Federal Court  Cour fédérale

Date: 20110614

Docket: T-129-89

Citation: 2011 FC 683

Ottawa, Ontario, June 14, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

THE FEDERATION OF NEWFOUNDLAND INDIANS, CALVIN WHITE, CLIFTON GAUDON, AUDREY STANFORD, CALVIN FRANCIS, WILSON SAMMS, EDWARD WEBB, ANDREW TOBIN, BENEDICT WHITE AND TERRY MILLS

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

REASONS FOR ORDER AND ORDER

Introduction

[1] By Notice of Motion dated February 1, 2010, the Plaintiff, Mr. Calvin White, seeks the following relief:

> 1. An Order vacating the draft Consent Order which dismisses the within action;

> 2. An Order vacating the Release signed by Calvin White;
>
> 3. An Order/ Injunction preventing the Defendant through the Minister of Indian and Northern Affairs from presenting the First Founding Members List to the Governor in Council seeking a Recognition Order of the Qalipu Mi-kmaq First Nation Band until further order from this Honourable Court;
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> 4. Costs; and
>
> 5. Such other Orders as the Honourable Court deems mete and just.

Background

[2] On January 12, 1989, this action was commenced upon the filing of a Statement of Claim in the names of the Federation of Newfoundland Indians ("FNI"), Calvin White, Clifton Gaudon, Lawrence Jeddore, Calvin Francis, Wilson Samms, Marie Sparkes and Effie Scanlon (the "Plaintiffs"). Her Majesty the Queen in Right of Canada (the "Defendant") and the Minister of Indian Affairs and Northern Development (the "Minister") were named defendants. By Order dated April 1, 2003, the Minister was struck as a defendant, and ceased to be a party to this action.

[3] In that Statement of Claim the Plaintiffs sought the following relief:

> 1) Declaring that the FNI Members are "Indians" within the meaning of s. 91(24) of The Constitution Act, 1867.
>
> 2) Declaring that the failure of Canada to provide the Plaintiffs with the benefits, entitlements and rights provided to other recognized Indians and Indian bands, including members of the Conne River (Miawpukek) Band, is discriminatory, and contrary to Section 15(1) of the Charter;
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> 3) Declaring that the FNI Members are entitled to receive benefits from Canada comparable to those provided by Canada to the Conne River (Miawpukek) Band members under the Canada/Newfoundland/Native Peoples Conne River Agreement of 4 July 1981, and any successor agreement;

> 4) Directing the Governor-in-Council to recognize the member Bands of the Federation as bands under The Indian Act; and
>
> 5) Awarding damages to the Federation for the breach by Canada of its fiduciary obligation to the member Bands of the Federation, which breach was Canada's failure to extend the benefits of The Indian Act and the CNA to them.

[4] The purpose of this action was to obtain recognition of Micmac, now "Mi'kmaq" in Newfoundland and Labrador as "Indians" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act"). The Plaintiff, the FNI, is a body corporate organized and existing under the laws of the Province of Newfoundland and Labrador, as the representative of the interests of Mi'kmaq Indians in that Province who are not registered as Indians under the Act.

[5] Mr. White was one of the original individual Plaintiffs in this action. All the individual Plaintiffs were described as Mi'kmaq Indians in the Province of Newfoundland and Labrador. Mr. White was and is a member of the FNI. According to the Further Amended Statement of Claim filed on October 19, 1990, Mr. White is also a member of the Flat Bay Local Band.

[6] The other individual Plaintiffs (the "other Plaintiffs") likewise are Mi'kmaq Indians in the Province of Newfoundland and Labrador, and Chiefs of various bands in that Province. The Federation and the other Plaintiffs oppose Mr. White's motion.

[7] From time to time, Orders issued amending the names of the Plaintiffs, up to and including an Order made on October 16, 2008 which provided the following at paragraph 6(a):

> 6. The amended statement of claim be further amended as follows:

> (a) The Plaintiffs, presently identified in the style of cause as:
>
> The Federation of Newfoundland Indians, Calvin White, Clifton Gaudon, Lawrence Jeddore, Calvin Francis, Wilson Samms and Marie Sparks
>
> Shall be identified as:
>
> > The Federation of Newfoundland Indians, Calvin White, Clifton Gaudon, Audrey Stanford, Calvin Francis, Wilson Samms, Edward Webb, Andrew Tobin, Benedict White and Terry Mills.

[8] The matter did not proceed to a trial but over the course of the years, discussions took place between the parties. By November 30, 2007 FNI and the Defendant (the "Parties"), reached an agreement in principle for the recognition of the Qalipu Mi'kmaq Band (the "Band") in Newfoundland and Labrador. On June 23, 2008, after ratification by the Parties, the Defendant and the FNI signed the Agreement (the "Agreement").

[9] The Agreement effectively delivers the relief sought by Mr. White, the FNI and the other Plaintiffs, that is the recognition "of a landless band for the Mi'kmaq group of Indians of Newfoundland", as appears from the preamble of the Agreement.

[10] Clause 8.2 of the Agreement states that it is of no force and effect until the Plaintiffs in this action execute a full and final release (the "Release"), attached as Annex G to the Agreement. The Plaintiffs, including Mr. White, executed the same copy of the Release, and each Plaintiff also executed a copy of the Release individually. According to the affidavit of Mr. Roy Gray dated

October 6, 2008, and filed in support of the Notice of Motion underlying the Consent Order of October 16, 2008, the Releases in question had been received by the Defendant by October 6, 2008.

