Federal Court  Cour fédérale

Date: 20190509

Docket: T-1600-18

Citation: 2019 FC 630

Ottawa, Ontario, May 9, 2019

PRESENT: Mr. Justice Grammond

BETWEEN:

CHIEF JOHN STAGG, COUNCILLOR LEONARD SUMNER, COUNCILLOR OWEN STAGG IN THEIR PERSONAL CAPACITY AND AS REPRESENTATIVES OF THE DAUPHIN RIVER FIRST NATION, AND THE SAID DAUPHIN RIVER FIRST NATION AS REPRESENTATIVE FOR ALL ITS MEMBERS

Applicants

and

THE ATTORNEY GENERAL OF CANADA, THE HONOURABLE RALPH GOODALE, MINISTER OF PUBLIC SAFETY, THE HONOURABLE JANE PHILPOTT, MINISTER OF INDIGENOUS SERVICES CANADA, THE HONOURABLE CAROLYN BENNETT, MINISTER OF CROWN-INDIGENOUS RELATIONS AND NORTHERN AFFAIRS

Respondents

JUDGMENT AND REASONS

[1] In the spring of 2011, the Dauphin River First Nation [DRFN] was evacuated due to the flooding of its reserve lands. Many of its members have been forced to relocate temporarily in the Winnipeg area or elsewhere in Manitoba. The rebuilding of the community took longer than expected. Indigenous Services Canada [ISC], through a number of intermediaries, provided DRFN members with benefits aimed at securing alternative housing while waiting for new houses to be ready. In the summer of 2018, as new houses were ready or about to be ready for occupancy, it declared that the evacuation was over and terminated the evacuee benefits.

[2] DRFN objected to the termination of evacuee benefits and now seeks judicial review of that decision. It says that the 70 houses that have been built so far are insufficient to address the needs of the community and that there remain 45 evacuee families who have no home to return to when their benefits are terminated. It argues that when the community was evacuated, ISC promised that a house would be built for every evacuated family. It also argues that the decision was not made in a procedurally fair manner.

[3] The Attorney General, on its part, denies that such a promise was ever made. He adds that the termination of the evacuee benefits was reasonable, because DRFN now has more houses and a lower rate of occupancy than before the flood, even when the natural increase of its population is taken into account. The Attorney General also argues that the decision to provide or to terminate benefits is a prerogative decision that courts cannot review.

[4] DRFN's application for judicial review is denied. The decision is not shielded from review because it is made under the royal prerogative or involved the allocation of public funds. However, the process leading to the decision complied with the requirements of procedural fairness. Most importantly, the decision was reasonable, as it took into account the collective needs of DRFN members. Given DRFN's role in allocating houses to its members, the decision-maker was not required to inquire into individual needs. Lastly, references to certain documents generated in the course of negotiations did not render the decision unreasonable.

I. Background

[5] As usual, a proper understanding of the case requires a detailed analysis of the facts. But it is difficult to appreciate the relevance of certain facts unless one begins with a summary of legislation and policy in two areas that intersect in this case: the provision of housing and emergency management and assistance.

[6] In these reasons, I refer to the relevant government department as Indigenous Services Canada or ISC. ISC was formerly part of a larger department, most recently known as Aboriginal Affairs and Northern Development Canada.

A. *Housing for First Nations*

[7] Housing is a fundamental human need. In this regard, Article 11 of the *International Covenant on Economic, Social and Cultural Rights* recognizes "the right of everyone to an adequate standard of living … including … housing." In this country, however, housing is often

considered to be a private matter. Individuals are expected to find housing by themselves and to resort to their own resources to cover housing costs. Nevertheless, federal and provincial governments have adopted various strategies to make housing more affordable. At the federal level, the *National Housing Act*, RSC 1985, c N-11, aims to "promote housing affordability" through the provision of financing or various forms of subsidies. Most provinces regulate residential tenancies and provide housing subsidies or other forms of housing assistance to low-income families. See, for example, *The Housing and Renewal Corporation Act*, CCSM c H160.

[8] Housing in First Nations communities is also provided through a combination of public and private initiative. Given the economic situation in many First Nations communities, as well as the constraints on private ownership flowing from the *Indian Act*, RSC 1985, c I-5, and other factors, public funding plays a more important role than in non-Indigenous communities. In many cases, such as in DRFN, First Nations build houses with whatever federal funding is available and rent them or simply allocate them to their members. Decisions regarding the allocation of housing are made by First Nations, either according to section 20 of the *Indian Act*, which deals with certificates of possession, through rental agreements or through more informal arrangements. The federal government plays no role in the allocation of housing in First Nations communities.

[9] While the federal government appears to accept the political responsibility to provide adequate housing to First Nation communities, the legal basis for the provision of that assistance is unclear. It may be, as DRFN suggested before me, that an obligation to provide housing flows from the treaty relationship between the Crown and many Indigenous peoples. DRFN, for one, is

a party to Treaty 2. In the Indigenous tradition, treaties were meant to establish a family relationship between treaty partners (*wahkohtowin*): Treaty Elders of Saskatchewan, *Our Dream Is That Our Peoples Will One Day Be Clearly Recognized As Nations* (Calgary: University of Calgary Press, 2000) at 33–36. Family members may have a duty to assist each other in times of need. Moreover, DRFN highlighted the fact that the availability of proper housing would be a prerequisite to the exercise of the harvesting rights enshrined in the treaties or in the *Constitution Act, 1930*. However, the evidentiary record in this case is insufficient to determine the existence and scope of a treaty right to housing.

[10] Parliament has not enacted legislation that deals specifically with First Nations housing (see, in this regard, *Canada (Attorney General) v Simon*, 2012 FCA 312 at paras 4–6; Janna Promislow and Naiomi Metallic, "Realizing Aboriginal Administrative Law", in Colleen M Flood and Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery, 2018) 87, 93–108). It appears that funding for housing is provided either by the Canadian Mortgage and Housing Corporation [CMHC] under the general provisions of the *National Housing Act*, or under policies of ISC. The relevant policies are not in evidence before me.

[11] It is common knowledge that the situation of housing in First Nations communities is particularly difficult, to the point that some speak of a crisis. More than twenty years ago, the Royal Commission on Aboriginal Peoples described the situation as follows:

> Aboriginal housing and community services are in a bad state, by all measures falling below the standards that prevail elsewhere in Canada and threatening the health and well-being of Aboriginal people. The inadequacy of these services is visible evidence of the

> poverty and marginalization experienced disproportionately by Aboriginal people. […]
>
> The problem is threefold: lack of adequate incomes to support the private acquisition of housing, absence of a functioning housing market in many localities where Aboriginal people live, and lack of clarity and agreement on the nature and extent of government responsibility to respond to the problem. […]
>
> (Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol 3, *Gathering Strength* (Ottawa: Canada Communication Group 1996) at 341).

[12] Indeed, it appears that there was a certain level of overcrowding at DRFN prior to the 2011 flood. The affidavits of Tanita and Alexis Cruly provide an illustration: the three Cruly sisters, two of whom were adults, lived in a three-bedroom house, together with their mother and stepfather, as well as the four-year old daughter of one of them. ISC has calculated that in 2011, the occupancy rate, that is, the number of residents per housing unit in DRFN, was 3.8. In comparison, the average occupancy rate for Manitoba First Nations was 5.4, while the overall average in Manitoba was 2.6.

B. *Emergency Assistance*

[13] Most Canadians would expect their governments to protect them in case of an emergency. Indeed, emergency planning has become a significant responsibility of all levels of government. Emergency planning includes prevention, preparedness, response when an emergency occurs and recovery.

[14] Recovering from an emergency may involve the reconstruction of communities and the temporary housing of persons who were evacuated. Those measures are critical for the persons

who are the most affected by an emergency. Despite their importance, however, there is no statutory right to these measures, as will become apparent from a review of the relevant legislation.

[15] The federal *Emergency Management Act*, SC 2007, c 15, is a very short statute. It is based on the premise that emergency preparedness is a jurisdiction shared between the various levels of government in Canada. Section 4 sets out a number of responsibilities of the federal government with respect to emergencies. In particular, it empowers the federal government to declare that a provincial emergency is of "federal concern" and, upon such a declaration, to provide financial assistance to a province. Section 6 provides that federal ministers shall prepare emergency plans with respect to matters falling under their jurisdiction. Pursuant to that authority, ISC or its predecessors have set up an Emergency Management Assistance Program [EMAP].

