasis]

[54] The relevant portion of Schedule 4 reads:

> Provision of income assistance

> The Council will ensure that services for all Members and other individuals living on-reserve who are in need will be delivered in accordance with:
> …
> (b) a formally defined and publicly available benefit schedule specifying types of assistance available, rates of assistance and conditions and criteria for eligibility of the reference Province;
>
> [my emphasis]

[55] While it is possible to interpret the phrase "in accordance with" as "equivalent to", this interpretation is not supported by the language of "reasonable comparability" contained in the 2007 National Manual, which would have been the governing national policy manual in place at the time. In my view, AANDC would not have entered into a BFA which stipulated requirements which were different from those found in its own policy manual. I have therefore concluded that the First Elsipogtog BFA does not support the Respondent's argument.

[56] Clause 4.2 of the Second Elsipogtog BFA requires the First Nation to deliver the programs for which funding is provided in accordance with the delivery standards set out in its Schedules. Clause 8 of Schedule 1-A to the Second Elsipogtog BFA also provides that:

> The Council will administer the Income Assistance Program in accordance with DIAND's *Income Assistance Program – National Manual* or any other approved program documentation issued by DIAND and as amended from time to time.
>
> [my emphasis]

[57] The Respondent argues that this passage in the Second Elsipogtog BFA refers to the National Manual (2012), which requires that on-reserve income assistance be delivered at rates "equivalent to" those in place in the province. However, in my view, there are two reasons why this submission is not persuasive.

[58] First, the reference to the "*Income Assistance Program – National Manual*" is the title of the 2007 National Manual. The National Manual (2012) is called the "*National Social Programs Manual*" and, if the intention was to refer to it, it is reasonable to conclude that the correct title would have been used.

[59] Second, the acronym "DIAND" (i.e. the Department of Indian Affairs and Northern Development) is used with reference to the manual. This suggests that it refers to the 2007 National Manual and not the National Manual (2012) because, by the time the latter manual was produced, DIAND had become AANDC.

[60] For these reasons, I have concluded that the Applicants' Motion is not moot.

THE TEST FOR INTERLOCUTORY RELIEF

[61] The Court's authority to grant an interlocutory injunction is set out in s. 18.2 of the Act and Rule 373 of the Rules. Section 18.2 of the Act reads:

> 18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

[62] Rule 373 reads:

> 373. (1) On motion, a judge may grant an interlocutory injunction.
>
> (2) Unless a judge orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages caused by the granting or extension of the injunction.

[…]

[63] The three-part test for injunctive relief was set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 at para 43. The Applicants must demonstrate that: (i) the Applicants will suffer irreparable harm; (ii) the balance of convenience favours the Applicants; and (iii) there is a serious question to be tried.

(i) Irreparable Harm

[64] The Applicants argue that both First Nations and Recipients face irreparable harm.

(a) Harm to First Nations

[65] Before dealing with these submissions, it is helpful to consider some background information about First Nations' financial arrangements, as they relate to housing, and about differences in the way benefits are paid by Elsipogtog and by New Brunswick.

[66] The construction of some housing on First Nations' reserves is financed by loans from the Canada Mortgage and Housing Corporation [CMHC] under section 95 of the *National Housing Act*, RSC, 1985, c N-11. These loans are guaranteed by ANNDC and, although they are sometimes referred to as mortgages, they do not attach the land in any way.

[67] At the moment, if a Recipient lives in a home that was built with CMHC financing, Elsipogtog repays CMHC by deducting amounts due from the Recipient's income assistance benefits. The First Nation pays those sums directly to CMHC. The Recipient never sees this money which is commonly referred to as a "shelter cost". The First Nation handles utilities in the same way. Utilities are paid directly by the First Nation on the Recipient's behalf. The balance of the money after shelter costs and utilities have been paid is remitted to the Recipient on a weekly basis.

