



Court File No. T- 201-18

IN THE FEDERAL COURT OF CANADA

BETWEEN:

**Shawn Benoit, Matthew Anderson,
Marie Tapp Melason, Bobbie Tapp Goosney,
Paul Bennett and Jennifer sue le Roux**
Plaintiffs

AND:

Federation of Newfoundland Indians Inc. (FNI)
First Defendant

AND:

Her Majesty the Queen (Canada)
Second Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Court Rules, 1998, serve it on the Plaintiff's solicitor or, where the Plaintiff does not have a solicitor, serve it on the Plaintiff, and file it, with proof of service, at a local office of this Court **WITHIN 30 DAYS** after this Statement of Claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States the period for serving and filing your statement of defence is sixty days.

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Copies of the Federal Court Rules, 1998, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

ORIGINAL SIGNED BY
MICHAEL KOWALCHUK
ORIGINAL SIGNÉ PAR

Issued by:

Registry Officer

Address of local office: 354 Water Street, Suite 209, St. John's, NL, A1C 1C4

TO: **The First Defendant**
Federation of Newfoundland Indians Inc. (FNI)
3 Church Street
Corner Brook, NL A2H 2Z4

TO: **The Second Defendant**
Her Majesty the Queen (Canada)
c/o Attorney General of Canada
Department of Justice Canada
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Halifax, NS B3J 1P3

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CLAIM

The Plaintiff Claims:

1. Rescission of the Supplemental Agreement entered into between the FNI and Canada dated July 4, 2013 (the "Supplemental Agreement") depriving the Plaintiffs of a fair and proper evaluation of their applications for inclusion within the Qalipu Mi'kmaq First Nation Band. (the "Qalipu Band")

2. A permanent injunction enjoining the enrollment committee established under the settlement agreement between the FNI and Canada dated June 23, 2008 (the "Settlement Agreement") from utilizing the revised evaluation criteria established under the Supplemental Agreement (the "revised criteria") either in the evaluation of ongoing enrollment applications or evaluations made as a result of the utilization of the revised criteria.
3. In the alternative a Declaration that the Supplemental Agreement was entered into by the FNI without proper corporate authority and contrary to the principles of contractual good faith.
4. Costs of the action jointly as against both Defendants.

Establishment of the FNI and Member Oppression

5. The FNI was established on August 20, 1984 as a not for profit corporation for the purpose, *inter alia*, to pursue the recognition of the rights of the Mi'kmaq of Newfoundland and continued pursuant to the provisions of the *Corporations Act*, R.S.N.L. 1990 c. C-36 (the "*Corporations Act*"). Pursuant to the originating Articles of Association which was then continued through by-laws adopted on continuation all members of bands located throughout Newfoundland became members of the FNI. (the "Original Membership")
 6. In pursuit of its stated objects the FNI commenced litigation in the Federal Court by way of Action under Court File T-129-89 seeking member recognition under the *Indian Act*, R.S.C. 1985 c. I-5.(the "Recognition Litigation")
 7. As a result of negotiations between Canada and the FNI a settlement of the Recognition Litigation was concluded with an agreement to establish a non-reserve status band to be known as the Qalipu Mi'kmaq First Nation Band.
 8. In pursuit of the Recognition Litigation settlement an agreement was signed between Canada and the FNI on June 23, 2008 agreeing to the discontinuance of said litigation.(the "Settlement Agreement")
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9. Ratification of the Settlement Agreement required the Original Membership of the FNI to approve the Settlement Agreement through a ratification vote.
 10. A ratification vote was held on the terms of the Settlement Agreement. The Settlement Agreement was ratified and executed by the FNI on June 23, 2008.
 11. Each of the Plaintiffs were part of the Original Membership of the FNI on the execution of the Settlement Agreement and were provided the opportunity to vote on the ratification of the Settlement Agreement.
 12. The Original By-laws of the FNI in place on the execution of the Settlement Agreement (the "Original By-laws") had, among other things, the following requirements;
 - a) The text of any special resolution was to be drafted and circulated to voting members **at least 21 days** prior the meeting with sufficient detail to allow members to form a reasonable judgment on it;
 - b) Terminated Members shall be entitled to Notice via registered mail and shall further have the right of appeal.
 13. On October 24/25 2009 at the FNI Annual General Meeting a special resolution was presented and vote taken in anticipation of the establishment of the Qalipu Band. (the "Special Resolution") The Special Resolution resolved to transfer all of the undertaking of the FNI to the Qalipu Band once established and the replacement of the existing by-laws. (the "Replacement By-laws") The stated purpose of the Replacement By-laws was to allow for operational efficiency due to an anticipated diminished role for the FNI on the establishment of the Qalipu First Nation Band.
 14. The Special Resolution had not been circulated prior to the meeting as required under the by-laws existing at that time. Voting members therefore had no time to consider or evaluate the content or the Special Resolution prior to a vote being called. A subsequent motion was presented to delay the adoption of the Special Resolution however this motion was rejected.
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15. The Replacement By-laws were not implemented until September 2012 following an annual general assembly (the "AGA"). The Replacement By-laws were again presented at the AGA as other business with a motion for adoption. Pursuant to the Article 2.10 of the Original By-laws voting members were to have been provided an opportunity to vote on any motion that would result in the change of the by-laws. No prior resolution was circulated or explained and no opportunity was provided to voting members to vote as the AGA did not include the voting members. The AGA was restricted to the band council members of the newly formed Qalipu Band and no others as if the Replacement By-laws had already been adopted. The September 2012 resolution for adoption of the Replacement By-laws was therefore made by the FNI without proper corporate authority.