[16] Manitoba's *Emergency Measures Act*, CCSM c E80, contains, among other things, provisions requiring government departments and local authorities to prepare emergency plans. It also provides for the declaration of a state of emergency and for exceptional powers to be exercised on such an occasion. Part IV of the Act relates to disaster assistance. Section 16.1 allows for the provision of disaster assistance in accordance with policies adopted by the government. It also states that such assistance is "gratuitous" and not subject to appeal, except to the Disaster Assistance Appeal Board created by section 17.

[17] We can now turn to the events that affected the Interlake region of Manitoba in 2011 and DRFN in particular.

C. *The 2011 Flood and Reconstruction Efforts*

[18] Flooding has been an issue in Manitoba for a long time. The provincial government is involved in managing water flows, preventing floods and mitigating flooding damage and has built a number of works to that end. One of them is the Portage Diversion, a canal that allows the diversion of excess water flows of the Assiniboine River into Lake Manitoba. The waters of Lake Manitoba flow into the Fairford River, then into Lake St. Martin, then into the Dauphin River, which exits in Lake Winnipeg. DRFN is located at the mouth of the Dauphin River in Lake Winnipeg.

[19] In the spring of 2011, a combination of factors led to record water levels in the Assiniboine River basin and elsewhere in Manitoba. In order to minimize the possibility of flooding along the Assiniboine, in particular in Winnipeg and the environs, the provincial government diverted considerable quantities of water into Lake Manitoba through the Portage Diversion. This had the effect of greatly increasing the flow of the Dauphin River. Major floods took place in the Interlake region. Several communities were badly damaged, including DRFN. DRFN describes the water management measures taken by the government of Manitoba as a conscious decision to sacrifice DRFN, and other communities in the region, in order to save Winnipeg and other densely populated areas.

[20] In view of the impending flood, DRFN was evacuated in May 2011, and its members relocated, mostly in the Winnipeg area. Many, if not all of the 53 houses then existing in DRFN were destroyed or rendered inhabitable.

[21] In 2013, DRFN initiated an action against the federal government in the Manitoba Court of Queen's Bench, with respect to the losses sustained as a result of the 2011 flood. Little progress has been made in bringing this action to trial. The parties have preferred to negotiate a comprehensive settlement agreement [CSA]. Those negotiations have led to an agreement-in-principle [AIP] in 2017, but no CSA has been signed yet.

[22] Although no CSA has yet been signed, the federal government funded DRFN reconstruction efforts, with the participation of the government of Manitoba. Before the flood, there were 53 houses in DRFN: affidavit of Aaron O'Keefe, Respondent's Record [RR] at 8, para 21. The initial plan, which was the object of an agreement between DRFN and the government of Manitoba in 2014, provided for the installation of 41 pre-built houses. However, in 2016, as DRFN identified additional needs, the federal government agreed to fund the construction of 20 additional houses and the renovation of another one. And even those numbers were exceeded, as an additional seven houses were built with funding approved by CMHC. The construction of those houses was completed in the summer or fall of 2018. Hence, there are now 70 new houses in DRFN.

[23] In addition, the federal government funded the reconstruction and the building of new collective infrastructure. As a result, DRFN now has a new band office, water and sewage system, health center and K-8 school.

[24] Nevertheless, DRFN takes the position that this is insufficient to cover the housing needs of DRFN members. At meetings with ISC held in the fall of 2017, it asserted that 45 additional houses would be needed. It says that it came to this conclusion as a result of a needs assessment performed in 2017, which would explain that it had not taken this position earlier.

[25] A motion to certify a class action against the federal and Manitoba governments was also filed in the Manitoba Court of Queen's Bench. The motion was initially dismissed against Manitoba as the judge found that a class action was not the preferable procedure to address the members' claims: *Anderson v Manitoba*, 2014 MBQB 255 [*Anderson MBQB*]. The Court of Appeal, however, reversed that finding and certified the class action against Manitoba: *Anderson v Manitoba*, 2017 MBCA 14. I understand that this action has been settled, but both parties agree that this settlement has no bearing on the issues before me. In the same decision, the Court of Queen's Bench dismissed the claims against the federal government as disclosing no cause of action: *Anderson MBQB* at paragraphs 170–192. That finding was not appealed.

D. *The Evacuation Benefits*

[26] One sad consequence of emergencies such as the 2011 flood is that persons who have been evacuated are often unable to return to their homes until significant remedial or reconstruction work is completed. As a result, emergency measures programs often include

relocation assistance, aiming at providing evacuees with the means of living while their homes remain unavailable.

[27] Such assistance, which the parties have referred to as "evacuee benefits," has been provided to DRFN members who were evacuated in 2011. For the purposes of this application, the precise scope of those benefits is immaterial. Affidavits sworn by five evacuees describe the monthly benefits as including the payment of rent directly to their landlords, for sums in the range of $800-$1200, as well as a cash payment for incidentals, in the range of $200-$300.

[28] The precise manner in which those benefits have been channelled to their recipients was made clear to DRFN only in the course of the present proceedings. The federal government adopted an order-in-council under the *Emergency Management Act* declaring the 2011 flood to be of national concern and authorizing payments to the province of Manitoba. As a result, the federal government made payments intended to cover, among other things, the payment of relocation assistance to both Indigenous and non-Indigenous Manitobans. The provincial government then contracted with a private non-governmental organization, initially the Manitoba Association of Native Firefighters and, starting in 2014, the Canadian Red Cross Society [Red Cross], for the actual delivery of assistance to the intended recipients. The lines of authority and accountability remain unclear. Thus, the federal government signed an agreement directly with the Red Cross in 2014. That agreement contains a statement of work that defines the services to be provided to the evacuees by reference to the provincial Disaster Financial Assistance Program. It also states that the Red Cross will seek reimbursement from the government of Manitoba. We do not know whether the benefits come within the purview of Manitoba's

Emergency Measures Act. Nevertheless, at the hearing of this application, counsel for the respondents admitted that the federal government is making decisions with respect to evacuee benefits and that the Red Cross would simply follow those decisions.

E. *The Challenged Decision*

[29] In the winter or early spring of 2018, ISC officials formed the view that DRFN had been restored to a state that allowed evacuees to return home. They asked DRFN to co-sign a letter to all evacuees informing them of the end of the evacuation and the termination of benefits. DRFN, however, declined to do so. As a result, ISC decided to terminate the evacuee benefits as of July 31, 2018. That decision was conveyed to DRFN members by letters from the Regional Director General, dated May 30, 2018, to each evacuee head of household. ISC says that most of those letters were received over the summer, with a few exceptions: affidavit of Aaron O'Keefe, RR at 15-16, paragraphs 43–44.

[30] DRFN objected to the termination of benefits, because of its view that 45 additional houses were needed to accommodate all evacuees, given the growth of community membership since the flood. That position was expressed, among other things, in a letter dated June 15, 2018, to then-Minister of ISC Jane Philpott. As a result of those representations, ISC agreed to delay the termination of evacuee benefits by one month, that is, benefits would end on August 31, 2018. ISC did not agree, however, to delay that termination indefinitely. That was confirmed by a letter of the Acting Regional Director General of ISC on August 23, 2018.

[31] As further discussions did not result in an agreement, DRFN brought the present application on August 31, 2018, also seeking interim and interlocutory relief. During a telephone conference held on that day with the undersigned, counsel for the respondents agreed to provide evacuee benefits until September 30, 2018, on the understanding that a motion for interlocutory injunction would be heard before that date. Counsel for both parties later agreed that the benefits would be provided until a decision is made on the main application, which rendered the motion for an interlocutory injunction moot. At this time, only the benefits for the 45 evacuee heads of households who have not been allocated a house remain in issue. DRFN no longer challenges the termination of benefits for other evacuees.

[32] The parties do not agree as to what the decision under review exactly is. DRFN says that it is the letter dated August 23, 2018, because the decision made on May 24, 2018 had been "rescinded." The Attorney General, on its part, says that the decision to terminate benefits was made on May 24, 2018, and was never rescinded, only delayed. I agree with the latter view, because ISC never wavered in its intention to terminate the benefits, although it agreed to delay the implementation of the decision by one month. The fact that ISC refused to reconsider its decision does not amount to a new decision being made. I note that in spite of this, neither party suggested that an extension of time was needed.