[68] In broad terms, the New Brunswick regime involves a comprehensive monthly payment to Recipients. Under this scheme, the First Nation will not be permitted to make any direct payments. Recipients will pay their own shelter costs and utilities directly and will have to budget for their needs over a one-month period.

[69] There is another important difference. Because New Brunswick's income assistance does not cover shelter costs, the First Nations will not be able to give eligible Recipients money for shelter costs from their income assistance budgets. However, AANDC has suggested a solution. Barbara Robinson who is the Manager of Social Programs at AANDC has deposed that, once they no longer pay CMHC for shelter, the First Nations will have surpluses in their income assistance budgets. She says that such surpluses can be transferred to capital budgets and then used for Recipients' shelter and utilities payments.

[70] It became apparent at the hearing of the Motion that the Applicants are concerned that AANDC may be planning to eliminate First Nations' discretion to transfer surplus funds out of income assistance budgets and instead require surpluses to be used to develop programs called

"active measures". These programs are meant to assist the unemployed to enter the workforce. Given this concern, at the Court's request, counsel for the Respondent contacted AANDC and assured the Court that Barbara Robinson's evidence is correct and that such transfers are permitted under the Second Elsipogtog BFA. This being so, I am not satisfied that First Nations will default on their CMHC loans and, even if that occurred, it would not constitute irreparable harm because it can be compensated in damages.

[71] With regard to the Applicants' submission that there will be "administrative dismantling" without the requested interlocutory relief, I have concluded that they have not provided evidence that the Policy will cause more than administrative inconvenience. In my view, such harm and any related costs are compensable in damages.

(b) The Recipients

[72] On June 11, 2012, AANDC advised the band that the total amount spent by Elispogtog on social assistance under the Etpiiteneoei Manual was substantially the same as the amount that would have been spent if New Brunswick rates and standards had been applied. The differences were at the individual Recipient level. This supports a conclusion that the irreparable harm, if it exists, may be found in the impact of the Policy on Recipients and their families.

[73] Regarding the impact on individual Recipients, the most recent evidence in the record is a comparison made in November 2010 of benefits paid under the Etpiiteneoei Manual with those available in New Brunswick. It shows that New Brunswick's rates are approximately $300.00 per

month less than the rates paid on reserves. This comparison was considered reliable as of February 22, 2011 because it was included in an AANDC document of that date entitled *Implementation Strategy for Provincial Rate Structure for Income Assistance (Background Information*).

[74] The comparison reads as follows:

> […] a comparison of benefits paid to individual families under the two structures in November 2010 reveals that most clients would receive less under the provincial rate structure. A family of four in New Brunswick would receive $908.00 per month under the provincial rate structure. A family [on reserve] of similar size and circumstance received benefits totalling $1262.00, although there were other families who received both larger and smaller amounts. A single, employable individual would receive a comprehensive allowance of $537.00 under the provincial rate structure. A single, employable person [on reserve] received $802.28, although there were other individuals who received both larger and smaller amounts.

[75] While some Recipients may experience reduced assistance, there is also the likelihood that others will become ineligible and lose all their income assistance.

[76] At paragraph 38 of her affidavit, Barbara Robinson identifies four situations in which a person would become ineligible once the Policy is implemented: (1) they have income that exceeds the needs test under provincial criteria; (2) they belong to the household of an individual who has income that exceeds the provincial needs test; (3) they reside off-reserve; and (4) the have assets in excess of provincial criteria which can be liquidated.

[77] The Ontario Superior Court has held that impoverishment, social stigma and the loss of dignity associated with severe poverty can constitute irreparable harm. In *El-Timani v. Canada Life Assurance Co.*, [2001] OJ No 2648 (SC), 106 ACWS (3d) 526 an insured individual with a severe back injury had been receiving disability payments for four years when these benefits were abruptly terminated by his insurer. In allowing an injunction requiring the insurer to continue paying the insured's benefits until trial, Madam Justice Molloy of the Ontario Superior Court accepted at paragraph 9 that "the loss of enjoyment of life resulting from a subsistence level existence pending trial is not calculable in money."

