Federal Court  Cour fédérale

Date: 20180508

Docket: T-300-17

Citation: 2018 FC 484

Ottawa, Ontario, May 8, 2018

PRESENT: The Honourable Mr. Justice Zinn

PROPOSED CLASS PROCEEDING

BETWEEN:

GERALD BRAKE

Applicant

and

ATTORNEY GENERAL OF CANADA AND THE FEDERATION OF NEWFOUNDLAND INDIANS

Respondents

ORDER AND REASONS

[1] The Applicant moves to convert his application for judicial review into an action pursuant to subsection 18.4(2) of the *Federal Courts Act*, RSC 1985, c F-7, and to certify that action as a class proceeding pursuant to Rule 334.16(1) of the *Federal Court Rules*, SOR/98-106.

[2] In addition to the decision rejecting Mr. Brake's application for membership in the Qalipu Mi'kmaq First Nation Band [QMFN], his Notice of Application seeks to review all decisions rejecting applications for membership in the QMFN under the Supplemental Agreement for the Recognition of the Qalipu Mi'kmaq Band [the Supplemental Agreement].

[3] The underlying judicial review, insofar as it relates to the decision rejecting Mr. Brake's application, is factually similar to that which the Court examined in *Wells v Canada (Attorney General)*, 2018 FC 483 [*Wells*]. Moreover, it raises identical legal issues to those raised in *Wells*. The Judgment and Reasons in *Wells* is being issued today together with this decision.

[4] Included in the motion record is a Proposed Statement of Claim against Canada in which Mr. Brake, in addition to the above remedies, seeks declarations that Canada breached its fiduciary duties, breached *Charter* rights, and was unjustly enriched, and he also seeks damages for the alleged breach of fiduciary duty, breach of *Charter* rights, and punitive damages. Included in the motion record was a Second Proposed Statement of Claim that added the FNI as a defendant, and also added two additional claims for relief relating to the decisions of the Enrolment Committee. Canada objected to the addition in the motion record of the Second Proposed Statement of Claim on the basis that "it attempts to remedy the numerous deficiencies in the proposed Claim" thereby undermining Canada's "ability to understand and respond to the claim."

[5] Regardless of which Claim is considered, the result of the following analysis is the same. However, for the purposes of these Reasons, I will reference the first Claim. I agree with Canada

that the late filing of a subsequent Claim is unfair to the responding parties, who are entitled to know the case they have to meet a reasonable time in advance of the hearing.

Background

[6] Newfoundland joined Canada on March 31, 1949. No provision was made in the Terms of Union of Newfoundland with Canada for the recognition and registration of Newfoundland's Aboriginal Peoples under the *Indian Act*, RSC 1985, c I-5.

[7] The Federation of Newfoundland Indians [FNI] was formed in 1972. One of its purposes was to secure recognition of the Mi'kmaq as status Indians under the *Indian Act*. Faced with little or no progress to this end, on January 12, 1989, the FNI initiated an action in the Federal Court of Canada [T-129-89] seeking, among other relief, a declaration that the FNI members are "Indians" within the meaning of section 91(24) of *The Constitution Act, 1867*, and an order directing the Governor-in-Council to recognize its member bands as "bands" under the *Indian Act*. In settlement of that action, Canada and the FNI entered into negotiations to recognize the QMFN as a band and its members as status Indians under the *Indian Act*.

[8] On November 30, 2006, Canada and the FNI reached an Agreement-in-Principle [AIP] that identified the process for the creation of a landless band of the Mi'kmaq for purposes of the *Indian Act* and for the enrolment of individual members as status Indian. On March 29, 2008, the FNI membership voted to ratify the AIP. 3,232 of the approximately 10,500 FNI members

cast ballots, of which 2,913 or 90% were in favour of ratification. The AIP was signed by representatives of Canada and the FNI on June 23, 2008 [the Original Agreement].

[9] The Original Agreement established a process for the recognition of the QMFN, the establishment of an Enrolment Committee to review and assess applications for membership in the QMFN, and the creation of criteria for membership in the QMFN [the Enrolment Committee Guidelines]. The Original Agreement also created an Appeal Master whose function was to consider and rule on appeals from decisions of the Enrolment Committee.

[10] The Original Agreement provided for a two-stage membership enrolment process over four years. Each application for membership was subject to approval by the Enrolment Committee. Each person accepted by the Enrolment Committee during this process was described as a "Founding Member" of the QMFN.

[11] The purpose of the first stage was to ensure that there was a sufficient number of persons interested to justify the creation of a band under the *Indian Act*. Between November 30, 2008, and November 30, 2009, at least 5,025 persons (50% of the number of FNI members) had to be accepted by the Enrolment Committee as members of the QMFN, otherwise the Original Agreement would be terminated. If this threshold was met, the second stage of the enrolment process would take place between December 1, 2009 and November 30, 2012. It was agreed that each Founding Member would be entitled to registration under paragraph 6(l)(b) of the *Indian Act*, as "a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act."

