Federal Court  Cour fédérale

**Date: 20191016**

**Docket: T-573-18**

**Citation: 2019 FC 1302**

**Ottawa, Ontario, October 16, 2019**

**PRESENT: The Honourable Mr. Justice Lafrenière**

**BETWEEN:**

**JUSTIN PHILIP ABBOTT**

**Applicant**

**and**

**CANADA (ATTORNEY GENERAL) AND FEDERATION OF NEWFOUNDLAND INDIANS**

**Respondents**

# JUDGMENT AND REASONS

## I. Overview

[1] In 2008, the Respondents, the Government of Canada [Canada] and the Federation of Newfoundland Indians [FNI], executed an agreement [Agreement] to create a landless band under the *Indian Act*, RSC, c I-5 [*Indian Act*] for the Mi'kmaq of the island of Newfoundland who had a "current and substantial cultural connection" to certain communities. This landless band became the Qalipu Mi'kmaq First Nation [QMFN].

[2] The Agreement established eligibility criteria for membership in the QMFN [Eligibility Criteria]. The Eligibility Criteria required proof of Canadian Indian ancestry, self-identification as a member of the Mi'kmaq Group of Indians of Newfoundland [MGIN], and acceptance as a member by the MGIN [Group Acceptance Criterion]. The Agreement also provided for a two-stage enrolment process as well as an Enrolment Committee to assess applications for membership, assisted by an Implementation Committee, and an authorized Appeal Master to deal with any appeals.

[3] In 2013, Canada and the FNI executed a supplemental agreement [Supplemental Agreement], requiring that all previously accepted applications be reassessed. Appended to the Supplemental Agreement was a directive [Directive] to the Enrolment Committee. The Directive addressed the nature of the evidence that applicants were required to provide to meet the Group Acceptance Criterion and the manner in which the evidence would be assessed.

[4] The Applicant, Justin Philip Abbott, applied for membership in the QMFN in 2009. He was initially accepted for membership in 2011. However, after reassessing his application, the Enrolment Committee determined Mr. Abbott had not satisfied the Group Acceptance Criterion and denied his application in 2017. His appeal to the Appeal Master was dismissed in 2018.

[5] In this proceeding, Mr. Abbott seeks judicial review of two decisions. The first decision is that of Bernard Valcourt, then the Minister of Indian Affairs and Northern Development [Minister], "to enter into the Supplemental Agreement dated July 4, 2013 to issue the appended Directive to the Enrolment Committee and the Appeal Master(s)". The second decision is that of

the Appeal Master dated January 19, 2018, affirming the decision of the Enrolment Committee to reject Mr. Abbott's application for membership in the QMFN.

[6] In summary, Mr. Abbott submits that the Appeal Master's decision was made pursuant to unauthorized and unlawful amendments to the Agreement, imposing arbitrary and under-inclusive requirements to satisfy the Group Acceptance Criterion and its assessment. Canada and the FNI respond that the clarifications to the evidentiary criteria for group acceptance set out in the Directive were authorized by the Agreement and reflect Canada and FIN's original intention.

[7] For the reasons that follow, I find that the Respondents were authorized to issue the Directive, that the decision to issue the Directive was reasonable and that the requirements of the Directive were neither arbitrary nor underinclusive. Given that the Appeal Master's decision was based on a proper application of the Directive, and that no procedural unfairness has been established, I conclude the application should be dismissed.

## II. Evidence of the Parties

[8] Mr. Abbott filed two affidavits in support of the application—his own and that of Hayward George Young. Mr. Young was involved in the movement for the recognition of the Mi'kmaq of the island of Newfoundland since 1982. He served as an observer at the negotiation committee for a portion of the negotiation of the Agreement in Principle [AIP] that led to the Agreement.

[9] The FNI responded with the affidavit of its former president, Brendan Sheppard. Mr. Sheppard served as President of the FNI from 1994 to 2015 and was directly involved in the negotiation of the AIP and Supplemental Agreement.

[10] Canada relies on the affidavit of Martin Reiher, Assistant Deputy Minister responsible for the Resolution and Individual Affairs Sector of Crown-Indigenous Relations and Northern Affairs Canada since 2017. Prior to occupying his current position, Mr. Reiher worked as legal counsel at Indigenous Affairs and Northern Development Canada Legal Services for twenty years. He participated in the negotiation of the AIP and the Supplemental Agreement and was also a member of the Implementation Committee between 2009 and 2017.

[11] Canada also relies on the affidavit of Keith Desjardins, a manager with the Winnipeg Processing Unit of Indigenous Affairs and Northern Development Canada that provides administrative support to the Enrolment Committee in processing applications for membership in the QMFN.

[12] Mr. Abbott, Mr. Sheppard and Mr. Reiher were extensively cross-examined on their affidavits. In the end, much of the affiants' evidence is factual and not controversial. The main point of contention between the parties is whether Canada and the FNI originally intended that the QMFN be comprised primarily of Mi'kmaq who had a current and substantial cultural connection with one of the 67 communities on the island of Newfoundland listed in Annex B of the Agreement and that stricter evidence be required from non-residents of the Annex B communities to satisfy the Group Acceptance Criterion.

## III. Background Facts

[13] In order to place these reasons in the proper context, it is necessary to set out in some detail the factual background that gave rise to the Supplemental Agreement and ultimately led to the Appeal Master's decision to dismiss Mr. Abbott's appeal.

### A. *Background and Negotiation of the Agreement: 1949 – 2008*

[14] When Newfoundland joined Confederation in 1949, the Terms of Union did not provide for the recognition and registration of the province's Aboriginal peoples under the *Indian Act* (see *Newfoundland Act*, 1949, 12-13 Geo VI, c 22 (UK)). As a result, the *Indian Act* was not applied to the Mi'kmaq of the island of Newfoundland.

[15] In 1972, the FNI was formed through the affiliation of Mi'kmaq bands on the island of Newfoundland. Members of the affiliate bands became, through their membership in those bands, members of the FNI.

[16] In 1989, the FNI initiated an action in this Court (Docket No. T-129-89) seeking a declaration that the members of its affiliate bands (seven local bands and three regional bands) were "Indians" within the meaning of subsection 91(24) of the *Constitution Act*, 1867, 30-31 Vict, c 3 (UK).

[17] Almost a decade later, Canada entered into talks with the FNI to assess whether the creation of a landless band could be a means of settling that action.

[18] Between 2003 or 2004 and 2006, the FNI and Canada [the Parties] negotiated the AIP for the creation of a landless band for the Mi'kmaq of the island of Newfoundland and the registration of its Founding Members as "Indians" under paragraph 6(1)(b) of the *Indian Act*.

[19] Ratification by the FNI required that the President of the FNI execute the AIP after a majority of eligible voting members approved the AIP at a ratification vote. Following consultation with its membership, the FNI held the successful ratification vote on March 29, 2008. Of the 3,232 members who voted, 2,913 voted in favour of the AIP.

[20] Ratification by Canada required that the Minister, duly authorized by the Governor in Council, execute the AIP.

[21] On June 23, 2008, Mr. Sheppard and Chuck Strahl, then the Minister, executed the AIP, which became the *Agreement for the Recognition of the Qalipu Mi'kmaq Band* (that is, the Agreement).

[22] The Agreement put an end to the FNI's action in this Court.

B. *Key Provisions of the Agreement*

[23] Section 1.14 of the Agreement defines the "Mi'kmaq Group of Indians of Newfoundland" as referring "collectively to the Mi'kmaq groups of Indians on the island of Newfoundland, including but not limited to those situated at the various locations listed in Annex

B to this Agreement". Annex B is a list of Mi'kmaq communities developed by the local Band Councils of the FNI.

[24] Section 4.1 provides the Eligibility Criteria for membership in the Band:

> 4.1 Eligibility Criteria
>
> An individual is eligible to be enrolled as a Founding Member if that individual is alive at the time of the Recognition Order and, in the assessment of the Enrolment Committee:
>
> (a) is of Canadian Indian ancestry, whether by birth or adoption; and
>
> (b) (i) on or before March 31, 1949 was a Member of a Newfoundland Pre-Confederation Mi'kmaq Community; or
>
> (ii) is a descendant; whether by birth or adoption, of a person referred to in subparagraph 4.1(b)(i); and
>
> (c) is not registered on the Indian Register on the date of the Recognition Order; and
>
> (d) on the date of the Recognition Order
>
> (i) self-identifies as a Member of the Mi'Kmaq Group of Indians of Newfoundland; and
>
> (ii) is accepted by the Mi'Kmaq Group of Indians of Newfoundland as a Member of the Mi'Kmaq Group of Indians of Newfoundland.
>
> [Emphasis added.]

[25] The term "Member" is defined in Chapter 1 of the Agreement as meaning a person "that has a current and substantial connection with the Mi'Kmaq Group of Indians of Newfoundland or, in the case of a person referred to in paragraph 4.1(b)(i), had on or before March 31, 1949 a substantial connection with a Newfoundland Pre-Confederation Mi'kmaq Community" [emphasis added].

[26] Section 4.2 of the Agreement establishes an Enrolment Committee, comprised of an equal number of representatives from Canada and the FNI and an independent chair, to assess membership applications on the basis of the Enrolment Committee Guidelines [Guidelines], attached as Annex A to the Agreement, and the Eligibility Criteria.

[27] Section 25 of the Guidelines provides that the Group Acceptance Criterion can be satisfied in one of two ways.

> 25. Acceptance by the Mi'kmaq Group of Indians of Newfoundland as a Member of the Mi'kmaq Group of Indians of Newfoundland shall be established through substantial connection with that group through either:
>
> a) residency in or around a Mi'kmaq Group of Indians on the island of Newfoundland
>
> **OR**
>
> b) i) frequent visits and/or communications with resident members of the Mi'kmaq Group of Indians on the Island of Newfoundland
>
> AND
>
> ii) maintenance of the Mi'kmaq culture or way of life, that is, membership in an organization promoting Mi'kmaq interests; knowledge of Mi'kmaq customs, traditions, and beliefs; participation in cultural or religious ceremonies; or, pursuit of traditional activities.

