IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Benoit v. Federation of Newfoundland Indians*, 2018 NLSC 141
Date: June 22, 2018
Docket: 201801G1147

BETWEEN:

SHAWN BENOIT

FIRST PLAINTIFF

AND:

MATTHEW ANDERSON

SECOND PLAINTIFF

AND:

MARIE TAPP MELANSON

THIRD PLAINTIFF

AND:

BOBBIE TAPP GOOSNEY

FOURTH PLAINTIFF

AND:

PAUL BENNETT

FIFTH PLAINTIFF

AND:

JENNIFER SUE LE ROUX

SIXTH PLAINTIFF

AND:

FEDERATION OF NEWFOUNDLAND INDIANS

FIRST DEFENDANT

AND:

HER MAJESTY THE QUEEN (CANADA)

SECOND DEFENDANT

Before: Justice Gillian D. Butler

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: June 18, 19, 20, 2018

Summary:

Interim Application for declaration of rights pursuant to section 371 of the *Corporations Act* granted. The Plaintiffs met the tripartite test for interim extraordinary relief against the First Defendant.

Appearances:

Keith S. Morgan	Appearing on behalf of the Plaintiffs
Philip J. Buckingham	Appearing on behalf of the First Defendant
Kelly Peck	Appearing on behalf of the Second Defendant

Authorities Cited:

CASES CONSIDERED:
Canada (Attorney General) v. TeleZone Inc., 2010 SCC 62; *Foster v. Canada*, 2015 FC 1065; *Hogan v. Newfoundland (Attorney General)* 1998, 162 Nfld. & P.E.I.R. 132, 156 D.L.R. (4th) 139, (Nfld. S.C. (T.D.)); *Musqueam Indian Band v. Canada (Public Works and Government Services)*, 2008 FCA 214; *Howse v. Canada*, 2015 FC 1063; *RJR MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311; *Wells v. Canada*, 2018 FC 483; *Commanda v. Canada*, 2018 FC 189; *Colgan v. Canada's National Firearm Assn.*, 2016 ABQB 412; *Bector v. Vedic Hindu Cultural Society*, 2014 BCSC 230; *Brake v. Canada and Federation of Newfoundland Indians*, 2018 FC 484; *Doucette v. FNI and Canada*, 2018 FC 497; *Abbott v. Canada*, Court File T-573-18

STATUTES CONSIDERED: *Indian Act*, R.S.C. 1985, c. I-5; *Companies Act*, R.S.N. 1970 c. C-54; *Corporations Act*, R.S.N.L. 1990, c. C-36; *Qalipu Mi'kmaq First Nation Act*, S.C. 2014, c. 18; *Federal Courts Act*, R.S.C., 1985, c. F-7; *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50

REASONS FOR JUDGMENT

BUTLER, J.:

FACTS

[1] When the Dominion of Newfoundland became a Province of Canada in 1949 (Confederation), the *Indian Act*, R.S.C. 1985, c. I-5 (the "*Indian Act*") was not applied because there was no agreement between Newfoundland and Canada. There were, however, indigenous people residing on both the island and Labrador portion of the Dominion of Newfoundland at that time. These consisted of Innu, Inuit, and Mi'kmaq.

[2] The Native Association of Newfoundland and Labrador was created in 1972 and had members of Innu, Inuit and Mi'kmaq Bands. However, the Innu and Inuit subsequently withdrew its members.

[3] The Federation of Newfoundland Indians Inc. ("FNI") was created in 1984 by license under section 253 of the *Companies Act*, R.S.N. 1970 c. C-54 (as a charitable company with limited liability (without the addition of the word 'limited'). It was created for the purposes of organizing and uniting, promoting and protecting the constitutional and legal rights of the Indian People of Newfoundland and, in particular, to negotiate on behalf of the Mi'kmaq with any level of government in order to pursue the recognition of the rights of the Mi'kmaq of the island of Newfoundland and to pursue registration of Mi'kmaq within the Association as status Indians.

[4] Membership in the FNI at that time was open to "all people who are of Mic Mac ancestry and reside in the Province of Newfoundland … " and "individual members of" recognized local affiliated bands.

[5] The FNI was continued under the *Corporations Act*, R.S.N.L. 1990, c. C-36 in 1988.

[6] The Mi'kmaq of Conne River became eligible for registration under the *Indian Act* and formed the Conne River (Miawpukek) Band in 1982. Six other Mi'kmaq Bands were not successful in obtaining registration under the *Indian Act* but were members of the FNI. Three more Bands were subsequently added as affiliates to the FNI.

[7] The Mi'kmaq Bands who had been unsuccessful in obtaining registration under the *Indian Act* commenced litigation in the Federal Court in 1989 and in 2002 negotiations commenced on the potential settlement of the Federal Court action. By late 2003, negotiations were focused on the concept of whether a 'landless' band would be a viable option to settle the Federal Court action. A survey of the 6,126 members of the FNI was conducted and gave positive feedback.

[8] Following a year of discussions, in June 2004, the FNI negotiated with Her Majesty the Queen ("Canada") for the creation of a landless Band for the Mi'kmaq Group of Indians of Newfoundland and Labrador which would enable its members to be registered as Indians for the purposes of the *Indian Act*. The next step was negotiation of an Agreement in Principle ("AIP").

[9] In 2006, the FNI amended its membership rules to permit individuals (who were not members of the FNI's affiliated Bands) to join the FNI as non-voting members ("General Members").

[10] On November 30, 2007, the AIP was announced. It was subject to two conditions precedent, namely ratification by the members and execution of the

Agreement by the President on authorization of the Board of Director(s). The FNI had approximately 10,500 members at this point and the FNI froze its membership so that it could conduct the ratification vote required on the AIP. Members were subsequently notified of the need to ratify the AIP and the ratification vote was taken on March 29, 2008 and summarized in a newsletter to members.

[11] On June 23, 2008, the AIP was signed. It anticipated that applications for membership would be received in two stages; Stage 1 would cover the period November 30, 2008 to November 30, 2009; and Stage 2 would cover the period December 1, 2009 to November 30, 2012. The AIP represented a Settlement Agreement of the Federal Court action and essentially created the process to be followed to the recognition of a landless Band for the Mi'kmaq Group of Indians of Newfoundland and Labrador (the "Settlement Agreement").

[12] One of the terms of the Settlement Agreement was the requirement for a threshold minimum membership of 5,250 members within the first 18 months (and therefore by June 30, 2009). This threshold number for founding members was attained in the first year.

