

FEDERAL COURT OF APPEAL

BETWEEN:

GERALD BRAKE

Appellant

and

ATTORNEY GENERAL OF CANADA and  
FEDERATION OF NEWFOUNDLAND INDIANS

Respondents

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Memorandum of Fact and Law  
Attorney General of Canada

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## **OVERVIEW**

1. The Federation of Newfoundland Indians (“FNI”) and the Government of Canada (“Canada”) entered into the 2008 Agreement and 2013 Supplemental Agreement (“Supplemental Agreement”) to create a band for Mi’kmaq peoples who have a current and substantial cultural connection to one of the 67 Mi’kmaq communities on the island of Newfoundland. Recognizing the new Qalipu Mi’kmaq First Nation (“QMFN”) fulfilled an important objective of reconciliation with the Mi’kmaq people.

2. Mr. Brake’s application for founding membership in the QMFN was rejected. He brought a judicial review application challenging the decision rejecting his application for founding membership in the QMFN and the validity of the Supplemental Agreement. He then moved to convert his judicial review to an action and to have that action certified as a class proceeding.

3. The Honourable Mr. Justice Zinn (the “Motion Judge”) properly found that Mr. Brake failed to meet the test for certification, and therefore conversion, because the private law causes of action advanced in his proposed Statement of Claim (“Proposed Claim”) were premature. An identifiable class and the issues that are common to that class cannot be ascertained until the administrative law issues are decided. The preferable procedure for dealing with these issues is through the summary judicial review process that already embodies the principles of access to justice and judicial economy. This summary process is already well advanced in judicial review test cases. There are no grounds upon which this Court should overturn the Motion Judge’s decision.

## PART I – FACTS

### A. 2008 Agreement

4. When Newfoundland and Labrador joined Confederation in 1949, there was no agreement between the province and Canada as to whether the *Indian Act* would be applied to the Mi'kmaq, who lived primarily on the island of Newfoundland. The *Indian Act* was not applied to Mi'kmaq living in the province.<sup>1</sup>

5. Between 2004 and 2006, the FNI and Canada negotiated to create a band for Newfoundland's Mi'kmaq people. On June 23, 2008, the FNI and Canada signed the 2008 Agreement to create a band for Newfoundland's Mi'kmaq people for the purposes of the *Indian Act* and enrolling its founding members. Enrolment for the new band was based on the criteria of: self-identification as a member of the Mi'kmaq Group of Indians of Newfoundland, acceptance of the individual by that group, and Aboriginal ancestry.<sup>2</sup>

6. The criteria reflected the results of FNI's consultations with its membership, who wanted founding membership to be based on a current and substantial connection to one of Newfoundland's 67 Mi'kmaq communities, so that members could actively contribute to the QMFN.<sup>3</sup>

7. Pursuant to the 2008 Agreement, the enrolment process was implemented by an Enrolment Committee ("Committee"), comprised of an equal number of representatives from the FNI and Canada and an Independent Chair.<sup>4</sup>

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<sup>1</sup> *Brake v Canada*, 2018 FC 484 ("Decision") at para 6, Appeal Book ("AB") Vol 1, Tab 2, p 12; Affidavit of Keith Desjardins affirmed October 11, 2017 ("Desjardins Affidavit 1") at para 5, AB Vol 4, Tab 11, p 1170.

<sup>2</sup> Desjardins Affidavit 1 at paras 5, 8, AB Vol 4, Tab 11, p 1170; 2008 Agreement at s 1.13, 1.14 & 4.1, AB Vol 4, Tab 12G, pp 1367, 1368 and 1376.

<sup>3</sup> Affidavit of Brendan Sheppard sworn October 10, 2017 ("Sheppard Affidavit") at paras 36-37, AB Vol 4, Tab 12, pp 1261 - 1262.

<sup>4</sup> Sheppard Affidavit at para 40, AB Vol 4, Tab 12, p 1263; 2008 Agreement at para 4.2.2., AB Vol 4, Tab 12G, p 1376.