[28] Section 28 of the Guidelines further provides that when assessing the satisfaction of paragraph 25(b)(i) of the Guidelines, the Enrolment Committee could consider affidavits from at least two resident members detailing the nature and frequency of the applicant's visits and communications. Section 28 reads as follows:

> 28. For the purpose of its assessment under paragraph 25(b)(i), the Enrolment Committee may consider affidavits from at least two residents of the Mi'kmaq Group of Indians on the island of Newfoundland which describe in detail the applicant's visits to the community or communications with the residents as well as the frequency of the applicant's visits and communications.

[29] Section 29 of the Guidelines provides a non-exhaustive list of example documents and records that the Enrolment Committee could consider when assessing whether an applicant maintained the Mi'kmaq culture or way of life under paragraph 25(b)(ii) of the Guidelines.

[30] Section 30 of the Guidelines further provides that when assessing paragraph 25(b)(ii), the Enrolment Committee could also consider evidence of membership in any existing Mi'kmaq organizations.

[31] Chapter 10 of the Agreement provides for the establishment of an Implementation Committee, comprised of an equal number of representatives from Canada and the FNI and an independent chair. Section 10.4 of the Agreement sets out the duties of the Implementation Committee as follows:

> 10.4 The Implementation Committee shall oversee and coordinate the implementation of this Agreement and advise the Parties on issues relating to the establishment of the Band. The Implementation Committee shall have no authority to bind the Parties. Without limiting the generality of the foregoing, the Implementation Committee shall:
>
> - develop the Implementation Plan,
>
> - serve as a forum to negotiate the funding agreements referred to in this Chapter including any required amendments to such funding agreements,
>
> - assist the Enrolment Committee as required,

- monitor the progress of the Enrolment Process,
- facilitate the resolution of any implementation issues.

[32] Decisions of the Enrolment Committee are not necessarily final. Section 4.3.1 of the Agreement provides for the selection of an independent and legally trained Appeal Master, and section 4.3.3 of the Agreement provides all applicants, as well as Canada and the FNI, with a right to appeal decisions of the Enrolment Committee to the Appeal Master.

[33] Finally, section 2.15 of the Agreement provides for an amendment mechanism. As a general rule, all amendments must be agreed to in writing by the Parties and be ratified in accordance with the same procedures through which the Agreement itself was ratified. Paragraphs (a), (b) and (c) of section 2.15 provide exceptions to this general rule and permit amendments without ratification in three specific circumstances.

C. *Enrolment Process and Creation of the Band: 2008 - 2012*

[34] The Agreement provides for a two-stage enrolment process over a four-year period, which would result in a list of individuals to be registered as Founding Members of the QMFN. The first stage was for applications submitted in the first year between November 30, 2008 and November 30, 2009, which were to determine whether there were sufficient numbers to justify the creation of a band. The second stage was for applications submitted in the three years between December 1, 2009 and November 30, 2012. No applications would be accepted after November 30, 2012.

[35] During the first stage of the enrolment process, close to 26,000 applications were submitted. Approximately 75,000 applications were submitted during this second stage, with two-thirds of those applications submitted in the three months before the application deadline of November 30, 2012.

[36] The QMFN was created by an Order in Council on September 22, 2011 [Recognition Order]. The Recognition Order was amended on March 30, 2012 and June 20, 2012 to add additional Founding Members, and by June 21, 2012, there were 23,877 Founding Members registered to the QMFN.

D. *The Supplemental Agreement*

[37] When the Agreement was executed in 2008, the Parties estimated the QMFN would be comprised of roughly 8,700 to 12,500 members (Canada estimated 8,700 to 12,000 members and the FNI estimated 12,500 members). Mr. Reiher explains at paragraphs 21 to 26 of his affidavit how the Parties arrived at this estimate:

> 21. The negotiation of the 2008 Agreement was based on the membership criteria of self-identification as a member of an historic community, acceptance of the individual by that community and aboriginal ancestry established by the Supreme Court of Canada decision in *Powley*. The parties considered the importance placed by the Supreme Court on the past and ongoing participation in a shared culture, in the customs and traditions of a community in an identified geographical location.
>
> 22. The parties intended that the First Nation was to be made up primarily of Mi'kmaq that had a current and substantial connection with the 67 communities on the island of Newfoundland listed in the 2008 Agreement, who could actively contribute to the development of the culture, traditions and activities of the Mi'kmaq communities on the island of Newfoundland as described in section 1.13 of the 2008 Agreement:

> see the testimony of Minister Valcourt before the House committee C-25 on March 25, 2014, attached as Exhibit "D".
>
> 23. The 2008 Agreement also specifically provided for individuals who lived outside of the 67 identified communities to become members if they self-identified as members of the Mi'kmaq Groups of Indians of Newfoundland and were accepted by the group. However, in order for such individuals to become members, they would need to demonstrate that they had maintained a current and substantial connection with a Newfoundland Mi'kmaq community: see the testimony of Minister Valcourt before the House committee C-25 on March 25, 2014, attached as Exhibit "D".
>
> 24. In negotiating the 2008 Agreement, the parties incorporated the desires and participation in cultural practices of the active Mi'kmaq communities in Newfoundland. The long-held desire of these many geographically disparate Mi'kmaq communities was to obtain recognition as a First Nation Band. Community events which fostered the shared culture and traditions of the Mi'kmaq of Newfoundland included regular pow-wows at various locations and the annual St. Anne's Day celebrations. Attendance at those events, which fostered Mi'kmaq culture, was viewed as an important part of community membership.
>
> 25. When the original agreement was signed in 2008, it was estimated the new First Nation would be comprised of roughly 8,700 to 12,000 members, since the 2006 census found there were approximately 23,450 residents of Newfoundland and Labrador who identified themselves as aboriginal. Of this number, about 7,765 identified themselves as First Nation members, as appears from the copy of the 2006 Census of population attached as Exhibit "E". Information provided by the FNI indicated that this estimate was credible.
>
> 26. During the negotiations which led to the 2008 Agreement, Canada and the FNI did not expect more than 20,000 individuals to apply for membership.

[38] Altogether, the Enrolment Committee received over 100,000 applications for Founding Membership during the four-year application period, with almost 46,000 received in the final three months.

[39] Mr. Reiher pointed to census data in his affidavit as support for the concerns expressed by Canada and the FNI regarding the unexpectedly high volume of applications received. (Certain percentages incorrectly stated by Mr. Reiher have been corrected for the purpose of these reasons.) In the 2001 Census, 2.0% of Canada's population declared themselves First Nation, with 1.4% of the population of Newfoundland and Labrador self-identifying as First Nation (including Innu and Mi'kmaq). In the 2006 Census, 2.0% of Canada's population declared themselves First Nation, with 1.6% of the population of Newfoundland and Labrador self-identifying as First Nation (including Innu and Mi'kmaq). In the 2011 Census, 2.5% of Canada's population declared themselves First Nation, with 3.7% of the population of Newfoundland and Labrador self-identifying as First Nation (including Innu and Mi'kmaq) (that is, 19,315 out of 514,536 individuals).

[40] After receiving many more applications than anticipated, the Parties questioned whether it was possible to review all the applications before the Agreement's deadline. The Parties' review of the enrolment process also raised a concern that the Enrolment Committee was accepting standard form affidavits containing generic statements regarding applicants' maintenance of the Mi'kmaq way of life and Mi'kmaq culture when finding that non-resident applicants were meeting the Group Acceptance Criterion.

[41] The bases for their concerns are well encapsulated in paragraphs 34 to 38 of Mr. Sheppard's affidavit.

> 34. After Qalipu was formed, tens of thousands of applications continued to be received. Through my involvement in the Implementation Committee established under the Agreement, I learned that the majority of applications received after Qalipu's

formation were from applicants who lived outside the geographic locations of the Mi'kmaq Group of Indians listed in Annex 'B' of the Agreement. I was surprised by this. If these individuals had sought to maintain Mi'kmaq culture or way of life, I would have expected greater numbers of people attending cultural events such as the Conne River or Flat Bay pow-wows or St. Anne Day ceremonies. Prior to Qalipu's formation, the number of people who would attend FNI-sponsored cultural events never exceeded more than a couple of hundred.

35. I also would have expected a greater number of Individuals living outside the geographic locations of the Mi'kmaq Group of Indians of Newfoundland to have sought FNI membership or to see such numbers reflected in the membership of other organizations on the island of Newfoundland representing Mi'kmaq, particularly the KMA which I understood accepted membership from individuals living off the island of Newfoundland. After the FNI's by-laws were amended in 2003 to allow individuals to apply to become General Members, no more than a few hundred individuals became FNI General Members up to 30 November 2007 when the FNI froze its membership.

36. Through a review of a random sample of applications undertaken by the Indian Registrar, it was discovered that applicants were submitting standard form affidavits, with blank spaces to insert names, describing hunting, fishing, and picking berries as maintaining a Mi'kmaq way of life. The high number of applications being received, including from applicants living outside the geographic locations of the Mi'kmaq Group of Indians listed in Annex 'B' of the Agreement, raised concerns as to whether applicants continued to rely on such affidavits in support of their applications.

37. Furthermore, in the latter stages of the enrolment process, the FNI also identified inconsistent provisions in the Agreement that could potentially result in applicants, who did not self-identify as members of the Mi'kmaq Group of Indians prior to Qalipu's formation, being determined to have nevertheless met the criterion. The Agreement specified that the self-identification criterion could be met by signing the application. The eligibility criteria required that self-identification had to occur prior to Qalipu's formation. Signing an application after the date Qalipu was established meant that applicants who could not objectively establish that they had self-identified as a Member of the Mi'kmaq Group of Indians of Newfoundland prior to Qalipu's formation could still be held to meet that criterion.

> 38. The combination of the high number of applications being received, the discovery that there were applicants, living outside the Annex ‘B’ geographic locations of the Mi’kmaq Group of Indians of Newfoundland, submitting standard form affidavits, and the realization that inconsistent provisions in the Agreement could result in applicants erroneously being held to have met the self-identification criteria prompted the parties to examine the enrolment process to ensure that the Enrolment Committee was applying the Agreement as the parties intended.

