Federal Court of Appeal  Cour d'appel fédérale

Date: 20191104

Docket: A-145-18

Citation: 2019 FCA 274

CORAM: **STRATAS J.A.**
LASKIN J.A.
RIVOALEN J.A.

BETWEEN:

GERALD BRAKE

Appellant

and

ATTORNEY GENERAL OF CANADA and THE FEDERATION OF NEWFOUNDLAND INDIANS

Respondents

Heard at Toronto, Ontario, on March 18, 2019.

Judgment delivered at Ottawa, Ontario, on November 4, 2019.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: LASKIN J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] In this appeal, Mr. Brake asks this Court to overturn the order dated May 8, 2018 of the Federal Court: 2018 FC 484. The Federal Court refused to convert Mr. Brake's application for judicial review into an action under subsection 18.4(2) of the *Federal Courts Act*, R.S.C. 1985,

c. F-7 and certify it as a class proceeding under Rule 334.16(1) of the *Federal Courts Rules*, S.O.R./98-106.

[2] Broadly speaking, Mr. Brake challenges Canada's decision to make it more difficult for people to qualify as members of the Qalipu Mi'kmaq First Nation Band and as status Indians under the *Indian Act*, R.S.C. 1985, c. I-5.

[3] For the reasons that follow, I would allow the appeal in part and, making the judgment the Federal Court should have made, I would certify the action as a class proceeding.

A. Basic facts

[4] Under an agreement in 2008, Canada and the Federation of Newfoundland Indians recognized the Qalipu Mi'kmaq First Nation Band as a Band and its members as status Indians under the *Indian Act*. Among other things, the 2008 Agreement created criteria for membership in the Band, an Enrolment Committee to review and assess applications for membership in the Band, and an Appeal Master to rule on decisions of the Enrolment Committee.

[5] An unexpectedly high number applied for Band membership, asserting that they met the membership criteria in the 2008 Agreement. In response, Canada and the Federation, concerned about the high number, amended the membership criteria to make it more difficult to qualify for membership in the Band. They also removed the right to appeal.

[6] Canada and the Federation made these changes under a Supplemental Agreement in 2013. They say they were authorized to do so under the 2008 Agreement, specifically by paragraph 2.15(b) which permits them to "make corrections or changes" to cure or correct a "mistake, manifest error or ambiguity".

[7] From that time, applications for Band membership were assessed under the new, tougher criteria introduced in the 2013 Supplemental Agreement, not the more lenient criteria under the 2008 Agreement. Not surprisingly, many who had or would have qualified as Band members under 2008 Agreement no longer qualified.

[8] The appellant, Mr. Brake, was one such person. He applied for judicial review of the rejection of his application and the rejection of all others' applications for Band membership, purportedly under the criteria in the 2013 Supplemental Agreement. He targets the decision to enter into that agreement. He alleges procedural unfairness, substantive unreasonableness and lack of good faith. He seeks, among other things, a redetermination of his application and all others' applications under the 2008 Agreement rather than the 2013 Supplemental Agreement, which he says cannot stand.

[9] In the Federal Court, Mr. Brake sought to transform his proceeding from an individual proceeding into a class proceeding. His goal was to seek both administrative law remedies against the decision and damages caused by the decision. Procedurally, he decided to follow an approach I will describe later as the *Tihomirovs* approach: *Tihomirovs v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 308, [2006] 2 F.C.R. 531.

[10] Following this approach, Mr. Brake moved for an order "to convert his application for judicial review into an action" under section 18.4 of the *Federal Courts Act*. As we shall see, that is not exactly the relief that section gives; there is no "conversion". In the same motion, Mr. Brake moved for certification of his proceeding as a class proceeding. In support of this, he filed a draft statement of claim and, later, a draft amended statement of claim. He filed these documents to show what the pleadings before the Federal Court would look like if his "conversion" motion were granted.

B. The Federal Court decision

[11] The Federal Court declined to look at the draft statements of claim. In its view, Mr. Brake placed them before the Court at too late a stage in the prosecution of the motion.

[12] The Federal Court went on to consider the motion to certify Mr. Brake's proceeding as a class proceeding. It correctly set out the five requirements for certification under Rule 334.16(1).

[13] The Federal Court declined to certify Mr. Brake's proceeding as a class proceeding. In its view, two of five requirements were not satisfied:

- The requirement under Rule 334.16(1)(*b*) of an identifiable class was not met because the class proposed by Mr. Brake was not ascertainable. In the Federal Court's view (at paras. 65-68), the class could be ascertained only after the judicial review was determined.

- The requirement under Rule 334.16(1)(*d*) that the class proceeding be the preferable procedure was not met. In the Federal Court's view (at paras. 73-74), it was preferable that the issues raised in the proposed class proceeding be determined through a test case. In the Federal Court's view, the test case was *Wells v. Canada (Attorney General)*, 2018 FC 483, [2019] 2 C.N.L.R. 321. The Federal Court (*per* the same judge) released *Wells* on the same day it released the reasons and judgment under appeal in this case.

[14] As for the other certification requirements, the Federal Court was prepared to accept that they were met. The Federal Court found Mr. Brake's private law claims to be premature but there was "at least one reasonable cause of action" among the public law claims (at paras. 56-58). Some of the common issues were acceptable (at paras. 69-70) and Mr. Brake and another person, Mr. Collins, were acceptable as representative plaintiffs (at paras. 75-77).