[33] Perhaps because of the disagreement as to when the decision was made, the parties also disagree as to what constitutes the reasons for that decision. In this regard, we must not lose sight of the fact that the decision is not the result of an adjudicative process. Thus, this is a case in which we need to "look to the record" to find what those reasons are: *Newfoundland and*

Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at paragraph 15, [2011] 3 SCR 708 [*Newfoundland Nurses*]. This record includes not only the letters of May 24, 2018 and August 23, 2018, but also several iterations of a "decision note" prepared for the Regional Director General as well as additional information provided by ISC's affiants. From those sources, I find that the reasons for the decision challenged by this application include:

- "The construction of all new housing at Dauphin River to address the impacts of flooding should be completed by June 30, 2018" (May 30, 2018 letter);

- The construction of 70 houses for 234 evacuees would bring the occupancy rate to 3.34, well below the average for Manitoba First Nations, and below the occupancy rate in DRFN before the flood (April 26, 2018 decision note);

- "It is uncertain of how many of the 234 evacuees will move home as there is the potential of a large number of false evacuees on the current red cross evacuee list, as well as evacuees who may no longer want to return home to Dauphin River [sic]" (May 24, 2018 decision note);

- The cost, estimated at $11 million, of building an additional 43 houses, as well as the fact that $2 million was offered for new housing in 2018-19 (May 24, 2018 decision note);

- "Dauphin River was originally supposed to demolish existing homes as new homes were being replaced; however the First Nation has been able to keep many of the existing homes which could accommodate future growth" (April 26, 2018 decision note);

- "The number of houses needed to address the impacts of the flood of 2011 was jointly agreed upon and acknowledged by Band Council Resolution, signed August 25, 2016 and in the Agreement of Principle signed May 10, 2017" (August 23, 2018 letter; also mentioned in the April 26, 2018 decision note).

[34] Over the course of the proceedings, both parties made claims that certain documents, in particular the 2016 band council resolution [BCR] and the 2017 AIP, were covered by settlement privilege and were not admissible in evidence. However, as I explain later, the real thrust of those submissions is that the Regional Director General should not have taken those documents into account when making his decision, not that I should not look at them. Therefore, I have admitted those documents and I will deal with the settlement privilege claim when reviewing the merits.

II. Analysis

[35] The subject-matter of the present application for judicial review is the termination of the evacuee benefits. Yet, this issue cannot be entirely separated from the larger issue of the sufficiency of housing. Intuitively, the evacuation cannot be ended until every family is able to return to a repaired or a new house. But the lapse of time – seven years between the flood and the

decision challenged – made things more complicated. When DRFN was evacuated, one could have thought that a family was the group of persons who inhabited the same house. However, as time went by, as children became adults, as babies were born, as coupled formed or separated and as people passed away, the families of 2011 may not be the same as the families of 2018. Hence DRFN's claim that 45 more houses are needed to fulfil the needs of its members.

[36] Resolving this issue is further complicated by the fact that the parties undertook reconstruction efforts before negotiating a comprehensive settlement of all issues arising from the flood. Thus, there is no agreement as to the number of houses to be built, nor as to the terms of the evacuee benefits program. There is no consensus on the metrics to be used to measure the needs of the community.

[37] This judgment is divided in three parts. I first need to address an objection raised by the Attorney General to this Court's jurisdiction and capacity to decide the matters at issue. I will explain why I find that the dispute is justiciable. I will then turn to the objections raised by DRFN to the process followed by ISC to make its decision. I will explain why those concerns are unfounded. I will then review the merits of the decision. Ultimately, I find that the decision was reasonable.

[38] At this juncture, I wish to make clear what this case is not about. This is not a claim for damages resulting from the flood. A class action to that effect was settled with Manitoba, and the claim against Canada will be decided by the Manitoba Court of Queen's Bench, on a more fulsome evidentiary record – unless, of course, the parties settle in the meantime. Neither is this a

claim based on a right to housing, whatever its source. The case was not argued on that basis and DRFN has not claimed any remedy regarding housing. And unlike *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2016 CHRT 2, this is not a discrimination claim. No evidence was adduced for the purpose of showing that DRFN members were adversely treated on the basis of a prohibited ground of discrimination.

A. *Jurisdiction, Justiciability and Standard of Review*

[39] Before dealing with the merits, I must address an objection raised by the Attorney General, who argues that the decision to terminate benefits is "not subject to judicial review." He says that the federal government has no legal obligation to provide evacuee benefits. The provision of those benefits would be an exercise of the royal prerogative, which would be subject to review on constitutional grounds only. The decision to provide such benefits would be a discretionary policy decision unsuitable for review by the courts.

[40] These arguments can be understood as a challenge either to this Court's jurisdiction or the justiciability of the matter. At the hearing, counsel for the Attorney General confirmed that he wished to advance both aspects of the argument. Nevertheless, whether viewed from the perspective of jurisdiction or justiciability, the argument fails.

[41] This Court's jurisdiction to review exercises of the royal prerogative is firmly established and, indeed, is expressly provided for in the definition of "federal board, commission or other tribunal" in section 2 of the *Federal Courts Act*, RSC 1985, c F-7: *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at paragraphs 36–58

[*Hupacasath*]. Our Court has reviewed decisions that are generally understood to be made under the royal prerogative, such as the issuance of passports (for example, *Lipskaia v Canada (Attorney General)*, 2018 FC 789) or the conclusion or withdrawal from international treaties (*Hupacasath*; *Turp v Canada (Justice)*, 2012 FC 893, [2014] 1 FCR 439).

[42] The Attorney General cited *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr*], as authority for the proposition that courts have jurisdiction "to review exercises of the prerogative power for constitutionality" (at paragraph 37) but not otherwise. However, the Supreme Court's reference to judicial review on constitutional grounds is explained by the fact that the claim in that case was based on the Charter. It was not meant to exclude other grounds of review: *Hupacasath* at paragraph 61. (To the extent that *Hospitality House Refugee Ministry Inc v Canada (Attorney General)*, 2013 FC 543, says otherwise, it has been overtaken by *Hupacasath*.) As the Ontario Court of Appeal wrote in *Black v Canada (Prime Minister)* (2001), 199 DLR (4th) 228 at 245 [*Black*]: "the expanding scope of judicial review and of Crown liability make it no longer tenable to hold that the exercise of a prerogative power is insulated from judicial review merely because it is a prerogative and not a statutory power." (See also Patrice Garant, *Droit administratif*, 7th ed (Cowansville, Qc: Yvon Blais, 2017) at 45−49 [Garant, *Droit administratif*]; Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf ed) at para 1.9 [Hogg, *Constitutional Law*].)

[43] Adopting the approach put forward by the Attorney General would cause significant practical problems. A precise definition of the royal prerogative would be needed, as this Court's jurisdiction would depend on the characterization of the source of the decision under review.

Yet, there is no agreement as to which decisions are made under the royal prerogative and which are made under another source of authority, as I will now demonstrate.

[44] The royal prerogative has been described as the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown" (*Khadr* at paragraph 34). Descriptions of the royal prerogative usually focus on powers that relate to traditional State functions, such as defence, foreign affairs, honours and mercy, as well as a number of traditional immunities: see, for example, Craig Forcese, "The Executive, the Royal Prerogative, and the Constitution" in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) [Forcese, "The Executive"]; Philippe Lagassé, "Parliamentary and Judicial Ambivalence Towards Executive Prerogative Powers in Canada" (2012) 55 Canadian Public Administration 157 [Lagassé, "Prerogative Powers"]; Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 75−106; Garant, *Droit administratif* at 49-75.

[45] Yet, it has sometimes been suggested that the royal prerogative also includes powers held by the Crown as a natural person, such as the power to enter into contracts or the power to spend money. It is sometimes said that government spending programs that are not backed up by an elaborate statutory scheme are made under the prerogative: see, for example, *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paragraphs 354–402, [2015] 2 FC 267. Such a characterization, however, is difficult to reconcile with the well-established rule to the effect that the government may not spend public money without Parliament's approval: *Financial Administration Act*, RSC 1985, c F-11, s 26. More generally, the very idea of royal

prerogative suggests powers that are unavailable to natural persons. In this regard, Professor Hogg says (*Constitutional Law* at para 1.9):

> Powers or privileges enjoyed equally with private persons are not, strictly speaking, part of the prerogative. For example, the Crown has the power to acquire and dispose of property, and to enter into contracts, but these are not prerogative powers, because they are possessed by everyone.

[46] It may also be difficult to determine whether the royal prerogative has been displaced by legislation: see, for example, the contrasting perspectives in Lagassé, "Prerogative Power" and Forcese, "The Executive." It would be highly inconvenient if this Court's jurisdiction depended on a detailed analysis of such a complex legal issue.

[47] In *Gestion Complexe Cousineau (1989) Inc v Canada (Minister of Public Works and Government Services)*, [1995] 2 FC 694 (CA), Justice Robert Décary of the Federal Court of Appeal warned against making this Court's jurisdiction dependent on fine distinctions regarding the source of authority for the decision reviewed (at 705):

> As between an interpretation tending to make judicial review more readily available and providing a firm and uniform basis for the Court's jurisdiction and an interpretation which limits access to judicial review, carves up the Court's jurisdiction by uncertain and unworkable criteria and inevitably would lead to an avalanche of preliminary litigation, the choice is clear. I cannot assume that Parliament intended to make life difficult for litigants.