[42] The credibility of the applications and enrolment process was being questioned not only by the Parties, but by other Indigenous organizations as well.

[43] In a letter dated March 22, 2011 to the Enrolment Committee, Canada expressed concerns regarding the strength of the evidence that non-resident applicants were presenting. These concerns were repeated in subsequent correspondence to the Enrolment Committee. Canada then appealed Enrolment Committee decisions finding that the Group Acceptance Criterion had been met.

[44] The Appeal Master allowed a number of Canada’s appeals, accepting Canada’s view that certain applicants’ evidence of group acceptance was insufficient to justify the Enrolment Committee’s award of membership in the QMFN. In coming to that conclusion, the Appeal Master determined that standard form affidavits stating simply that an applicant hunts, fishes and picks berries, which are not exclusively Mi’kmaq pursuits, are not determinative of involvement in and acceptance by the Mi’kmaq community. The Appeal Master also concluded that acceptance by the MGIN must mean more than keeping a connection with an applicant’s own family.

[45] It became clear to the Parties in the summer of 2012 that the QMFN's membership applications could not be assessed by the March 23, 2013 deadline imposed by the Agreement. Consequently, Mr. Sheppard wrote to Canada to request an extension to the deadline to permit the Enrolment Committee to process all membership applications.

[46] Negotiations between the Parties followed. Their discussions focussed on concerns with the integrity of the enrolment process, specifically relating to the sufficiency of evidence being provided by the applicants to meet the Group Acceptance Criterion and the inconsistent provisions within the Agreement on meeting the self-identification criterion. On the evidentiary requirements to meet the Group Acceptance Criterion, the Parties discussed whether the Appeal Master's decisions adequately addressed the type of evidence that should be accepted as sufficient to meet the criterion, including with respect to how applicants maintained a Mi'kmaq culture and way of life. The result of these negotiations was the Supplemental Agreement executed by the Parties on June 30, 2013.

[47] Canada and the FNI announced the execution of the Supplemental Agreement in a joint press conference on July 4, 2013, in which both parties stated that the high number of applications were not credible and undermined the integrity of the QMFN.

### E. *Terms of the Supplemental Agreement and the Directive Relevant to the Group Acceptance Criterion*

[48] The preamble to the Supplemental Agreement expresses the Parties' reasons for its execution, and it is reproduced below in full:

**WHEREAS** the Preamble to the Agreement for the Recognition of the Qalipu Mi'kmaq Band (the "Agreement") expressed the intent to establish a landless band for the Mi'kmaq Group of Indians of Newfoundland;

**AND WHEREAS** the eligibility criteria to be enrolled as a Founding Member of the Qalipu Mi'kmaq First Nation Band (section 4.1 of the Agreement) required among other things that an individual:

(i) self-identify as a Member of the Mi'kmaq Group of Indians of Newfoundland, and

(ii) be accepted as a Member of the Mi'kmaq Group of Indians of Newfoundland,

on 22 September 2011, the date that the Governor-in-Council adopted the Recognition Order establishing the Mi'kmaq Group of Indians of Newfoundland as a band for the purposes of the *Indian Act*;

**AND WHEREAS** Member was defined within the Agreement to mean a person having a current and substantial connection with the Mi'kmaq Group of Indians of Newfoundland;

**AND WHEREAS** the Mi'kmaq Group of Indians of Newfoundland was defined within the Agreement to refer collectively to the Mi'kmaq Groups situate at the various locations on the island of Newfoundland listed in Annex 'B' to the Agreement;

**AND WHEREAS** the Agreement was signed by the respective Parties on 23 June 2008;

**AND WHEREAS** by the terms of the Agreement, every applicant has to establish that he or she had a current and substantial connection to the Mi'kmaq Group of Indians of Newfoundland leading up to and on the date of the Recognition Order, and that applicants residing outside of the locations listed in Annex 'B' to the Agreement had to provide objective evidence in support of a strong and continuing connection to that Group;

**AND WHEREAS** the foundation for the creation of a landless *Indian Act* band was based on the membership of the following Mi'kmaq Groups of Indians who advocated for many years prior to the signing of the Agreement to have their members recognized as members of a band created pursuant to the terms of the *Indian Act*: Federation of Newfoundland Indians; Ktaqamkuk Mi'kmaq

Alliance; Benoit First Nation; Kitpu Band; and Sip'kop Mi'kmaq Band;

**AND WHEREAS** applying section 24 of the Enrolment Committee Guidelines (Annex 'A' to the Agreement) to applications signed after 22 September 2011 would result in the acceptance of evidence that would not be sufficient to meet the criterion that the applicant self-identified as a Member of the Mi'kmaq Group of Indians of Newfoundland prior to and on the date of the Recognition Order, as required by paragraph 4.1(d)(i) of the Agreement;

**AND WHEREAS**, therefore, reliance solely on the evidence authorized by section 24 of the Enrolment Committee Guidelines would be inconsistent with the requirements of paragraph 4.1(d)(i) of the Agreement if applied to applications signed after 22 September 2011, thereby requiring the correction of a defective provision within the Agreement;

**AND WHEREAS** the Parties desire to give greater precision on the nature of the evidence that Applicants shall provide to establish that they have been accepted by the Mi'kmaq Group of Indians of Newfoundland in accordance with the criterion established pursuant to paragraph 4.1(d)(ii) of the Agreement;

**AND WHEREAS** the Parties desire to issue the directive appended herein to the Enrolment Committee that has been established pursuant to the Agreement to address the nature of the evidence that applicants shall provide in order to meet the paragraph 4.1(d)(ii) criterion contained in the Agreement and the manner in which the evidence is to be assessed;

**AND WHEREAS** the volume of applications submitted by individuals seeking membership in the band far exceeded the reasonable expectations of the Parties so as to overtake the capacity of the enrolment process established pursuant to the Agreement to assess the applications received within the timeframes set out in the Agreement;

**AND WHEREAS** the Parties' original intention was, and continues to be, that all applicants be treated in a fair and equal manner;

**AND WHEREAS** section 2.15 of the Agreement allows the Parties to amend its provisions without further ratification to remove conflicts or inconsistencies with the law, to cure manifest

> errors arising from defective or inconsistent provisions, and to extend time limits;
>
> […]

[49] Section 2 of the Supplemental Agreement provides for the assessment or reassessment of all applications received and not rejected during the Enrolment Process (November 30, 2008 to November 30, 2012).

[50] Section 9 of the Supplemental Agreement provides for the joint issuance of directives to the Enrolment Committee and the Appeal Master on the application of the Group Acceptance Criterion as follows:

> 9. **Supervision and Directives.** The Parties confirm that section 10.4 of the Agreement encompasses the Parties' authority to supervise the work of the Enrolment Committee and Appeal Master, request reports in the manner and form established by the Implementation Committee, issue joint Directives to the Enrolment Committee and Appeal Master and require the Enrolment Committee and Appeal Master to seek directions from the Parties, through the Implementation Committee, where a novel, unforeseen, situation arises or where the wording of the Agreement needs further clarification.
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> A Directive on the application of paragraph 4.1(d)(ii) of the Agreement and section 25 of the Enrolment Committee Guidelines is attached as Annex A.

F. *The Directive*

[51] The preamble to the Directive states that its purpose is to provide directions on the application of paragraph 4.1(d)(ii) and sets out in the context in which it is being issued.

> The Preamble to the Agreement for the Recognition of the Qalipu Mi'kmaq Band expressed the intent to establish a landless band for the Mi'kmaq Group of Indians of Newfoundland. The "Mi'kmaq Group of Indians of Newfoundland" referred collectively to the Mi'kmaq Groups situate at the various locations on the island of

> Newfoundland as determined under the Agreement. Members of the Mi'kmaq Group of Indians of Newfoundland were defined under section 1.13 of the Agreement to be those persons having a "current and substantial connection" with the Group. Founding membership in the Qalipu Mi'kmaq First Nation was intended to be granted primarily to persons living in or around these locations who met the other criteria in the Agreement. However, provision was made in the Agreement to permit persons who lived outside these locations to become band members if they self-identified as members of the Mi'kmaq Group of Indians of Newfoundland and were accepted by the Group. Persons who did not reside in or around these locations had to have a substantial connection to the Mi'kmaq Group on the island of Newfoundland to be eligible to become Founding Members.
>
> The words "current and substantial" must be given their due importance in the context of the Agreement. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a community's identity and distinguish it from other groups. The connection that an applicant must show with a Newfoundland community of the Mi'kmaq Group has to be significant in quality and quantity; it must be true, profound and not of recent vintage. An applicant must demonstrate strong ties with the Mi'kmaq Group of Indians of Newfoundland that pre-date or were contemporaneous with the signing of the Agreement and continued up to the date of the Recognition Order.
>
> The frequent references to the Mi'kmaq Group of Indians of Newfoundland in the Agreement show an intention by the Parties to the Agreement that acceptance by the Group must mean more than keeping a connection with one's own family members. Section 25 of the Guidelines mandates that there be evidence of activities that are directly related to the traditions and culture of the Mi'kmaq Group of Indians of Newfoundland with an emphasis on belonging to a Mi'kmaq community represented by a band or organization in Newfoundland, or in the alternative, a wider participation with the Mi'kmaq Group of Indians of Newfoundland in its activities and ceremonies so as to infer acceptance by the Group.

[52] The body of the Directive does two things. First, it sets out a number of more general principles and requirements the Enrolment Committee and Appeal Master must apply when determining whether an applicant has met the Group Acceptance Criterion. Second, it establishes

a point system for the paragraph 4.1(d)(ii) assessment and provides specific directions with respect to the system's application.

[53] Section 7 of the Directive specifically provides for a heightened threshold of proof for non-resident applicants seeking to satisfy the Group Acceptance Criterion, and particularly for those who have resided for a long period of time outside the location to which their current and substantial connection is alleged.

[54] Section 8 of the Directive further provides that the connection claimed by an applicant "must go beyond close contacts with family members and include participation in the cultural and social life of the Newfoundland communities forming the Mi'kmaq Group of Indians of Newfoundland".