[15] The Federal Court dismissed the "conversion" motion under section 18.4 of the *Federal Courts Act*. It cited *Tihomirovs* for the proposition that if the reason for conversion was to support an application for certification as a class proceeding and if certification were denied, then conversion should also be denied (at paras. 48-51).

C. Analysis

(1) Introduction

[16] Certification decisions in the Federal Court are often straightforward. Usually the proceeding sought to be certified as a class proceeding is a single action or application. The certification motion aims to transform the action or application into a class action or class application, nothing more.

[17] The law on certification in the Federal Courts system is reasonably straightforward. The *Federal Courts Rules* set out the five requirements for certification: Rule 334.16(1). These requirements are similar to those in provincial jurisdictions and were recently discussed by this Court in *Wenham v. Canada (Attorney General)*, 2018 FCA 199, 429 D.L.R. (4th) 166.

[18] *Wenham* was released after the decision of the Federal Court in this case. It summarizes leading decisions of the Supreme Court on certification such as *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 and *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3. The parties agreed that *Wenham* accurately summarizes the current state of the law in the Federal Courts system.

[19] Appeals from certification decisions are often relatively straightforward as well. The appeal court looks for legal error or palpable and overriding error in the first-instance court's application of the law to the facts of the case, nothing more.

[20] However, the case at bar is more complex because Mr. Brake is seeking remedies for invalid administrative decision-making and damages at the same time, as he is entitled to do. Specifically, he wants, among other things, to quash Canada's decision to make the 2013 Supplemental Agreement (a remedy for invalid administrative decision-making) and to be compensated for loss caused by the decision (damages). Before the Federal Court was an application for judicial review seeking the former and a proposed statement of claim which would seek the latter.

[21] The law relating to simultaneous judicial reviews and actions is fraught with unnecessary procedural complexity and uncertainty, not just in the Federal Courts system but in other court systems across Canada. In my view, these caused the certification analysis of the Federal Court to veer off course. This resulted in legal error.

[22] This case presents an opportunity to assist those prosecuting and defending simultaneous judicial reviews and actions—whether individual proceedings or class proceedings—and to prevent what happened here by reducing the complexities and uncertainties in this area of law. The complexities and uncertainties stem from judge-made law developed in reaction to certain foundational legal propositions. A tweaking of this judge-made law will reduce the complexities and uncertainties in the future.

(2) Simultaneous judicial reviews and actions: foundational legal propositions

[23] We begin with two foundational propositions. Damages cannot normally be had through a judicial review. Administrative law remedies against administrative decision-makers such as *certiorari* and *mandamus* cannot normally be had in an action.

[24] These propositions are artefacts of our legal history. In relatively ancient times, predecessors and forms of actions and judicial reviews were in two separate courts, courts of law and courts of equity. Nearly a century and a half ago, the courts of law and equity were combined. But echoes of their separation reverberate to this day.

[25] In the Federal Courts system, as in most if not all court systems across Canada, actions for damages and applications for judicial review still have separate procedures: Part 4 of the *Federal Courts Rules* sets out the rules for actions and Part 5 sets out the rules for applications for judicial review. As well, in the Federal Courts system, as in most if not all other systems across Canada, substantive and remedial distinctions between actions and applications remain.

[26] In the Federal Courts system, section 18 of the *Federal Courts Act* and associated jurisprudence set out the substantive and remedial distinctions:

- Damages for an administrative decision cannot be sought on a judicial review. The remedies on judicial review are restricted to the administrative law remedies set out in subsection 18(1) of the *Federal Courts Act* such as injunction,

certiorari, prohibition, *mandamus*, *quo warranto* and declaration. See, *e.g.*, *Al-Mhamad v. Canada (Radio-Television and Telecommunications Commission)*, 2003 FCA 45; *Bouchard v. Canada (Min. of National Defence)* (1998), 158 F.T.R. 232, 18 Admin. L.R. (3d) 7, aff'd (1999), 187 D.L.R. (4th) 314, 180 F.T.R. 9 (C.A.).

- Administrative law remedies such as *certiorari* and *mandamus* can only be obtained on an application for judicial review: *Federal Courts Act*, subsection 18(3).

- If administrative law remedies are not being sought, damages caused by an administrative decision can be sought in an action. In such circumstances, it is not always necessary to bring a separate application for judicial review. See *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585.

[27] In the Federal Court, as in most if not all other courts in Canada, to seek both administrative law remedies and damages simultaneously, one must launch two separate proceedings: an application for judicial review started by a notice of application and an action for damages started by a statement of claim.

[28] This has obvious ramifications for access to justice. For a litigant to prosecute one proceeding all the way through to judgment is difficult enough. To prosecute two is doubly

difficult. Further, the potential for unnecessary expenditure of judicial resources and conflicting results is real.

[29] Fortunately, however, the Federal Courts have tools to address this to some extent. A useful one is Rule 105, the power to consolidate multiple proceedings. Consolidation allows multiple proceedings to progress as if they were one proceeding governed by one set of procedures. But in law each retains its character as a distinct substantive proceeding seeking distinct relief, governed by separate substantive rules governing the availability of that relief. See *3488063 Canada Inc. v. Canada*, 2016 FCA 233 at paras. 50-53 and *Venngo Inc. v. Concierge Connection Inc.* 2016 FCA 209 at para. 9. To ensure the smooth and efficient progress of proceedings, the Court can order consolidation on its own motion: *Coote v. Lawyers' Indemnity Company*, 2013 FCA 143; *Montana Band v. Canada* (1989), 182 F.T.R. 161 (C.A.).