[13] On October 24, 2009, the FNI held its Annual General Assembly ("AGA") with notice to members. It is conceded that in the conduct of this AGA, the FNI was non-compliant with its By-Laws (because the text of the Resolution had not been previously circulated as required under provision 8.07). However, a majority of the voting members present nevertheless agreed to table the Special Resolution and the Resolution passed. It purported to approve amendments to the Articles and By-Laws of the FNI which amendments were to be effective when:

(a) the Qalipu Mi'kmaq First Nation ("QMFN") Band was formed; and

(b) the First Founding Members List ("FFML") was recognized.

[14] However, the proposed amendments were not attached to the minutes of the meeting and the Special Resolution itself did not reflect either that, once amended, the only member of the FNI would be the newly created QMFN Band or that only the QMFN Band council members would be voting members. It was not established on this Application that either the non-voting or the voting members present at the AGA knew these consequences of the amendments to the By-Laws, when the Resolution passed.

[15] By November 30, 2009, (the end of the first stage of the enrolment process), a total of 23,877 applicants had qualified as members in the intended QMFM Band. This included the six Plaintiffs.

[16] On September 22, 2011 the QMFM Band was formed by PC Order 2011-928 and the FFML was recognized by a "Recognition Order in Council" SOR/2011-180. As of this date, therefore, the two conditions precedent of the October 24, 2009 resolution amending the Articles and By-Laws of the FNI were satisfied. However, it was not until September 12, 2012 when the FNI Board at its Annual General Assembly officially approved the amendment to the By-Laws. The amended By-Laws were provided in the Plaintiffs' Memorandum of Documents.

[17] The FNI characterizes the Board approval given on September 12, 2012 as a mere formality to the amendment of the Articles and By-Laws which it asserts had received approval by members at the Annual General Assembly in October 2009 and the conditions precedent for which were satisfied on September 22, 2011. The Plaintiffs assert however that (if the amendments were valid), approval was not given until September 12, 2012. The dispute is relevant to a limitation period defence that is pled by the FNI (to the Plaintiffs' ability to pursue relief from any alleged improper actions of the FNI Board) and may have some bearing on the issue of irreparable harm but determination of the limitation period is a matter that will be reserved for trial.

[18] In either event, the FNI asserts that after September 12, 2012, the QMFN was the sole member of the FNI and Brendan Sheppard had been named as Chief of the QMFN; coincidentally, he was also President of the FNI. The band council of the

QMFN, was to be composed of "the incumbent board of directors of the FNI existing as of the date of the establishment of the Band". The "first election for all positions on band council was to be held" within six months. It was not established when this occurred but the FNI asserts that these band council members became the only voting members of the FNI.

[19] It is not disputed that all six Plaintiffs became First Founding Members of the QMFN Band as of September 22, 2011 and remain so; they each received their status as registered Indians on October 19, 2011.

[20] By November 30, 2012 Canada and the FNI had three concerns about the enrolment process. There were 101,473 applications received during Stage 2 and the processing deadline of November 30, 2012 could not be met. 46,000 of these were received within the last three months of the four-year process and gave rise to credibility issues **to those Applications**. Through the work of the Appeals Masters, concern was raised for an inconsistency between section 4 of the Settlement Agreement and section 24 of Annex A to the Settlement Agreement (**for applicants who filed after the Recognition Order**).

[21] These concerns led Canada and the FNI to execute a Supplemental Agreement on July 4, 2013 which they justified under section 2.15 of the Settlement Agreement on the basis that the amendments merely extended a time period or corrected a "defective or inconsistent provision" contained in the Settlement Agreement.

[22] The FNI (through Brendan Sheppard) concedes that none of these concerns applied to the six Plaintiffs (whose Applications had been approved before the Recognition Order) but that the FNI and Canada concluded that new Guidelines should be prepared, a Directive would be issued to the Enrolment Committee and all applicants would be assessed under these new Guidelines, even those who had already qualified and were recognized as First Founding Members.

[23] As a result of this characterization, the Supplemental Agreement was not ratified but was merely executed by Brendan Sheppard as President of the FNI. Had

it been characterized otherwise, the Settlement Agreement required that amendments receive "ratification through the same procedure as … (the Settlement Agreement) was ratified".

[24] Plaintiffs' counsel submits that the amendments (as they relate to First Founding Members) were substantive and required ratification by the same 10,500 members as had ratified the Settlement Agreement in 2008.

[25] The FNI's counsel submits that if ratification was a requirement (which is denied), it would merely be required to be sought from the membership as of 2013 being the band council members of the QMFN Band. It is an open question whether the First Founding Members of the QMFN Band would be entitled to notice and to be involved in such a ratification.

[26] Brendan Sullivan was President of the FNI between 1994 and 2015 and asserts that in this capacity he had the full right and authority to enter into the terms of the Supplemental Agreement with Canada under the exception stated in section 2.15 for amendments, without notice to members/ratification.

[27] A press release was issued in July 2013 to advise that all applications (even those of First Founding Members) would be reassessed and a Directive was given to the Enrolment Committee providing it with directions on the types of evidence it could consider when assessing applications on a go-forward basis. This involved a point system to be applied to evidence presented which had not previously existed.

[28] The *Qalipu Mi'kmaq First Nation Act*, S.C. 2014, c. 18 (the "*QMFN Act*") was passed on June 19, 2014 and section 3 gave the Governor in Council authority to amend the QMFN Band Order to add **or remove** names from the Founding Members List. This is significant because no provision of the Settlement Agreement spoke of "removal" of names from the First Founding Members List; they spoke only of the "addition" of names through the Stage 2 process.

[29] The effect of this (as it pertains to the six Plaintiffs) is that despite being amongst the First Founding Members of the QMFN Band and their status as registered Indians under the *Indian Act*, each was reassessed and each was notified in January 2017 that they did not qualify.

[30] While most (if not all of the Plaintiffs) appealed, none of the Plaintiffs who testified sought judicial review in the Federal Court which I accept has exclusive jurisdiction for judicial review of the work of a Federal tribunal or board. A number of the Plaintiffs cited the expense associated with such an application as their grounds.

[31] On April 30, 2018 a new Founding Members List compiled by the work of the Enrolment Committee and Appeals Masters was presented to the FNI and Canada.

[32] The testimony of Keith Desjardins, Senior Operations Manager within the Department of Crown-Indigenous Relations and Northern Affairs Canada raised uncertainty as to whether the Minister has since recommended that this List be approved by the Governor in Council. However, the Canada Gazette, Part. 1, Vol. 152, Number 20 published the intent of the Governor in Council to amend the Schedule to the *QMFN Act* and replace it with the new Founding Members List effective Monday, June 25, 2018.