[55] Section 9 of the Directive states that applicants must provide objective documentary evidence that pre-dates or is contemporaneous with the signing of the Agreement, the connection claimed must have been in existence on the date of the Recognition Order, and that any evidence relating to facts after the Recognition Order is not relevant and must not be considered.

[56] Section 11 of the Directive requires that any documentary evidence submitted to establish Group Acceptance must be supported by at least two affidavits from residents of the MGIN which identify their relationship to the applicant and provide sufficient detail with respect to the elements set out in paragraphs 25(b)(i) and 25(b)(ii) of the Guidelines.

[57] Finally, section 12 of the Directive requires that applicants providing new evidence must submit a sworn declaration attesting to its authenticity.

G. *Point System to meet the Group Acceptance Criterion for Membership*

[58] Section 6 of the Directive directs the Enrolment Committee to make its assessment under subsection 25(b) of the Guidelines using the point system attached to the Directive.

[59] An applicant who did not reside in a location of the MGIN on the date of the Recognition Order must receive a minimum of 13 points under the Point System to satisfy subsection 25(b) (and therefore to meet the Group Acceptance Criterion for membership).

[60] Up to 4 points can be earned for frequent visits to members of the MGIN, and up to 2 points can be earned for frequent communications with those members.

[61] Section 13 of the Directive provides that to be considered "frequent", for the purposes of paragraph 25(b)(i) of the Guidelines, visits and communications should occur on a regular basis over an extended period of time prior to or contemporaneous with the signing of the Agreement.

[62] Section 14 of the Directive specifies that "visits and communications must not be limited to family members" and that the evidence thereof "must demonstrate contacts with other Members […] and involvement in the cultural and social life of the Mi'kmaq community".

[63] Section 15 of the Directive provides examples of documentary evidence (which must pre-date or be contemporaneous with the signing of the Agreement) which may be submitted to meet the requirements of paragraph 25(b)(i), including airplane tickets, phone bills and original dated letters, emails or other written communications.

[64] Up to 9 points can be earned for an applicant's demonstrated "[m]aintenance of Mi'kmaq culture and way of life" (for the purposes of paragraph 25(b)(ii)).

[65] Section 16 of the Directive provides that such maintenance may be inferred from "membership in the Federation of Newfoundland Indians, Ktaqamkuk Mi'kmaq Alliance, Benoit First Nation, Kitpu band or Sip'kop band" prior to the signing of the Agreement.

[66] Section 17 provides that such maintenance may also be inferred from evidence pre-dating or contemporaneous to the signing of the Agreement showing that the applicant has attended, participated in or supported religious, ceremonial, traditional or cultural activities of the MGIN; or has demonstrated initiatives taken to gain knowledge of the Mi'kmaq way of life and interact with the MGIN.

[67] Section 18 provides examples of the religious, ceremonial, traditional and cultural activities of the MGIN for the purposes of section 17.

[68] Section 19 provides a list of examples of the types of evidence that can be submitted to satisfy section 17.

[69] Finally, under the point system, an applicant can earn 3 points for residency on the island of Newfoundland and 9 points for membership in one of the Mi'kmaq organizations listed in section 16 of the Directive.

H. *Detailed Point System Grid to Assess the Group Acceptance Criterion*

[70] On June 30, 2013, the Parties issued 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* (that is, the Directive). The Directive was made available to the public.

[71] In the year following the execution of the Supplemental Agreement, the Parties, through the Implementation Committee, developed a second, more specific version of the point system [Detailed Point System Grid]. The Detailed Point System Grid was not made available to applicants. The Detailed Point System Grid was developed with input from the Enrolment Committee, and the Enrolment Committee was encouraged to recommend additional Mi'kmaq cultural activities not initially considered by the Implementation Committee for the Group Acceptance Criterion for inclusion in the Detailed Point System Grid. Thereafter, the Enrolment Committee applied the Detailed Point System Grid to assess whether non-resident applicants met the Group Acceptance Criterion.

[72] The Detailed Point System Grid also allowed the Enrolment Committee to award 2 additional discretionary points where it was of the view the evidence provided by the applicant showed an exceptional level of involvement in the Mi'kmaq community in Newfoundland.

[73] As addressed in the preamble to the Detailed Point System Grid "[t]he Agreement, including the Supplemental Agreement and the Directive, provide the substantive and procedural rules with respect to the enrolment as a Founding Member of the Qalipu Mi'kmaq First Nation and were to prevail over the Grid in case of inconsistency".

I. *Assessment and Reassessment of Applications under the Supplemental Agreement*

[74] In July 2013, Canada and the FNI jointly issued a press release advising applicants that all applications for membership in the QMFN would be reviewed to ensure compliance with the validity requirements in the Enrolment Committee Guidelines. Applicants were also advised of the Supplemental Agreement and Directive's evidentiary requirements, and they were reminded that it was their responsibility to determine what documentation they wanted to provide to support their applications.

[75] In November 2013, all applicants for membership in the QMFN, except those rejected during the first phase, were sent a letter from the Chair of the Enrolment Committee advising them that their applications were either invalid, and rejected, or valid, and able to be considered. Those whose applications were valid were allowed to provide additional documentation to meet the evidentiary requirements which had been clarified in the Supplemental Agreement and Directive. The brochure included with that letter, *November 2013 – Updated information for*

*applicants for membership in the Qaliup Mi'kmaq First Nation*, further set out specifically what evidence would be accepted. Applicants were warned it was the "sole responsibility of applicants to determine what additional documentation, if any, they wish to provide in support of their application"—though they were instructed to submit as many documents as possible.

[76] Section 2 of the Supplemental Agreement required the reassessment of all applications received and not rejected during the Enrolment Period. The Enrolment Committee completed its reassessment of approximately 100,000 applications for Founding Membership by January 31, 2017, sending letters to the applicants with the results of its review.

[77] 78,632 of those applications were found ineligible for Founding Membership, and 10,396 of the approximately 21,500 original Founding Members were removed from the Founding Members List. 18,473 applicants failed to satisfy the revised evidentiary requirements of the Group Acceptance Criterion under the Supplemental Agreement and Directive, and 10,363 of them were original Founding Members; they had their membership revoked for failing to meet the 13 point threshold imposed on non-resident applicants.

[78] Canada and the FNI agreed that the enrolment decisions of all of the over 100,000 applications would be communicated at the same time. After several extensions of time to complete the enrolment and appeal processes, the appeal process was ultimately concluded on February 28, 2018.

J. *The Applicant*

[79] Mr. Abbott submitted his signed application for QMFN membership on October 26, 2009. His application formed part of a family package in which his aunt, Judy Penney, was the main applicant. His sons, Hayden and Lucas, were included in his application as child applicants.

[80] In his application, Mr. Abbott identified his grandfather, Roland Leonard Young, as his ancestral connection to the pre-Confederation Mi'kmaq community of Chance Port (Twillingate) and his current connection to Gander Bay South (Musgrave Harbour), an Annex B community.

[81] Mr. Abbott left Newfoundland and Labrador to pursue a career in engineering and now resides in Ottawa, Ontario. As a non-resident applicant, Mr. Abbott was required to satisfy the Group Acceptance Criterion under subsection 25(b) of the Guidelines.

[82] To satisfy paragraph 25(b)(i), Mr. Abbott provided affidavits from Glenys Abbott, Sharla Abbott, Verlie Sharpe and Judy Penney describing his communications with and visits to members of the Gander Bay South community. To satisfy paragraph 25(b)(ii), Mr. Abbott provided an additional affidavit from Glenys Abbott attesting to his maintenance of the Mi'kmaq way of life by hunting, fishing, berry picking and camping. Mr. Abbott also included a letter written by Chief Nellie Power of the Sple'tk First Nation confirming that he was of Mi'kmaq descent, a member of the Sple'tk First Nation, and affiliated with the FNI as a non-status Indian.

[83] On or about May 17, 2011, Mr. Abbott received a letter from the Chair of the Enrolment Committee informing him that his application for membership was approved. Neither Respondent appealed the Enrolment Committee's assessment. Following the creation of the

QMFN through the Recognition Order, together with his sons, Mr. Abbott became a Founding Member.

[84] In November 2013, Mr. Abbott received a letter from the Enrolment Committee advising him that his application would be reassessed. Mr. Abbott did not apply for judicial review of this decision of the Enrolment Committee. Moreover, he did not challenge the evidentiary requirements set out in the Directive to satisfy the Group Acceptance Criterion.

[85] Instead, he followed the reassessment procedures provided by the Enrolment Committee. After reviewing the Directive and its included point system, Mr. Abbott provided the following evidence to satisfy the revised evidentiary requirements imposed by the Directive:

1) a personal letter written by Mr. Abbott dated February 5, 2014 stating, *inter alia*, that he left his community in 1992 to pursue an engineering degree and that he left the province in 1999 to find employment in his field, and that he has introduced his sons to the traditions of berry picking, hunting and fishing;

2) two additional affidavits confirming Mr. Abbott's frequent communications and visits and his participation in traditional activities including fishing, making preserves and gathering roots and bark for making medicines;

3) flight itineraries for five family trips between Ottawa and Gander, dating from August 2008 to March 2012; and

4) a receipt for band fees for membership in the Sple'tk First Nation between April 1, 2011 and March 31, 2012.

[86] On or around January 31, 2017, Mr. Abbott received a letter from the Enrolment Committee advising him that his application to become a Founding Member of the QMFN was rejected. The letter indicated that he failed to receive the minimum 13 points required to satisfy the Group Acceptance Criterion. Mr. Abbott received a total of 12 points: 3 of 4 points for

frequent visits, 0 of 2 points for communications, 0 of 3 points for residence on the island of Newfoundland, 9 of 9 points for membership in a Mi'kmaq organization and 0 out of 9 points for maintenance of the Mi'kmaq culture or way of life.

[87] Mr. Abbott requested and received a copy of his application file, which included the Enrolment Committee's assessment of his application on the Detailed Point System Grid.