[12] Based on census records and a survey of the Mi'kmaq population, Canada and the FNI expected approximately 20,000 applications to be filed over the course of the four-year membership process. In fact, 25,912 applications for membership were submitted during the twelve months of the first stage.

[13] Due to the unexpectedly high number of applicants, not all applications received during the first stage were assessed by the Enrolment Committee within the time period prescribed in the Original Agreement. Nevertheless, it was agreed that since the membership numbers exceeded the minimum, Canada would create the QMFN by Order in Council, and later amend the list of persons identified therein as members of the band until all eligible applicants who applied during the first stage became members.

[14] The QMFN was legally created by Order-in-Council PC 2011-928 [the Recognition Order] on September 22, 2011.

[15] After the first stage and up to September 22, 2011, the date of the Recognition Order, another 4,816 individuals applied for membership. After the creation of the QMFN on September 22, 2011, and up to November 30, 2012, the deadline for membership application, 69,946 more individuals applied for membership with approximately 46,000 of these being received in the last 3 months of the enrolment process. In total, 100,674 applications for membership in the QMFN were received by the Enrolment Committee in the period provided for in the Original Agreement.

[16] In the fall of 2012, it became clear to the FNI that not all of the membership applications could be assessed by the Enrolment Committee before the March 23, 2013 deadline established in the Original Agreement. The FNI wrote to Canada on August 16, 2012, seeking its agreement to extend the deadline.

[17] The Original Agreement provided that three criteria were required for membership in the QMFN: Self-identification as a member of the Mi'kmaq, Mi'kmaq ancestry, and community acceptance. The self-identification and community acceptance criteria are those at issue in the proposed class action litigation.

Self-Identification

[18] Subparagraph 4.1(d)(i) of the Original Agreement stated that "an individual is eligible to be enrolled as a Founding Member if … in the assessment of the Enrolment Committee on the date of the Recognition Order [the individual] self-identifies as a Member of the Mi'kmaq Group of Indians of Newfoundland" [emphasis added].

[19] Section 4.2.1 of the Original Agreement requires the Enrolment Committee to assess applications "in accordance with the procedures set out in section 4.4 and with the Enrolment Committee Guidelines." Section 24 of the Enrolment Committee Guidelines provided that "[a] signed application form constitutes sufficient evidence that the applicant self-identifies as a Member of the Mi'kmaq Group of Indians of Newfoundland."

[20] In the fall of 2012, the FNI took the view that persons signing an application form after the date of the Recognition Order had not thereby objectively shown that they self-identified as a member of the Mi'kmaq prior to the date of the Recognition Order. In light of this realization, as the former President of the FNI attests "the Federation appealed all four Enrolment Committee decisions made up to that time where Qalipu Founding Membership had been approved based on the applicants self-identifying as Members of the Mi'kmaq Group of Indians of Newfoundland by signing the application after the date of the Recognition Order."

[21] In its appeal, the FNI outlined its concern as follows:

> For applicants that signed an Application before the date of the Recognition Order, this guideline was consistent with the clause 4.1(d)(i) criteria since the band had yet to be established. In this case, the date of the application post-dates the Recognition Order and there [*sic*] cannot be presumed to reflect the fact that the Applicant had self-identified on the date of the Recognition Order.
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> For applications that post-date the Recognition Order, the evidence addressed in the guideline; i.e. a signed application, does not speak to whether the clause 4.1(d)(i) criterion had been met on or before the date of the Recognition Order. It merely reflects that the applicant self-identified as of the application's date which is inconsistent with the clause 4.1(d)(i) requirement. Accordingly, further objective evidence must be supplied to show that the criterion has been met. If it is not provided, the application must be rejected on the basis that insufficient evidence has been provided to meet clause 4(1)(d)(i) criterion.

[22] No decision was made by the Appeal Master on the FNI appeals prior to the expiration of the time permitted. However, these concerns and the requested extension of time to assess the unexpectedly large number of applications were discussed with Canada. Canada had the same concerns as the FNI.

[23] Article 2.15 of the Original Agreement stipulated when and how its terms could be amended:

> This Agreement may only be varied, changed, amended, added to or replaced by written agreement between the Parties, ratified through the same procedures as this Agreement was ratified, save and except that the Parties may agree in writing from time to time to amend this Agreement, without further ratification or approval, for any of the following purposes
>
> a) to remove any conflicts or inconsistencies which may exist between any of the terms of this Agreement and any provision of any applicable law or regulation, so long as the parties agree that such amendments will not be prejudicial to their respective interests
>
> b) to correct any typographical error in this agreement or to make corrections or changes required for the purpose curing or correcting clerical omissions, mistake, manifest error or ambiguity arising from defective or inconsistent provisions contained in this agreement or
>
> c) to extend any time limit set out in this agreement.
>
> [emphasis added]