[11] The execution of the Agreement led to a further Order that was issued by the Court on October 16, 2008 in the following terms:

> **THIS COURT ORDERS** that:
>
> 1. The action is dismissed without costs.
>
> 2. Paragraph 1 of this Order shall take effect on the date of the passage of the recognition order by the Governor-in-Council as provided for in Chapter 3 of the Agreement, proof of which shall be filed with the Registry of the Court within ten (10) business days of the date thereof.
>
> 3. In the event that the said recognition order is not issued within thirty (30) months of the date of this order, Court shall retain jurisdiction for the sole purpose, on motion of the parties of amending this order to extend the aforesaid time period, or of vacating this order, as applicable.

[12] Mr. White filed two affidavits in support of his motion. In his first affidavit, dated February 1, 2010, he expressed concerns about the process leading up to the creation of the Qalipu Mi'kmaq Band, including the process for the establishment of the First Founding Members List. Paragraphs 3, 4 and 5 of this affidavit provide as follows:

> 3. I consented to the adoption of the "Agreement for the Recognition of the Qalipu Mi'kmaq First Nation Band" (hereinafter called the Agreement), based on how it was presented to me and was willing to discontinue this Action on behalf of myself and that of the Flat Bay Band after the Recognition Order for the Qalipu Mi'kmaq First Nation Band was granted by the Governor in Council, with the understanding that as long as I and my fellow Band Members applied to be a member before November 30, 2009 we would be on the First Founding Members List and a member of the Qalpiu Mi'kmaq First Nation Band upon its creation. **Attached hereto as Exhibit A is the Agreement.**

> 4. During the negotiations which resulted in the Agreement, which I was an active part of, it was represented to me that I and my fellow Band Members, as Plaintiffs in the Federal Court Action, would be on the First Founding Members List, but it appears that is not the case.
>
> 5. It was also represented to me and many other Applicants that there was a November 30, 2009 deadline, in which by that time, our application had to have been submitted to the Enrolment Centre. It was not until November 27, 2009 that we were informed that based on the November 30, 2009 deadline it was only the applications which had been processed by then that would form part of the First Founding Members List. **Attached hereto as Exhibit B is a press story in which for the first time we found out we would not be on the First Founding Members List, dated November 27, 2009.** [emphasis in original].

[13] With leave of the Court, Mr. White filed a further affidavit sworn to on September 8, 2010. He sought leave to file the supplementary affidavit in order to introduce more recent evidence relating to his Notice of Motion of February 1, 2010.

[14] Two exhibits were attached to his second affidavit, the first was an extract from the website maintained by Indian and Northern Affairs Canada entitled "Frequently Asked Questions – Agreement between Canada and The Federation of Newfoundland Indians". The second exhibit was a copy of a letter dated August 20, 2010 from the office of the Enrolment Committee that had been established pursuant to the Agreement for the Formation of the Qalipu Mi'kmaq First Nation Band. The letter, signed by Mr. Thomas G. Rideout, Chair of the Enrolment Committee, contained the following statements:

> The Committee finds that you **do meet** the criteria to be enrolled as a Founding Member of the Qalipu Mi'kmaq First Nation Band pursuant to the terms of the Agreement governing its formation and your application to be enrolled as a Founding Member of the Qalipu

> Mi'kmaq First Nation Band is **hereby approved**. [emphasis in original]
>
> …
>
> Once the List has been updated to include your name, you will be contacted to confirm your membership in the new Band, your registration on the Indian Register and your eligibility for programs and benefits related to your membership.

[15] The Defendant filed two affidavits of Mr. Ray Hatfield in response to the affidavits filed by Mr. White. Mr. Hatfield is the Director General, Individual Affairs, Indian and Northern Affairs Canada and has served in that position since June, 2000.

[16] The other Plaintiffs filed the affidavit of Mr. Brendan Sheppard in opposition to the present motion. Mr. Sheppard is the President of the FNI and has held that post since 1994.

[17] In their affidavits, Mr. Hatfield and Mr. Sheppard provide information on the negotiation and implementation of the Agreement.

[18] Following the recognition in 1982 of the Mi'kmaq people of Conne River as being eligible for registration under the Act, the FNI continued its efforts to obtain recognition under the Act for other Mi'kmaq peoples in Newfoundland and Labrador. Following the commencement of this action in 1989, the FNI attempted to negotiate an agreement with the Government of Canada.

[19] A tentative agreement in principle was presented to FNI's Board of Directors in September 2006. Continual negotiations between the Parties began in November 2006, resulting in the conclusion of the Agreement on November 30, 2007.

[20] The Agreement included a ratification process among members of the FNI and a ratification vote was held on March 30, 2008, with a 90 percent positive vote in favour of the Agreement. The Parties executed the Agreement on June 23, 2008.

[21] According to Mr. Hatfield and Mr. Sheppard, the Agreement provided for a two-stage enrolment process where the first stage would last for 12 months, and the second stage would continue for a three year period thereafter. Those who had their applications for membership approved during the first stage would have their names placed on the First Founding Members List (the "First Founding Members List"). Those individuals who applied after the first stage, or whose applications were not determined prior to the conclusion of the first stage, would be determined during the second stage.

[22] The Enrolment Committee began accepting membership applications on December 1, 2008. An unexpectedly high number of applications were received up to November 30, 2009, that is 25,912 applications. By that date, 11,012 applications had been approved.