[33] This deadline gave rise to the Plaintiffs' request for extraordinary interim relief.

[34] Each of the four Plaintiffs who testified received correspondence from Indigenous and Northern Affairs Canada on June 1, 2018 advising that "subject to the approval of the updated Founding Members List by the Governor in Council's anticipated in June 2018, the removal of your name from the Indian Register will take effect on August 31, 2008". It is not disputed that the non-insured health benefits program for those Plaintiffs will expire on August 31, 2008 as will funding to pursue post-secondary studies. However, if "the name of one of (their) parents is

on the updated Founding Membership List, (they) will remain registered as a Status Indian and as a Band member, but not as a Founding Member". In such a case, benefits would continue "but under a different provision of the *Indian Act*".

[35] By Statement of Claim issued February 14, 2018, the Plaintiffs allege contractual bad faith, seek rescission of the Supplemental Agreement, an injunction to enjoin the work of the Enrolment Committee (which has the power delegated to it to determine if applications meet the eligibility requirements of the Supplemental Agreement) and declaratory relief that the Supplemental Agreement is oppressive or unfair.

[36] By Amended Interlocutory Application, the Plaintiffs clarify the relief sought as an injunction against both Canada and the FNI enjoining them from the acceptance of the New Founding Members List and enjoining the Minister from recommending the substitution of the New Founding Members List for the current schedule to the Recognition Order, pending a judicial determination regarding the Plaintiffs' claims of oppression.

[37] The Plaintiffs' Memorandums of Law also assert (as against Canada) that its actions represent a failure to ensure protection of the Plaintiffs. Whether this is as First Founding Members of the QMFN, as members of the FNI or as registered Indians is unclear. In either case, this is not a claim made in the pleadings themselves.

JURISDICTION

For Claims Against the FNI

[38] No challenge is made to the Court's ability to provide private remedies to the Plaintiffs against the FNI as a corporation continued under the *Corporations Act* of this Province.

For Claims Against the Enrolment Committee

[39] The Defendants suggest however that the Plaintiffs are attacking the decisions of the Enrolment Committee which they characterize as a Federal Board, the review of whose decisions falls within the exclusive jurisdiction of the Federal Court. Section 18(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 states as follows:

> 18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[40] I agree with the FNI and Canada's characterization of the Enrolment Committee as akin to a Federal Tribunal and I accept that the Federal Court has exclusive jurisdiction for judicial review of decisions of Federal Boards pursuant to section 18(1).

[41] The Plaintiffs acknowledge that they did not seek judicial review of the final decisions of the Enrolment Committee/Appeals Masters and assert that such action would not have addressed their concerns. I am not satisfied that this is the case (at least relative to their claims against Canada) because there has been a recent decision from the Federal Court in the context of a judicial review Application that declared two sections of the Supplementary Agreement invalid. This is addressed later herein.

[42] In addition, the FNI asserts that since the Plaintiffs had the right to seek judicial review of the decision of the Enrolment Committee or Appeals Masters in each of their individual cases, their failure to further these remedies should effectively foreclose their ability to further this litigation.

[43] The legitimacy of this position was not established and runs contrary to *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62. This Court has concurrent jurisdiction with the Federal Court over claims against Canada in contract or tort and it is conceded that it has jurisdiction to hear the claims against the FNI. I do not consider the Plaintiffs' decisions not to pursue judicial review, as an impediment to this action.

[44] In any event, the heart of the Plaintiffs' claims in this litigation is their challenge to the Supplementary Agreement which required that the six Plaintiffs be reassessed notwithstanding that they were on the FFML and had received their status as registered Indians. The Supplemental Agreement was entered into by the Defendants, not the Enrolment Committee.

For Claims against the Governor in Council

[45] Relative to any claims made by the Plaintiffs which could be construed as against the Governor in Council, in making the Band Order (and amending it) the Governor in Council has acted and will act pursuant to paragraph 2(1)(c) and sub-section 73(3) of the *Indian Act* (see *Foster v. Canada*, 2015 FC 1065, at paragraph 26). It was section 3 of the *QMFN* which had the effect of permitting the Governor in Council to "amend the Qalipu Mi'kmaq First Nation Band Order, in particular to add the name of a person to, or remove the name of a person from, the Schedule to that Order, along with the person's date of birth". No constitutional challenge has been made to the *QMFN Act*.

[46] As a result, I accept that the Founding Membership of the QMFN was established as part of a legislative process and is anticipated to be amended by Order in Council under section 3 of the *QMFN Act* by the Governor in Council as part of the same legislative process. Further, I accept that "The law is quite clear that the courts cannot intervene in the legislative process; they enjoy a supervisory jurisdiction once a law has been enacted, but until that time, a court cannot interfere in the process of enacting legislation. To conclude otherwise would be to obliterate the boundaries that properly separate the functions and roles of the legislatures and

the courts" (*Hogan v. Newfoundland (Attorney General)* 1998, 162 Nfld. & P.E.I.R. 132, 156 D.L.R. (4th) 139, (Nfld. S.C. (T.D.)), at paragraph 60).

[47] It follows that this Court cannot provide a remedy to the Plaintiffs against the Governor in Council relative to the anticipated amendment to the *QMFN Act*.

For Claims Against Canada

[48] Section 21(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 states as follows:

> 21 (1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.

[49] I am satisfied therefore that this Court has jurisdiction to hear the Plaintiffs' claims against Canada.

[50] However there are statutory limits to the form of relief available against Canada.

[51] It is generally understood that injunctive relief is unavailable against the Crown. Section 22 of the *Crown Liability and Proceedings Act*, states:

> Declaration of rights
>
> 22 (1) Where in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, a court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.

[52] Despite this, counsel for the Plaintiffs suggests that *Musqueam Indian Band v. Canada (Public Works and Government Services)*, 2008 FCA 214 supports the availability of injunctive relief against the Crown in certain instances.

[53] I do not find *Musqueqam* to support this Court's ability to order injunctive relief against Canada. The Federal Court of Appeal in *Musqueam* made a clear distinction between an action (under section 17 of the *Federal Court Act*) and judicial review under section 18 thereof. The Court therein determined that judicial review was not a proceeding against the Crown. (see paragraphs 66-69)

[54] The case before this Superior Court is an action and I accept that section 22(1) of the *Crown Liability and Proceedings Act* precludes injunctive relief but supports the ability of this Court to make an Order declaratory of the rights of the Plantiffs, against Canada if the Plantiffs assert and can maintain a recognized cause of action.