8. The enrolment process consisted of two stages, each resulting in a list of individuals to be registered as QMFN founding members. The first stage was for applications submitted between November 30, 2008 and November 30, 2009 to determine whether there were sufficient members to justify creating a band. The second stage was for applications submitted in the subsequent three years, to November 30, 2012.<sup>5</sup> The process also provided applicants, the FNI, and Canada with the option to appeal the Committee's decisions to an Appeal Master.<sup>6</sup>

9. During the first stage of the enrolment process, 25,912 applications for membership were submitted. The required threshold of approved applications was met and the QMFN was legally created by an Order in Council on September 22, 2011 ("Recognition Order").<sup>7</sup>

10. By June 21, 2012, 23,877 applicants were registered as founding members by Orders in Council.<sup>8</sup> These individuals comprise the current founding member list and were all registered as Indians under the *Indian Act*.<sup>9</sup>

11. After the creation of the QMFN, and during the second stage of the enrolment process, over 75,000 applications were submitted. Almost two-thirds of these, 46,000, were submitted in the final three months, between September 1, 2012 and November 30, 2012.<sup>10</sup> More than 104,000 applications were submitted during the entire process. This was five times the number of applications expected by the FNI and Canada.<sup>11</sup> Both the FNI and Canada had concerns about the much larger than anticipated number of

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<sup>5</sup> Desjardins Affidavit 1 at para 10, AB Vol 4, Tab 11, p 1171.

<sup>6</sup> 2008 Agreement at s 4.3.3, p 19, AB Vol 4, Tab 12G, p 1381.

<sup>7</sup> Desjardins Affidavit 1 at paras 11-12, AB Vol 4, Tab 11, p 1171; Sheppard Affidavit at para 47, AB Vol 4, Tab 12, p 1264; 2008 Agreement at Preamble, note 2 at s 1.18, AB Vol 4, Tab 12G, pp 1365 and 1369; *Qalipu Mi'kmaq First Nation Act*, SC 2014 ("*Qalipu Mi'kmaq First Nation Act*"), c 18 at Preamble.

<sup>8</sup> Desjardins Affidavit 1 at paras 11 & 13, AB Vol 4, Tab 11, p 1171.

<sup>9</sup> Desjardins Affidavit 1 at para 13, AB Vol 4, Tab 11, p 1171; 2008 Agreement at ss 3.1., 3.2., and 3.4, AB Vol 4, Tab 12G, p 1375; *Qalipu Mi'kmaq First Nation Act*, at Preamble.

<sup>10</sup> Desjardins Affidavit 1 at para 14, AB Vol 4, Tab 11, p 1171.

<sup>11</sup> Desjardins Affidavit 1 at para 15, AB Vol 4, Tab 11, p 1172.

applications. Almost 70% of the applicants did not reside in any of the 67 Mi'kmaq communities identified in the 2008 Agreement and more than 40% were from outside the province.<sup>12</sup>

12. In addition, the FNI and Canada each had concerns about the Committee's assessment of certain applications. The FNI brought appeals of the Committee's decisions in cases where the Committee permitted applications signed after September 22, 2011 to serve as proof of self-identification before that date without any other objective evidence being provided.<sup>13</sup> Canada also appealed several Committee decisions based on the group acceptance criteria. Forty-two of these appeals were successful, finding that the evidence before the Committee was insufficient to show that the individual applicant's interaction with and acceptance by the Mi'kmaq Group of Indians of Newfoundland.<sup>14</sup>

13. Due in part to the exponentially higher than expected number of applicants, it was evident that the Committee would not meet the initial March 24, 2013 deadline to evaluate all applications.<sup>15</sup> This led the FNI and Canada to discuss next steps regarding the consideration of applications and the appropriate implementation of the 2008 Agreement in accordance with the parties' intention.<sup>16</sup>

## **B. 2013 Supplemental Agreement**

14. The FNI and Canada entered into discussions to address the issues that arose during the application process.<sup>17</sup> These discussions resulted in the Supplemental Agreement, which was concluded on July 4, 2013. The Supplemental Agreement

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<sup>12</sup> Desjardins Affidavit 1 at para 25, AB Vol 4, Tab 11, p 1176.

<sup>13</sup> Sheppard Affidavit at paras 39, 51-52, AB Vol 4, Tab 12, pp 1262, 1265 - 1266.

<sup>14</sup> Sheppard Affidavit at para 55, AB Vol 4, Tab 12, pp 1266 - 1267, Sheppard Affidavit Exhibit L, AB Vol 5, Tab 12L, p 1503.

<sup>15</sup> Desjardins Affidavit 1 at para 16, AB Vol 4, Tab 11, p 1172.