[88] Mr. Abbott appealed the Enrolment Committee's reassessment of his application to the Appeal Master, claiming that he was entitled to points for maintenance of the Mi'kmaq culture and way of life and that the assessment process raised concerns under the *Canadian Charter of Rights and Freedoms* [*Charter*].

[89] On or around January 19, 2018, Mr. Abbott received a letter from the Appeal Master, denying his appeal on the basis that he did not demonstrate an error on the part of the Enrolment Committee.

[90] Following receipt of the Appeal Master's decision, Mr. Abbott brought the present application for judicial review.

[91] Both Mr. Abbott and his sons have been removed from the list of Founding Members. Mr. Abbott, who was previously registered as a status-Indian under paragraph 6(1)(b) of the *Indian Act*, is now registered pursuant to subsection 6(2) as a child of a Founding Member. As such, his children no longer have any status under the *Indian Act*.

[92] Mr. Abbott's mother, sister and brother were all granted membership following the reassessment process. Like Mr. Abbott, his brother also moved to Ottawa to pursue a career in engineering.

## IV. Issues

[93] While numerous grounds were raised in the Notice of Application, including *Charter* issues, the parties agree that the application is limited to the following issues:

A. Does this Court have jurisdiction to hear this application for judicial review?

B. What are the applicable standards of review for the decisions at issue?

C. Was the decision to enter into the Supplemental Agreement and issue the Directive unreasonable?

D. Was the Appeal Master's decision denying Mr. Abbott's application for membership reasonable?

E. Was Mr. Abbott denied procedural fairness?

## V. Analysis

[94] Before turning to the main issues, a procedural matter needs to be addressed. In the Notice of Application, Mr. Abbott seeks leave pursuant to Rule 302 of the *Federal Courts Rules*, SOR/98-106 to challenge more than a single decision in this proceeding. He submits that it would be appropriate to order that this application proceed even though it is not, strictly speaking, limited to a single decision, as was recognized by Mr. Justice Russel Zinn in *Wells v Canada (Attorney General)* 2018 FC 483 [*Wells*].

[95] In *Wells*, the applicants were challenging decisions of the Enrolment Committee rejecting each of their applications for membership in the QMFN. They were also challenging the

legitimacy of amendments to the Agreement, including changes to the Enrolment Committee Guidelines regarding the evidence required to establish an applicant's self-identification as a member of the MGIN and limiting the availability of an appeal from decisions of the Enrolment Committee.

[96] On May 8, 2018, Justice Zinn determined that the requirement to provide self-identification evidence that pre-dates the Agreement in order to fulfill the self-identification criterion was not reasonable and that applicants should be provided with the right to appeal the decision made on their file.

[97] This application is strictly concerned with section 4.l(d)(ii) of the Agreement, which requires that an applicant be, on the date of the Recognition Order, "accepted by the Mi'kmaq Group of Indians of Newfoundland as a Member of the Mi'kmaq Group of Indians of Newfoundland". However, many of the same factual and legal questions raised in *Wells* arise again in the present case, including the issues of this Court's jurisdiction to entertain the proceeding and the applicable standards of review.

[98] In the present case, Mr. Abbott seeks judicial review of the decision of the Appeal Master dated January 19, 2018, as well as the Minister's decision, made almost five years earlier in June 2013, to enter into the Supplemental Agreement and issue the Directive.

[99] Rule 302 provides that an application for judicial review shall be limited to a single order or decision in respect of which relief is sought unless the Court orders otherwise. The general

rule is that an application for judicial review should not be used to contest more than one decision.

[100] The Court may make an exception to the rule when there is a connection between the decisions an applicant seeks to challenge. Generally, that connection will result from the fact that the impugned decisions concern the same parties and arise from the same facts and decision-maker. That is not the case here. The decisions in question involve two vastly different factual situations and two different decision-making bodies (the Minister and the Appeal Master).

[101] At the hearing, counsel for the parties advised that this is a test case and that it would be in the best interest of all of parties, as well as the members of the QMFN and other applicants for membership in the QMFN, that all facets of the dispute be dealt with in a single decision, so that closure can be brought to the matter.

[102] Given that there is a link between the two decisions under review, in that they are part of a factual and decision making continuum, and that the allegations raised by Mr. Abbott cannot be examined in isolation, I consider it just and appropriate to grant the relief requested pursuant to Rule 302.

A. *Does this Court have jurisdiction to hear this application for judicial review?*

[103] The parties submit—and I accept—that this Court has jurisdiction to review the impugned decisions.

[104] Justice Zinn concluded in *Wells* that this Court has jurisdiction to review decisions of the Enrolment Committee, relying on the analysis of Mr. Justice Michael Manson in *Howse v Attorney General of Canada*, 2015 FC 1063 [*Howse*] at paragraphs 19 to 21 and *Foster v Attorney General of Canada*, 2015 FC 1065 [*Foster*]. The decision on jurisdiction in *Howse* rested on the fact that the powers of the Enrolment Committee flow from the process for band member recognition established under a federal statute.

[105] Justice Zinn also found that this Court has jurisdiction to review the decisions made by Canada that the Agreement failed to properly address self-identification after the formation of the QMFN, and to review the decisions made as to how to amend those terms. He reasoned as follows at paragraph 46:

> The Original Agreement was entered into by Canada using its prerogative to constitute new bands and decide upon membership and Indian status under the provisions of the Indian Act. The decision of Canada, through its Minister, to amend the terms of the Original Agreement also flows from this prerogative power. That decision affects the rights of applicants for membership in the QMFN. As such, I find that both the decision made to enter into the Supplemental Agreement, and the decision made as to its terms, are reviewable by this Court under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[106] I agree with the analysis of the law and the conclusions reached by my colleagues on the issue of jurisdiction.

B. *What are the applicable standards of review for the decisions at issue?*

[107] The parties agree that all issues in dispute, except for those related to procedural fairness, are to be reviewed on the standard of reasonableness.

[108] When considering what standard of review should be applied, the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a specific issue before the court is settled by past jurisprudence, a reviewing court may adopt that standard of review. It is only when that search proves fruitless that a reviewing court must undertake a consideration of factors comprising the standard of review analysis.

[109] In *Wells*, Justice Zinn held that decisions made as to the terms of the Supplemental Agreement are best characterized as matters of ministerial discretion reviewable on a reasonableness standard. He also added at paragraph 52:

> The matters currently before the Court are quite unlike most that come before this Court. They differ in that here the decision-makers, Canada and the FNI, are the authors of the Original Agreement, and therefore their decision that it contained a mistake is a decision of the original authors of the agreement. It is not, as is more usually the case, a decision of someone interpreting a provision that it did not create or a disagreement between the authors of an agreement as to its proper interpretation.

[110] Given that questions of fact, discretion and policy cannot be easily separated from the factual issues (see *Dunsmuir* at para 51), the decision of the Minister to adopt the Supplemental Agreement is to be reviewed on the reasonableness standard. Reasonableness is concerned with the existence of justification, transparency and intelligibility and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (see *Dunsmuir* at para 47).

[111] The Supreme Court of Canada in *Dunsmuir* at paragraph 47 taught that "[r]easonableness is a deferential standard". It went on at paragraphs 48 and 49 to explain that deference means respect, not blind reverence to decision makers. I endorse this approach and have applied it to the issues before me.

[112] However, Justice Zinn also cautioned at paragraph 54 that because the agreements before him involved and safeguarded the rights of the Mi'kmaq, judicial forbearance by way of deference "cannot come at the expense of adequate scrutiny of the actions of Canada and the FNI, to ensure compliance with the terms of the creation of the QMFN and membership in it". So while I am aware that the authors of the Agreement have offered opinions as to how the Agreement is to be interpreted and as to their intent in executing the Agreement, I am also adopting Justice Zinn's call to apply adequate scrutiny to ensure the Minister's actions comply with the terms of the Agreement.

[113] In *Howse* and *Foster*, Justice Manson characterized decisions of the Enrolment Committee as mixed questions of fact and law, reviewable on a reasonableness standard. I agree with the parties that the same standard should apply to a review of the Appeal Master's decision.

[114] Finally, it is well settled by the jurisprudence of this Court that issues of procedural fairness are reviewable on a correctness standard and that little deference is owed to the decision at issue (see *Dunsmuir* at para 50).

C. *Was the decision to enter into the Supplemental Agreement and issue the Directive unreasonable?*

[115] Mr. Abbott submits that the decision to enter into the Supplemental Agreement and, more particularly, to issue the Directive, does not fall within a range of possible, acceptable outcomes in respect of the facts and law, and it is unreasonable for the following reasons. First, the changes to the evidence required to satisfy the Group Acceptance Criterion and its assessment are improper amendments not authorized by section 2.15 of the Agreement. Second, the Directive was improperly issued on the basis of section 10.4 of the Agreement. Third, the Directive's changes to the Group Acceptance Criterion were made for an improper purpose or on the basis of irrelevant considerations. Fourth, the Directive's changes to the Group Acceptance Criterion for non-resident applicants were arbitrary and under-inclusive.

[116] I will deal with the first two reasons advanced by Mr. Abbott together as they both relate to the authority of the Parties to issue the Directive and the reasonableness of their decision to do so.

1) Whether the changes to the evidence required to satisfy the Group Acceptance Criterion and its assessment are improper amendments not authorized by section 2.15 of the Agreement.

2) Whether the Directive was improperly issued on the basis of section 10.4 of the Agreement.

[117] Mr. Abbott submits that the Directive greatly increases the evidentiary burden and requirements for non-resident applicants set out in paragraph 4.1(d)(ii) of the Agreement and subsection 25(b) of the Guidelines. He argues that the changes to the evidence required to satisfy

the Group Acceptance Criterion and its assessment constitute amendments that had to be made in accordance with the amending mechanism provided in section 2.15 of the Agreement.

[118] The Respondents submit that the Agreement contemplated that issues would arise during the implementation of the Enrolment Process and provided the Parties with various means to address them, including by way of the Implementation Committee formed under Chapter 10 of the Agreement.

[119] According to the Respondents, section 10.4 of the Agreement encompasses the Parties' authority to supervise the work of the Enrolment Committee and the Appeal Master and issue joint directives to them through the Implementation Committee.