[24] Canada and the FNI were of the view that the self-identification evidence provision in the Enrolment Committee Guidelines constituted a "mistake, manifest error or ambiguity" under paragraph 2.15(b) of the Original Agreement. In their view, an application for membership signed after the date of the Recognition Order could not establish that the applicant self-identified as Mi'kmaq prior to that date, as required by paragraph 4.1(d)(i) of the Original Agreement. As a result, they amended section 24 of the Enrolment Committee Guidelines to require that those making an application for membership after the date of the Recognition Order establish that they self-identified as Mi'kmaq by showing that they were named on one of the

membership lists of the FNI, Ktaqamkuk Mi'kmaq Alliance, Benoit First Nation, or Sip'kop Mi'kmaq Band. Alternatively, they were required to provide at least one of the documents listed in section 24(3)(ii) to (v) of the amended Enrolment Committee Guidelines:

> ii. 2006 or earlier census return filed by a resident of the Island of Newfoundland, indicating that he or she identified as an Aboriginal person, a North American Indian or a member of an Indian Band/First Nation;
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> iii. Copy of a Newfoundland newspaper article pre-dating the 23 July 2008 signing of the Agreement reporting the participation of the applicant as a member of the Mi'kmaq Group of Indians of Newfoundland in ceremonial, traditional, or cultural activities of the Mi'kmaq of Newfoundland;
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> iv. Subject to the written approval of both Parties that the document represents acceptable evidence of self-identification, certified true copy of an application form filled out by a resident on the island of Newfoundland prior to the signing of the 23 June 2008 Agreement for:
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> - a job in a government, other public institution or an aboriginal organization listed in (i) above; or
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> - a program benefit sponsored by a government or governmental agency
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> indicating that the applicant self-identified as Mi'kmaq, Indian, or Aboriginal for the purpose of being selected for the job or program benefit;
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> v. Subject to the written approval from both Parties, other relevant documents submitted to or issued by a government, a public institution, the Federation of Newfoundland Indians, Ktaqamkuk Mi'kmaq Alliance, Benoit First Nation, Kitpu Band, and Sip'kop Mi'kmaq Band, prior to the signing of the 23 June 2008 Agreement, showing that the applicant self-identified as a Member of the Mi'kmaq Group of Indians of Newfoundland.

[25] Article 4.3.3 of the Original Agreement provided appeal rights to Canada, the FNI, and those whose applications for membership had been rejected:

> Within thirty (30) days of the mailing of its decision by the Enrolment Committee, the applicant and the Parties shall have the right to appeal the decision of the Enrolment Committee by sending an Appeal Notice to the Appeal Master, with a copy to the Enrolment Committee.

[26] The appeal was based on a review by the Appeal Master of the of the record before the Enrolment Committee including the application, documentation submitted by the applicant, written communication between the Enrolment Committee and the applicant, and the decision of the Enrolment Committee.

[27] The appeal rights of applicants rejected on the basis of self-identification were removed by section 6(2)(b) of the Supplemental Agreement, as follows:

> An applicant shall not have any right to appeal from a decision of the Enrolment Committee denying an application on the grounds that:
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> …
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> (b) that name of the applicant or either of the applicant's parents is not on one of the lists mentioned in paragraph 24(2)(i) of the Enrolment Guidelines and the applicant has not submitted any objective documentary evidence of self-identification under any of paragraphs 24(2)(ii) to (iv).

Other Concerns of Canada and the FNI

[28] In addition to the concerns about timing and the self-identification evidence, both Canada and the FNI were concerned by the much larger than anticipated number of applications. Canada's affiant, Roy Gray, attests that "the submission of over 46,000 applications in the final three months of a four year application period raised questions about the credibility of the

applications." He attests that "[b]oth Canada and the FNI were concerned about that integrity and credibility of the Qalipu Mi'kmaq First Nation and the legitimacy of its membership." Brendan Sheppard of the FNI described his reaction to this number of applications in a similar manner:

> Based on my longstanding experience in the Federation, it was not fathomable that these individuals could have self-identified as Members of the Mi'kmaq Group of Indians before QMFN was formed. If they had, I would have expected a greater level of interest than had been experienced in the Federation membership or membership in the other organizations on the island of Newfoundland representing Mi'kmaq. There would have been greater numbers attending cultural events such as Conne River or Flat Bay pow-wows or St. Anne Day ceremonies. It therefore was not credible that all of these applicants could have self-identified as Members of the Mi'kmaq Group of Indians of Newfoundland before QMFN's formation. It raised a question as to how many of these new applicants applied to obtain benefits that band membership offered.
>
> I saw evidence of this after the Government of Canada issued what was commonly referred to as 'status cards' in early 2012 to QMFN members. Shortly after the issuance of the 'status cards', a Corner Brook car dealership started to advertise tax-free automobile sales to QMFN members who had their 'status cards' on CFCB, a Corner Brook radio station that broadcast to the western portion of the island of Newfoundland. After those advertisements were broadcast, hours long line-ups started appearing at the QMFN Corner Brook office, which also served as the Federation office, with people looking to file their applications to obtain their 'status cards'.