[30] Rule 105 permits the consolidation of multiple proceedings of any sort. So an application for judicial review can be consolidated with an action for damages. In that case, the consolidation order defines the single set of procedures that will be followed for both. At the end of the consolidated proceeding, the Court issues two judgments: one for the application for judicial review and one for the action. Where appropriate, each judgment will give the relief available in each proceeding. So the judgment in the application for judicial review, where appropriate, will give administrative law relief and the judgment in the action, where appropriate, will give damages.

(3) Consolidated judicial reviews and actions: can they become class proceedings?

[31] Rule 334.16(1) provides that a "proceeding" can be certified as a "class proceeding". Is an application for judicial review that has been consolidated with an action a "proceeding" that can become a class proceeding under Rule 334.16(1)? Yes.

[32] This is a question of legislative interpretation that requires us to look at the text, context and purpose of the *Federal Courts Rules*: see *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, 417 D.L.R. (4th) 173 at paras. 41-52, *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556 at paras. 18-29 and *Canada v. Cheema*, 2018 FCA 45, 420 D.L.R. (4th) 534 at paras. 73-75.

[33] The *Federal Courts Rules* do not define the word "proceeding". But the plain meaning of "proceeding" is broad enough to encompass an application and an action and a consolidation of the two. The word "proceeding" is literally singular but the singular includes the plural and so "proceeding" could refer to more than one type of proceeding: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 33(2).

[34] Rule 334.1 tells us that the class proceedings regime "applies to actions and applications other than applications for judicial review under section 28 of the Act." Rule 334.11 further clarifies that, generally, "the rules applicable to actions and applications … apply to class proceedings." As discussed above, Rule 105(a) allows the Court to consolidate an action with an application with the effect that the two become one for the purposes of applying the Rules. Since

an action consolidated with an application is to be treated as one proceeding for the purposes of applying Rule 334.16, the text and context of the Rule suggest that a consolidated proceeding can be certified as a class proceeding.

[35] Turning to purposive considerations, an interpretation of "proceeding" in Rule 334.16(1) that includes a consolidated action and application is consistent with the recognized goals of class proceedings: behaviour modification, judicial economy and access to justice (*Wenham* at para. 78). A lesser meaning of "proceeding" would create a technicality that works against these objectives by putting up pointless procedural barriers to the realization of substantive rights (see *Fischer* at para. 34).

[36] I add that the jurisprudence on consolidation under Rule 105 poses no barrier to consolidating a class application and a class action, which in substance is the same.

(4) Certifying consolidated judicial reviews and actions as class proceedings: three recognized ways in the case law

[37] Over the years, the Federal Courts have developed three approaches for litigants to seek simultaneously both administrative law remedies against an administrative decision and damages for losses caused by the administrative decision. Under each approach, a class proceeding is possible:

- *The Hinton approach.* An application for judicial review seeking administrative law remedies is started. A separate action for damages for the administrative

misconduct is also started. The two are consolidated. If desired, certification of the consolidated proceeding as a class proceeding can be sought under Rule 334.16(1). See *Canada (Citizenship and Immigration) v. Hinton*, 2008 FCA 215, [2009] 1 F.C.R. 476, and *Meggeson v. Canada (Attorney General)*, 2012 FCA 175, 349 D.L.R. (4th) 416 at paras. 36-40; see also *Del Zotto v. Canada* (1995), 103 F.T.R. 150, [1996] 1 C.T.C. 120.

- *The Paradis Honey approach.* An action is started. In the statement of claim starting the action, both administrative law remedies and damages for the administrative misconduct are sought. But the entitlement to damages is pleaded as a public law cause of action for unreasonable or invalid decision-making. *Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89, [2016] 1 F.C.R. 446; see also the Supreme Court cases mentioned in para. 131 of *Paradis Honey* where this manner of proceeding seems to have been allowed in other contexts. The rationale underlying this approach is that the pleading operates as a consolidated action and application from the outset and so section 18(3) of the *Federal Courts Act* is not offended. If desired, certification of the action as a class proceeding can be sought under Rule 334.16(1).

- *The Tihomirovs approach.* An application for judicial review seeking administrative law remedies is started. A motion for an order permitting the judicial review to be prosecuted as an action under subsection 18.4(2) of the *Federal Courts Act* is brought. Then the litigant brings a motion for certification

> as a class proceeding under Rule 334.16(1). In support of the certification motion, a proposed statement of claim is filed, simultaneously seeking administrative law remedies and damages. The Court determines the motions together.

[38] In this case, Mr. Brake has pursued the *Tihomirovs* approach. This explains the unusual nature of the pleadings that were before the Federal Court on the certification motion: an application for judicial review, a proposed statement of claim, and a proposed amended statement of claim.

[39] There are two unsatisfactory features associated with the *Tihomirovs* approach: a misunderstanding of the effect of a section 18.4 order and the Court's reliance on a draft statement of claim.

[40] First, the *Tihomirovs* approach seems to embody the erroneous idea that if an order is granted under subsection 18.4(2) of the *Federal Courts Act* allowing an application for judicial review to "be treated and proceeded with as an action", the applicant must issue a statement of claim as the originating document for the "new" converted proceeding. But there is no such obligation because there is already an issued originating document—the notice of application.