The Enrollment Process and Creation of the Qalipu Band

16. The Settlement Agreement contemplated a two-stage enrollment process to create a non-reserve Mi'Kmaq Band on the island of Newfoundland to be known as the Qalipu Mi'Kmaq First Nation Band. The first stage was to include applicants who were current members of the FNI while the second stage was open to all who could establish grounds for enrollment pursuant to the terms of the Settlement Agreement. The first stage of enrollment was to be completed on November 30, 2009 and second stage on November 30, 2012.
 17. On the conclusion of the first stage of enrollment 23,877 applicants were qualified for the first founding members list and 3000 were rejected. Pursuant to the terms of the Settlement Agreement the Qalipu Mi'kmaq First Nation was created pursuant to an Order in Council on September 22, 2011. (the "Band Order")
 18. As a result of the Band Order the qualifying applicants from the first stage of enrollment were recognized as members of the Qalipu Band and provided status pursuant to the Indian Act.
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19. At the time of the Band Order the second stage of enrollment was ongoing. On the conclusion of same on November 30, 2012 a total of 101,743 applications for membership in the Qalipu Band had been received.

The Supplemental Agreement

20. As the number of applications for membership increased it was recognized that the volume of applications had far exceeded expectations. Canada therefore requested the FNI to renegotiate the Settlement Agreement with the imposition of significantly more restrictive evaluation criteria for use by the enrollment committee. (the "Restrictive Criteria")
 21. The ratification of any amendment of the Settlement Agreement presented the logistical problem of ratification by the Original Membership. It was therefore determined that the Replacement By-laws would be signed into effect to circumvent the requirement for ratification by the Original Membership of the FNI as the Replacement By-laws restricted membership to the band council of the Qalipu Band and no others. (the "Restricted Membership")
 22. The Replacement By-laws were signed into effect on September 12, 2012. The Original Membership of the FNI prior to September 2012 was in excess of 20,000. The adoption of the 2012 by-laws effectively terminated the membership of substantially all of the Original Membership in favor of the Restricted Membership.
 23. The Original By-laws required that written notice of termination be sent to those terminated by registered mail and that they be provided a right to appeal their termination. No notice was provided to terminated members on the adoption of the Replacement By-laws and no right of appeal was given.
 24. Following the execution of the Replacement By-laws the Restricted Membership then completed a Supplemental Agreement with Canada severely curtailing the availability of Qalipu Band membership. This agreement was executed on July 4, 2013. There was no ratification by the Original Membership.
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25. The terms of the Supplemental Agreement included significant retroactive changes and/or restrictive interpretations as compared to the Settlement Agreement including, but not limited to the following;
- a) Appeal rights removed for particular Enrollment Committee decisions;
 - b) Specific restrictions and thresholds imposed for the following criteria;
 - i) Connection to the Mi'kmaq community;
 - ii) Connection with family members;
 - iii) Residency in the vicinity of Newfoundland Mi'kmaq communities;
 - iv) Participation in Mi'kmaq activities;
 - v) Connection to Mi'kmaq culture and way of life;
 - vi) Evidentiary requirements for applicants.