[29] Mr. Gray pointed to census data as further support for the concerns expressed by Canada and the FNI. In his affidavit, he summarized that data:

> The 2001 census indicates that Canada's population was 30,007,094, of which 608,850, or 0.02% [*sic* it should be 2%], declared First Nation Identity [*sic*]. The population of the province of Newfoundland and Labrador in 2001 was 508,080, of whom 18,775 (3.6%) self-identified as aboriginal and 7,035 (or 1.4%) as First Nation, which included both Innu and Mi'kmaq. …

> The 2006 census indicates that Canada's population was 31,234,030 of which 689,025, or 0.02% [*sic* it should be 2%], declared First Nation identity. The population of the province of Newfoundland and Labrador in 2006 was 500,610. Approximately 24,000 (or 4.6%) residents of Newfoundland and Labrador self-identified as aboriginal, of whom 7,765 (or 1.6%) identified as First Nation, which included both lnnu and Mi'kmaq. …
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> The 2011 census indicates that Canada's population was 32,852,320 of which 851,560, or 0.025% [*sic* it should be 2%], declared First Nation identity. The population of Newfoundland and Labrador was 514,536. Approximately 36,000 (or 7%) residents of Newfoundland and Labrador self-identified as aboriginal, of whom 19,315 (or 3.7%) identified as First Nation, which included both Innu and Mi'kmaq.

[30] Based on his analysis of the census data and the number of applications received, Mr. Gray concluded that it was neither reasonable nor credible that all of the more than 100,000 applicants could validly claim that they met the membership requirements:

> Given these numbers, it was neither reasonable nor credible to expect that 104,000 applicants would claim to meet the requirements for membership in the Qalipu Mi'kmaq First Nation, as the number of applicants represented 1 in 5 (19%) of the population of Newfoundland and Labrador and about 11% of Canada's First Nation population (whereas the population of Newfoundland and Labrador represented only 1.6% of the population of Canada in 2011).

Community Acceptance

[31] Section 4.1(d)(ii) of the Original Agreement specified that to be eligible for membership in the QMFN, an applicant had to establish "on the date of the Recognition Order … [that he or she] is accepted by the Mi'kmaq Group of Indians of Newfoundland as a Member of the Mi'kmaq Group of Indians of Newfoundland."

[32] Section 25 of the Enrolment Committee Guidelines provided that the community acceptance criterion could be satisfied in one of two ways. First, subsection 25(a) provided that an applicant could demonstrate community acceptance by residence "in or around a Mi'kmaq Group of Indians on the Island of Newfoundland." Second, subsection 25(b) provided that an applicant could satisfy community acceptance by demonstrating both "frequent visits and/or communications" with resident members of the Mi'kmaq and "maintenance of the Mi'kmaq culture or way of life."

[33] In the Preamble to the Supplemental Agreement, the responding parties addressed the community acceptance criteria and their perceived need to "give greater precision on the nature of the evidence" to be provided to establish community acceptance. They did so by issuing Annex A to the Supplemental Agreement, the "Directive to the Enrolment Committee and the Appeal Master(s) with respect to the application of paragraph 4.1(d)(ii) of the Agreement for the Recognition of the Qalipu Mi'kmaq Band relating to acceptance as a Member of the Mi'kmaq Group of Indians of Newfoundland" [the Directive].

[34] The Directive sets out a number of more general principles and requirements that the Enrolment Committee and Appeal Master must apply when determining whether an applicant has met the community acceptance criterion. It also establishes a point system for the assessment and provides specific directions with respect to the system's application.

Application of the Supplemental Agreement and the Directive

[35] Section 2 of the Supplemental Agreement provided that previously accepted applications made between December 1, 2008, and November 30, 2012, were to be reassessed by the Enrolment Committee. Section 4 of the Supplemental Agreement provided that everyone whose application was to be assessed or reassessed, was to be provided with written notification "of the evidentiary requirement pertinent to the assessment or reassessment under the terms of the criteria of subsection 4.1(d) … and provided with an opportunity to send documentation not already submitted…"

Gerald Brake

[36] Mr. Brake was born in Corner Brook, Newfoundland, but now lives in Casselman, Ontario. He submitted his application for membership on November 5, 2011, one and one-half months after the date of the Recognition Order. He was informed by letter dated January 31, 2017, that his application was rejected by the Enrolment Committee.

> The Enrolment Committee has reached a decision to deny your application on the grounds that you **did not meet** the requirements for self-identification under paragraph 4.1(d)(i) of the Agreement and section 24 of the Guidelines. Your name (or the name of your parent if you are/were under 18 years of age) was not on the membership lists of the Federation of Newfoundland Indians, Ktaqamkuk Mi'kmaq Alliance, Benoit First Nation or Sip'kop Mi'kmaq Band. You also did not provide objective documentary evidence of self-identification as required in paragraphs 24(3)(ii). (iii), (iv) or |(v) of the Guidelines. [emphasis in original]

[37] The Enrolment Committee assessed applications in a sequential manner. Once an application was found to be valid as having met the conditions under sections 1 to 7 of the

Enrolment Committee Guidelines, the three eligibility criteria were then examined in order: self-identification, community acceptance, and ancestry. Because Mr. Brake's application failed to meet the self-identification criteria, the Enrolment Committee did not assess the other two criteria.