[41] This documentary confusion reflects a deeper concern with the *Tihomirovs* approach: If the action is ultimately certified, what happens to the application that has been brought? It would seem that under the *Tihomirovs* approach only the action is certified, not the application. But the application can't just sit in limbo forever: *Sharif v. Canada (Attorney General)*, 2018 FCA 205,

50 C.R. (7th) 1 at para. 55; *Keremelevski v. Ukrainian Orthodox Church of St. Mary*, 2018 FCA 218 at para. 9. Something has to happen to it. The *Tihomirovs* approach, as presently formulated, does not address this.

[42] Underlying the *Tihomirovs* approach is a misunderstanding of what happens under subsection 18.4(2) of the *Federal Courts Act*. The Federal Court and the parties in this case were operating under this misunderstanding. They spoke of Mr. Brake's motion "to convert the application into an action", but under subsection 18.4(2) nothing at all is converted. All that happens is that the Rules relating to actions become available to the parties in prosecuting and defending the application. See *Canada (Human Rights Commission) v. Saddle Lake Cree Nation*, 2018 FCA 228 at paras. 23-26.

[43] A subsection 18.4(2) order does not "convert" an application into an action, replace a notice of application with a statement of claim or require that a litigant file a statement of claim alongside the notice of application. At all times, the notice of application remains the operative originating document. In *Saddle Lake*, this Court put it this way (at paras. 23-26):

> Under subsection 18.4(2) of the *Federal Courts Act*, the application for judicial review is "to be treated and proceeded with as an action." It is not stayed. It is not replaced by a fresh action. The notice of application is not to be replaced with a statement of claim. After all, judicial review remedies can only be granted on an application for judicial review: *Federal Courts Act*, s. 18(3).
>
> The effect of subsection 18.4(2) is purely procedural, not substantive. The originating document remains the notice of application. The substantive law remains the law of judicial review. All that happens after a subsection 18.4(2) order is that the Rules relating to actions become available when the application is prosecuted.

> An order under subsection 18.4(2) should specify in what ways the application is to be treated as and proceeded with as an action. The order might provide for the conducting of discoveries. It might schedule motions for summary judgment and the hearing itself. It might allow amendments to the grounds for review in the notice of application to be made. Since the procedures for actions apply, sometimes amendments supporting a public law damages claim are allowed: *Paradis Honey v. Canada*, 2015 FCA 89, [2016] 1 F.C.R. 446.
>
> In this case, the Federal Court never should have stayed the application for judicial review. It never should have authorized a fresh action. Saddle Lake never should have brought a fresh action.

[44] Second, the Court's reliance on a draft, unissued statement of claim on a certification motion under Rule 334.16(1) is problematic. In certification motions, a draft, unissued statement of claim is a nullity until it is issued. Yet, under the *Tihomirovs* approach, the draft, unissued statement of claim becomes the subject of a certification motion. This is contrary to the text of Rule 334.16(1). It speaks of certifying an existing proceeding, not a proposed proceeding.

[45] The Court in *Tihomirovs* seems to have considered whether the proposed statement of claim and the application together met the criteria for certification—as if the former were issued and the two were consolidated. But, again, the proposed statement of claim is not an issued originating document and even if it were, there was no consolidation motion before the Court in *Tihomirovs*.

[46] Before us, the parties did not suggest that *Tihomirovs* should no longer be followed. Absent a specific submission to that effect, *Tihomirovs* remains good law: *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149. Yet, as the concerns above illustrate, *Tihomirovs* sits uncomfortably within the *Federal Courts Act* and the *Federal Courts Rules* and

associated jurisprudence. *Tihomirovs* needs to be tweaked to address these concerns so that it can fit more comfortably into the *Federal Courts Rules*.

[47] A revised *Tihomirovs* approach that better fits the *Federal Courts Rules* is as follows:

- The Court should consider the proposed statement of claim as if it were finalized and filed.

- The Court should assess whether the action and the application for judicial review, if they were consolidated, would meet the certification requirements under Rule 334.16.

- If so, the Court's certification order should begin by regularizing and simplifying matters: it should require that within a short period of time the proposed statement of claim be filed as the statement of claim, the action be consolidated with the application, and the consolidated proceeding be prosecuted as if it were an action.

- The certification order should then set out the terms required by Rule 334.17.

[48] Under this revised approach, nothing is being converted to an action under subsection 18.4(2) of the *Federal Courts Act*, consistent with the jurisprudence of this Court: see *Saddle Lake*. Instead, the Court is attaching a term to its certification order allowing the consolidated proceeding to be prosecuted as if it were an action. Thus, technically, the motion in this case for

conversion of the application to an action under subsection 18.4(2) of the *Federal Courts Act* should be dismissed.

[49] In the end result, the revised *Tihomirovs* approach places the litigants in substantially the same position they would have been in if the *Hinton* approach or the *Paradis Honey* approach had been followed.

[50] In the future, parties in the position of Mr. Brake—those seeking to certify a class proceeding where they seek simultaneously the invalidation of administrative decision-making and damages for wrongful administrative decision-making—might be wise to follow either the *Hinton* approach or the *Paradis Honey* approach. These approaches seem more straightforward and more manageable under the Rules. Of the two, the *Paradis Honey* approach is the simplest of all.