[23] The First Founding Members List was provided to the Parties on February 2, 2010. The number of names on the First Founding Members List exceeded 50% of the number of FNI members at the time the Agreement was executed. According to Mr. Hatfield, Indian and Northern Affairs Canada began carrying out work relative to the issuance of an Order-in-Council by the Governor-in-Council for the creation of the Band, including the preparation of a draft Recognition Order.

[24] Since a large number of membership applications remain to be considered, the Parties agreed on an accelerated process for updating the Founding Members List. Although the Agreement contemplated an update of the Founding Members List 36 months after compilation of the First Founding Members List, the accelerated process meant that the Founding Members List would be updated every four months after recognition of the Band pursuant to the Order-in-Council.

[25] The introduction of the accelerated process was a step that was agreed to by the Parties, without being put to a ratification vote among the membership of the FNI. According to Mr. Sheppard, the purpose of this accelerated process was to make sure that "eligible members of the Mi'kmaq of Newfoundland" became members of the new Band as soon as possible. He noted that the date of the First Band election was extended to permit those added to the list as part of the accelerated process to participate in the first election, by running for office and voting. The establishment of the accelerated process was communicated to the membership by means of a press release located on the website of the FNI.

[26] In his affidavit, Mr. Sheppard also responded to certain allegations made by Mr. Calvin White in his affidavit dated February 1, 2010. Specifically, he set out his understanding that Mr. White's application for membership was currently pending and that Mr. White had not been denied any right to be added to the Founding Members List nor denied the right to vote, hold office, apply for employment or enjoy any of the other rights and benefits available to any member of the FNI. Further, he said that he was unaware of any representations made to Mr. White that he had "any

particular entitlement to be added to the Founders List other than the same rights as any other qualified applicant".

[27] Finally, Mr. Sheppard stated that the FNI was intended to proceed with the Agreement:

> … so as to allow the recognition of the Qalpiu Mi'kmaq First Nation Band and that this process will continue until such time as the matter is placed before the Governor in Council for a recognition order to give the Band status under the *Indian Act*.

Submissions

[28] In this motion, Mr. White seeks to set aside the Court Order of October 16, 2008, to vacate the Release he signed and to obtain an injunction stopping the Defendant, through the Minister, from presenting the First Founding Members List to the Governor-in-Council, in support of the issuance of an Order-in-Council that recognizes the Qalipu Band.

[29] Mr. White essentially argues that he expected to be included in the First Founding Members List and that his exclusion from that list, due to the delay in the processing of an unexpectedly high number of applicants, gives rise to a case of differential treatment, "two classes" of membership that will prejudice the rights of those persons not included in the First Founding Members List. Mr. White alleges that non-inclusion on the First Founding Members List negatively impacts upon a person's ability to vote or run in Band elections, apply for certain jobs offered to Status Indians, partake in benefits and social programs offered by the Department of Indian Affairs and Northern Development, and access benefits currently offered by FNI.

[30] Further, Mr. White submits that he signed the Release on the understanding that he would be included on the First Founding Members List and that his non-inclusion on that list amounts to failure of consideration, thereby justifying the vacation of the Release.

[31] Mr. White also argues that he is acting in a representative capacity in this action and that he is seeking relief not only on a personal basis but also in respect of all those whom he represents.

[32] The other Plaintiffs and the Defendant oppose the motion. In their written and oral submissions these parties argued that the motion should be denied since Mr. White had failed to meet the evidentiary and legal burden of showing that any of the relief sought should be granted. These parties also submitted that Mr. White's motion can only be treated as a personal motion, made on a personal basis since no Order was made granting him status as a representative.

Discussion and Disposition

i) Procedural Background

[33] When this action was commenced in February, 1989, Mr. White and the other individual Plaintiffs sued simply in their own personal capacity. The Statement of Claim was amended, for the first time, on October 19, 1990. At that time, Mr. White purported to sue in his individual capacity and also ask the "representative for the individual members of the Flat Bay local band…".

[34] In 1990, representative proceedings in this Court were governed by Rules 1708 to 1711 of the *Federal Courts Rules*, C.R.C. 1978, c. 663 (the "former Rules"). Rule 1711 of the former Rules is relevant and provides as follows:

> (1) Where numerous persons have the same interest in any proceeding, the proceeding may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
>
> (2) At any stage of a proceeding under this Rule, the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceeding; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order adding that person as a defendant.
>
> (3) Where an order is made under this Rule, it shall contain directions as to consequential pleadings or other steps and any interested party may apply for supplementary directions.
>
> (4) A judgment or order given in a proceeding under this Rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceeding without leave of the Court, which leave will only be granted on an application notice of which has been served personally upon the person against whom it is sought to enforce the judgment or order.
>
> (5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.
>
> (6) The Court hearing an application for leave under paragraph (4) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.

[35] Rule 1711 of the former Rules was replaced by Rule 114 of the *Federal Courts Rules* in 1998. Rule 114, at that time, provided as follows:

(1) *Representative proceedings* - Where two or more persons	(1) *Recours collectif* – Lorsque des personnes ont un intérêt

have the same interest in a proceeding, the proceeding may be brought by or against any one or more of them as representing some or all of them.	commun dans une instance, celle-ci peut être engagée par ou contre l'une ou plusieurs de ces personnes au nom de toutes celles-ci ou de certaines d'entre elles.
(2) *Motion to appoint representative* – At any time, the Court may, on motion, appoint a person to represent some or all of the parties in a proceeding referred to in subsection (1).	(2) *Représentant désigné sur requête* – Dans une instance visée au paragraphe (1), la Cour peut, à tout moment, sur requête, désigner une personne en tant que représentant de toutes les parties ou de certaines d'entre elles.
(3) *Where representative not a party* – Where under subsection (2) the Court appoints a person not named as a party to the proceeding, it shall make an order adding that person as a party.	(3) *Constitution en partie* – Si la personne désignée aux termes du paragraphe (2) n'est pas une partie, la Cour rend une ordonnance constituant cette personne partie à l'instance.
(4) *Order binding on represented persons* – An order in a proceeding referred to in subsection (1) is binding on all represented parties, but shall not be enforced against them without leave of the Court.	(4) *Effet de l'ordonnance* – L'ordonnance rendue dans une instance visée au paragraphe (1) lie toutes les personnes représentées, mais ne peut être exécutée contre celles-ci sans la permission de la Cour.