Gregory Collins

[38] The applicant filed an affidavit of Gregory Collins, a resident of Rockland, Ontario, who was born in Corner Brook, Newfoundland. Mr. Collins attests that should the Court see it as necessary, he is willing to join with Mr. Brake as a representative plaintiff. Mr. Collins filed his application for membership on February 1, 2009, during Phase 1 of the application process. It was accepted on May 29, 2009. However, his application was reassessed by the Enrolment Committee as was required under the terms of the Supplemental Agreement and by letter dated January 31, 2017, was rejected by the Enrolment Committee because it failed to meet the community acceptance requirement as defined by the Directive. Mr. Collins unsuccessfully appealed that decision.

Issues

[39] There are two issues that require the Court's consideration:

1. Whether the Court should exercise its discretion pursuant to subsection 18.4(2) of the *Federal Courts Act* to convert this application for judicial review into an action; and

2. If the Court decides that conversion into an action is appropriate, has the applicant met all of the requirements in Rule 334.16(1) of the *Federal Courts Rules* to certify this as a class proceeding.

Analysis

[40] Subsection 18.4(2) of the *Federal Courts Act* provides as follows: "The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action." The provision offers no guidance as to when it may be "appropriate" to convert an application into an action, or the factors that should or could be considered.

[41] In Canada (Attorney General) v MacInnis, [1994] 2 FC 464, [1994] FCJ No 392, the Federal Court of Appeal cautioned at paragraph 9 that "[o]ne should not lose sight of the clear intention of Parliament to have applications for judicial review determined wherever possible with as much speed and as little encumbrances and delays of the kind associated with trials as are possible." Applications for judicial review are the norm; actions the exception.

[42] A broad view of the scope of the discretion conferred on a motions judge by subsection 18.4(2) of the *Federal Courts Act* was taken by the Federal Court of Appeal in *Drapeau v Canada (Minister of National Defence)* (1995), 179 NR 398, [1995] FCJ No 536, where it was held by a majority that the motions judge did not err in giving consideration to the desirability of avoiding a multiplicity of proceedings on a motion for conversion. Mr. Drapeau had indicated in

his application that he intended to commence an action for damages in addition to the application for judicial review, both arising out of the same facts.

[43] The majority of the Federal Court of Appeal also found at paragraph 3 that subsection 18.4(2) of the Act placed no limits on the factors that can properly be considered on a conversion motion and that the "desirability of facilitating access to justice and avoiding unnecessary cost and delay" is one such proper consideration.

[44] The most instructive decision dealing with the interface between conversion of an application into an action and a proposed class proceeding is *Tihomirovs v Canada (Minister of Citizenship & Immigration)*, 2005 FCA 308 [*Tihomirovs*], reversing *Tihomirovs v Canada (Minister of Citizenship and Immigration)*, 2005 FC 479.

[45] Mr. Tihomirovs applied for permanent residence on February 1, 2002, under the provision of the *Immigration Act*, RSC 1985, c I-2. His application was not processed prior to the coming into force of the *Immigration and Refugee Protection Act*, RSC 2001, c 27, on June 28, 2002, and so his application was processed according to the new Act and it was denied. He brought an application for judicial review seeking an order of *mandamus* directing the Minister of Citizenship and Immigration to assess his application in accordance with the former legislation. He moved to convert his application into an action. His stated reason for seeking conversion was to permit him to seek certification of his action as a class proceeding. His proposed class included not only the 21 other applications for judicial review brought on similar

grounds, but the approximately 40,000 individuals who applied for permanent residence in Canada between January 1 and June 28, 2002.

[46] On the motion for conversion, Mr. Tihomirovs submitted that his desire to apply to have this matter certified as a class action formed a sufficient basis, by itself, to have his application converted to an action. The Federal Court noted that "there may well be cases where it is so clear on the face of the application for judicial review that the nature of the application is so manifestly unsuited to proceeding by way of class action that conversion should not be permitted." However, it found that Mr. Tihomirovs' claim did not fall into that category of cases. Moreover, the motions judge observed that refusing leave to convert in the present circumstances "results in effectively denying certification to Mr. Tihomirovs, as without his application being converted to an action, certification will be unavailable to him." On that basis it was held that the motion to convert raised an access to justice issue and the Court directed that the application be converted into an action.

[47] The Federal Court of Appeal in *Tihomirovs* allowed an appeal from this finding. Rothstein J.A., as he then was, held at paragraph 12 that an intention to certify is "is just another consideration to be taken into account on the application for conversion." Further, at paragraph 14, he stated that because "judicial review is to provide for a speedy and summary resolution of public law matters, it will always be necessary for the court to weigh the advantages of a class action proceeding against the efficiency of a judicial review proceeding."