(5) Mr. Brake's certification motion

[51] With this revision of the *Tihomirovs* approach in place, we can now assess the Federal Court's decision. If Mr. Brake's proposed action and application for judicial review were consolidated, would they meet the certification requirements under Rule 334.16? Did the Federal Court commit any reversible errors in answering that question in the negative?

[52] I conclude that the Federal Court erred when it denied Mr. Brake's certification motion under Rule 334.16. The Federal Court was wrong to treat its decision in *Wells* as determinative

of Mr. Brake's judicial review application and to assume that all the private law claims advanced in Mr. Brake's action were premature. Because of these errors, the Federal Court failed to apply the proper test at multiple stages of the certification analysis.

[53] This Court can intervene and decide whether Mr. Brake's proceeding should be certified: *Federal Courts Act*, para. 52(b)(*i*). It will do so.

(a) Reasonable cause of action (Rule 334.16(1)(*a*))

[54] Under this requirement, the party seeking certification need only show that the cause of action is not doomed to fail. Put another way, it must not be "plain and obvious" that the cause of action as pleaded will fail: see *Wenham* at paras. 22-31 and the Supreme Court cases cited therein.

[55] The Federal Court divided the issues into two categories: public law issues and private law issues. The former concerned the judicial review; the latter concerned the damages claims.

[56] The Federal Court found that Mr. Brake's judicial review was factually similar to and raised "identical legal issues to those raised in *Wells*" (at para. 3). In the Federal Court's view, the substance of Mr. Brake's application was basically resolved, and there was no need to engage with the content of Mr. Brake's claims (at para. 57). The Federal Court took *Wells* as a lead or test case that bound Mr. Brake and proceeded on that basis to evaluate which of Mr. Brake's claims had "any possibility of success". This was a legal error.

[57] The Federal Court's decision in *Wells* is only persuasive, not binding, in the Federal Court: *Apotex Inc. v. Allergan Inc.*, 2012 FCA 308, 105 C.P.R. (4th) 371; *Restrepo Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461, [2007] 1 F.C.R. 107 at paras. 33-35, aff'd 2007 FCA 199, [2008] 1 F.C.R. 156. It is not at all binding in this Court or the Supreme Court: *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342 at para. 26; *Apotex Inc. v. Pfizer Canada Inc.*, 2014 FCA 250, 465 N.R. 306 at para. 114. Mr. Brake did not consent to his claims being decided in *Wells* as a "lead case". Mr. Brake also did not have an opportunity to make submissions or present evidence in *Wells*. The Federal Court should have considered whether Mr. Brake's pleadings stated a reasonable cause of action.

[58] *Wells* is based on the particular evidentiary record filed and the specific claims pleaded. The class intends to place a different evidentiary record before the Court to support different claims. For example, it wishes to investigate the existence of improper purpose by using the tools available to it in an action, particularly discovery. During argument, in response to questioning from the Court, the Attorney General conceded that the pleading of improper purpose was proper and the investigation into improper purpose would not be barred as an illegitimate fishing expedition under cases such as *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, 321 D.L.R. (4th) 301 and *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198, 335 D.L.R. (4th) 312. With a different evidentiary record before the Court, a different result from *Wells* is possible: *Almrei v. Canada (Citizenship and Immigration)*, 2007 FC 1025, 316 F.T.R. 49 at para. 62.

[59] The judicial review, as pleaded, cannot be said to be doomed to fail. It is not plain and obvious that Mr. Brake's application is barred by *res judicata*, issue estoppel or abuse of process or does not plead a reasonable cause of action. It passes muster under the requirement in Rule 334.16(1)(*a*).

[60] The Federal Court considered the damages claims to be premature and did not assess whether they disclose a reasonable cause of action (at para. 58). Elsewhere it held that "decisions respecting the public law remedies sought need to be determined first before the private law claims are considered, for only then will the class of members with private law claims be identifiable" (at para. 68).

[61] This was an error of law. In no way can the damages claims be seen as premature. As can be seen from cases such as *Tihomirovs*, *Hinton*, *Del Zotto*, *Paradis Honey* and many others, public law claims and private law claims can be prosecuted simultaneously. As well, the Supreme Court has suggested that one need not always prosecute a judicial review first before proceeding with a claim for damages: *Canada v. Telezone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 at paras. 23, 30, 76 and 78.

[62] In support of its view that the damages claims were premature, the Federal Court held that the claims were contingent on class members' applications being rejected under invalid provisions of the 2013 Supplemental Agreement when they would not have been rejected under the terms of the 2008 Agreement (at para. 71). In considering this, the Federal Court applied the

decision in *Wells*, finding that it determined the substantive merits of the issue of the invalidity of the 2013 Supplemental Agreement.

[63] This was a legal error. The Federal Court focused on the merits of the case and the individual circumstances of each class member contrary to the approach of the Supreme Court in *Rumley* (at paras. 31-32) and the Court of Appeal for Ontario in *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, 247 D.L.R. (4th) 667 at para. 61. In these cases, whether torts were committed was certified as a common issue even though issues of causation and harm would still have to be determined on an individual basis.

[64] As far as the merits on a certification motion are concerned, the Court is restricted to considering whether it is plain and obvious the cause of action will fail. It is not entitled to go further.