STANDING

[55] The Plaintiffs' standing is challenged by the Defendants. They allege that in the context of aboriginal and treaty rights, the nature of the rights bears on the question of standing and that an individual Plaintiff cannot advance "collective rights" without support of the community which holds the right. (*Howse v. Canada*, 2015 FC 1063)

[56] I accept on this Interim Application that the Plaintiffs have no authority to represent the First Founding Members of the Qalipu Mi'kmaq First Nation. Based upon the current state of the pleadings, their claims are individual claims that:

a) the Supplemental Agreement is invalid because as an amendment to the Settlement Agreement, it required member ratification;

b) the Supplemental Agreement had an oppressive and unfairly prejudicial effect upon each of the Plaintiffs' rights as members of the FNI; and

c) Canada knew the amendments required ratification and its failure to ensure it occurred represents contractual bad faith.

[57] In a later section I will address whether an appropriate basis has been established for the Plaintiffs' private claims against Canada.

SUMMARY OF JURISDICTION AND STANDING

[58] To this point I have concluded that:

- The Plaintiffs have standing to pursue private claims and remedies only;
- This Court has jurisdiction to hear the Plaintiffs' claims against both the FNI and Canada;
- It is not fatal to the Plaintiffs' claims that neither sought judicial review for which the Federal Court would have exclusive jurisdiction;
- The nature of relief potentially available to the Plaintiffs is declaratory in nature pursuant to section 371 of the *Corporations Act* and section 22(1) of the *Crown Liability and Proceedings Act*.

[59] In addressing whether the Plaintiffs are entitled to interim extraordinary relief in either instance, I accept that the test for an injunction is apt to apply.

[60] In the analysis that follows, I shall assess whether the Plaintiffs have established the tripartite test for interim extraordinary relief stated in *RJR MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311.

ANALYSIS

Serious issue to be tried against Canada

[61] The party whose actions are challenged by the Plaintiffs in this instance is Canada, through the Minister of Indian Affairs; not the Enrolment Committee nor the Governor in Council.

[62] It is not disputed that Canada raised the need to amend the Settlement Agreement and executed the Supplemental Agreement. Further, the FNI acknowledges that the Settlement Agreement was akin to a Treaty Agreement between Canada and the indigenous people represented by the FNI, including the six Plaintiffs. As such, I accept that the terms of the Settlement Agreement would require a broad interpretation and adequate scrutiny in response to assertions of either bad faith or failure to protect the Plaintiffs' rights by inappropriately relying on section 2.15 to amend the Settlement Agreement without ratification.

[63] In terms of contract this is an unusual situation because the Court is called upon to interpret a provision of a contract that has not been challenged by either of the parties to it. Further, the FNI does not assert a breach by Canada of the terms of either the Settlement Agreement or Supplemental Agreement. As such, Canada asserts (and I accept) that no contractual rights pertain to the individual Plantiffs against Canada.

[64] As to tort, Canada asserts firstly (and I accept) that the Plaintiffs have not pled that Canada owed them as individuals, any fiduciary duty. The Statement of Claim currently asserts only that Canada knew the amendments required ratification; that relying on section 2.15 to amend "falls below the standard of good faith required in

contractual dealings" and that the Supplemental Agreement is the "direct result of the oppressive acts undertaken by the FNI to the detriment of the original membership of which Canada knew … "

[65] Secondly, Canada submits that such a fiduciary duty would in any event be owed to the aboriginal collective (the Mi'kmaq Group of Indians of Newfoundland) and Canada notes that the FNI does not assert that Canada breached any fiduciary duty owed to the FNI or its members.

[66] I cite paragraphs 53-54 of *Wells v. Canada*, 2018 FC 483 as follows:

> 53. Although the Original Agreement stipulates in section 2.1 that it is not a treaty within the meaning of section 35 of the *Constitution Act, 1982*, I agree with Canada that the guidance the Supreme Court of Canada offered in *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 (S.C.C.) [*Nacho Nyak Dun*], at para 33, when interpreting treaties is apt because, like there, this is a situation where the Court is required it to examine an agreement relating to Aboriginal rights:
>
> > Modern treaties are intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership. In resolving disputes that arise under modern treaties, courts should generally leave space for the parties to govern together and work out their differences. Indeed, reconciliation often demands judicial forbearance. It is not the appropriate judicial role to closely supervise the conduct of the parties at every stage of the treaty relationship. This approach recognizes the *sui generis* nature of modern treaties, which, as in this case, may set out in precise terms a co-operative governance relationship. [citations omitted]
>
> 54. While deference is called for from the Court when reviewing the decisions under review, at the same time, the agreements involve and safeguard the rights of the Mi'kmaq, and thus, as was observed in *Nacho Nyak Dun* at paragraph 34, 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.

[67] I accept that judicial forbearance by way of deference is owed to the FNI and Canada's ability to work out their historical differences, but that it cannot come at the expense of adequate scrutiny of the actions of the FNI and Canada to ensure compliance with the terms of creation of the QMFN and its membership. The

question is whether this scrutiny can only be grounded in a public law claim which is appropriately dealt with by way of judicial review. (*Commanda v. Canada*, 2018 FC 189)

[68] Such scrutiny was given to these contracts in *Wells* which was a judicial review application albeit brought by two individuals. However it is referred to as a test or lead case suggestive of a representative action. This case before this Court is neither a judicial review, a test case or a representative action.

[69] Further, the oppression and unfairly prejudicial actions relied upon in tort are in relation to the corporate governance of the FNI. They cannot ground a private claim in tort against Canada.

[70] This Interim Application was heard at a very early stage of the litigation and I accept that amendments to the pleadings are likely as the case progresses. However, in assessing if a potential private cause of action is alleged against Canada, the basis must be the pleadings as they currently exist.

[71] Notwithstanding that *RJR MacDonald Inc.* confirms a very low threshold for the first component of the test for interim extraordinary relief, I conclude that the Plaintiffs have failed to plead or establish at this stage, a recognized private cause of action against Canada in tort.

[72] I am unable to find a serious issue to be tried against Canada but am not prepared to strike the claim. It is entirely possible that amendments may follow that alter the characterization of the Plaintiffs' claims against the Second Defendant.