(the "Restrictive Criteria")

Contractual Good Faith and Breach of the Settlement Agreement

26. The effect of the Supplemental Agreement has been to severely restrict the membership in the Qalipu Band through the implementation of the Restrictive Criteria in the enrollment process. The First Founding Members List after the application of the Restrictive Criteria has been reduced from 23,877 eligible applicants to 13,365. After processing the additional 68,134 applications from the second stage of enrollment only 4679 were found to have been eligible after application of the Restrictive Criteria.
27. The second stage of the enrollment process under the Settlement Agreement presented Canada with both financial and logistical problems. The number of applications received in
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the second stage far exceeded what Canada had anticipated. Based upon the prior rate of acceptance it was anticipated that the number of accepted applications would far exceed the then current band membership creating a financial burden associated with the extension of benefits. Canada and the leadership of the FNI also had the logistical problem of the enrollment committee associated with the processing of the volume of applications within a reasonable period of time.

28. In response to the issues associated with the implementation of the Settlement Agreement Canada embarked upon a process with the leadership of the FNI to amend the Settlement Agreement.
 29. Pursuant to article 2.15 of the Settlement Agreement any amendment of the agreement could only be made using the same procedure for ratification ie. a vote of the Original Membership. This requirement was subject to the qualification that amendments to remove conflicts and inconsistencies that are not prejudicial to the interests of the parties can be completed by written agreement of the parties.
 30. Canada convinced the leadership of the FNI to circumvent the Original Membership in concluding the Supplemental Agreement on the basis that the Supplemental Agreement was an exception to the ratification requirement and therefore did not require a ratification vote by the Original Membership. At that time Canada was aware that the Restrictive Criteria that it was seeking to have adopted would severely limit those qualifying for inclusion within the Qalipu Band and therefore was prejudicial to the interests of the Original Membership.
 31. Canada knew or ought to have known that the terms of the Supplemental Agreement constituted a substantive change to the Settlement Agreement. The failure to refer the Supplemental Agreement to the Original Membership for ratification therefore constitutes a breach of article 2.15 of the Settlement Agreement. The failure of the FNI to uphold its rights under article 2.15 of the Settlement Agreement therefore constitutes a further act of oppression of the Original Membership.
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32. Pursuant to the decision of the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 S.C.C. 71, each of the parties have an overarching duty to act in good faith in the conclusion of their contractual dealings. In convincing the FNI to accept the Supplemental Agreement significantly restricting the ability of the Original Membership to qualify for inclusion Canada has fallen below the standard expected. Canada knew or ought to have known that the effect of the Supplemental Agreement would be to deny acceptance to a significant number of those that had been accepted and severely limit the ability of other applicants to be accepted for inclusion within the Qalipu Band. These limitations were contrary to the spirit and intent of the original Settlement Agreement. Canada would also have known that the Original Membership would not have been consulted or ratified the Supplemental Agreement however persisted in its implementation.
 33. The actions of Canada and the leadership of the FNI to amend the terms of the Settlement Agreement through the Supplemental Agreement was to the clear detriment of the Original Members of the FNI and falls below the standard of good faith required in contractual dealings. The failure of the FNI to uphold the right of the Original Membership to contractual good faith in the completion of the Settlement Agreement with Canada also constitutes oppression of the Original Membership.
 34. Canada knew or ought to have known of the oppressive acts taken by the FNI to enable the adoption of the Supplemental Agreement. Canada and the FNI knew that the Supplemental Agreement would never be ratified had it been submitted to the Original Membership for approval. The Supplemental Agreement is therefore the direct result of the oppressive acts undertaken by the FNI to the detriment of the Original Membership of which Canada knew or ought to have known on the execution of same.
 35. The Plaintiffs plead the provisions of the *Corporations Act*, s. 371 and state that actions taken by the FNI constitute member oppression on the following grounds;
 - a) The adoption of a Special Resolution to replace the by-laws of the corporation without proper notice or detail provided to voting members in contravention of the existing by-laws;
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- b) The refusal to allow the membership to review and consider the new by-laws prior to adoption;
- c) The failure to adhere to member expectations regarding membership;
- d) The termination of substantially all of the membership of the corporation without notice;
- e) The failure to properly notify the membership of the termination in accordance with existing by-laws;
- f) The failure to provide a proper or any avenue of appeal to terminated members to appeal the termination of their membership.
- g) The failure to ensure Canada's adherence to the terms of the Settlement Agreement in relation to the ratification process for any amendments;
- h) The failure to ensure Canada's compliance with the principle of contractual good faith in the implementation of the Supplemental Agreement;
- i) The failure to properly prosecute the charitable purpose for which the FNI was established by the failure to protect and promote the interests of all Mi'kmaq people in Newfoundland as a result of the adoption of the Supplemental Agreement;