[65] In his draft amended statement of claim, Mr. Brake pleads a breach of fiduciary duty. He alleges that the honour of the Crown required that Canada undertake to act in the best interests of the alleged beneficiaries when it negotiated the terms of entitlement to membership in the Band in circumstances where it knew that the Federation of Newfoundland Indians did not represent all those who would be eligible and that the 2008 Agreement did not require ratification by anyone other than members of the Federation of Newfoundland Indians. He says that having done this, Canada then had a fiduciary duty to ensure that the interests it had identified in negotiating the 2008 Agreement were not significantly eroded by the 2013 Supplemental Agreement which did not require ratification at all. He says that significant interests were at

stake for those affected: acceptance and recognition of their cultural heritage and Indigenous ancestry by the federal government, and entitlement to programs and benefits provided by Canada under the 2008 Agreement or under the *Indian Act*.

[66] Given that the law of fiduciary duty in this context is a very dynamic area of law that is rapidly evolving and given that "when the areas of fiduciary obligations and [Indigenous] law intersect…a defendant has a particularly heavy burden in seeking to strike a pleading," it cannot be said that that it is plain and obvious that the fiduciary duty claim will fail: *Shubonacadie Indian Band v. Canada (Attorney General) et al.* (2001), 202 F.T.R. 30 (T.D.) at paras. 5-6, aff'd 2002 FCA 249, 291 N.R. 393 (C.A.); *Davis v. Canada (Attorney General)*, 2004 NLSCTD 153, 240 Nfld. & P.E.I.R. 21 at paras. 10-11; *Canada (Attorney General) v. The Virginia Fontaine Memorial Treatment Centre Inc. et al.*, 2006 MBQB 85, 265 D.L.R. (4th) 577 at paras. 44-46.

[67] Mr. Brake pleads that the differential treatment in the 2013 Supplemental Agreement goes beyond a mere temporal distinction and results in discrimination based upon an arbitrary characteristic prohibited by the principles underlying section 15(1) of the Charter. Substantive equality can be denied by the imposition of a disadvantage that is unfair or objectionable: *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61 at paras. 180 and 201. Mr. Brake pleads that the distinctions created by the 2013 Supplemental Agreement perpetuated the historical disadvantage suffered by many Indigenous peoples, specifically those less well informed of or further removed from the progress of the Government's negotiations concerning their heritage. In his view, two disparate groups among the Mi'kmaq peoples were created: those whose self-identification was accepted simply because they applied, and those who were

compelled to comply with more onerous and arbitrary requirements that devalued their claims to indigenous heritage and perpetuated the historical disadvantage suffered by them. He adds that the distinction between residents and non-residents in the 2013 Supplemental Agreement, being based on an individual's "Aboriginality-residence," is discriminatory and contrary to section 15(1) of the Charter: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1. I am not persuaded that it is plain and obvious these allegations will fail.

[68] Mr. Brake also pleads an entitlement to damages for the section 15 Charter breaches, relying upon *Ward v. Vancouver (City)*, 2010 SCC 27, [2010] 2 S.C.R. 28. Given the Supreme Court's decisions in *Quebec (Attorney General) v. A.*, *Corbiere* and *Ward*, and given the ever-evolving state of section 15 and Charter damages jurisprudence, it cannot be said that the section 15 claim for damages is doomed to fail.

[69] Finally, Mr. Brake has pleaded the requisite elements of an unjust enrichment claim and it cannot be said that it is doomed to fail. He pleads that Canada has benefitted by improperly rejecting thousands of applicants for membership in the Band, the class members were deprived of membership and associated benefits and, assuming for the moment the invalidity of the 2013 Supplemental Agreement, there is no juristic reason for the benefit and corresponding loss.

[70] In my view, the reasonable cause of action requirement under Rule 334.16(1)(*a*) has been made out. In saying this, I express no opinion on the ultimate merit of Mr. Brake's allegations. The test under Rule 334.16(1)(*a*) is a low one and it has been met.

(b) Identifiable class (Rule 334.16(1)(*b*))

[71] Under this branch of the certification test, all that is required is "some basis in fact" supporting an objective class definition that bears a rational connection to the common issues and that is not dependent on the outcome of the litigation: *Wenham* at para. 69, citing *Dutton* at para. 38 and *Hollick* at paras. 19 and 25.

[72] The Federal Court found that the class for the purposes of the damages claims could not be identified with precision because individuals could not know whether their applications were rejected under the terms of the Supplemental Agreement struck down in *Wells* until each application has been re-evaluated under the terms of the Original Agreement and the surviving terms of the Supplemental Agreement (at para 67). Only after the judicial review is determined and the Enrolment Committee has reviewed the applications would the Court be able to ascertain who might have a claim.

[73] Underneath the Federal Court's reasoning seems to be a view that membership in the class was only for those with a high probability of success or, indeed, those who would be successful. The Federal Court further assumed that members' probability of success was dependant on the way the public law claims had already been determined in *Wells*. Another way of putting this is that, contrary to the above authorities, the definition of the class bore some relationship to the outcome of the litigation. This error was compounded by the Federal Court's view that the outcome of the litigation was itself dependant on the outcome in *Wells*.

[74] The appellant proposes a class defined as "all individuals whose applications for Qalipu Band membership were rejected in accordance with the 2013 Supplemental Agreement." I consider this class definition to bear a rational connection to the common issues. It is not dependent on the outcome of the litigation. The identifiable class requirement in Rule 334.16(1)(*b*) is met.