[36] Rule 114 was repealed in 2002; see SOR/2002-417, s. 12. Former Rule 114, which applied only to actions, was repealed in 2002 when rules relating to class actions were first introduced in the Federal Court. However, Rule 114 was reintroduced, in an amended form, in 2007 pursuant to SOR/2007-301, s. 4.

[37] The status of the Plaintiffs, including Mr. White, as representatives, was raised as an issue in the course of case management of this file, as appears from the Index of Recorded Entries and the various orders and directions issued in the case management process. In this regard, I refer to the Plaintiffs' motion to amend their Statement of Claim in February 2002, and the Defendant's motion to strike FNI as a plaintiff in April 2004. Among others, these motions were heard on November 14 and 25, 2002.

[38] By February 2003, the rule on representative proceedings had been repealed and the rule concerning class actions had been introduced. Justice Blanchard, as case management Judge, issued a Direction in the following terms on February 18, 2003:

> … Please advise counsel in the above noted matter that they should be prepared to speak to the following subjects at the teleconference scheduled for March 6, 2003, at 9:30 a.m. E.S.T. 1. Application of new class action rules and their impact on issues raised and under reserve on motions heard on November 14 and 15, 2002…

[39] On March 6, 2003, the parties agreed that the Plaintiffs would file a motion for certification of the action as a class action. This motion was filed by the Plaintiffs on September 17, 2003. However, this motion was never adjudicated. No order was ever issued with respect to the status of this proceeding as a representative proceeding and more particularly, with respect to the status of Mr. Calvin White as a representative Plaintiff.

[40] By the time the motion had been filed in September 2003, the Parties were engaged in negotiations. The file and the Index of Recorded Entries show that active progression of this file was held in abeyance, governed by "rolling" 180 day abeyances. Ultimately, the Court was advised

that an Agreement had been reached between the Parties and upon the request of the parties, a Consent Order was issued on October 16, 2008.

[41] The status of the Plaintiff Mr. White did not become an issue in this proceeding until this present motion was brought, seeking to set aside the Consent Order and the vacation of the Release that was signed by Mr. White.

[42] In my opinion, the arguments that he is now advancing are neither well-founded nor relevant.

[43] At the time the action was commenced, Rule 1711 of the former Rules provided for representative proceedings by plaintiffs without an order of the Court. Rule 1711(1) provided that an action may be begun "where numerous persons have the same interest in any proceeding" unless the Court otherwise ordered. No order was made between the time the action was commenced and when the current Rules came into effect on April 25, 1998. Rule 501 of the Rules, in 1999 provided as follows:

(1) *Ongoing proceedings* – Subject to subsection (2), these Rules apply to all proceedings, including further steps taken in proceedings that were commenced before the coming into force of these Rules.	(1) *Instances en cours* – Sous réserve du paragraphe (2), les présentes règles s'appliquent à toutes les instances, y compris les procédures engagées après leur entrée en vigueur dans le cadre d'instances introduites avant ce moment.
(2) *Order for exceptions* – The Chief Justice may, by order, direct that rule 380 shall not apply to certain proceedings or classes of proceedings pending	(2) *Exceptions* – Le juge en chef peut, par ordonnance, soustraire à l'application de la règle 380 certaines instances ou catégories d'instances en cours

on the coming into force of these Rules until a date or dates set out in the order.	au moment de l'entrée en vigueur des présentes règles, jusqu'à la date ou aux dates prévues dans l'ordonnance.

[44] Rule 501 currently provides as follows:

Ongoing proceedings	Instances en cours
501. (1) Subject to subsection (2), these Rules apply to all proceedings, including further steps taken in proceedings that were commenced before the coming into force of these Rules.	501. (1) Sous réserve du paragraphe (2), les présentes règles s'appliquent à toutes les instances, y compris les procédures engagées après leur entrée en vigueur dans le cadre d'instances introduites avant ce moment.
Order for exceptions	Exceptions
(2) The Chief Justice of the Federal Court of Appeal or the Federal Court, as the case may be, may, by order, direct that rule 380 shall not apply to certain proceedings or classes of proceedings before their court that are pending on the coming into force of these Rules until a date or dates set out in the order.	(2) Le juge en chef de la Cour d'appel fédérale ou de la Cour fédérale, selon le cas, peut, par ordonnance, soustraire à l'application de la règle 380 certaines instances ou catégories d'instances relevant de sa juridiction et qui sont en cours au moment de l'entrée en vigueur des présentes règles, jusqu'à la date ou aux dates prévues dans l'ordonnance.