Serious Issue to be tried Against the First Defendant

[73] The Plaintiffs assert that they are "complainants" as defined in s. 368 of the *Corporations Act* as members or former members of the FNI, a not for profit corporation. They assert further that the FNI (in executing the Supplemental

Agreement) took an action that was either oppressive or unfairly prejudicial to the Plaintiffs and/or that had unfair disregard for the interests of the Plaintiffs as members or former members of the FNI. Sections 371 and 374 of the *Corporations Act* provide as follows:

> 371. (1) A complainant may apply to a court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or an affiliate
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> (a) an act or omission of the corporation or an affiliate effects a result;
>
> (b) the business or affairs of the corporation or an affiliate are or have been carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or an affiliate are or have been exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.
>
> (3) In connection with an application under this section, the court may make an interim or final order it thinks appropriate including
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> (a) an order restraining the conduct complained of;
>
> (b) an order appointing a receiver or receiver-manager;
>
> (c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
>
> (d) an order directing an issue or exchange of securities;
>
> (e) an order appointing directors in place of or in addition to all or some of the directors then in office;
>
> (f) an order directing a corporation, or another person, to purchase securities of a security holder;
>
> (g) an order directing a corporation, or another person, to pay to a security holder a part of the money paid by the security holder for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or another party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 258 or an accounting in another form that the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 374;

(l) an order liquidating and dissolving the corporation;

(m) an order directing an investigation under Part XVII to be made; and

(n) an order requiring the trial of an issue.

(4) Where an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall immediately comply with subsection 314(4); and

(b) another amendment to the articles or by-laws may not be made without the consent of the court, until a court otherwise orders.

(5) A shareholder is not entitled to dissent under section 304 where an amendment to the articles is effected under this section.

(6) A corporation shall not make a payment to a shareholder under paragraph (3)(f) or (g) where there are reasonable grounds for believing that

(a) the corporation is or would after that payment be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would as a result be less than the aggregate of its liabilities.

(7) An applicant under this section may apply in the alternative for an order under section 343.

374. (1) Where the name of a person is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, the registers or other

records of a corporation, the corporation, a security holder of the corporation or an aggrieved person may apply to a court for an order that the registers or records be rectified.

(2) An applicant under this section shall give the registrar notice of the application and the registrar is entitled to appear and be heard in person or by counsel.

(3) In connection with an application under this section, the court may make an order it thinks appropriate including

(a) an order requiring the registers or other records of the corporation to be rectified;

(b) an order restraining the corporation from calling or holding a meeting of shareholders or paying a dividend before the rectification;

(c) an order determining the right of a party to the proceedings to have the party's name entered or retained in, or deleted or omitted from, the registers or records of the corporation, whether the issue arises between 2 or more security holders or alleged security holders, or between the corporation and security holders or alleged security holders; and

(d) an order compensating a party who has incurred a loss.

[74] I accept that several sub-sections of section 371(3) would enable rectification of the matter complained of by various means which fall within the jurisdiction of this Court (as against the FNI); specifically, section 373(3)(c) ordering the FNI to amend its By-Laws; section 373(3)(h) ordering a variation of a contract to which the FNI was a party; or section 373(3)(m) ordering an investigation. Under section 374, the Court would also have jurisdiction to rectify the records of the FNI.

[75] The Plaintiffs were members of the FNI (until September 12, 2012) and if the by-laws were validly amended, thereafter, First Founding Members of the QMFN whose Band Council members are the voting members of the FNI. They are, in either respect, stakeholders and as such, I agree that each of the Plaintiffs has the right under the *Corporations Act* to question the legitimacy of the actions taken by the FNI which impact them.

[76] Relying on *Colgan v. Canada's National Firearm Assn.*, 2016 ABQB 412, if this matter proceeds to trial, the court must consider whether the process followed by the FNI, in executing a Supplemental Agreement (with the effect of retroactively amending the manner in which assessments of the criteria for membership in the FNI were to be conducted by the Enrolment Committee), without ratification "through the same procedure" as the Settlement Agreement:

- supported the reasonable expectation asserted by the Plaintiffs;

- or violated the reasonable expectation by conduct that was so oppressive, unfair or prejudicial or represented an unfair disregard of a relevant interest, that it warrants relief under section 371 of the *Corporations Act*.

[77] The claims of oppression stem back to the impugned amendments to the by-laws which by-laws constitute contractual obligations between the FNI members and the not for profit corporation. (see *Bector v. Vedic Hindu Cultural Society*, 2014 BCSC 230)

[78] The text of the Special Resolution amending the Articles and By-Laws of the FNI on October 24-25, 2009 had not been previously circulated to voting members as required by By-Law 8.07. This notice was required to "permit the Voting Member(s) to form reasonable judgment on it". The FNI now relies on these amended by-laws to support that the Plaintiffs were not members of the FNI when the Supplementary Agreement was signed. It asserts that they were not entitled to any notice of it or required to ratify its terms. However, the Supplementary Agreement stands to remove the Plaintiffs as First Founding Members of the QMFN Band and lose status as registered Indians.

[79] When the FNI membership (including the six Plaintiffs) ratified the Settlement Agreement, its terms did not contemplate and specifically provided against removal of a First Founding Member from membership after Stage 2 of the process for enrolment.

[80] The preamble of the Settlement Agreement provided that the parties would establish an Enrolment Committee to assess whether applicants met the eligibility criteria established in the Agreement to be enrolled as Founding Members of a Band to be established by the Governor in Council and to be known as the Qalipu Mi'kmaq First Nation Band. The Enrolment Committee was to provide the parties with the FFML by November 30, 2009 and the Second Founding Members List by November 30, 2012. It spoke specifically of the "addition of names" to the FFML from Stage 2 to become the Second Founding Members List. Of like effect, are sections 1.10, 3.3, 3.4, 4.2.18.4 and 4.2.19.2, all of which speak of having names "added to the schedule" for the creation of the Second Founding Members List.

[81] Despite this, Canada and FNI characterize the Supplemental Agreement as one that served only to remove any conflicts or inconsistencies and therefore not requiring full ratification in "through the same procedure as that required for the Settlement Agreement". However, it is not disputed that by virtue thereof the six Plaintiffs' applications for enrolment were reassessed notwithstanding that they were recognized as FFM of the QMFN Band in September 2011 and had been given registered Indian status in October 2011.

[82] The Supplementary Agreement revised the enrolment process from a Stage 1 and Stage 2 process to a one-stage process only following which there would be only one Founding Members List generated notwithstanding that the FFML had already been recognized by Order in Council. The Supplemental Agreement had the result of stripping the Plaintiffs of their membership in the QMFN Band and of registered Indian status.

[83] At trial, the six Plaintiffs will have the onus of establishing that either Canada or the FNI's actions in executing the Supplemental Agreement (without ratification) with this effect on them, was inappropriate under section 2.15 and gives rise to private rights and remedies.

[84] Three recent decisions of the Federal Court must be addressed in the consideration of whether the Plaintiffs have established a serious issue to be tried against the FNI.