(c) Common issues of law and fact (Rule 334.16(1)(*c*))

[75] Rule 334.16(1)(*c*) requires that "the claims of the class members raise common questions of law or fact whether or not those common questions predominate over questions affecting only individual members."

[76] The Supreme Court has offered the following guidance on this element of the test for certification:

> The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

(*Dutton* at para. 39; see also *Vivendi* and *Wenham* at para. 72.)

[77] Also of importance is the fact that the result of the determination of the common issues need not be the same for all class members. In particular,

(a) for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members;

(b) a common question can exist even if the answer given to the question might vary from one member of the class to another, and a common question may require nuanced and varied answers based on the circumstances of individual members;

(c) the requirement of commonality does not mean that the answer for all members of the class needs to be the same or even that the answer must benefit them to the same extent as long as the questions do not give rise to a conflict of interest among the members; for example, the success of one member must not result in failure for another.

(See *Vivendi* at paras. 44-46; *Rumley* at para. 36; *Hodge v. Neinstein*, 2017 ONCA 494, 136 O.R. (3d) 81 at para. 114.)

[78] The Federal Court did not apply the test in Rule 334.16(1)(*c*) or any of these authorities. It failed to conduct the required analysis of commonality. These are errors of law that permit this Court to intervene: *Wenham* at para. 58.

[79] Mr. Brake proposes the following common issues:

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

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

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

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

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

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

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

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

[80] When the proper legal test is applied, the common issues offered by Mr. Brake meet the requirement in Rule 334.16(1)(*c*). There are common issues of law and fact and resolving those issues will advance the class members' individual claims because the individual claims share a substantial common ingredient. The common issues are significant in relation to the individual issues and certification will reduce duplicative fact-finding and analysis. Certification as a class proceeding will yield considerable benefits by saving the scarce resources of the Court and the litigants.

[81] It is true that the determination of the common issues in this case will not necessarily determine all aspects of each class member's claim. It may only significantly advance that determination, in which case individual determinations will be necessary after a common issues

trial. But Rule 334.18(*a*) explicitly states that this is not a reason to deny certification and Rules 334.26 and 334.27 establish a process specifically for dealing with such determinations.

[82] The common issues broadly relate to the legality of administrative decision-making surrounding the 2013 Supplemental Agreement, whether legal duties were owed to the class, whether those legal duties were breached and, if so, what remedies ought to follow. These issues are not unlike the common issues found in *Wenham*, *Rumley*, *Cloud*, and other cases such as *Dolmage v. Ontario*, 2010 ONSC 1726, 6 C.P.C. (7th) 168.

[83] Mr. Brake claims that Canada breached its fiduciary duty to the class in negotiating the terms of the Supplemental Agreement. This issue falls to be determined on a review of the actions taken by Canada without reference to the question whether an individual claimant may or may not have a valid claim. By determining this issue, the claims of the class will be significantly advanced.

[84] If this proceeding were certified as a class proceeding, the common issues trial would determine the appropriateness of the implementation of the 2013 Supplemental Agreement. If successful at that stage, there would be individual determinations of eligibility under a process derived from Rule 334.26.

(d) Preferable procedure (Rule 334.16(1)(*d*) and Rule 334.16(2))

[85] The governing principles for whether a class proceeding is the preferable procedure in a given case were set out in paragraph 77 of *Wenham* (relying on *Hollick* at paras. 27-31):

> (a) the preferability requirement has two concepts at its core:
>
> (i) first, whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and
>
> (ii) second, whether the class proceeding would be preferable to other reasonably available means of resolving the claims of class members;
>
> (b) this determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole; and
>
> (c) the preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over individual issues.

[86] The preferability of a class proceeding must be "conducted through the lens of the three principal goals of class [proceedings], namely judicial economy, behaviour modification and access to justice": *Fischer* at para. 22, cited by *Wenham* at para. 78.

[87] Under this branch of the certification test, the Federal Court did not consider the purposes of class proceedings. Instead, it simply accepted that it would be preferable to advance the class members' claims through *Wells* as a lead or test case. This conclusion disregarded the requisite test from *Fischer* and *Wenham* because of two erroneous assumptions which have already been discussed: first, that all of the private law claims advanced in the action were premature and,

second, that *Wells* properly addressed the public law claims advanced in the application. This was an error of law.

[88] The Federal Court was of the view that the preferable procedure for Mr. Brake and others in his position would be to re-submit their membership applications for assessment under the post-*Wells* terms of the Supplemental Agreement (at para. 74). But that approach would require Mr. Brake and the other class members to accept *Wells* as a binding disposition of their public law claims, which they do not. As mentioned above, as a matter of law, Mr. Brake is not bound by the Federal Court's decision in *Wells*.

[89] Treating *Wells* as a lead or test case would not be a preferable procedure for Mr. Brake and the other class members for a number of reasons:

- The issues adjudicated in *Wells* were not identical to those in Mr. Brake's case.

- Mr. Brake and the class he wishes to represent did not have an opportunity to participate in the *Wells* judicial review and have no standing to appeal the outcome.

- Mr. Brake will likely offer broader evidence than what was before the Court in *Wells* and will not be restricted by the Rules governing applications for judicial review. For example, in *Wells*, the Federal Court rejected arguments against the decision-making surrounding the 2013 Supplemental Agreement based on

improper purpose on the ground that the evidence was lacking. In his class proceedings, Mr. Brake intends to use his rights of discovery to find that very evidence.