[48] Thus, the better view is that the Crown is not acting under the royal prerogative when it sets up a spending program that is not supported by specific legislation, such as the emergency assistance program at issue here. And even if I were wrong in this conclusion, *Hupacasath* tells us that a decision made under the royal prerogative is not beyond this Court's jurisdiction.

[49] Nevertheless, the Attorney General's objection may be recast as a challenge to the justiciability of the matter, instead of a challenge to jurisdiction. Jurisdiction and justiciability are different concepts. In *Hupacasath*, Justice David Stratas of the Federal Court of Appeal explained the concept of justiciability in the following terms, at paragraphs 62 and 66:

> Justiciability, sometimes called the "political questions objection," concerns the appropriateness and ability of a court to deal with an issue before it. Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government.
>
> […]
>
> Usually when a judicial review of executive action is brought, the courts are institutionally capable of assessing whether or not the executive has acted reasonably, i.e., within a range of acceptability and defensibility, and that assessment is the proper role of the courts within the constitutional separation of powers […]. In rare cases, however, exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, taking courts beyond their proper role within the separation of powers. For example, it is hard to conceive of a court reviewing in wartime a general's strategic decision to deploy military forces in a particular way.

[50] The phrase "high policy" has sometimes been used to describe the kind of decisions that are not justiciable (Forcese, "The Executive," at 166). In contrast, where "high policy" issues are not at stake, "the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual" (*Black*, at 246–247). Although it was traditionally said that the wisdom of discretionary decisions is not a matter for the courts, the evolution of administrative law in recent decades has resulted in a

widening of the grounds on which administrative decisions may be reviewed. Thus, the decisive factor is not the political implications of the matter or the decision's discretionary component, but the fact that the question "has a sufficient legal component to warrant the intervention of the judicial branch:" *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 545 [*Re Canada Assistance Plan*]; see also Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012).

[51] In this case, it is difficult to discern any "high policy" issues similar to those at stake in *Black* or *Operation Dismantle*. In spite of this, the Attorney General argues that the matter is not justiciable because no one has a right to emergency assistance, citing *Anderson MBQB*, at paragraph 173. Yet, the fact that there is no right in the strict sense does not make the matter non-justiciable. For example, even though no one has a right to a passport, the process by which decisions regarding passports are made is justiciable (*Black*, at 247) and this Court has often reviewed such decisions, as I noted above. Likewise, the fact that a payment is made *ex gratia* (that is, in the absence of an obligation in the strict sense) does not render a matter non-justiciable. When the government chooses to make *ex gratia* payments to a group of individuals, it may set out a process and substantive conditions. Compliance with that process and those conditions raises justiciable issues, as shown by a number of decisions from this Court: see, for example, *Kastner v Canada (Attorney General)*, 2004 FC 773; *Briand v Canada (Attorney General)*, 2018 FC 279.

[52] The Attorney General also argues that the decision challenged is not justiciable because it involves budgetary matters. Indeed, budgetary decisions may not always be justiciable, as the

allocation of public money is a political matter involving choices that cannot be measured against any legal standard. Yet, the mere fact that a decision involves monetary benefits or has an impact on the public purse does not push it beyond the pale of justiciability. In general terms, a decision is less susceptible to be justiciable when its scope is broad. Purely operational decisions will usually be justiciable.

[53] Here, the decision challenged does not pertain to the choice to create ISC's EMAP program nor to the scope or main parameters of the program. It is a decision that terminates the benefits provided to 45 families in the wake of a specific evacuation, on the basis, if I may summarize it that way, that the conditions that required the evacuation are no longer present. This is not the kind of decision that we would usually describe as a policy one. Courts are well-equipped to review such a decision to ensure that it was made in a procedurally fair manner and that it is reasonable. In this regard, an analogy may be drawn with *Tesla Motors Canada ULC v Ontario (Ministry of Transportation)*, 2018 ONSC 5062, where the precise manner in which an environmental subsidy program was terminated was held to be justiciable.

[54] This brings me to the selection of the standard of review. Where this Court reviews an administrative decision, even in a non-adjudicative context, there is a strong presumption that the decision can only be overturned if it is shown to be unreasonable: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraph 50, [2013] 2 SCR 559; *Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56 at paragraphs 15−16, [2017] 2 SCR 488.

[55] DRFN seeks to rebut the presumption by asserting that the decision-maker in this case has no specific expertise and that the rationale for deference is absent. I disagree. The decision challenged deals with the provision of services to members of First Nations. This is the daily work of ISC officials. They certainly have more knowledge and expertise regarding those matters than this Court. While the Regional Director General is not specifically empowered by legislation, he has the subject-matter expertise that underpins deference in judicial review. Although the precise context may have been different, this Court has reviewed decisions made by ISC or its predecessors with respect to funding decisions or the administration of service programs and concluded that the standard of review was reasonableness: *Pikangikum First Nation v Canada (Minister of Indian and Northern Affairs)*, 2002 FCT 1246; *Ermineskin v Canada*, 2008 FC 741 at paragraph 43; *Tobique Indian Band v Canada*, 2010 FC 67 at paragraph 56; *Kehewin Cree Nation v Canada*, 2011 FC 364 at paragraphs 16-18; *Thunderchild First Nation v Canada (Indian Affairs and Northern Development)*, 2015 FC 200 at paragraph 26.

[56] Relying on *Hupacasath* at paragraph 67, the Attorney General argues that decisions such as the one challenged can only be quashed in "egregious" cases. This, however, as *Hupacasath* made clear, does not amount to a different, more exacting standard of review. Reasonableness is still the standard. Rather, the use of that adjective highlights the difficulty that an applicant may face in attempting to show that a decision is unreasonable, where it is the result of the balancing of an array of policy considerations, rather than the product of the application of a well-defined legal rule to a particular set of facts.

[57] With respect to issues of procedural fairness, no standard of review is applicable: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraphs 54–56. The issue is "whether the procedure was fair having regard to all of the circumstances" (*ibid* at paragraph 54).

B. *Procedural Fairness Issues*

[58] DRFN has advanced a wide number of grounds in support of its challenge to the decision. Those grounds overlap to a certain extent and they sometimes straddle the divide between process and substance. It is easier to deal first with the complaints regarding procedural fairness.

(1) Notice and Right of Appeal

[59] DRFN first claims that no notice was given to the individuals affected by the decision.

[60] In administrative law, the requirement to give notice is a component of procedural fairness. In an adjudicative context, notice must be given in order to enable the person concerned to participate in the hearing or other decision-making process. Thus, a notice must typically provide enough information about the "case to meet," so as to enable the person concerned to make meaningful submissions. It must give sufficient time to allow for preparation. Notice requirements are less stringent when a decision is not adjudicative in nature. Indeed, the requirements of procedural fairness vary according to the nature of the decision: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21–28 [*Baker*]; *Canada (Attorney General) v Mavi*, 2011 SCC 30 at paragraph 39, [2011] 2 SCR 504 [*Mavi*].

[61] In this case, the requirement to give notice serves an additional purpose. Upon the termination of benefits, evacuees need to make alternative housing arrangements. The notice period provides the evacuees with some time to do this in an orderly manner. ISC recognized this purpose of the notice requirement in certain Frequently Asked Questions [FAQ] that it prepared for the evacuees or posted on its website. One of those FAQs, prepared in 2016, stated that "Evacuees will be provided at least 60 days' notice before benefits end."

[62] With this in mind, I can now review the process by which notice was given to the evacuees. As early as February 2018, ISC staff indicated to DRFN's council and members that they intended to terminate the evacuee benefits in the next summer. As soon as the May 24, 2018 decision was made, letters were prepared for each evacuee. According to the affidavit of Aaron O'Keefe, all but six of those letters had been received by August 31, 2018. DRFN argues, however, that those letters were invalid or ineffective, as the decision that they conveyed – termination of the benefits as of July 31, 2018 – had been "rescinded." A new notice should have been given, says DRFN, when the decision to terminate the benefits on August 31, 2018 was made. As I explained above, this is based on a misapprehension of what constitutes the decision. The decision to terminate the benefits was made on May 24, 2018. That ISC chose to delay the implementation of that decision by one month does not invalidate the notices already given.