[45] It is clear from Rule 501(1) that the "new" Rules applied to all proceedings that were commenced under the former Rules. If there was an issue as to the status of Mr. Calvin White as a representative, once the current Rules came into effect, it should have been addressed. From my review of the file and the Index of Recorded Entries, that status became an issue at some time in 2003, leading to the Direction from the case management Judge. However, in light of the continuing

negotiations between the FNI and the Defendant, which led to the Agreement, the motion concerning the representative status of the Plaintiffs was never adjudicated.

[46] Mr. White did not bring a motion for representative status. He has only asserted that status in the three Amended Statements of Claim. The Order of October 16, 2008, allowing for the Third Amended Statement of Claim, did not grant him representative status.

[47] As noted above, once the current Rules came into effect on April 25, 1998, those Rules applied to this proceeding. Rule114, dealing with representative proceedings, was repealed in 2002 but reinstated in 2007. That Rule requires an Order for the recognition of representative status. No such Order was ever made in this proceeding.

[48] In the result, I find that Mr. White is acting only in his personal capacity, both in this action and in this motion. My opinion in this regard is supported by the fact that he executed the Release only in his personal capacity and not as a representative.

ii) Substantive Disposition

[49] The present motion seeking to set aside the Consent Order and to vacate the Releases is not dependant upon the status of Mr. Calvin White as a representative Plaintiff. Furthermore, the Agreement required all the individual Plaintiffs to sign a Release. The execution of the Release was a necessary condition for the issuance of the Consent Order.

[50] The heart of Mr. White's complaint is that his name is not included on what he calls the "First Founders List". Although he argues that he received a representation that his name would be included on that first list, this position is contradicted by his own evidence upon cross-examination on his affidavit. In that regard, I refer to page 111 of that cross-examination, as follows:

> Q. Okay, so again, and I don't mean to belabour it but lawyers are, we tweak these things so when you say it was represented to you, no one in particular said to you specifically that you would be on the founding members list per se, that was something that…
> A. Not a person, no.
> Q. That was something you took from reviewing the agreement.
> A. From reviewing the, yes, from reviewing the agreement.

[51] The key to the disposition of this motion is the Agreement. As noted above, execution of this Agreement provides for the establishment of a landless band in Newfoundland and Labrador comprised of Mi'kmaq Indians who, upon issuance of the Recognition Order, will obtain recognition as Indians pursuant to the Act. "Recognition Order" is defined in the Agreement as follows:

> 1.18 Recognition Order
>
> "Recognition Order" refers to the Order-in-Council establishing the Mi'kmaq Group of Indians of Newfoundland as a band for the purposes of the *Indian Act*, pursuant to paragraph (c) of the definition of band under subsection 2(1) and subsection 73(3) of the *Indian Act*.

[52] Chapter 3 of the Agreement is entitled "Band Recognition and Registration". This chapter of the Agreement sets out the circumstances upon which the Band will be recognized. Section 3.1 of Chapter 3 provides as follows:

> Chapter 3 Band Recognition and Registration
>
> 3.1 Upon receipt of the First Founding Members List established by the Enrolment Committee, and provided that this list includes a

> number of names at least equivalent to fifty percent (50%) of the number of members of the FNI at the time of the initialing of this Agreement, the Minister shall recommend the issuance of the Recognition Order by the Governor-in-Council.

[53] Although this provision refers to a "First Founding Members List", that term is not separately defined in the Agreement. Rather, there is a definition of "Founding Members List" which refers to a "First Founding Members List". The definition of "Founding Members List" provides as follows:

> 1.10 Founding Members List
>
> "Founding Members List" refers to the list of Founding Members established by the Enrolment Committee from a first Founding Members List ("First Founding Members List"), established after the first stage of the Enrolment Process, amended by the addition of the names on a second Founding Members List ("Second Founding Members List") established after the second stage of the Enrolment Process.

[54] It is clear from the evidence of Mr. Brendan Sheppard, President of the FNI, that there is only one Founders List. It was to be composed following a two stage enrolment process, all as detailed in the Agreement, specifically Chapter 4. The Founding Members List would consist of those names on a First Founding Members List, following completion of the first stage of the enrolment process. The Founding Members List would be amended by the addition of those names on a Second Founding Members List, to be completed after the second stage of the enrolment process.

[55] The Band would come into existence only upon the issuance of the Recognition Order. The effect of the Recognition Order, when issued by the Governor-in-Council, is set out in section 3.2 as follows:

> 3.2 The recommended Recognition Order shall declare that the body of Indians made up of the persons named on the Founding Members List, attached as a schedule to the Recognition Order, is a band for the purposes of the *Indian Act*.

[56] The issuance of the Recognition Order is the ultimate goal of the Agreement. The Agreement, providing for the issuance of that order was conditional upon the Parties and the individual Plaintiffs seeking a Consent Order dismissing the present action, together with the execution of Releases by all Plaintiffs in this action. These conditions are set out in Chapter 8 of the Agreement. Section 8.1 specifically provides that the "draft consent order shall contain a provision that it take effect on the date of the establishment of the Band".

[57] That Order was issued by the Court on October 16, 2008 and indeed, contains such a provision.

[58] Furthermore, Chapter 8 of the Agreement also requires that an application for enrolment pursuant to Chapter 4 of the Agreement shall also include a full and final Release in favour of Canada, from any person seeking enrolment as a founding member. This condition is set out in section 8.3 of the Agreement, as follows:

> 8.3 Any applicant for enrolment pursuant to Chapter 4 shall complete and sign an application form developed by the Parties, which will include a full and final release in favour of Canada with respect to any claims or proceedings against Canada or any of its officers, servants, employees or agents, seeking recognition as an Indian under the Indian Act or damages as a result of the failure by Canada, its officers, servants, employees or agents to, at any time, provide to the applicant benefits comparable to those available to Indians.
>
> …

> Any applicant not signing the proper application form, including the full and final release, will have his application automatically denied by the Enrolment Committee, without prejudice to the ability of the applicant to submit a new application form properly completed and signed. In the event that the Recognition Order is not issued or that the applicant is denied the right to have his name added to the Founding Members List, the executed release shall be of no force or effect.