- Typically a lead or test case is designated in the course of case management when a set of proceedings are consolidated, stayed, or put in abeyance on the motion of the parties or the Court. To treat *Wells*, which has now concluded, as a lead or test case for different, ongoing litigation is unusual and anomalous.

[90] A class proceeding in a case like this often advances the interests of judicial economy, behaviour modification and access to justice better than a lead or test case. Many of the considerations discussed at paragraphs 85-98 of *Wenham* that favour a class proceeding over a lead or test case apply with equal force here.

[91] This is a case where a class proceeding advances the interests of judicial economy, behaviour modification and access to justice. These objectives are well-served in this case by a class proceeding that will determine important common questions affecting over 80,000 people: the propriety of the 2013 Supplemental Agreement, the existence and breach of a fiduciary duty, the engagement and breach of the Charter, the claims of unjust enrichment and the claims for damages.

[92] At some point, there may be individual issues that will require resolution. As discussed above, the *Federal Courts Rules* specifically provide ways to accommodate those issues. Rule

334.26 provides for a court-supervised individual assessment process to address the reconsideration of individual applications for membership in the Band, or any necessary causation determinations, that might be required after the determination of the common issues. Rules 334.26(1)(*b*) and 334.26(1)(*c*) allow the Court to fashion a process for those determinations, including appointing "one or more persons to evaluate the individual questions".

[93] Mr. Brake submits that, absent a class proceeding, significant access-to-justice impediments exist for individual litigants. I agree. These include a lack of resources to retain legal counsel, the likelihood that the cost of enforcing their rights will be less than the recovery, the disincentive to sue the Government of Canada with all its resources and its discretionary power over benefits, and the potential for adverse cost consequences.

(e) Adequate representative plaintiff (Rule 334.16(1)(*e*))

[94] The central issue here is whether the proposed representative plaintiff/applicant would fairly and adequately represent the interests of the proposed class. Here, Mr. Collins has been proposed. His adequacy as a representative plaintiff/applicant is not challenged. I consider this requirement for certification to be met.

[95] Mr. Brake was originally proposed as a presentative plaintiff/applicant and was acceptable. However, owing to a development discussed in the postscript in these reasons, he can no longer serve as a representative plaintiff/applicant.

(6) Motion for conversion of the application into an action

[96] In accordance with the reasoning in paragraph 48, above, the appeal of the Federal Court's dismissal of this motion should be dismissed.

D. Postscript

[97] Just before this Court rendered judgment, counsel for the appellant advised the Court that Mr. Brake has passed away. His application for judicial review continues: Rule 116. His estate wishes to continue the application for judicial review. Regard should be had to Rule 117 and action should be taken forthwith to amend the pleadings to reflect this development.

E. Proposed disposition

[98] I would allow the appeal in part, set aside the order of the Federal Court insofar as it denies certification under Rule 334.16(1), grant the motion for certification and make the order the Federal Court should have made.

[99] I would order that the most recent proposed statement of claim be changed forthwith to take into account the development discussed in the postscript to these reasons, the proposed statement of claim forthwith be caused to be issued, the action be consolidated with the application, and the consolidated proceeding be prosecuted as if it were an action on the basis of the common issues set out in paragraph 79, above.

[100] I would define the class as “all individuals whose applications for Qalipu Band membership were rejected in accordance with the 2013 Supplemental Agreement”.

[101] I would appoint Mr. Collins the representative plaintiff for the class. I would approve the litigation plan proposed by Mr. Brake. I would order that no other class proceedings based upon the facts giving rise to this proceeding may be commenced without leave. I would approve the form, content and method of dissemination of notice to the class.

[102] As this class proceeding progresses and as the Federal Court manages it, the purposes of class proceedings and Rule 3 will govern the Court’s discretion. Rule 3 requires the Court to “interpret and apply the Rules so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits”.

[103] It may be that upon receiving submissions from the parties, the Federal Court may wish to modify the litigation plan, amend the common issues, make other modifications in light of the development discussed in the postscript to these reasons, and amend other aspects of matters dealt with by this Court’s order. For example, the Court may consider it useful to give directions regarding which issues ought to proceed first and the manner in which they should proceed. The Federal Court has a free hand in doing all those things. As new circumstances present

themselves, the Federal Court should not consider itself shackled in its management of these proceedings by this Court's order.

"David Stratas"
J.A.

"I agree
J.B. Laskin J.A."

"I agree
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-145-18
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE ZINN DATED MAY 8, 2018, NO. T-300-17	
STYLE OF CAUSE:	GERALD BRAKE v. ATTORNEY GENERAL OF CANADA AND THE FEDERATION OF NEWFOUNDLAND INDIANS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 18, 2019
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	LASKIN J.A. RIVOALEN J.A.
DATED:	NOVEMBER 4, 2019

APPEARANCES:

Paul Vickery David Rosenfeld Robert Alfieri	FOR THE APPELLANT
Elizabeth Kikuchi Sarah Sherhols	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA
Stephen J. May	FOR THE RESPONDENT, THE FEDERATION OF NEWFOUNDLAND INDIANS

SOLICITORS OF RECORD:

Koskie Minsky LLP Toronto, Ontario	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA
Cox & Palmer St. John's, Newfoundland and Labrador	FOR THE RESPONDENT, THE FEDERATION OF NEWFOUNDLAND INDIANS