[63] In practice, it is the Red Cross, and not ISC, who had a monthly contact with the evacuees, for the purpose of paying the benefits. One troubling aspect of this case is the assertion, contained in the affidavits of Irene Stagg, Melodie Asham and Cherise Ross, that in July 2018, Red Cross personnel required the evacuees to sign a release to the effect that they

accepted that their benefits would end on August 31, 2018. The practice was not uniform, as Tanita and Alexis Cruly say, in their affidavits, that they have not been required to sign such documents. I have not seen those releases, as the affiants say that they were not given a copy. The Attorney General merely says that he is unaware of this situation and has apparently made no effort to investigate. In any event, he does not rely on any releases that might have been signed by the evacuees.

[64] On the strength of *Mavi*, DRFN argues that ISC had a duty to give evacuees notice of the impending decision and, presumably, a right to make submissions showing why their benefits should not be cut. This assumes, however, that the impugned decision is made at the individual level. As I show below, however, the Regional Director General could reasonably terminate the DRFN benefits on a collective basis. Most importantly, the matter was dealt with collectively, in discussions between ISC staff and DRFN's council. The council was well aware of ISC's intentions as early as February 2018. ISC initially sought the collaboration of DRFN in communicating with evacuees, but DRFN declined to do so. In those discussions, there is no doubt that DRFN's council advocated on behalf of the individual evacuees. Indeed, the five evacuees who provided an affidavit stated that they "look to Chief and Council to be my advocate and to act in my best interests." In the specific circumstances of this case, I conclude that the discussions between ISC and DRFN's council constituted sufficient notice of the impending decision.

[65] DRFN also argues that the decision should be quashed because no right of appeal was provided to the evacuees. It notes that the FAQs prepared by ISC or posted on ISC's website

referred to a right to appeal. However, no information was ever given as to what that appeal process was and how an individual could initiate it. (No one appears to have drawn any connection with the appeal process provided for by section 17 of Manitoba's *Emergency Measures Act*.)

[66] There was certainly room for improvement in this process, especially with respect to information regarding an appeal process. However, this does not invalidate the decision. There is no evidence that any evacuee actually sought to initiate an individual appeal. What would have happened then is speculation. Perhaps someone would have found what the appeal process was. We simply do not know. In any event, the matter was treated collectively through the present application for judicial review.

[67] Likewise, the requirement to sign a release, while most likely objectionable, does not invalidate the decision. As the releases are not before me, I cannot say whether they amounted to an invalid attempt to curtail the evacuees' right of appeal or other recourse. Moreover, they were obtained after the decision was made.

[68] With respect to the second purpose of giving notice in this case – allowing evacuees to make alternative arrangements – I conclude that ISC made reasonable efforts to notify all evacuees at least 60 days in advance of the termination of their benefits. Several evacuees may not have received the initial letters 60 days ahead of the July 31 deadline, but the extension to August 31 appears to have cured the problem for most of them. The fact that some letters were returned to ISC because evacuees changed their addresses without notifying ISC or the Red

Cross does not result in a breach of procedural fairness, given that ISC deployed other means to ensure that evacuees were made aware of the termination of the benefits.

[69] As a result of the passage of time, the notices given in the spring or summer of 2018 are no longer effective in ensuring that evacuees have adequate time to make alternative living arrangements. Thus, ISC will need to provide a new notice when this judgment is issued.

(2) Bias or Conflict of Interest

[70] DRFN says that the Regional Director of ISC was biased or in a conflict of interest, as he made the challenged decision while he also represented ISC in the negotiations for the conclusion of a CSA. I am unable to accede to that submission, because it overlooks the nature and the context of the function performed by the Regional Director General.

[71] It is trite law that the requirements of procedural fairness, including the requirement of impartiality, vary according to the context. In *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 at paragraph 31, [2003] 2 SCR 624 [*Imperial Oil*], Justice Louis LeBel wrote, for a unanimous Supreme Court:

> The extent of the duties imposed on the administrative decision-maker will then depend on the nature of the functions to be performed and on the legislature's intention. In each case, the entire body of legislation that defines the functions of an administrative decision-maker, and the framework within which his or her activities are carried on, will have to be carefully examined. The determination of the actual content of the duties of procedural fairness that apply requires such an analysis.

[72] In that case, the Minister of the Environment had issued a remediation order against Imperial Oil with respect to lands that it had owned in the past. Imperial Oil argued that the Minister was biased, because the government was being sued by third parties in connection with the failure of past efforts to decontaminate that land. The Supreme Court held that this situation did not result in the Minister being biased. In making his order against Imperial Oil, the Minister was simply furthering the public interest.

[73] Likewise, in the present case, the Regional Director General was not performing an adjudicative function. He oversees ISC's activities in Manitoba, which include the provision of housing and other infrastructure to Indigenous communities, as well as issues arising out of the 2011 flood. One must expect that he will be involved with respect to all issues affecting a First Nation. Thus, he will oversee the conduct of litigation and negotiations with a given First Nation and the provision of services to that same First Nation under existing programs or authorities. Given the nature of his functions, he will not be considered to be biased simply on account of the broad array of responsibilities that he exercises with respect to a particular First Nation.

(3) Legitimate Expectation

[74] DRFN argues that the decision breached a legitimate expectation arising out of promises repeatedly made by ISC since 2011. I disagree. As I explain below, the statements made by ISC do not have the full scope that DRFN seeks to impart to them. More fundamentally, the doctrine of legitimate expectations cannot create substantive rights.

[75] When reviewing the history of the discussions between DRFN and ISC since 2011, it should be borne in mind that the decision under review relates to the termination of evacuee benefits, not to the issue of the number of houses required to fulfil the needs of DRFN members. Yet, the two issues are often intertwined, as appears from the promises allegedly made by ISC. These alleged promises can be described by three statements: (1) the community will be rebuilt as it was before the flood or better; (2) a house will be built for every family; (3) every family will receive evacuee benefits until a house is ready for them. In their affidavits, DRFN representatives state that ISC repeatedly made promises (1), (2) and (3). ISC accepts that it made promise (1), but denies making promises (2) and (3).

[76] In their affidavits, DRFN representatives state that Ms. Anna Fontaine, then Regional Director General of AANDC (ISC's predecessor), made promise (2) at a meeting held in May 2011, just before DRFN was evacuated. Ms. Fontaine, in her affidavit, denies making that promise. She also denies that promise (1) was made in consideration of DRFN's consent to be flooded.

[77] On cross-examination, Mr. John Stagg, who is now chief of DRFN and who was present at some of those meetings, did not have a precise recollection of the sequence of events and what Ms. Fontaine said exactly. For example, he testified:

> 69 Q. And so can you recall the words that Anna Fontaine used which suggested that every evacuee who had a family would have a house made available for them?
>
> A. Well, from my understanding, that was always in my head, you know, every evacuee would get a home. But you know, like a lot has happened within the six, seven years.
>
> […]

> 70 Q. […] And that's when you told me the promise was made by Anna Fontaine that every evacuee who had a family would have a house made available for them?
>
> A. Yes.
>
> 71 Q. Were those the exact words she used, or can you recall the words she used to get that across?
>
> A. No, I can't recall.

[78] Mr. Stagg also described the promises made during that meeting in terms that are more compatible with promise (1) than with promise (2):

> 58 Q. Is it your evidence that you heard Anna Fontaine in the meeting that you did attend make the promises with respect to rebuilding your community on condition that the First Nation consented to water being diverted into the community?
>
> A. I didn't hear her say, like, in that way. I just heard her say, like, well, we'll rebuild your community, or even better. That's my answer.

[79] With respect to the benefits themselves, which are the subject of the alleged promise (3), Mr. Stagg said:

> 117 Q. So did Stephen Traynor [the Regional Director General] tell you that the evacuee benefits would continue until everyone had a house to go back to?
>
> A. Well, that's what I told him, so –
>
> 118 Q. So you told him. Did anyone from Canada tell you that?
>
> A. Not that I recall, no.
>
> 119 Q. Now Aaron O'Keefe, in his affidavit, has said that such a commitment was never made. Do you have a response to that evidence?
>
> A. Not at this time, no.

[80] Mr. Emery Stagg, who was chief at the time and who appears to have a better recollection of the events, described ISC's promises as follows:

> 19 Q. But what I would like to know is what [Ms. Fontaine] said to you. Did she ever say anything about flooding and devastating your community?
>
> A. When we were meeting she advised me that, Chief, whatever damages you incur in your First Nation will be replaced, or to a better quality, or better.
>
> […]
>
> 38 Q. Do you have a response to that evidence from Ms. Fontaine?
>
> A. […] And they told me, well, you know, there's going to be a big flood coming your way. And that's when I was told that whatever your losses are, we will replace anything that is damaged to equal or better than what your community had before.
>
> […]
>
> 43 Q. And, again, Anna Fontaine, in her affidavit, has said […] that she did not promise or suggest that a house would be built to offer to each evacuee household. Do you have a response to that?
>
> A. It was our, it was my belief at that time, as spokesman for the community, that anybody that had a house that was going to be affected by the flood would be replaced.
>
> […]
>
> 47 Q. Can you recall the words used by Anna Fontaine?
>
> A. When I was at that meeting she, I was sitting next to her and she said, Chief, whatever the losses are, we will replace all your housing and whatever infrastructure that is damaged.
>
> 48 Q. Did Anna Fontaine promise anything else?
>
> A. No.