[59] The Agreement, the Founding Members List, the Consent Order and the Releases are all integrally related and are all necessary for the establishment of the Band. Establishment of the Band was the aim and goal of this action. According to the submissions of the other Plaintiffs and the Defendant, the only impediment to the establishment of the Band at this time is this outstanding motion.

[60] Mr. White is seeking three specific remedies, that is the vacation of the Consent Order made on October 16, 2008; the vacation of the Release that he signed in connection with that Order; and an injunction preventing the Defendant through the Minister from submitting the Founding Members List to the Governor-in-Council in support for the issuance of the Recognition Order.

[61] Mr. White seeks an order to vacate both the Consent Order and the Release that he signed in connection with that Order. While the Order and the Release are two different documents, with different status in this proceeding, the legal basis upon which either or both can be vacated is the same. In this regard, I refer to the decision in *McCowan v. McCowan* (1995), 24 O.R. (3d) 707 (Ont. C.A.), where the Ontario Court of Appeal said the following at pages 712-713:

> In *Hudersfield Banking Company, Limited v. Henry Lister & Son, Limited* (1895), 2 Ch. 273 (C.A.), one issue before the court was whether an order issued on consent further to an agreement between the parties should be set aside. The defendants took the position that

> a consent order was as binding on the parties as any other order and could not be set aside once acted upon, except on proof of fraud. Lindley L.J. held that a consent order could be impeached on any ground (including fraud) that would invalidate the agreement giving rise to the consent order. He said at p. 280:
>
> > A consent order, I agree, is an order; and so long as it stands it must be treated as such, and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that; nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expresses in a more formal way than usual.... To my mind, the only question is whether the agreement upon which the consent order was based can be invalidated or not. Of course, if that agreement cannot be invalidated the consent order is good. If it can be, the consent order is bad.
>
> …
>
> The general principle set out in these authorities was accepted by this court in *Monarch Construction Ltd. v. Buildevco Ltd. et al*. (1988), 26 C.P.C. (2d) 164 at 165-166 (Ont. C.A.):
>
> > A consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud. In other words, a consent judgment can only be rectified on the same grounds on which a contract can be rectified.
>
> In my view, it is well established that a consent judgment may be set aside on the same grounds as the agreement giving rise to the judgment. These grounds go to the formation of the agreement, not to its subsequent performance. Evidence of non-performance may, however, be relevant to the issue whether the underlying agreement was so tainted in its formation that it should be invalidated.

[62] In *Rick v. Brandsema*, [2009] 1 S.C.R. 295, the Supreme Court of Canada said the following at paragraph 64:

> This makes it unnecessary to deal with the effect of the consent order since, as Osborne J.A. observed in *McCowan v. McCowan* (1995), 14 R.F.L. (4th) 325 (Ont. C.A.), at para. 19, "it is well established that a consent judgment may be set aside on the same grounds as the agreement giving rise to the judgment". This approach was explained by James G. McLeod as follows:
>
> > This rule reflects the reality that a consent judgment is not a judicial determination on the merits of a case but only an agreement elevated to an order on consent. The basis for the order is the parties' agreement, not a judge's determination of what is fair and reasonable in the circumstances.

[63] A party seeking to set aside a consent order must meet the same legal test as a party seeking to invalidate a contract. In *Monarch Construction Ltd. v. Buildevco Ltd. et al.* (1988), 26 C.P.C. (2d) 164 (Ont. C.A.), the Ontario Court of Appeal said the following at paragraph 3:

> A consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud. In other words, a consent judgment can only be rectified on the same grounds on which a contract can be rectified. Here, there was no allegation of fraud and, in our opinion, there was no basis on the material before the local judge on which she was entitled to grant rectification. The contract is unambiguous on its face; on the motion of Monarch, it was incorporated in a consent judgment and should be performed in accordance with its terms.

[64] The law relating to setting aside an executed release is succinctly stated in the decision *Richmond v. Matar*, 276 N.S.R. (2d) 221. In that case, the Supreme Court of Nova Scotia held that an executed release will be enforced unless the party wishing to set it aside establishes fraud or other circumstances; see paragraphs 14 through 16 as follows:

> [14] Absent fraud or other exceptional circumstances, an executed release is given its full and intended effect. *Van Patter v. Tillsonburg District Memorial Hospital et al*, [1998] O.J. No. 1700 (Ont. Ct. Gen. Div.).