[85] I have already referenced the Federal Court decision in *Wells* released on May 8, 2018. It is distinguishable on its facts because it addresses the rights of two individuals who applied for membership in the QMFN Band after the date of the Recognition Order in September 2011 (David Wells' application had been filed on October 1, 2012, see paragraph 33; Sandra Wells had filed her application on September 27, 2012, see paragraph 38). These individuals were therefore not on the FFML and were not members of the Qalipu Mi'kmaq First Nation at the time that the Supplemental Agreement was executed.

[86] There were seven issues placed before the Federal Court but each was addressed in the context of a judicial review of the respective Enrolment Committee decisions. Justice Zinn was therefore applying a standard of reasonableness to most issues with the exception of procedural fairness for which he applied a standard of correctness. Nevertheless, the court addressed the validity of portions of the Supplemental Agreement.

[87] I found, in particular, Justice Zinn's explanation of the Defendants' characterization of the "mistake" or "inconsistency" that had been made in the Settlement Agreement to be very helpful. He explained that section 4.1(d)(i) had provided that an individual is eligible to be enrolled as a founding member if (in the assessment of the Enrolment Committee on the date of the Recognition Order), the individual self-identifies as a member of the Mi'kmaq Group of Indians of Newfoundland (paragraph 19).

[88] In addition, *Wells* explained that section 4.21 required the Enrolment Committee to assess applications "in accordance with the procedures set out in section 4.4 and with the Enrolment Committee guidelines". Section 24 of the guidelines provided at that time that "a signed application form constitutes sufficient evidence that the applicant self-identifies as a member of the Mi'kmaq Group of Indians of Newfoundland".

[89] Thus, in the *Wells* case, the FNI's concern was for applications that post-dated the Recognition Order (see paragraph 21) because their evidence did not speak to whether the clause 4.1(d)(i) criterion had been met on or before the date of the

Recognition Order. It merely reflected that the applicant self-identified as of the date of their application. This, it was asserted, was inconsistent with the clause 4.1(d)(i) requirement.

[90] Justice Zinn summarized the amendments made as follows.

[91] Since an applicant who applied after the Recognition Order could not prove that he/she self-identified as Mi'kmaq prior to that date, as required by sub-paragraph 4.1(d)(i) "…they amended section 24 of the … Guidelines to require that those making an application for membership after the date of the Recognition Order were required to establish that they self-identified as Mi'kmaq by showing: (1) that they were named on at least one of the lists in sub-paragraph 24(3)(i), or (2) by providing at least one of the documents listed in sub-paragraphs 24(3)(ii) to (v) of the Amended Enrolment Committee Guidelines (see paragraph 28).

[92] In addition, the right of applicants (rejected on the basis of self-identification) to appeal was removed by sub-section 6(2)(b) of the Supplemental Agreement (see paragraph 31).

[93] Thirdly, section 2 of the Supplemental Agreement provided that "previously accepted applicants' applications made between December 1/08 and November 30, 2012 were to be reassessed by the Enrolment Committee" (see paragraph 32).

[94] While Justice Zinn did address if the Supplemental Agreement had been entered into for an improper purpose, in so doing, as previously stated, he was addressing two plaintiffs who applied after the Recognition Order. In this respect, he held that the purpose of the amendment (to the evidence required for such applicants) was to correct an error that allowed these applicants to rely on evidence after the Recognition Order to establish their status (see paragraph 60).

[95] This conclusion in *Wells* would have no bearing on the rights of the six Plaintiffs herein because this allegedly "defective" provision was not appropriate to

individuals who qualified before the Recognition Order (see paragraph 66). In concluding therefore that the provision could reasonably be considered flawed (thus justifying an amendment without former ratification of the agreement) (paragraphs 78-80), Justice Zinn was not addressing the issues placed before me in this instance.

[96] Justice Zinn did address whether the decision to amend the appeal provisions of the Settlement Agreement without ratification was within the power of Canada and the FNI pursuant to sub-section 2.15 of the Settlement Agreement. In this regard he held that neither Canada nor the FNI had authority pursuant to paragraph 2.15(a) or (b) of the Settlement Agreement to amend its appeal provisions and accordingly section 6 of the Supplemental Agreement was invalid and unenforceable.

[97] The third challenge that Justice Zinn addressed was the applicants' concern that applicants prior to the Recognition Order would be treated differently because they could continue to rely on their forms whereas new applicants had to meet a more onerous burden of providing one of five documents set out in section 24(3) of the guidelines. The plaintiffs in the case before Justice Zinn claimed that this was arbitrary and under-inclusive.

[98] Here, Justice Zinn held that there was nothing arbitrary or unreasonable in fixing the change to be applied to applicants whose applications were filed after the Recognition Order (paragraph 95), but that fixing the date for the evidence on which these new applicants could rely as June 23, 2008 or earlier, was both arbitrary and unreasonable (paragraph 101) thus, the judgment given confirmed that the amendment to section 24 of the Enrolment Committee Guidelines regarding self-identification evidence was not reasonable and must be set aside.

[99] Specifically, Justice Zinn was not required to consider the following questions:

1) Whether the decision to require First Founding Members to be reassessed, (without ratification of the amendment) was within the power of Canada and the FNI pursuant to section 2.1.5 of the Settlement Agreement;

2) Whether the FNI executed the Supplemental Agreement without authority;

3) Whether the FNI's actions (in executing the Supplemental Agreement) were oppressive, unfairly prejudicial to or in unfair disregard to the interests of the Plaintiffs warranting remedies under section 371 of the *Corporations Act*.

[100] The *Wells* decision does however support that there is potential legitimacy to the Plaintiffs' claims to the invalidity of other portions of the Supplementary Agreement.

[101] In *Brake v. Canada and Federation of Newfoundland Indians*, 2018 FC 484 released concurrently with *Wells*, the applicant made a motion to convert his application for judicial review into an action pursuant to section 18.4(2) of the *Federal Courts Act* and to certify the action as a class proceeding pursuant to Rule 334.16(1) of the Federal Court Rules.

[102] Mr. Brake's application for enrolment in the QMFN Band was made after the Recognition Order and was rejected (see paragraph 36). Justice Zinn therefore relied upon many of the same facts and analyses he had given in the *Wells* decision released on the same date in addressing Mr. Brake's application.