[120] At paragraph 45 of his affidavit, Mr. Sheppard states that the Directive at issue in this case was not the first directive provided to the Enrolment Committee. He asserts that prior to entering into the Supplemental Agreement, the Parties developed a "practice" of addressing issues that arose during the implementation of the Agreement through the issuance of directives. Mr. Sheppard appends as exhibits to his affidavit more than a dozen letters and e-mails addressed to the Enrolment Committee between April 2009 and December 2012 which he claims are examples of such directives: Exhibits F, G, H and N 1-12 to the affidavit of Brendan Sheppard sworn September 25, 2018.

[121] The difficulty I have with most of the documents identified by Mr. Sheppard as proof of directives being issued to the Enrolment Committee is that they are not issued in the name of the

Implementation Committee, but rather by a representative of one party or the other. Nor do the documents invoke section 10.4 of the Agreement to "direct" or require that the Enrolment Committee apply particular evidentiary standards or processes of assessment. With the exception of Exhibits N 11 and N 12, the documents appear to be, as submitted by Mr. Abbott, a "series of detailed submissions and requests" to the Enrolment Committee.

[122] By way of example, in his letter dated August 12, 2010, Mr. Stephen May of the FNI responds to an inquiry by the Chair of the Enrolment Committee regarding the reliance by some applicants on the 1921 Census for the Burgeo/LaPole District to establish that they were of Canadian Indian ancestry. Mr. May concludes his letter by stating that: "[I]f the Enrolment Committee decides to reject the FNI's submissions", the FNI should be notified of any further application that is approved to allow time to decide whether to appeal to the Appeal Master. The other letters or e-mails produced by Mr. Sheppard are all couched in similar language.

[123] Moreover, only two of the documents are actually written on behalf of the Implementation Committee. Neither of these documents took the form of directives purporting to bind the Enrolment Committee's activities or assessments.

[124] Prior to the Supplemental Agreement, the Implementation Committee, or the Parties themselves, made submissions or observations to the Enrolment Committee and provided answers to inquiries, leaving it to the Enrolment Committee to decide whether to adopt or reject them. The issuance of a formal directive therefore represented a marked departure from the Parties' earlier dealings with the Enrolment Committee. However, the fact that previous letters to

the Enrolment Committee were not framed as directives does not mean that they were not intended to be treated as such.

[125] The Implementation Committee is a creature of the Parties' agreement with the jurisdiction conferred upon it by the Agreement. Its role is very broad—to oversee and coordinate the implementation of the Agreement. This role included assisting the Enrolment Committee, monitoring the enrolment process, and facilitating the resolution of implementation issues. In this regard, the Implementation Committee acted as the representatives of the Parties. There is no merit to Mr. Abbott's attempt to draw a sharp distinction between the Implementation Committee and the Parties.

[126] At paragraph 55 of his affidavit, Mr. Reiher confirms that the Implementation Committee played more than an advocacy role:

> In accordance with section 10.4 of the 2008 Agreement, the Implementation Committee regularly provided guidance to the Enrolment Committee to assist and to resolve issues with the implementation of the Agreement. The Enrolment Committee, in turn, routinely referred questions to the Implementation Committee for resolution.

[127] On the evidence before me, I am satisfied that correspondence by or on behalf of the Parties were intended to be, and the Enrolment Committee accepted them as, directives. They were viewed and interpreted by the Enrolment Committee as guidance provided jointly from the Parties. In particular, on the issue of group acceptance, Mr. Reiher wrote to the Chair of the Enrolment Committee on March 22, 2011 to express concern with respect to the insufficiency of detailed affidavits. He highlighted the importance for applicants to provide sufficient factual

evidence to allow the Enrolment Committee to assess the strength of the applicant's connection to the MGIN. Mr. Reiher expressed concerns with the lack of detail in many affidavits, including those written on standard forms, as well as with the general absence of any additional documentary evidence to supplement weak affidavits. Following this correspondence, the Enrolment Committee adjusted its practice: it ceased to accept affidavits on standard forms and requested new more detailed affidavits from the applicants who had provided them.

[128] Faced with the extraordinarily high numbers of applications, most of which came from individuals who were not resident in the 67 identified Mi'kmaq communities, the Parties had to consider how best to proceed to avoid derailing the enrolment process. In light of inconsistent decisions by the Enrolment Committee, and the weak standard form evidence it was accepting as satisfying the Group Acceptance Criterion for non-resident applicants, the Parties were faced with the prospect of appealing thousands of decisions to ensure compliance with the terms and intention of the Agreement and missing a deadline.

[129] In the circumstances, I agree with the Respondents that the Directive addresses "implementation issues" which were identified by the Parties during their review process and agreed with by the Appeal Master in his decisions.

[130] In one of those decisions, the Appeal Master commented on what the applicant had submitted to meet the requirement that applicants maintain a Mi'kmaq way of life:

> As to Article 25(b)(ii), the affidavits are completely silent on the subject of how he maintains a Mi'kmaq way of life; silent on membership in an organization promoting Mi'kmaq interests; knowledge of Mi'kmaq customs, traditions and beliefs. There is no

> mention of participation in cultural or religious ceremonies or pursuit of traditional activities. [The applicant] hunts, fishes, and berry picks, but these are pursuits engaged in by thousands of Newfoundland citizens and are not exclusively Mi'kmaq.

[131] In a separate decision, the Appeal Master further commented on the evidentiary requirements:

> The affidavits which have been supplied are silent on the issue of acceptance by the Mi'kmaq Group of Indians of Newfoundland. They show a family connection but more is required than connection with family members.

[132] In a further decision , the Appeal Master elaborated on what evidence a non-resident applicant had to provide:

> What I believe Article 25 is mandating is activities which are directly related to the activities and culture of the Mi'kmaq Group of Newfoundland Indians. All of the foregoing emphasizes the importance of belonging to some organized Mi'kmaq organization if that is possible, or in the alternative wider participation with the Group of Mi'kmaq Indians than closeness with family.

[133] Further elaboration was provided in a separate decision:

> In my opinion, Article 25(b)(ii) of Annex A of the Agreement emphasis (sic) the importance of belonging to the Mi'kmaq Group in the wider sense than family only and, or belonging to a Mi'kmaq organization, which is an important indicator of acceptance.

[134] The Agreement required applicants to provide evidence of community acceptance. The nature of the evidence used to establish the Group Acceptance Criterion and the manner in which that evidence was to be assessed were described in the Agreement, however it was up to the Parties to determine what evidence they would ultimately accept as sufficient to meet the Group Acceptance Criterion. The Directive merely provides guidance which clarifies for the Enrolment

Committee and Appeal Master the types and amount of evidence the Parties to the Agreement considered sufficient to meet the requirements for membership set out in that Agreement.

[135] Either party could have exercised its right under subsection 2.21(b) to terminate the Agreement based on the failure on the part of the Enrolment Committee to comply with the terms of the Agreement. The Parties elected instead to require applications impacted by the non-compliance to be reassessed and to direct how the Enrolment Committee should apply the Agreement to ensure compliance.

[136] It is important to note that Mr. Abbott did not challenge the decision of the Parties to invalidate his membership. Nor did he challenge their authority to enter into the Supplemental Agreement or take issue with the terms of the Directive before he reapplied for membership. Mr. Young states in his affidavit that the modifications to the Agreement sparked outrage and concern from applicants. While that may be, it appears that most applicants bowed to the new requirements.

[137] The authors of the Agreement agree that they were entitled to take such steps as necessary to give effect to the intention of the Parties and the members of the FNI who ratified the Agreement. In my view, the decision of the Parties to issue the Directive was a reasonable response to an unexpected development.

[138] If I am wrong in my conclusion that the Parties were authorized to issue the Directive pursuant to section 10.4 of the Agreement, then I must direct myself to the question of whether

the Parties could have resorted to another provision of the Agreement to justify their actions. Although not invoked by the Respondents, section 2.15 of the Agreement contemplates that the agreement may be "varied, changed, amended, added to or replaced". The section provides for two possible avenues to make an amendment.

[139] The first avenue is a general rule authorizing amendments for any purpose so long as it is done by way of a written agreement between the parties ratified through the same procedures as set out in Section 9 of the Agreement.

[140] The second avenue is an exception to the general rule in section 2.15. It provides that the ratification process is not required when Canada and the FNI mutually agree to vary, change, amend, add to or replace the terms of the Agreement for 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 of curing or correcting any clerical omission, 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.

[141] Mr. Abbott submits that the evidence falls well short of demonstrating that the Directive was issued to "cure or correct" a "mistake, manifest error or ambiguity" arising from "defective or inconsistent provisions," as required by subsection 2.15(b). I disagree.

[142] The Respondents claim that one of the goals of the Supplemental Agreement and the Directive is to give "greater precision" to the nature of the evidence that applicants should be providing to establish that they have been accepted by the MGIN in accordance with the criterion established pursuant to paragraph 4.1(d)(ii) of the Agreement. This implies that there may have been some ambiguity in the terms of the Agreement.

[143] The Parties should be accorded deference in seeking to ensure the Enrolment Committee complied with their intentions when determining who meets the Group Acceptance Criterion and whether the evidence applicants submitted was sufficient to meet that criterion. To the extent that there may have been a lack of precision or a deficiency in any provision of the Agreement, it was open to the Parties to provide clarification or correct any perceived deficiency under subsection 2.15(b).

(1) Whether the Directive's changes to the Group Acceptance Criterion were made for an improper purpose or on the basis of irrelevant considerations

[144] Mr. Abbott argues the Directive's changes to the Group Acceptance Criterion were based on improper purposes or on the basis of irrelevant considerations; he gives three of them: (a) that the Directive was issued to reduce the number of successful non-resident applicants; (b) that the Directive was issued as a response to the Parties' credibility concerns flowing from the use of "standard form" affidavits; and (c) that the Directive was issued on the basis of the Parties' pragmatic concerns.

[145] For the reasons that follow, I disagree. Mr. Abbott has failed to establish that the Parties' decision to issue the Directive was tainted by any desire to reduce the number of successful non-resident applicants or to impose unreasonable requirements on them.