[81] This review of the evidence leads me to find that any promise made by ISC representatives was along the lines of promise (1), namely, to rebuild the community as it was

before the flood or better. There was never any specification of what "better" meant. In fairness to the witnesses, it may be that the difference between promises (1) and (2) was not clearly apparent in 2011. A promise that every family would obtain a house would be equivalent to a promise to rebuild the community as it was, provided that families are defined as the groups of persons who actually occupied houses before the flood. Under that assumption, Messrs. Stagg may have honestly rephrased or understood ISC's promise in terms of "every evacuee will have a house." This does not mean, however, that ISC made promise (2), committed to build a particular number of houses or undertook to build a house for every DRFN member who declares himself or herself to be a head of family.

[82] I now turn to alleged promise (3) – that evacuated DRFN heads of families would receive benefits until a house is made available for them. As I mentioned above, ISC officials have denied making such a promise and DRFN representatives have not been able to say when, and by whom, such a promise would have been made. Nevertheless, DRFN points to two FAQs documents prepared by ISC, which would embody such a promise.

[83] The first document, which I will call the "paper FAQ," must have been prepared in early 2016, as it refers to events in the spring or summer of 2016 in the future tense. According to Chief Stagg, this FAQ was meant to update DRFN members, at a time when it was thought that a number of DRFN families could be repatriated to the first tranche of new housing in the following summer. This paper FAQ contains the following statements:

> **5. When will my evacuee benefits be cut off?**
>
> Once evacuees return to the reserve, and a home is ready for them, their evacuee benefits will end. Evacuees will be provided at least 60 days' notice before benefits end.

> **10. What happens if I want to return home but there is no house available? Who will work with me to resolve this issue?**
>
> 2011 flood evacuees are the priority to receive housing. Dauphin River First Nation will be provided with 41 homes as well as 6 CMHC homes for a total of 47 homes. At this time, there are 41 homes on site.
>
> The First Nation is responsible to allocate houses to families on the evacuee list and will be responsible for addressing issues that arise from allocation of houses. Additional homes maybe [*sic*] provided later subsequent to a Comprehensive Settlement Agreement.
>
> **14. What happens to me if the only reason why I am not prepared to move back is because there is no house available for me and my family?**
>
> Members are deemed to be evacuees until reasonable housing is offered.

[84] Another FAQ document, which I will call the "web FAQ," appears to have been available on ISC's website until mid-August 2018. The page is titled, "Information for 2011 Manitoba Flood Evacuees." It provides a general description of evacuee benefits, outlines eligibility criteria and defines the scope of the benefits by reference to provincial regulations. It outlines the role of the Red Cross and specifies that decisions regarding eligibility are made by ISC, not the Red Cross. This web FAQ does not contain any specific statements about the termination of evacuee benefits. It merely states that ISC will continue to work with the Red Cross "to ensure evacuees continue to receive services and support until they can safely return to their communities."

[85] When read globally, these FAQs do not address directly the matter at hand, namely the possibility of putting an end to the benefits where some families have not been allocated a house. The paper FAQ was mainly geared towards the logistics of a first wave of repatriation to DRFN.

It expressly acknowledged that not everyone would obtain a house at that point in time. Additional housing was contemplated, but no specific promises were made. When that document was written, no one had apparently realized that the allocation of houses to evacuees would result in 45 families not having a house. Thus, the statement to the effect that members would be considered as evacuees until a house is offered to them must be read in light of the expectation that there would be a second tranche of houses. It is difficult to interpret it as an open-ended promise that benefits would continue until all housing needs, however defined, are satisfied. Likewise, the web FAQ does not deal in any level of detail with the issue of the end of the evacuation or the termination of benefits. While it refers to the concept of a "safe return home," it does not explain what this means when one family has become two (or more).

[86] More generally, ISC could only make promise (3) – that benefits would run until everyone is offered a home – if promise (2) – that a home would be built for everyone – had already been made. I have shown above that this is not the case.

[87] In conclusion, I am unable to find that ISC made promises that were "clear, unambiguous and unqualified" (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraphs 95–96, [2013] 2 SCR 559 [*Agraira*]) so as to give rise to a legitimate expectation.

[88] In any event, the doctrine of legitimate expectations relates only to process and not to substance (*Re Canada Assistance Plan*, at 557; *Baker*, at paragraph 26; *Agraira*, at paragraph 97). In other words, even though the government makes a promise with respect to a particular outcome, it is not bound to deliver that outcome. Here, DRFN is invoking the doctrine of

legitimate expectations to produce a substantive result: because a promise was made that evacuee benefits would last until each family has its own house, ISC is bound to that promise. This is not a recognized application of the doctrine.

C. *Reasonableness of the Decision*

[89] That brings me to the crux of the matter, which is the reasonableness of the Regional Director General's decision to terminate evacuee benefits. I will analyze the arguments raised by DRFN in support of its allegation that the decision was unreasonable.

(1) Taking Into Consideration Privileged Documents

[90] DRFN first line of attack is that the decision should not have been based on documents that were produced in the course of negotiations aimed at reaching a comprehensive settlement and that were subject to privilege. The prominence given to that argument may derive from the fact that DRFN considers that the decision challenged was made only on August 23, 2018. The letter written on that day by the Acting Regional Director General referred to two documents that DRFN says are subject to privilege: a BCR adopted in August 2016, and an AIP signed in 2017 in view of a comprehensive settlement of all matters arising out of the 2011 flood. The decision note prepared in April 2018, also refers to the 2016 BCR and the 2017 AIP and it appears to have been a consideration in the Regional Director General's initial decision.

[91] Settlement privilege is "a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute" (*Union Carbide Canada Inc v Bombardier*

Inc, 2014 SCC 35 at paragraph 31, [2014] 1 SCR 800 [*Union Carbide*]). Privilege is a rule of evidence. As such, it applies when a party seeks to introduce certain evidence in the context of judicial proceedings.

[92] It can hardly be disputed that the 2017 AIP is a document that was prepared for the purposes of settling all the disputes that arose between DRFN and the federal government as a result of the 2011 flood. Moreover, the AIP itself states that it "does not create legally binding commitments" and participation in the negotiations does not "constitute an admission of fact or law with respect to any claim or issue." Every page of the AIP bears the mention "a without prejudice document, subject to settlement privilege."

[93] In my view, the 2016 BCR is also subject to settlement privilege. To understand why, one must bear in mind that since 2011, ISC has implemented or funded a number of reconstruction projects in spite of the fact that no comprehensive settlement had yet been concluded. The execution of the 2016 BCR was a requirement set by ISC for moving forward on one of those projects, the construction of 20 additional houses. While the Attorney General says that the approval of that project was distinct from the negotiation process, I am unable to dissociate them. The aim of the negotiation process was to settle all claims arising from the flood, including the funding of efforts to "build back better." Building 20 additional houses was an interim measure aimed at achieving part of what was negotiated before a comprehensive deal was struck.

[94] That, however, does not mean that settlement privilege precluded the Regional Director General from considering the 2016 BCR and the 2017 AIP in making the challenged decision.

Settlement privilege, as I mentioned above, is a rule of evidence. It applies when a negotiating party attempts to bring evidence of the negotiation before an independent decision-maker. Where a party to the negotiation is also in a position to make unilateral decisions with respect to issues that are related to the subject-matter of the negotiation, however, settlement privilege does not apply. Here, the Regional Director General, who was overseeing the negotiation, cannot in any meaningful sense be said to have brought evidence before himself when he took into consideration the 2016 BCR and the 2017 AIP. These were matters of which he already had knowledge. There is no issue of privilege.

[95] Likewise, when DRFN applies for judicial review of a decision and argues that it improperly refers to the 2016 BCR and the 2017 AIP, it is difficult to see how the Court can discharge its review function without knowledge of the contents of those documents. In this regard, this case is similar to *Union Carbide*. In that case, it was held that there is an exception to settlement privilege where a party seeks to prove that a settlement was reached and what the terms of the settlement were. Then, by necessity, the court needs to see otherwise privileged documents in order to be able to decide the case. Likewise, in the instant case, it is necessary for me to see the 2016 BCR and 2017 AIP in order to decide the application.