[103] While many issues addressed in *Brake* are not particularly germane to the issues I must determine (for example, grounds for the conversion of an application to an action under the *Federal Court Act* and Rules) it is important to note that Justice Zinn was required to consider if there was a "reasonable cause of action" raised in the pleadings. In this respect, I note that he held that the applicants had claimed (*inter alia*) that the Supplemental Agreement had not been ratified in accordance with the process outlined in the Settlement Agreement (paragraph 55). Since Justice Zinn had in *Wells* declared as invalid portions of the Supplemental Agreement, Justice Zinn concluded that the pleadings disclosed at least one reasonable cause of action (paragraph 57).

[104] In denying the appropriateness of the class action requested, Justice Zinn referred to the *Wells* litigation as the "lead case" on the validity of the self-identification aspects of the Supplemental Agreement. He held that his decision in *Wells* provided a result for Mr. Brake whose application was rejected on the same basis as the Plaintiffs in *Wells*. Specifically, that Mr. Brake could, rather than pursuing his own application, have his application assessed under whatever valid clauses of the Supplemental Agreement remain, or possibly under amended clauses put in place in accordance with the terms of the Settlement Agreement. Until this was done, Zinn, J. concluded that it would be premature to address whether a class proceeding can be said to be an efficient process to determine any private law remedies incorrectly rejected applicants may have".

[105] Finally, in *Doucette v. FNI and Canada*, 2018 FC 497, the Federal Court was addressing a motion for an injunction to prevent Canada and the FNI from taking steps to remove 10,512 First Founding Members of the QMFN Band by amending the Schedule to the Qalipu Mi'kmaq First Nation Band Order SOR/2011-180. The injunction was denied.

[106] However, in *Doucette*, the applicant had applied for enrolment on July 5, 2010 and on July 5, 2012 his application was rejected. He appealed but his appeal was dismissed and he was advised that he could reapply. The reapplication was filed on November 9, 2012 (after the Recognition Order) and once again was rejected, appealed and the appeal was dismissed.

[107] The Court applied the test in *RJR MacDonald Inc.* to the request made for the extraordinary remedy and confirmed as follows:

a) Serious issue to be tried – here the threshold is low; the court must be satisfied that the application is not frivolous or vexatious and beyond that the court should not engage in a prolonged examination of the merits (paragraph 15).

b) Irreparable harm – the applicant must demonstrate that he would suffer real, definite, unavoidable harm that cannot be monetarily quantified or otherwise cured (paragraph 20).

c) Balance of convenience – here the court would balance the individual rights suffered from having his matter determined before the Order in Council was issued against the public interest in having the agreements delayed.

[108] While the court was satisfied that there was potentially a serious issue to be tried, the applicant could not identify anyone within the 10,512 Band members likely to be harmed, let alone himself (paragraph 24) and therefore could not establish irreparable harm. Relying on the same facts, the court concluded that the requested injunction would harm the public interest in seeing that agreements between Government and First Nations communities are given effect.

[109] The broad question underlying the Plaintiffs' claims before me is whether the amendments reflected in the Supplemental Agreement are properly characterized as changes permitted under section 2.15(a) or (b) or instead as substantive changes requiring ratification in the same manner as the Settlement Agreement.

[110] I am satisfied that the Plaintiffs have established several serious issues to be tried in relation to their claims against the FNI which I summarize below;

- Were the FNI By-Laws validly amended and if not, should they be restored to the pre-amendment wording under section 371(3)(c) of the *Corporations Act* or should the FNI's membership be rectified to include the Plaintiffs under section 371(3)(h) of the *Corporations Act*;

- Given that section 2.15(a) or (b) permitted amendment (without ratification through the same process as the Settlement Agreement) only in three specific instances, and since the Supplemental Agreement permitted removal of names

whereas the Settlement Agreement spoke only of the addition of names, whether the FNI failed to comply with fundamental terms of the Settlement Agreement by relying upon section 2.15(a) or (b) to amend the Settlement Agreement and execute the Supplemental Agreement without ratification;

- Whether the amendment (requiring reassessment of the Plaintiffs' applications) should be characterized as altering substantive rights of the Plaintiffs who were First Founding Members of the QMFN Band and therefore declared invalid as an amendment requiring ratification;

- If ratification was required, what form would it take? The Settlement Agreement required that it be "through the same procedure as" the Settlement Agreement "was ratified". How would this be accomplished given that the membership of the FNI in 2012 was allegedly restricted to members of the QMFN Band Council? Should ratification have required participation of the First Founding Members?

- Whether the execution of the Supplemental Agreement was oppressive or unfairly prejudicial to the rights of the Plaintiffs pursuant to section 371 of the *Corporations Act*?

Irreparable Harm

[111] As to whether there is a likelihood of irreparable harm, counsel for Canada firstly suggests that even after the Order in Council is passed, section 3 of the *QMFN Act* enables the Schedule to the Band Order to be amended. Therefore, Canada asserts that if it is subsequently found to be justified, the name of a First Founding Member, such as the six Plaintiffs, removed wrongfully following the reassessment process, could be restored to the Founding Members List.

[112] However, the Court was not provided with any assurance from Canada (by Affidavit from a representative of the Minister) that such was the case.

[113] Secondly, the Court's attention has been drawn to the case of *Abbott v. Canada*, Court File T-573-18 pending in the Federal Court and in which claims of invalidity of additional sections of the Supplemental Agreement are raised (see paragraphs 66-70 of the Application). It is believed that *Abbott* is intended to be a test or lead case in this regard. Canada suggests therefore that the Plaintiffs herein may benefit from this test case and if so the harm cannot be characterized as "irreparable".

[114] However, I am mindful here that both *Wells* and *Abbott* are judicial review cases under section 18 of the *Federal Courts Act* and that counsel for the FNI has challenged the Plaintiffs' rights to pursue judicial review on the basis that the relevant statutory time period has expired. Thus, I cannot be confident that the Plaintiffs would have the availability of other avenues of relief from these Federal cases.

[115] In favour of a conclusion of "irreparable harm", Plaintiffs' counsel points to the following facts suggestive that Canada has not been attentive to either policy or procedural steps warranted by related litigation.

[116] Firstly, counsel suggest that the Plaintiffs' Statement of Claim was filed in February 2018 but the Enrolment Committee nevertheless provided the updated Founding Members List to the FNI and Canada on April 30, 2018.

[117] Secondly, he submits that *Wells* and *Brake* were filed on May 8, 2018 and suggested that reassessments or another amendment to the Settlement Agreement may follow from the declaration of invalidity of two sections of the Supplemental Agreement. Notwithstanding this development, Canada issued a Regulatory Impact Analysis Statement on May 19, 2018 confirming the intended Order in Council on June 25, 2018. (I note also that the Attorney General filed a motion for Reconsideration of *Wells* on May 18, 2018.)