(a) *Whether the Directive was issued for the improper purpose of reducing the number of successful non-resident applicants.*

[146] Mr. Abbott submits that the Directive was issued to reduce the number of non-resident members in the QMFN—and that this was contrary to the purpose of the Agreement. According to Mr. Abbott, the purpose of the Agreement was to recognize the MGIN as a landless band, entitling the QMFN's membership to registration as status-Indians under section 6.1 of the *Indian Act*. Having executed the Agreement setting out the process for registration and recognition, it was not open to the Minister to make amendments that would thwart that purpose by retrospectively restricting or rescinding recognition for applicants.

[147] In my view, these arguments are without merit.

[148] The burden of establishing that the Parties acted with an improper purpose rests with Mr. Abbott; however, he has provided no evidentiary basis for his assertion.

[149] The fact that there was a reduction in the number of successful non-resident applicants is not, in itself, evidence of an improper purpose. Rather it reflects the legitimacy of the concerns that arose during the Agreement's implementation.

[150] The evidence before me is clear and consistent. The Parties intended when negotiating the AIP to give effect to the group membership criteria set out in the decision of the Supreme Court of Canada in *R v Powley*, 2003 SCC 43 [*Powley*].

[151] In *Powley*, the Supreme Court of Canada was looking to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under section 35 of the *Charter*: self-identification, ancestral connection and community acceptance. Relevant portions of the *Powley* decision were summarized by Justice Zinn in *Wells* at paragraphs 69 and 70:

> [69] *Powley* concerned two Métis men who killed a moose and were charged with contravening an Ontario hunting law. In their defence, they argued that section 35 of the *Constitution Act, 1982*, protects the right of Métis to hunt for food. In its reasons, the Supreme Court of Canada laid out criteria that might be used to determine who is entitled to Métis rights. While not suggesting that the criteria it identified were complete, the Supreme Court of Canada at paragraph 30 held that there were "three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance."
>
> [70] With respect to the factor of self-identification, the Supreme Court of Canada at paragraph 29 stated that there was "the need for the process of identification to be objectively verifiable" and at paragraph 31 stated that it should not be of recent origin:
>
> > […] This self-identification should not be of recent vintage: While an individual's self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement.

[152] In the terms of community acceptance, in *Powley*, the Supreme Court of Canada stated as follows:

> 33. Third, the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. Membership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Métis community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups. This is what the community membership criterion is all about. Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members about the claimant's connection to the community and its culture. The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community.

[153] I am satisfied that the Parties intended throughout their negotiations leading to the Agreement and when entering into the Supplemental Agreement that the QMFN be centred in and around the geographic locations of the Annex B communities. Because those communities are geographically separated, the Parties took steps to ensure the Annex B communities would thrive. The Parties understood that the communities would benefit from the active involvement of non-resident members and made room for non-residents with a "current and substantial connection" to the communities. The Agreement was never intended to include non-residents who had no history of frequent visits and communications with those communities and had not maintained the Mi'kmaq way of life. These factors were always understood to be important and essential predictors of involvement in the Annex B communities.

[154] Mr. Abbott submits that the Respondents intended that the Agreement provided for two separate, but equally accessible paths to satisfying the Group Acceptance Criterion for residents

and non-residents. However, while the Agreement made it possible for non-residents of Annex B communities to be Founding Members, the evidentiary burden they were required to meet was clearly more stringent than for residents. While residents of Annex B communities had merely to prove residence at the relevant time, non-residents were required to show both frequent visits and communication and maintenance of the Mi'kmaq culture or way of life.

[155] Mr. Abbott has not demonstrated that the Parties issued the Directive to create unreasonable requirements on non-residents to satisfy the Group Acceptance Criterion. In fact, the Parties had no choice in the matter. They had a duty to ensure that only those members with a demonstrable connection to the Annex B community could obtain membership. As stated in *Powley* at paragraph 34: "Verifying membership is crucial […]"

[156] I add that I find nothing improper in the Parties taking a hard look at the claims submitted by non-residents. The simple fact is that a large number of non-resident applications led them to assess the enrolment process, and this assessment revealed non-resident applicants whose MGIN membership claims were suspect. Justice Zinn reached essentially the same conclusion in *Wells*:

> [59] There is no question that both of the responding parties were shocked by the number of applications received. It was five times the number they had anticipated. But there is no evidence that the number of applications caused them to take steps to restrict the number of persons admitted to the band. […]

(b) *Whether the Directive was improperly issued as a response to the Parties' credibility concerns flowing from the submission and acceptance of "standard form" affidavits*

[157] Mr. Abbott submits that it was improper to increase the evidentiary burden on non-resident applicants alone. He gives four reasons. First, affidavits are "sacrosanct documents" that

enjoy a presumption of veracity absent evidence to the contrary. Second, affidavits are "esoteric legal documents" and it is reasonable that applicants received assistance to prepare them. Third, there is nothing in the Guidelines saying hunting, fishing and berry picking or other non-exclusively Mi'kmaq pursuits are incapable of satisfying the Group Acceptance Criterion. Fourth, the Directive perpetuates negative stereotypes about what it means to be "truly Aboriginal".

[158] The Respondents submit that their concerns about the sufficiency or credibility of the evidence submitted by non-resident claimants were justified and that the Directive was a reasonable measure to address their concerns. I agree.

[159] Section 28 of the Guidelines annexed to the Agreement specified that any affidavits must describe in detail the applicant's visits to the community or communications with the residents as well as the frequency of the applicant's visits and communications. However, as noted by Mr. Reiher, it was discovered that applicants, including Mr. Abbott, were submitting standard form affidavits, with blank spaces to insert names, describing hunting, fishing, and berry picking as maintaining a Mi'kmaq way of life.

[160] The vague and impersonal affidavits produced by applicants insufficiently demonstrative that they would contribute to the culture of the Annex B communities and the QMFN, generally, as confirmed by the Appeal Master in allowing a number of Canada's appeals. The Appeal Master accepted Canada's view that certain applicants' evidence of group acceptance was insufficient to justify the Enrolment Committee's award of membership in the QMFN. In coming

to that conclusion, the Appeal Master determined standard form affidavits simply stating an applicant hunts, fishes and picks berries, which are not exclusively Mi'kmaq pursuits, are not determinative of involvement in and acceptance by the Mi'kmaq community.

[161] Without clear instructions as to what was sufficient evidence to satisfy the Group Acceptance Criterion, the Enrolment Committee risked accepting applicants that met the Agreement's stated requirements (according to the Enrolment Committee's understanding of those requirements) but failed to satisfy the Agreement's intention (according to the Parties).

[162] Mr. Abbott suggests that the term "objective evidence" does not appear in the text of the Agreement. That is true. It remains that an applicant was required to establish on a balance of probabilities their current and substantial connection that predates or was contemporaneous with the signing of the Agreement. It was therefore reasonable for the Parties to require specific or individualized details in affidavits to substantiate statements that visits or communications were frequent or that an applicant maintained a Mi'kmaq way of life.

(c) *Whether the Directive was improperly issued on the basis of the Parties' pragmatic concerns*

[163] Mr. Abbott takes issue with the Parties' decision to issue the Directive on pragmatic grounds, such as being confronted with the prospect of appealing thousands of decisions and their view that non-resident applicants "should be the exception".

[164] Mr. Abbott submits that those pragmatic grounds must be rejected for two reasons. First, it was open to the Respondents to amend any of the timelines in the Agreement pursuant to

subsection 2.15(c), including the dates by which the Appeal Master had to determine all appeals under section 4.3.9. Moreover, the Respondents could have amended the Agreement to increase the complement of Appeal Masters. Second, the decisions at issue were determinative of the constitutional rights of thousands of applicants. Mr. Abbott submits that resolvable resourcing issues were not a sufficient or relevant basis on which to issue the Directive.

[165] While it was open to the Parties to amend the timelines or hire more Appeal Masters to deal with the massive influx of applications, the Respondents correctly point out that doing so without providing notice of the evidence that would be considered acceptable could have resulted in applicants, already approved for Founding Membership, being rejected without an opportunity to submit additional evidence. A notice outlining the evidence that applicants should provide was therefore required to ensure that applicants were treated fairly.

[166] The Parties concluded that the most efficient, practical and equitable way to ensure compliance with the terms and intention of the Agreement within a reasonable period of time was through a Directive concerning the objective evidence required to demonstrate the Group Acceptance Criterion. In my view, this was a reasonable decision.

(2) Whether the Directive's changes to the Group Acceptance Criterion for non-resident applicants were arbitrary and under-inclusive.

[167] Mr. Abbott argues the Directive's changes to the Group Acceptance Criterion were arbitrary and under-inclusive for three reasons: (a) that the preclusion of evidence from the period June 23, 2008 and September 22, 2011 to satisfy subsection 25(b) of the Guidelines is arbitrary; (b) the requirement that the "substantial connection" go beyond close family is

arbitrary; and (c) that the types of evidence acceptable to satisfy paragraph 25(b)(ii) of the Guidelines are under-inclusive. For the reasons below, I disagree.

(a) *Whether the preclusion of evidence from the period June 23, 2008 to September 22, 2011 is arbitrary*

[168] Mr. Abbott submits that the Directive is arbitrary because it prevents non-Annex B residents from submitting evidence dated after the execution of the Agreement, June 23, 2008, to satisfy paragraphs 25(b)(i) or 25(b)(ii), notwithstanding that the Agreement only requires non-resident applicants to demonstrate their acceptance by the MGIN on the date of the Recognition Order, September 22, 2011. That is simply not the case.

[169] Paragraph 9 of the Directive states that applicants must provide objective documentary evidence that pre-dates or is contemporaneous to the signing of the Agreement and that the connection must also have continued and be in existence on the date of the Recognition Order. The paragraph further states that: "For the purposes of the assessment of the current and substantial connection, primary regard will be given to the five year period immediately preceding the date of application".