[96] The real question, as I see it, is whether the contents of the negotiation were an irrelevant consideration that tainted the decision. In performing this analysis, I must heed the Supreme Court of Canada's guidance to the effect that administrative decisions must be read globally, having regard to elements of the record that may help understand the reasoning (*Newfoundland Nurses*, at paragraphs 13–17) and that judicial review is not a "line-by-line treasure hunt for

error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at paragraph 54, [2013] 2 SCR 458).

[97] In the April 2018 decision note, references to the 2016 BCR and 2017 AIP are found in a section titled "Background." That section describes the history of the negotiations – also including a 2014 "agreement on fundamental elements" – as an explanation of the transition from a pre-flood situation where there were 53 houses in the community, to a current count of 70. The note then mentions that DRFN requested an additional 43 houses in October 2017 and then goes on to review factors that relate to the adequacy of ISC's contribution to rebuild DRFN. Those factors are: the fact that DRFN has been able to keep many existing homes instead of demolishing them; the number of evacuees; the current occupancy rate compared to the average rate of Manitoba First Nations; and the new collective infrastructure that has been built. Under the heading "Considerations," the note then mentions that DRFN has refused to jointly sign a letter to evacuees; it discusses the costs associated with various options and suggests that there may be a "large number of false evacuees" as well as evacuees who might not wish to return to the community. No mention is made of the 2016 BCR or the 2017 AIP in that section. The decision note also contains a "Summary," which focuses on the state of readiness of the recently built housing and infrastructure as well as DRFN's refusal to collaborate. It makes no mention of the 2016 BCR or the 2017 AIP.

[98] Thus, in my view, the decision note referred to the 2016 BCR and the 2017 AIP simply to provide a history of the discussions that led to the construction of a larger number of houses than existed before the flood. The substantive reason for the recommendation to terminate benefits is

clearly the fact that building 70 houses as well as new collective infrastructure puts DRFN in an adequate position, relative to its situation before the flood and to the situation of other First Nations in Manitoba, and that building an additional 43 houses is not warranted in light of the needs and the costs.

[99] In other words, the decision note did not consider the 2016 BCR and the 2017 AIP as a bar to DRFN's claims. The decision note addressed the substance of the claim for additional housing and found that it was not warranted on the current facts, irrespective of previous promises or admissions. Thus, the decision was not based on an irrelevant factor.

[100] It is true that the August 23, 2018 letter seems to give much more importance to the 2016 BCR and the 2017 AIP as reasons for terminating the benefits. However, as I noted earlier, the decision was made in May 2018, and was based on a much wider array of factors than the 2016 BCR and the 2017 AIP. Moreover, the August 23, 2018 letter was written by someone who was replacing the Regional Director General on an interim basis and who may not have accurately summarized the reasons for the decision made in May 2018. In my view, the reference to those documents in the August 23, 2018 letter does not invalidate the decision retroactively.

(2) Taking Needs Into Consideration

[101] A constant theme of DRFN's argument is that the decision failed to take actual needs into account. In the present case, the concept of needs may relate to the state of housing in DRFN – are there enough houses? – or to the evacuee benefits – does an individual need those benefits to make a living? I said at the outset that this case is not about a general claim to a particular level

of housing. Nevertheless, it is not possible to entirely separate housing and evacuee benefits. This is so because, logically, ISC cannot reasonably decide to terminate evacuee benefits unless it first makes a reasonable determination that housing needs are met. Said otherwise, it would be unreasonable to cut benefits and to require people to return to a community that has not enough space to accommodate them.

[102] This, indeed, flows from the requirement that the decision-maker must consider the purposes of the relevant legislation or program (*Doshi v Canada (Attorney General)*, 2018 FC 710 at paragraphs 31–36). The explicit or implicit objective of the "recovery" component of the EMAP program is to restore a community affected by a disaster to a situation at least equivalent to the status quo ante. AANDC's National Emergency Management Plan, prepared in 2011, describes "recovery" as follows (at page 19):

> Recovery focuses on the reparation or restoration of conditions to an acceptable level through measures taken after the emergency. Recovery activities include the return of evacuees, trauma counselling, reconstruction, economic impact studies and financial assistance for eligible costs. […]
>
> Returning a community to a state of normalcy, which existed prior to the emergency, is a priority.

[103] This is encapsulated in the phrase "build back or better" that is frequently repeated in the evidence. "Or better" is a recognition that all the needs of the community may not have been fulfilled before the disaster or that those needs may evolve over time, particularly if reconstruction takes a long time.

[104] Either in the specific context of housing or with respect to public services generally, the assessment of needs calls for an important measure of discretion. Defining need involves a degree of subjectivity and a measure of political judgment. It is an exercise in line-drawing. And in a complex situation such as housing, there is no single metric by which need can be measured.

[105] In this case, the Regional Director General assessed need by a collective metric, the occupancy rate, that is, the number of residents divided by the number of houses. In my view, it was reasonable to do so and to reach the conclusion that, collectively, DRFN's housing needs were sufficiently met to end the evacuation.

[106] First, it was reasonable to resort to a collective metric. ISC respects First Nations' power to allocate housing in their communities. It does not require First Nations to report on how or to whom houses are allocated. As a result, ISC is unable to assess whether individual needs are met. Moreover, as part of the reconstruction efforts, ISC funded the construction of new collective infrastructure. It is difficult to measure the value of that infrastructure in individual terms.

[107] Second, it was reasonable to rely on the fact that the occupancy rate in DRFN has been brought from approximately 3.8 to approximately 3.3. In doing so, ISC recognized that it was necessary to build more houses than existed in 2011, because DRFN's population had increased in the meantime. This also constituted an improvement in comparison to the situation before the flood and gave effect to the promise to "build back or better." I also note that ISC's calculation includes the 45 families who have not been allocated houses so far, comprising 86 persons,

according to the Red Cross list. If those persons are excluded from the calculation, the occupancy rate is brought down to approximately 2.2.

[108] It was also reasonable to rely on the fact that DRFN's occupancy rate was significantly below the average occupancy rate of Manitoba First Nations. In doing so, I am not suggesting that an inadequate situation should be used as a yardstick. However, where budgetary resources are limited, it is not unreasonable to allocate them where the needs are most important first.

[109] Third, in my view, ISC was not required to match a lower target. Such a target would be difficult to define in the abstract. The parties did not suggest any basis for saying that the occupancy rate should be, for instance, 3.0, 2.8 or 2.5. Moreover, one should not lose sight of the purpose of the EMAP program, under which the evacuee benefits are funded – it is to restore the community to its pre-emergency state, not to fulfil housing needs that were then unmet.

[110] Fourth, it was reasonable to take into account the fact that the Red Cross list was potentially inaccurate and contained the names of persons that ISC described as "false evacuees," as well as the fact that DRFN has been able to keep certain old houses. In other words, because the allocation of houses is a matter for DRFN, and acknowledging the unreliability of the information before him, the Regional Director reasonably based his decision on what appeared to be the most reliable source of information to calculate the rate of occupancy, namely, the Red Cross evacuee list.

[111] There is little information in the record as to how the Red Cross list was compiled. The FAQ documents and the agreement between ISC and the Red Cross suggest that names were put on that list with the consent of both DRFN and ISC.

[112] DRFN has suggested that the list is incomplete and under-estimates the number of persons who currently live in the community or wish to return there. Chief John Stagg, in cross-examination (AR at 757-758), suggested as much, but it appears that he was mainly referring to the fact that some DRFN members who did not reside in the community might choose to move there in the future. In an affidavit filed pursuant to a direction I gave after the hearing, Mr. Emery Stagg provided additional information as to the allocation of houses. He indicated that the number of persons indicated on the Red Cross list for each household is not necessarily accurate. In an unspecified number of cases, relatives of the head of the household should be added to the list.

[113] On the other hand, there are indications that the list may over-estimate the housing needs of DRFN members. In his affidavit, Aaron O'Keefe states that he had observed that a number of houses existing in 2011 had not been demolished: RR at 8, para 21. This appears to be the basis of a statement to that effect in the April 26, 2018 decision note. DRFN did not cross-examine Mr. O'Keefe on that subject nor otherwise challenge that statement. Moreover, the Attorney General underlined that the Red Cross list contains six pairs of single persons listed as heads of households bearing the same family names who appear to share accommodations, as well as one case of a person who appears to share accommodations with another person bearing the same family name and two dependents.

[114] In those circumstances, it was reasonable for ISC to calculate the occupancy rate on the basis of the Red Cross list. Before leaving that topic, I would simply observe that ISC made a presentation to DRFN members in February 2018, which compared the occupancy rates of DRFN before the flood and after reconstruction with those of Manitoba First Nations and Manitoba in general, in support of its position that the emergency would soon be over: Affidavit of Aaron O'Keefe, RR at 28. DRFN did not seek to correct those numbers or to provide its own calculations.