[48] At paragraph 16, Rothstein J.A. stated the obvious - if the reason for conversion was to support an application for certification as a class proceeding, and if the applicant cannot convince the court that he would meet the test of certification set out in Rule 299.18 [now Rule 334.16], then the application ought not to be converted. However, at paragraph 19, he makes it clear that even if the applicant is able to convince a court that the action would be certified, that alone does not inevitably lead to a finding that it ought to be converted:

> [T]he question of the preferable procedure is a matter to be taken into account in the conversion/certification proceeding. The Court will look at the questions of practicality and efficiency and which procedure will provide the least difficulty for resolving the matter. For example, a multiplicity of judicial review proceedings, which a class action might avoid, might also be avoided if the parties agree to treat one judicial review as a test case for other judicial reviews dealing with the same issue. These and other considerations should allow the Court to determine whether to grant conversion and certification.

[49] When the application for conversion was returned to the Federal Court, it was found that if converted, the action it could not meet the requirements for certification, and thus the Court dismissed the application: *Tihomirovs v Canada (Minister of Citizenship and Immigration)*, 2006 FC 197.

[50] Motions to certify a class proceeding are governed by Rule 334.16(1) which states:

> Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if
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> (a) the pleadings disclose a reasonable cause of action;
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> (b) there is an identifiable class of two or more persons;

> (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
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> (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
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> (e) there is a representative plaintiff or applicant who
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> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,
>
> (iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and
>
> (iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

[51] The Rule provides that certification is mandatory if all five of the elements listed in the Rule are met. In keeping with *Tihomirovs*, I will first consider whether, if the application is converted into an action, it would satisfy the test to be certified as a class proceeding.

(a) Is There a Reasonable Cause of Action?

[52] The test as to whether there is a reasonable cause of action is the same as that used to strike a claim: Whether it is plain and obvious that the pleading discloses no reasonable cause of action: *Hunt v Carey Canada Inc*, [1990] 2 SCR 959.

[53] In this application, Mr. Brake seeks many typical public law remedies, including: (1) a declaration that the rejection of the applicant's application and others' applications for membership in the QMFN pursuant to the Supplemental Agreement was "manifestly unfair under the principles of natural justice and contrary to section 18.1(4) of the *Federal Courts Act*"; (2) a declaration that in making these rejections, Canada acted in bad faith; (3) a declaration that the Enrolment Committee acted beyond its jurisdiction or refused to exercise its jurisdiction, failed to observe principles of natural justice, based its decisions on erroneous findings of fact made in a perverse or capricious manner, and erred in law; and (4) an order quashing the Enrolment Committee's decisions rejecting these applications, or setting them back to be redetermined.

[54] These remedies are also sought in the proposed statement of claim, in addition to other declaratory relief, including declarations that Canada breached its fiduciary duties, breached the applicant's *Charter* rights, and was unjustly enriched. In addition, the applicant seeks damages in the proposed action for the alleged breach of fiduciary duty, breach of *Charter* rights, and punitive damages.

[55] I agree with the observation of the FNI paragraph 50 of its memorandum that Mr. Brake's proposed action is "predicated on his application having been improperly assessed" because the Supplemental Agreement was not ratified in accordance with the process outlined in the Original Agreement. Also underlying the proposed action is his claim that the decision of the Enrolment Committee and the entire assessment process was unfair.

[56] Both Canada and the FNI submit that the proposed statement of claim does not advance a reasonable cause of action in that Mr. Brake's proposed private law causes of action have no reasonable prospect of success. However, neither made the same submission regarding the public law remedies he seeks.

[57] Mr. Brake submitted that "an applicant will satisfy the first requirement set out in rule 334.16(1)(a) in a judicial review unless the 'cause of action is so clearly improper as to be bereft of any possibility of success'." I agree with this submission. A similar point was made by Rothstein J.A. in *Tihomirovs* when he observed that in the context of proposed class actions arising in the immigration context, the reasonable cause of action element of the test for certification will ordinarily have already been determined by the time that the case gets to the conversion/certification stage because leave will have been granted by this stage. Moreover, this element has been met because *Wells* has already been decided on facts similar to those of Mr. Brake, and was partly successful. Accordingly, I find that the pleading discloses at least one reasonable cause of action.

[58] In so finding, it should not be assumed that the private law remedies sought in the proposed statement of claim also raise reasonable causes of action. As is explained below in the analysis on whether there is an identifiable class, all of the applicant's private law claims are premature. As a result, it would be improper for the Court to assess whether these could hypothetically disclose a reasonable cause of action in the future. However, for the purposes of the present analysis, I accept that this criterion has been satisfied by Mr. Brake.

(b) Is There an Identifiable Class of Two or More Persons?

[59] Mr. Brake proposes the following class: all individuals whose applications for Qalipu Band membership were rejected in accordance with the Supplemental Agreement.

[60] The purpose of this requirement is to identify the individuals entitled to notice, entitled to any relief awarded, and bound by the judgment. The Supreme Court of Canada in *Hollick v Toronto (City)*, 2001 SCC 68 at paragraph 21, observed that this requirement is not an onerous one.