[170] Consistent with the Founding Membership criteria requiring that group acceptance be established on the date of the Recognition Order, the November 2013 brochure advised applicants that evidence of activities must have "taken place prior to September 22, 2011". Mr. Abbott followed this advice by submitting travel documents detailing visits occurring between August 2008 and January 2010 and had his evidence assessed on that basis.

[171] Mr. Abbott alleges that there is no rational connection between the date the "substantial connection" must be proven in the Directive and the date of the Agreement. I disagree.

[172] The use of the term "current and substantial connection" in the definition of "Member" in Chapter 1 of the Agreement was not haphazard. The Parties considered the importance placed by the Supreme Court of Canada in *Powley* on the past and ongoing participation in a shared culture and in the customs and traditions of a community. The Directive does nothing more than clarify how that past and ongoing participation is to be assessed.

(b) *Whether the requirement that the "substantial connection" go beyond family is arbitrary*

[173] Mr. Abbott asserts the requirement in sections 8 and 14 of the Directive that the "substantial connection" in the Group Acceptance Criterion must go beyond close contacts with family members and include involvement in the cultural and social life of the Annex B communities is arbitrary. He submits there is no evidence that the Group Acceptance Criterion in the Agreement was intended to capture active involvement in the cultural and social life of Annex B communities beyond an applicant's close family. He further submits that section 14 arbitrarily imposes a burden on non-resident applicants as against resident applicants because resident applicants did not need to demonstrate any such participation or involvement in the "cultural or social life" of their Annex B community or even with close family members. I disagree.

[174] Both Mr. Reiher and Mr. Sheppard confirm that the Parties intended that the QMFN was to be made up primarily of Mi'kmaq that had a current and substantial connection with the

Annex B communities, who could actively contribute to the development of the culture, traditions and activities of the Mi'kmaq communities on the island of Newfoundland. In negotiating the Agreement, the Parties clearly expected that there would be evidence of active participation in the cultural practices of the Mi'kmaq communities in Newfoundland, separate and distinct from family visits. This included participation in community events which fostered the shared culture and traditions of the Mi'kmaq of Newfoundland, such as pow-wows and the annual St. Anne's Day celebrations. Attendance at those events, which fostered Mi'kmaq culture, was viewed as an important part of community membership.

[175] The requirement of substantial connection to the MGIN beyond family members was neither arbitrary nor rigidly enforced. Because the Agreement emphasized the maintenance of the Annex B communities, it was open to the Parties and reasonable for them to ask applicants to demonstrate their involvement beyond their own close family.

[176] Mr. Abbott has not demonstrated that the Parties' decision to clarify what evidence was needed to satisfy the Group Acceptance Criterion is unreasonable. In fact, it is consistent with the core of community acceptance as defined in *Powley* at paragraph 33.

(c) *Whether the types of acceptable evidence were under-inclusive*

[177] Mr. Abbott submits that the Directive's set of acceptable types of evidence to establish frequent visits and communications for paragraph 25(b)(ii) of the Agreement was unduly limited. Mr. Abbott points to the case of his brother, who, like him, left Newfoundland and Labrador to study and pursue a career, and who, unlike him, met the Community Acceptance Criterion,

having included phone records as documentary evidence of his communications with members on the island of Newfoundland.

[178] Mr. Abbott claims that although he has the same genealogical history as his brother and a connection to his community and his Mi'kmaq heritage similar to that of his brother, he was disadvantaged because he chose to communicate with members on the island of Newfoundland primarily through Skype videochat. Mr. Abbott maintains that since he had no similar records to produce as his brother, he received no points for communications with members of the MGIN, and his application was denied. This argument is unfounded.

[179] Mr. Abbott testified that he communicated with family members in Mi'kmaq communities by phone and e-mail and yet he submitted no phone or e-mail records to the Enrolment Committee. He also did not advise the Enrolment Committee or Appeal Master of his alleged difficulty in obtaining the records of his Skype conversations.

[180] In any event, the Directive does not purport to limit the type of evidence accepted to establish frequent visits or communications for the purposes of paragraph 25(b)(ii). Section 15 of the Directive simply sets out examples of the documentary evidence that can be used to satisfy the paragraph 25(b)(ii) requirements; those included phone bills, credit card bills or original dated letters, emails or other written communications. The provided examples are not a limit on the type of evidence accepted. If Mr. Abbott was truly incapable of providing documentary evidence to demonstrate his frequent communications, there was nothing stopping him from explaining that limitation to the Enrolment Committee in his application.

D. *Was the Appeal Master's decision denying Mr. Abbott's application for membership reasonable?*

[181] Mr. Abbott asserts that the Enrolment Committee erred in awarding him no points under section 25(b)(ii) for maintaining the Mi'kmaq culture or way of life. Section 16 of the Directive provides that maintenance of the Mi'kmaq culture and way of life can be inferred from membership in the FNI before June 23, 2008. The Enrolment Committee acknowledged Mr. Abbott's membership in the Sple'tk First Nation (and in the FNI), awarding him 9 points for the same but, according to Mr. Abbott, failed to make the inference permitted by Section 16.

[182] This very argument was considered and rejected by the Appeal Master in earlier decisions. In one decision following an appeal by the FNI, the Appeal Master held that additional points were not to be awarded beyond the 9 points specified under the point system for membership in a Mi'kmaq organization, for ancillary activities associated with that membership. In another decision, the Appeal Master held that membership in a Mi'kmaq organization did not require an inference that an additional point be awarded under the point system for maintenance of Mi'kmaq culture and way of life.

[183] Section 16 of the Directive provides that an inference can be made from an applicant's prior membership of maintenance of the Mi'kwaq culture and way of life. The Parties left it open to the Enrolment Committee to determine whether such an inference should be made on a case by case basis.

[184] The affidavits produced by Mr. Abbott in support of his application were vague and contained little to no detail. Moreover, one of the affiants who confirmed that Mr. Abbott had maintained the Mi'kmaq way of life was his brother-in-law Neil Mouland who, as Mr. Abbott conceded on cross-examination, was not himself Mi'kmaq. In the circumstances, the Appeal Master's decision, confirming the Enrolment Committee's findings, was reasonable based on the record before him.

E. *Was Mr. Abbott denied procedural fairness?*

[185] Mr. Abbott argues that the Respondents' failure to provide him with the Detailed Point System Grid gave him insufficient notice of the case to be met. Mr. Abbott was of the view when he submitted his application for reassessment that the supplemental information he provided established frequent visits and communication over an extended period of time. After the denial of his application, and after receipt of a copy of the Detailed Point System Grid relating to his application, Mr. Abbott noted that the Enrolment Committee had applied a different, formalistic and much more stringent test. Mr. Abbott claims that had he known of the Detailed Point System Grid, he would have provided more documentation on frequent visits and/or communications. This argument has no merit.

[186] First, there is no evidence to substantiate Mr. Abbott's assertion that he could have adduced more or better evidence.

[187] Second, all applicants, including Mr. Abbott, were provided with notice specifically stating that they should provide all documentation that would assist them in meeting the

requirements for frequent visits and/or communications and maintaining Mi'kmaq culture and way of life. The notice was clear and unambiguous. Other family members, who also applied as non-residents, were able to provide sufficient material to qualify for Founding Membership.

[188] On the evidence before me, I am satisfied that Mr. Abbott knew the case he had to meet and that he had a full opportunity to respond to it. Moreover, I agree with the Respondents that it is not a requirement of adequate notice that applicants know, prior to submission of an application, precisely how their submissions will be weighed. While Mr. Abbott did not have the Detailed Point System Grid, he was made aware of the case to be met through the Directive, the point system and the November 2013 brochure.

[189] While the Detailed Point System Grid was not made public, the Supplemental Agreement and Directive were, and it is not necessary to disclose evaluation criteria where the undisclosed evaluation criteria was reasonably related to, or could be reasonably inferred from, the published evaluation criteria: see *GCI Information Systems and Management Consultants Inc v Canada Post Corporation*, 2015 FCA 272.

[190] While the duty of procedural fairness is high in relation to the QMFN enrolment process (see *Foster* at paras 28-47; see *Howse* at paras 22-41), I conclude that the procedure in this case was fair having regard to all of the circumstances. Mr. Abbott was made aware of the evidentiary requirements he was required to satisfy for QMFN membership and the point system to be used in assessing applications through the brochure sent to him in November 2013 as well as the Agreement, Supplemental Agreement and Directive, which were accessible to the public. With

the information available to him, Mr. Abbott should have put his best foot forward and produced all available evidence in support to his application for QMFN membership.

[191] Finally, I am satisfied that the Detailed Point System Grid left room for the Enrolment Committee make an assessment in its discretion, as demonstrated by the fact that Mr. Abbott was awarded 2 points for his visits.

## VI. Costs

[192] None of the parties requested their costs, therefore none will be awarded.

## VII. Conclusion

[193] In light of the reasons above, I have come to the following conclusions.

[194] The Minister's decision to enter into the Supplemental Agreement and issue the Directive was a measured and appropriate response to the particular circumstances facing the Parties.

[195] The Directive's clarifications to the evidentiary requirements to satisfy the Group Acceptance Criterion were reasonable: they were authorized by the Agreement, and they were not made for an improper purpose or on the basis of irrelevant considerations.

[196] The Appeal Master's decision, confirming the Enrolment Committee's decision to deny Mr. Abbott's application for membership in the QMFN, was reasonable.

[197] Mr. Abbott was not denied procedural fairness.

**JUDGMENT IN T-573-18**

**THIS COURT'S JUDGMENT is that**:

1. The Applicant is granted leave to challenge more than one decision in this proceeding pursuant to Rule 302 of the *Federal Courts Rules*, SOR/98-106.
2. The application for judicial review is dismissed.
3. No costs are awarded.

"Roger R. Lafrenière"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-573-18 |
| **STYLE OF CAUSE:** | JUSTIN PHILIP ABBOTT v CANADA (ATTORNEY GENERAL) AND FEDERATION OF NEWFOUNDLAND INDIANS |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | FEBRUARY 26, 2019 |
| **JUDGMENT AND REASONS:** | LAFRENIÈRE J. |
| **DATED:** | OCTOBER 16, 2019 |

**APPEARANCES:**

| | |
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