> The many cases in the law report dealing with settlement releases may seem to have sharp edges but their thrust is that absent fraud, overreaching or some similar equitable consideration, the release must be given its due. Typical of these cases is *Athabasca Reality Co. v. Foster*, (1982), 18 Alta. L.R. (2d) 385 at p. 394, 132 D.L.R. (3d) 556 (C.A.) Where, Laycraft, J.A. says this:
>
> > While a settlement extends only to subjects which the parties have in contemplation, a settlement may not be avoided because the damages arising under one of the headings contemplated is greater than expected. Where, for example, a party settles a claim for personal injuries and later finds he was injured more seriously than he thought, a settlement is binding: *Thornburn v. Danforth Bus Lines Ltd.*, [1955] O.R. 494, [1955] I.L.R. 1-188, and *Tucker v. Moerman*, [1970] 2 O.R. 775, 12 D.L.R. (3d) 119.
>
> …
>
> [16] This approach was affirmed in *Woods v. Hubley*, 1995 CarlswellNS 273. Chipman J. observed that:
>
> > ... In my opinion once the first and third elements set out by Hallett J. have been established, the effect is, prima facie, to establish the second as well. See comment by B. E. Crawford (1966), 44 C.B.R. 142. The burden would then fall upon the party defending the transaction to show that the superior power was not used to attain the advantage. This would be a difficult task indeed in most cases.

[65] A fraudulent representation is another basis for setting aside a release; see *Rick v. Brandsema*.

[66] Coercion of a party may also be a ground for setting aside an agreement. In *Wagg v. Minister of National Revenue (Customs and Excise)* (2003), 308 N.R. 67, the Federal Court of Appeal said the following at paragraphs 29 and 30:

> 29 In *Racz v. Mission (District)* (1988), 28 C.P.C. (2d) 74 (B.C. C.A.), at pp. 75-76, the British Columbia Court of Appeal described a consent judgment in the following terms:
>
> > An order entered by consent is in effect an agreement of compromise and such an order may be set aside on any ground which would invalidate a contract. In all other respects the judgment has full force and validity.
>
> 30 The onus of establishing the facts which would invalidate the "agreement of compromise" is on the person seeking to set aside the consent judgment. Coercion, if proved, would invalidate a settlement. A review of the passages from the transcript which are reproduced earlier in these reasons shows that the trial judge was very proactive in the conduct of the hearing. He discouraged the applicant from making speeches in the guise of giving evidence. He led the applicant through each of the Crown's assumptions of fact in its reply to the Notice of Appeal to see which were admitted and which were not. He attempted to find an administrative solution to the applicant's problem by inquiring as to the possibility of retroactively revoking the applicant's registration. Finally, he alerted the applicant to the contradiction inherent in his position: if he was found to supplying a non-exempt supply, so as to be eligible to claim input tax credits, he would also be liable to remit tax on his sale of supplies.

[67] Finally, the subsequent repudiation of an agreement by one party may also invalidate a release or consent order. In *Fieguth v. Acklands Ltd.* (1989), 59 D.L.R. (4th) 114 (B.C.C.A.) at page 122, the British Columbia Court of Appeal said the following:

> 45 The law in this connection has recently been restated by this court in *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 16 B.C.L.R. (2d) 349, [1987] 6 W.W.R. 273, 18 C.C.E.L. 238, 43 D.L.R. (4th) 56 (C.A.), where Wallace J.A., speaking for the court, reviewed a number of authorities. At p. 357 he quoted from the opinion of the House of Lords in *Mersey Steel & Iron Co. v. Naylor*,

> *Benzon & Co.* (1884), 9 App. Cas. 434, where Lord Selborne L.C. said at p. 438:
>
> > 'You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what the conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.'

[68] In the present case, there is no evidence of fraud or other exceptional circumstances that would tend in favour of vacating the Release signed by Mr. White. The evidence is clear, including evidence from Mr. White himself, that no representations were made to him concerning the time on which his name would be added to the Founding Members List. Certainly, there is no evidence that a representation was made that his name would go forward as part of the first stage of the enrolment process. There is evidence that he submitted his application for enrolment but that application was incomplete; see page 121 of the transcript of his cross-examination. Mr. White's Release was required to give effect to the Agreement. The Release was also a necessary element for the issuance of the Consent Order by the Court. There is no evidence that Mr. White was misled as to the requirements of the Release nor the circumstances concerning its execution.

[69] Chapter 8 of the Agreement is entitled "Litigation Settlement, Release and Indemnity". Section 8.2 specifically states that the Agreement will be of no force and effect unless and until a Release is executed by all Plaintiffs to the action. That would include Mr. White. Section 8.3 also provides that all applications for enrolment, that is the process governed by Chapter 4 of the

Agreement, must include a release in favour of the Defendant. The form of the release is the same in both cases, that is as set out as Annex G to the Agreement.

[70] The body of the Release itself requires that the signor, in this case Mr. White, acknowledged that he has received independent advice.

[71] According to his cross-examination, Mr. White received independent legal advice from two lawyers; see pages 92 and 268 of the transcript of his cross-examination.

[72] As well, I note that Mr. White had reviewed the text of the Agreement, in full, prior to its distribution to the membership of the FNI at large.

[73] In the face of this evidence, I conclude that he was aware of the terms of the Agreement requiring the execution of the Release and that upon receiving independent legal advice from two lawyers, he freely and willingly signed the Release. It is not open to him now to attempt to repudiate that Release, in the guise of asking the Court to set it aside.

[74] There is no evidence that Mr. White signed the release pursuant to a fraudulent representation. There is no evidence that the releasee, that is the Defendant, repudiated the agreement to which the release relates; see *Fieguth*.

[75] Finally, there is no evidence that Mr. White was subject to coercion from the other Plaintiffs or the FNI in the matter of signing the Release, as was discussed in *Wagg*.

[76] As discussed above, the same factors of fraud, repudiation and coercion are to be considered in addressing Mr. White's motion to set aside the Consent Order; see *McCowan v. McCowan*. Applying these factors to the facts in the present case, it is clear that the "agreement giving rise to the judgment" is the Agreement. According to the defined terms in that Agreement, the Parties are FNI and the Defendant.