(the "oppressive acts")

- 36. The *Corporations Act*, s. 371 contains a broad latitude to rectify oppression once a finding has been made. Included within the remedies available under s. 371(3)(h) is the capacity to vary or set aside a transaction or contract entered into by the corporation.
- 37. The Supplemental Agreement is an extension of the original Settlement Agreement which is a contract entered into between the FNI and Canada for the resolution of the ongoing litigation and as such is an extension of the contract of settlement between Canada and the

FNI. The oppressive acts have resulted in the adoption of the Supplemental Agreement therefore it is right and just that the Supplemental Agreement be rescinded pursuant to the authority granted under s. 371(3)(h) of the *Corporations Act* to rectify the member oppression that has occurred.

Injunction Request

38. Should the Court see fit to vary or rescind the Supplemental Agreement the implementation of this decision requires that applications previously evaluated by the enrollment committee utilizing the criteria under the Supplemental Agreement be suspended and re-evaluated pursuant to the criteria as set forth under the original Settlement Agreement.
39. Pursuant to the provisions of the *Federal Courts Act*, R.S.C. 1985 c. F-7, s. 17 the Court retains equitable jurisdiction in matters involving the Crown's obligations under contract. The Plaintiffs seek a permanent injunction prohibiting the enrollment committee from further processing of applications utilizing the criteria under the Supplemental Agreement and submission of a final members list to Canada under the Settlement Agreement.
40. Where the injunction requested arises in respect of the completion of the work of the enrollment committee under the terms of the Settlement Agreement the Court retains jurisdiction to Order same as it does not interfere with Canada's legislative prerogative.
41. In the alternative, in the event that the Court does not accept jurisdiction to provide injunctive relief, the Plaintiffs ask for a Declaration that the Supplemental Agreement is oppressive and unfair and that further member evaluations by the enrollment committee be suspended and current completed evaluations be held pending review based solely upon the criteria under the Settlement Agreement. Authority for the Declarative order sought in the alternative and is available to the Court through the provisions of the *Federal Courts Act*, s. 17.

Relief Sought

42. The Plaintiffs seek the following relief;

- a) A finding of member oppression pursuant to the *Corporations Act* together with an Order rescinding the Supplemental Agreement;
- b) A permanent injunction as against the enrollment committee established under the Settlement Agreement prohibiting the further consideration of membership applications or submission of membership lists derived through the application of the criteria established under the Supplemental Agreement;
- c) In the alternative, a Declaration that the Supplemental Agreement is oppressive and unfair and that all existing and future applications for membership ought to be evaluated without reference to the criteria as established under the Supplemental Agreement;
- d) Costs on the Action as against both Defendants; and
- e) Such other award as this Honorable Court deems just.

The Plaintiff proposes that this action be tried at St. John's, Newfoundland and Labrador.

DATED AT St. John's, in the Province of Newfoundland and Labrador, this 2nd day of February, A.D., 2018.



Keith S. Morgan

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Solicitors for the Plaintiffs

Whose address for service is:

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I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the 2nd

day of February A.D. 20 18

Dated this 2nd day of February 20 18



M. Kowalchuk
Registry Officer
Agent du greffe