[118] I agree that this confirmation of the intended Order in Council casts doubt on Canada's willingness to postpone the approval of the new Founding Members List.

[119] Further as Mr. Desjardins' testimony on June 17, 2018 confirmed, no decision has been made by the policy section of the Department of Crown Indigenous Relations and Northern Affairs Canada in respect of the *Wells* decision. I therefore cannot be assured that Justice Zinn's assumption (that either reassessments or amendments are likely) is accurate.

[120] The testimony of four of the Plaintiffs at the hearing supports the conclusion that the removal of their names would represent real, definite and unavoidable harm that cannot be monetarily quantified or cured. The witnesses spoke of the embarrassment, and loss of credibility associated with their loss of membership and related loss of registered Indian status and the deterioration that this would have on their pride as First Founding Members of the QMFN Band and recognized Indigenous persons.

[121] Each of the four witnesses spoke (in their own terms) with pride at being one of the First Founding Members of the Qalipu Mi'kmaq First Nation Band. Even if the Plaintiffs' names were ultimately restored as members at a future date, I am satisfied that their removal (contemplated on June 25, 2018) would represent a significant loss that was not capable of being compensated in monetary terms.

[122] The witnesses who testified (supported by their Affidavits) addressed potential financial losses from the non-insured health benefits program with which they currently have coverage as a registered Indian and/or the income tax benefits they enjoy.

[123] I am satisfied that the loss of these benefits would cause significant hardship to the Plaintiffs in the short term. The FNI suggests that such lost benefits may be compensable in the long-term. However, I note that Canada relies on section 4 of the *QMFN Act* in support of the position that it has eliminated the Plaintiffs' right to

compensation for any alleged wrongful removal from the List. If so, the financial losses are not compensable at all.

[124] In addition to their own losses, the loss of registered Indian status which will flow from the removal of the Plaintiffs as First Founding Members of the QMFN Band extends to their current or future children who receive benefits from their parents' status. I acknowledge that the ability to benefit future generations with registered status (with or without financial benefits) is a significant honour the Plantiffs.

[125] The Plaintiffs have satisfied this second element for interim extraordinary relief. The terms of the impugned Supplemental Agreement have resulted in the pending revocation of the Plaintiffs' status as First Founding Members of the QMFN Band and as registered status Indians. This would represent irreparable harm not otherwise compensable.

Balance of Convenience

[126] This component requires consideration of private and public rights and is not restricted to those of the parties to the litigation. I have already concluded that the Plantiffs stand to lose significant rights if the existing Schedule to the Recognition Order is replaced on Monday, June 25, 2018.

[127] Canada and the FNI cite the rights of the (net) 5,100 persons who (if the Order in Council is given) would be added to the Founding Members List. This is not a consideration on the balance of convenience because nothing this Court could declare in the context of this litigation concerning the private rights of the six Plantiffs could affect these 5,100 individuals.

[128] I agree with counsel for the FNI that the process which stands to be completed on Monday, June 25, 2018 represents the end of a dispute that arose in the 1970s to "right" an historic wrong in the non-recognition of Indigenous peoples in the

Dominion of Newfoundland at the time of the Confederation. There is an extraordinary public interest in having this negotiation concluded.

[129] However, once again, the within private action can have no effect on Canada's right to conclude matters for any applicant other than the six Plantiffs.

[130] There is also a recognizable public interest in having the Supplemental Agreement between Canada and the FNI enforced but such interest has been reduced since *Wells* because two sections of the Supplemental Agreement have already been declared invalid and, there are additional challenges made to the validity of the Supplemental Agreement in *Abbott* and in this litigation.

[131] Finally, there is another public interest at stake that tips the scales in the Plaintiffs' favour and that is the public interest in ensuring that any contract executed by Canada meets applicable legal standards and in the context of a contract affecting Aboriginal rights, that it receives the appropriate scrutiny to ensure that it safeguards the rights of the six Plaintiffs as Indigenous people.

[132] The third factor therefore also favours the Plaintiffs.

RELIEF

[133] Having determined the Plaintiffs' right to an extraordinary interim remedy against the FNI in this instance, what remedy is appropriate?

[134] Any declaratory relief must recognize that the work of the Enrolment Committee and Appeals Masters is (subject to what flows from *Wells*), complete. Neither the FNI nor Canada compiled the List, but the List was submitted to both on April 30, 2018. Mr. Desjardins confirmed in his testimony that he understood the Minister had recommended or was about to recommend that the Governor in Council

(Cabinet) make an Order in Council that the new Founding Members List be substituted for Schedule A to the Recognition Order in Council on Monday, June 25, 2018. Section 7 of the Supplemental Agreement mandates that the Minister do so ("will recommend").

[135] In these unusual circumstances, I believe the following Declaratory Order is appropriate.

DECLARATORY ORDER

Pursuant to section 371 of the *Corporations Act*, it is declared that (until determination of the validity of the Supplemental Agreement executed by the FNI and Canada on July 4, 2013, including Canada and the FNI's reliance on section 2.15 of the Settlement Agreement to amend it (and in particular the provisions thereof that required retroactive reassessment of the Plaintiffs' enrolment as members of the QMFN and resulted in their potential removal as FFM of the QMFN) without ratification:

1) The Plaintiffs have the right to have their names remain on the Founding Members List of the QMFN created under the Settlement Agreement;

2) The FNI shall take all steps necessary and within its power to ensure that the Plaintiffs' names remain as Founding Members of the QMFN. This would include (without limiting the generality of the foregoing) the following requirements:

    a) that the FNI reject or appeal the pending removal of the six Plaintiffs from the List submitted to it by the Enrolment Committee on April 30, 2008;

b) that the FNI advise the Minister of the declaration of the Plantiffs' rights and the restraint placed on the FNI by the Court in this respect; and

c) that the FNI request Canada to honour the declaration of the Plantiffs' rights and the restraint placed on the FNI in this respect.

[136] The declaratory relief I have granted the Plaintiffs against the FNI, directly affects Canada's contract with the FNI. Portions of the Supplemental Agreement have already been declared invalid in *Wells* and I understand from *Brake* that reassessments or amendments to the Supplemental Agreement may follow from these declarations of invalidity. The pending litigation in *Abbott* raises issues similar to those before this Court on the validity of the reliance on section 2.15 to amend without ratification.

[137] While the Plaintiffs have not met the tripartite test for interim declaratory relief against Canada in these circumstances, I can only trust that Canada will not take any steps that would render the effect of this decision nugatory.

_____

GILLIAN D. BUTLER
Justice