[77] Mr. White is not a party to the Agreement, although the execution by him of a Release is a condition that must be satisfied before the Agreement is given its full effect, that is the making of a recommendation by the Minister to the Governor-in-Council for the issuance of a Recognition Order that will lead to the establishment of the Band.

[78] On the basis of the relevant law and the evidence that is before me, I am satisfied that there is no basis to vacate either the Consent Order or the release signed by Mr. White.

[79] I now turn to the remaining issue, that is Mr. White's prayer for the issuance of an injunction to prevent the Defendant, through the Minister, from submitting the First Founding Members List to the Governor-in-Council in support of a Recognition Order of the Band, until further order of this Court.

[80] The other Plaintiffs and Defendant argue that section 22 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, operates as an absolute bar against issuing an injunction against the Defendant in this case. Section 22 of that Act provides as follows:

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.	22. (1) Le tribunal ne peut, lorsqu'il connaît d'une demande visant l'État, assujettir celui-ci à une injonction ou à une ordonnance d'exécution en nature mais, dans les cas où ces recours pourraient être exercés entre personnes, il peut, pour en tenir lieu, déclarer les droits des parties.
(2) A court shall not in any proceedings grant relief or make an order against a servant of the Crown that it is not competent to grant or make against the Crown.	(2) Le tribunal ne peut, dans aucune poursuite, rendre contre un préposé de l'État de décision qu'il n'a pas compétence pour rendre contre l'État.

[81] I agree with and adopt the submissions made on behalf of the other Plaintiffs and the Defendant, that in the usual course of events, injunctive relief will not lie against the Crown when it is acting within the scope of its discretion. I refer in this regard to the decision in *Paul et al. v. Canada* (2002), 219 F.T.R. 275.

[82] I also agree with the arguments made on behalf of the Defendant and the other Plaintiffs that there is no evidence adduced by Mr. White to show that the Minister has acted beyond the scope of his discretion. Indeed, section 3.1 of the Agreement specifically obliges the Minister to recommend the issuance of a Recognition Order by the Governor-in-Council if the number of names of the First Founding Members List is at least fifty percent of the number of FNI members at the time the Agreement was executed.

[83] In any event, in my opinion, Mr. White cannot meet the test for obtaining an injunction.

[84] The test for obtaining an injunction is well known; see *RJR - MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311. An applicant for an injunction must meet a tri-partite, conjunctive test and establish that there is a serious issue for trial, that irreparable harm will result if the injunction is denied and that the balance of convenience lies in favour of the moving party.

[85] In the present case, the question of a "serious issue" must be assessed by reference to this motion, not to the issues raised in the Statement of Claim. There is no doubt that the underlying Statement of Claim raises serious issues, including equality and discrimination issues under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[86] However, the so-called "serious issue" raised in the Notice of Motion is the differential treatment accorded to those on the First Founding Members List and the Second Founding Members List.

[87] As stated above, Mr. White's arguments are unsupported by the evidence, in particular the terms of the Agreement. According to the Agreement, there is one Founding Members List. There is a two stage enrolment process, each generating a list. The list generated after the first stage of the process, if it includes enough names as required under the Agreement, can constitute the Founding Members List which will be submitted to the Governor-in-Council. The names that will be included

on the Second Founding Members List will, at some point, be added to the Founding Members List, in accordance with the terms of the Agreement.

[88] At the end of the day, there is one Founding Members List, created by a two stage process. Where an individual's name is on the First Founding Members List or the Second Founding Members List, at some point, all those persons will be recognized as members of the Band. The goal of this action is to obtain recognition of the Band, not to obtain recognition of a Founding Members List. That is not the bargain that was made between the Parties, that is the FNI and the Defendant. The bargain is for the establishment and recognition of the Band, pursuant to the Act.

[89] Since Mr. White has failed to establish the first element of the tri-partite conjunctive test for obtaining an injunction, it is unnecessary for me to consider the remaining elements, that is the questions of irreparable harm and balance of convenience, and the motion for injunctive relief is denied.

Conclusion

[90] In the result, Mr. White's motion is dismissed, in its entirety.

[91] I note that paragraph 3 of the Consent Order provides as follows:

> In the event that the said recognition order is not issued within thirty (30) months of the date of this order, Court shall retain jurisdiction for the sole purpose, on motion of the parties of amending this order to extend the aforesaid time period, or of vacating this order, as applicable.

[92] That 30 month period was to be calculated from the date of the Consent Order, that is October 16, 2008. That 30 month period expired on April 16, 2011. However, by the clear wording of the Consent Order which was the subject of this motion, this Court retains jurisdiction to extend the 30 month period or to vacate the Consent Order.

[93] Although the present matter arises from a motion to vacate the Consent Order, that motion was not brought pursuant to paragraph 3 of the Consent Order. The Consent Order remains valid and effective and the parties are at liberty to continue with their efforts to implement the Agreement in accordance with its terms and in accordance with the terms of the Consent Order.

[94] The motion is dismissed with costs to the other Plaintiffs and the Defendant. If the parties are unable to agree on those costs, they may advise the Court within five days of the issuance of the Order dismissing this motion and directions will issue with respect to submissions on costs.

ORDER

THIS COURT ORDERS that the motion is dismissed with costs to the other Plaintiffs and the Defendant. If the parties are unable to agree on those costs, they may advise the Court within five days of the issuance of the Order dismissing this motion and directions will issue with respect to submissions on costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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