[61] Canada submits that the proposed class "is without the required rational connection to the proposed causes of action and common issues and is thus fatally overbroad." Mr. Brake in oral submissions urged the Court to amend the proposed class if it was found to be overbroad.

[62] Canada submits that the proposed class is over broad for three reasons:

a. It wrongly assumes that all applicants who were rejected would be entitled to founding membership but for the Supplemental Agreement. Class members who would not qualify for founding membership under either of the Agreements have no cause of action or damages.

b. It fails to consider that applicants who received a negative Committee or Appeal Master decision were denied founding membership for various reasons and that they can judicially review the decisions of the Committee or Appeal Master. For example, if Mr. Brake is successful on judicial review, his application will be returned to the Committee, which may subsequently grant founding membership. Presently the proposed class included members who may ultimately receive founding membership. These class members have no cause of action or damages.

> c. It also fails to consider that an applicant who does not satisfy the enrolment criteria for founding membership may satisfy the requirements for registration under the Indian Act. Such an applicant would not have founding membership, but would be a status Indian and be eligible for all associated benefits and services. These class members would have suffered no damages, even though they are not founding members.

[63] In my view, the proposed class definition might be appropriate if one considered only the public remedies sought – those that would otherwise be available through judicial review. Indeed, at one point in oral submissions Canada appeared to acknowledge that a representative proceeding in the nature of judicial review might be appropriate.

[64] Although I focused only on the public law remedies when examining whether there was a reasonable cause of action disclosed, under this factor, one must consider that the proposed claim also includes private wrong remedies.

[65] I fail to see how anyone whose application would have been rejected under the Original Agreement (which is not attacked), would have any claim against either of the responding parties because the application was rejected under the terms of the Supplemental Agreement. I agree with Canada that the proposed claim presupposes that each rejected applicant would be successful under the terms of the Original Agreement. I therefore agree with Canada that the proposed class definition is overly broad because it includes those whose applications would also have been rejected under the Original Agreement's terms.

[66] Even if I were prepared to restrict or refine the proposed class, it is unclear how that could be done at this point with any degree of certainty or that would result in persons being able

to ascertain merely by reading the class description whether or not they fall within it. For example, if the class was limited to those whose applications were rejected under the terms of the Supplemental Agreement but would not have been under the Original Agreement, then to know whether one is in or outside the class, one would have to know whether one's application would have been accepted under the terms of the Original Agreement. That cannot be known or determined unless the Enrolment Committee did such an assessment for each of the thousands of possible members of the class. It did not do so. Moreover, to do so now, simply to find if someone is a member of the class, would require months, if not years, of possibly unnecessary work.

[67] Additionally, that type of class definition assumes that all of the terms of the Supplemental Agreement are struck down, but *Wells* struck only parts of the Supplemental Agreement. Accordingly, if a membership application would have been rejected under the surviving terms of the Supplemental Agreement those persons have no obvious private remedy claims.

[68] What this illustrates is that decisions respecting the public law remedies sought need to be determined first before the private law claims are considered, for only then will the class of members with private law claims be identifiable.

(c) Do the Claims of the Class Members Raise Common Questions of Law or Fact?

[69] Mr. Brake, in Schedule A to his memorandum, attached as Appendix A, lists eight issues of law or fact, which he submits are common to the proposed class. Canada submits that seven of them are not appropriate. Canada appears to accept that the issue of whether the rejection of the applications for Qalipu Band membership for the class under the Supplemental Agreement, including its annexes and schedules, was unlawful pursuant to section 18.1(4) of the *Federal Courts Act*, is a common issue. Again, this is an issue directed solely to the public law remedies sought in the proposed action.

[70] In my view, all of the other proposed common issues would arguably only be common to those whose applications were rejected under the now declared invalid terms of the Supplemental Agreement and whose applications for membership would otherwise be accepted. That class is not determinable at this point. Accordingly, I can see only one common issue, and it is not related to any of the private law remedies claimed.

(d) Is a Class Action the Preferable Procedure for the Fair and Efficient Resolution of the Common Questions of Law or Fact?

[71] I agree with Mr. Brake that "the Respondents have not suggested by way of evidence any preferable procedure to address the class members' claims for breach of fiduciary duty, Charter violations, or unjust enrichment" [emphasis in original]. But this argument presupposes that the class members have those claims, but whether they do is contingent on those members' applications being rejected under invalid provisions of the Supplemental Agreement when they would not otherwise have been under the terms of the Original Agreement, the valid terms of the

Supplemental Agreement, or indeed under any valid terms subsequently put in place by the responding parties.