(3) Failure to Take Into Account Individual Situations

[115] From the above, we can conclude that the Regional Director General reasonably concluded that, collectively, DRFN now has enough housing available to put an end to the evacuee benefits program. But DRFN argues that this is not enough – the Regional Director General also had to consider each evacuee's personal circumstances. To put this bluntly, benefits should not be cut where that would result in sending a family to the street. In that perspective, "need" refers not only to a collective assessment of housing needs, but also to an individual, family-by-family assessment of housing arrangements. According to DRFN, this requires ISC to examine the circumstances of each person whose name appears on the Red Cross list, to ensure that appropriate living arrangements are available before evacuee benefits are terminated for that person.

[116] To define what is appropriate, DRFN referred to "national occupancy standards" published by CMHC. Those standards define the number of rooms that a house should have

depending on the composition of the family. I have no information as to the legal status of those standards.

[117] In this regard, DRFN submitted the affidavits of five of its members to whom no house has been allocated and who would have nowhere to live if their benefits are terminated. These witnesses explain how the threat to cut evacuee benefits made it difficult for them to conclude or renew satisfactory rental arrangements. Some describe their living conditions as "couchsurfing" with friends or family.

[118] I have much sympathy for persons who might suddenly lose the source of income that they have used over the last few years to pay for their rent. However, I have come to the conclusion that the Regional Director General did not have to consider individual situations before terminating the evacuee benefits program.

[119] The basic reason is simple: individual situations are the product of housing allocation decisions made by DRFN, over which ISC has no control, as well as the individual choices of the persons to whom houses have been allocated, regarding who will be invited to reside in their houses.

[120] In all fairness, ISC cannot be required to consider individual situations unless it is given all the information about the process of allocation and its outcome – which house was allocated to whom and who lives in each house? It would also be unfair to require ISC to remedy individual situations when it did not make the allocation decisions that gave rise to those

situations. Moreover, ISC cannot be responsible for the consequences of individual choices as to who will live together. For example, DRFN's submissions refer to the situation of a couple who divorced during the evacuation – should they now be required to share a house in the newly rebuilt community? Obviously, people cannot be forced to live together against their wishes. However, such a situation cannot have the effect of increasing ISC's responsibility. Likewise, the situation of Tanita Cruly, which was often mentioned as an example in DRFN's argument, is not different from that of many First Nations young adults across the country who are on the waiting list for a house in their community. While this may cause personal hardship, the evacuee benefits program was not meant to address that situation.

[121] DRFN's argument is based on the premise that every person whose name appears on the Red Cross list is entitled to a house and, in the meantime, to evacuee benefits. Yet, we know little about how that list was compiled. While it was suggested that the list includes only the names of persons residing in DRFN before the flood, it is difficult to accept that every person whose name appears on the list was a "head of household" to whom a house was then allocated. There are 115 names on the list, while there were 53 houses in DRFN before the flood. Moreover, 56 names on the list are those of single adults, with no spouses or children.

[122] Thus, the Red Cross list does not appear to be a reliable tool for ascertaining housing needs. Indeed, in response to a question I asked after the hearing, DRFN stated that the list was not necessarily accurate, in that a number of persons who are shown as single adults would actually be living with spouses, dependents or relatives.

[123] Moreover, to the extent that this Court is asked to make determinations of individual need, it should be provided with all the information required to understand why those needs are not met. One key component is the allocation of the 70 new houses to persons on the Red Cross list or other DRFN members. In this connection, it bears repeating that the satisfaction of the housing needs of DRFN members is a collaborative enterprise involving both DRFN and ISC and other federal entities. Yet, DRFN has taken the position that it need not explain its housing allocation policy and decisions, as "no one had argued that it had done anything wrong" in this regard and it could not be asked to "prove a negative." While DRFN provided some information after the hearing, this only increased the confusion, as DRFN now suggests that the Red Cross list is under-inclusive.

[124] In those circumstances, it was reasonable for the Regional Director General to decline to consider the individual needs of DRFN members whose names appeared on the Red Cross list.

(4) Fiduciary Duties

[125] DRFN alleges that the termination of evacuee benefits was contrary to a fiduciary duty. These arguments do not appear to have been brought to the attention of the Regional Director General before the initial decision was made in May 2018, nor even before the decision was reiterated in August 2018. Be that as it may, DRFN has not proved that a fiduciary duty exists in this case.

[126] The Supreme Court of Canada has recognized that the relationship between the Crown and Indigenous peoples is fiduciary in nature, but that not every aspect of that relationship results

in a legally cognizable fiduciary duty: *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paragraph 48, [2013] 1 SCR 623 [*MMF*]. A fiduciary duty may arise where the Crown assumes discretionary control over a specific Indigenous interest: *MMF*, at paragraph 49. While the Supreme Court did not exhaustively define the kinds of interests that may give rise to a fiduciary duty, until now it has applied the doctrine to collective interests in land only: *MMF*, at paragraphs 51–59; *Guerin v The Queen*, [1984] 2 SCR 335; *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at paragraphs 52–53, [2018] 1 SCR 83; see also *Coldwater Indian Band v Canada (Indian and Northern Affairs)*, 2017 FCA 199 and, in a somewhat different context, *Caron v Alberta*, 2015 SCC 56 at paragraph 106, [2015] 3 SCR 511. A fiduciary duty may also arise from an undertaking to act in the best interests of the beneficiary: *MMF*, at paragraph 50; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at paragraph 36, [2011] 2 SCR 261 [*Elder Advocates*].

[127] With respect to the first source of fiduciary duties, DRFN's present claim is not based on an interest in land, or even a private law interest, over which the Crown assumed discretionary control. It must be borne in mind that the present case is not about reserve lands as such – DRFN has advanced such a claim in another court. It is not even about the construction of houses. It pertains to the payment of evacuee benefits. In *Elder Advocates*, the Supreme Court held that benefits schemes do not ordinarily give rise to fiduciary duties, at paragraph 52:

> Access to a benefit scheme without more will not constitute an interest capable of attracting a fiduciary duty. Although the receipt of a statutory benefit may affect a person's financial welfare, absent evidence that the legislature intended otherwise, the

> entitlement is a creation of public law and is subject to the government's public law obligations in the administration of the scheme.

[128] I am not aware of any case in which a court held that the provision of services to members of First Nations gives rise to a fiduciary duty. In *Grant v Canada (Attorney General)* (2005), 77 OR (3d) 418 (SCJ), the Ontario Superior Court of Justice declined to strike a statement of claim alleging, among other causes of action, a fiduciary duty in the context of housing in First Nations communities. This, however, does not mean that such a duty exists. It simply means that the issue will be decided at trial. To my knowledge, no judgment on the merits has been rendered in that matter.

[129] With respect to the second source of fiduciary duties, the argument appears to be a restatement of the argument regarding legitimate expectations that I discussed above. To the extent that I found that ISC made no promise to build a house for each head of family or to provide evacuee benefits until such a house is available, there can be no promise-based fiduciary duty. ISC's policies regarding housing generally have not been put in evidence before me. It is therefore impossible for me to find any fiduciary duty based on the contents of those policies.

(5) Aboriginal and Treaty Rights

[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.

III. Conclusion

[132] As a result, DRFN has not shown that the decision to terminate evacuee benefits was unreasonable or reached through an unfair process. I can only express the hope that ISC and DRFN will continue to collaborate in order to better address the housing needs of DRFN members.

[133] The application for judicial review will be dismissed, with costs.

JUDGMENT in T-1600-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. The applicants are ordered to pay the costs of the respondents.

"Sébastien Grammond"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-1600-18
STYLE OF CAUSE:	CHIEF JOHN STAGG, COUNCILLOR LEONARD SUMNER, COUNCILLOR OWEN STAGG IN THEIR PERSONAL CAPACITY AND AS REPRESENTATIVES OF THE DAUPHIN RIVER FIRST NATION, AND THE SAID DAUPHIN RIVER FIRST NATION AS REPRESENTATIVE FOR ALL ITS MEMBERS v THE ATTORNEY GENERAL OF CANADA, THE HONOURABLE RALPH GOODALE, MINISTER OF PUBLIC SAFETY, THE HONOURABLE JANE PHILPOTT, MINISTER OF INDIGENOUS SERVICES CANADA, THE HONOURABLE CAROLYN BENNETT, MINISTER OF CROWN-INDIGENOUS RELATIONS AND NORTHERN AFFAIRS
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	MARCH 26, 2019
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	MAY 9, 2019

APPEARANCES:

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