[78] This issue was also considered in *Ausman v Equitable Life Insurance Co. of Canada*, [2002] OJ No 3066 (SC), 114 ACWS (3d) 1096. At paragraph 52, Mr. Justice Henderson said:

> The long term effect of the loss of security and the impoverished lifestyle constitutes more than the loss of money. It constitutes irreparable harm.

[79] In my view, the estimated decline in income assistance rates under the Policy and the potential for ineligibility will cause emotional and psychological stress amounting to irreparable harm for some Recipients. Individuals who are reliant on income assistance are especially vulnerable even to small changes in the resources available to meet their basic needs and, for this reason, I have concluded that the Applicants have demonstrated irreparable harm.

(ii) Balance of Convenience

[80] If the injunction is granted, the Policy will not be implemented on April 1, 2012 and the Applicants say that this is the better outcome because Recipients will not be adversely affected

pending a decision on the Application and because compliance is not an urgent matter given that ANNDC and First Nations have been non-compliant for many years.

[81] In my view, the Applicant's have succeeded on this issue.

(iii) Serious Issues

[82] The Applicants suggest that there are three serious issues. I will deal with them in turn.

[83] The Applicants say that, although this case does not concern an Aboriginal or Treaty right, they were entitled to be consulted before the Policy was adopted. In my view, it is arguable that procedural fairness requires consultation about the Policy and not just its implementation. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, paras 21-28, the Supreme Court held that the duty of fairness is variable and that its content is determined in the specific context of each case according to a number of factors. Those factors included: (i) the nature of the decision being made and the process followed in making it; (ii) the nature of the relevant statutory scheme; (iii) the importance of the decision to the individuals affected (iv) the legitimate expectations of the individual challenging the decision; and (v) the decision-maker's own choices of procedure.

[84] The Court also emphasized, at para 22, that:

> [U]nderlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its

> statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[85] In my view, given that the Policy was adopted to achieve compliance with the Directive, and that there is no legislative scheme in play, the first two factors weigh in favour of the Respondent's argument that meaningful consultation was not required. However, based on the significant impact of the Policy on Recipients, and on the Applicant's submission that they expected to be consulted before the Policy was adopted, the third and fourth factors suggest that meaningful consultation may be required.

[86] Regarding AANDC's own choice of procedure, it is not clear that AANDC made any procedural choices. For this reason, I have concluded that the fifth *Baker* factor is not relevant.

[87] Because *Baker* may require the AANDC to consult First Nations about how to comply with the Directive, I am satisfied that there is a serious issue.

[88] In view of this conclusion, it is not necessary to consider the Applicants' submissions about improper delegation or legitimate expectation.

[89] The Applicants also argued that a requirement for meaningful consultation is grounded in the *sui generis* relationship between the Crown and First Nations, citing *Mushkegowuk Council v. Ontario*, [1999] 4 CNLR 76, 1999 CanLII 15034 (Ont SC), and informed by Canada's public law duties to cooperate in good faith with Indigenous people regarding the implementation of administrative measures that affect them pursuant to Articles 19 and 21 of the *United Nations*

Declaration on the Rights of Indigenous People and by a 2011 Status Report to the House of Commons by the Auditor General of Canada. Moreover, at the hearing Applicants' counsel pointed to a now expired Political Accord signed in 1998 by Canada and the Mi'kmaq and Maliseet First Nations Chiefs of New Brunswick, Nova Scotia and Newfoundland and Labrador. However, given the finding of serious issue described above, it is not necessary to deal with these submissions.

[90] For all these reasons, an order was made on March 30, 2011, granting the Motion.

"Sandra J. Simpson"
Judge

April 2, 2012

FEDERAL COURT

SOLICITORS OF RECORD

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