[72] Rule 334.16(2) directs the Court to the matters to be considered when addressing this issue:

> All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether
>
> > (a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;
> >
> > (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;
> >
> > (c) the class proceeding would involve claims that are or have been the subject of any other proceeding;
> >
> > (d) other means of resolving the claims are less practical or less efficient; and
> >
> > (e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[73] Essentially, the submission of Mr. Brake is that through a class proceeding all 80,000 rejected applicants will be able to obtain a remedy, rather than each and every one launching his or her own application. But there is another process that avoids that result, which is to proceed by way of a lead case, at least so far as the public law remedies are concerned. *Wells*, in fact was said by Canada and the FNI to be a lead case regarding the validity of the self-identification

aspects of the Supplemental Agreement. Accordingly, it has provided a result for Mr. Brake whose application was rejected on that basis.

[74] The final disposition of the *Wells* cases will result in those applicants as well as similarly rejected applicants, including Mr. Brake, should he choose to be so included rather than pursuing his own application, having their applications assessed under whatever valid clauses remain, or possibly under amended clauses put in place in accordance with the terms of the Original Agreement. It is only after that is done that a class proceeding can be said to be an efficient process to determine any private law remedies incorrectly rejected applicants may have.

(e) Whether Mr. Brake is a Suitable Representative Plaintiff?

[75] I accept that Mr. Brake is a suitable representative plaintiff for those class members whose applications were rejected for the same reason as his; namely based on the failure to meet the self-identification criteria. He is not, in my view, acceptable to represent those whose applications were rejected based on community acceptance.

[76] The Court was informed that Mr. Collins would agree to be added as a representative plaintiff. His application was rejected based on the community acceptance criteria.

[77] Based on the affidavit evidence provided and accepting that the proposed plaintiff or plaintiffs need not be the best representative, I am prepared to accept both men as representative plaintiffs.

Conclusion

[78] As was noted earlier, the factors listed in Rule 334.16(1) must all be met if a proceeding is to be certified. Mr. Brake has not met at least two and it follows that a motion for certification would not be successful. While Mr. Brake and Mr. Collins are suitable representative plaintiffs with at least one reasonable cause of action, the only identifiable class of persons relates to the public law issues that can more efficiently be determined by way of lead judicial review applications(s). Consequently, this proposed class proceeding would not be certified, and in keeping with the ruling in *Tihomirovs*, the motion to have this application for judicial review converted into an application is dismissed.

[79] The disposition of these motions is without prejudice to any future claim or claims being made by any rejected applicant for membership in the Qalipu Band who is subsequently found to qualify for membership or any subsequent motion for certification as a class proceeding.

[80] As these motions arise in a class proceeding, there is no order as to costs.

ORDER in T-300-17

THIS COURT ORDERS that:

1. The Applicant's motion to convert his application for judicial review into an action pursuant to subsection 18.4(2) of the *Federal Courts Act*, RSC 1985, c F-7, and to certify that action as a class proceeding pursuant to Rule 334.16(1) of the *Federal Court Rules*, SOR/98-106, is dismissed; and

2. There is no order as to costs.

"Russel W. Zinn"
Judge

Appendix "A"

1) Is the rejection of the applications for Qalipu Band membership for the Class under the 2013 Agreement, including its annexes and schedules, unlawful pursuant to section 18.1(4) of the *Federal Courts Act*?

2) Did the conduct of Canada in the establishment and implementation of the 2013 Agreement breach a fiduciary duty owed to the class?

3) Did the conduct of Canada in the establishment and implementation of the 2013 Agreement breach the rights of the class to the equal protection and equal benefits of the law without discrimination based on race, national original, and ethnic origin under section 15 of the *Canadian Charter of Rights and Freedoms*?

4) If the answer to common issue (3) is "yes", were Canada's actions saved by section 1 of the *Canadian Charter of Rights and Freedoms*, and if so, to what extent and for what time period?

5) If the answer to common issue (3) is "yes", and the answer to common issue (4) is "no", do those breaches make damages an appropriate and just remedy under section 24 of the *Canadian Charter of Rights and Freedoms*?

6) If the answer to any of the common issues (1), (2), and (5) is "yes", can the court make an aggregate assessment of damages under Rule 334.28 suffered by some or all class members as part of the common issues trial, and if so, in what amount?

7) Has Canada's conduct resulted in unjust enrichment to Canada? If so, is Canada a constructive trustee holding ill-gotten gains for the benefit of the Applicant and the Class Members? What amount is held by Canada in the constructive trust?

8) Does the conduct of Canada justify an aware of punitive damages, and if so, what is an appropriate amount of punitive damages?

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	GERALD BRAKE v ATTORNEY GENERAL OF CANADA ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

David Rosenfeld Brittany Tovee	FOR THE APPLICANT
Elizabeth Kikuchi Sarah Sherholds	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA
Stephen J. May	FOR THE RESPONDENT THE FEDERATION OF NEWFOUNDLAND INDIANS

SOLICITORS OF RECORD:

Koskie Minsky LLP Barristers and Solicitors Toronto, ON	FOR THE APPLICANT
Attorney General of Canada Department of Justice Canada Ottawa, ON	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA
Cox & Palmer Barristers and Solicitors St. John's, NL	FOR THE RESPONDENT THE FEDERATION OF NEWFOUNDLAND INDIANS