<sup>16</sup> Sheppard Affidavit at paras 50, 53, AB Vol 4, Tab 12, pp 1265 - 1266, Sheppard Affidavit Exhibit I, AB Vol 5, Tab 12I, p 1477; Desjardins Affidavit 1 at para 17, AB Vol 4, Tab 11, p 1172.

<sup>17</sup> Desjardins Affidavit 1 at para 19, AB Vol 4, Tab 11, p 1172, Desjardins Affidavit 1, Exhibit B, AB Vol 4, Tab 11B, p 1186; Sheppard Affidavit at paras 64-66, AB Vol 12, pp 1269 - 1270.

amended the timelines to consider the applications, but did not change the November 30, 2012 deadline for submitting applications.<sup>18</sup>

15. The Supplemental Agreement did not alter the enrolment process or change the enrolment criteria, but rather clarified the evidentiary requirements for the self-identification and group acceptance criteria for founding membership in accordance with the amending provisions of the 2008 Agreement.

16. The FNI and Canada agreed that the documents referred to in the 2013 Supplemental Agreement to establish self-identification for applications made after the creation of the QMFN needed to demonstrate self-identification prior to the signing of the 2008 Agreement. A statement or indication of self-identification in a document established independently and prior to the enrolment process would constitute the best objective evidence that the applicant self-identified, since it would have been made prior to and irrespective of any possibility of obtaining membership in the QMFN and Indian status.<sup>19</sup>

17. Both the FNI and Canada supported these clarifications, which reflected the parties' intentions on entering the 2008 Agreement of how these criteria should be met.<sup>20</sup>

18. Pursuant to the Supplemental Agreement, all applications that had been filed were to be assessed or, in the case of applications already decided by the Committee, to be re-assessed.<sup>21</sup>

19. All applicants for founding membership were sent letters of decision on January 31, 2017 advising that they were founding members or that they did not qualify as

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<sup>18</sup> Desjardins Affidavit 1 at para 18, AB Vol 4, Tab 11, p 1172.

<sup>19</sup> Sheppard Affidavit at paras 56-59, AB Vol 4, Tab 12, p 1267-1268.

<sup>20</sup> Desjardins Affidavit 1 at para 20, AB Vol 4, Tab 11, p 1173; Sheppard Affidavit at paras 55-56, AB Vol 4, Tab 12, pp 1266 - 1267.

<sup>21</sup> Desjardins Affidavit 1 at para 20, AB Vol 4, Tab 11, p 1173, Desjardins Affidavit 1 Exhibits B & C, AB Vol 4, Tab 11B and Tab 11C.

founding members and the reason for this denial. Applications could be rejected for any one of ten possible reasons.<sup>22</sup>

20. Of the applications submitted, 78,623 applications were rejected, with 57,779 applicants failing to provide objective evidence of self-identification as required. At the close of the period to submit an appeal, 13,159 appeals had been submitted by either individuals or the FNI.<sup>23</sup>

### **C. Appeal Process**

21. The Committee assessed applications in a sequential process. Once an application was deemed valid, the three eligibility criteria were assessed in this order: self-identification, group acceptance, and then Aboriginal ancestry. The Committee only moved on to the next criteria if the previous one was satisfied. An applicant had to satisfy all three criteria to be a founding member. By way of example, if an applicant failed to satisfy the self-identification criteria, the assessment would stop and the application would be denied; group acceptance and Aboriginal ancestry would not be assessed.<sup>24</sup>

22. If an applicant was denied founding membership, they may have a right to appeal the Committee's decision to an independent third party Appeal Master. Where an appeal is filed, the Appeal Master may reassess the eligibility criteria that was not met and make a new determination on that criteria only.<sup>25</sup>

23. The Appeal Master started sending decision letters on appeals at the end of October, 2017.<sup>26</sup> Decisions on all the appeals have now been made. The appeal decisions may be judicially reviewed.

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<sup>22</sup> Desjardins Affidavit 1 at para 23, AB Vol 4, Tab 11, p 1174 - 1175, Desjardins Affidavit 1 Exhibits E-O, AE Vol 4, Tab 11E – Tab 11O.

<sup>23</sup> Affidavit of Keith Desjardins affirmed November 15, 2017 (“Desjardins Affidavit 2”), Exhibit A at paras 24-27, AB Vol 5, Tab 14A, pp 1523 – 1525.

<sup>24</sup> Desjardins Affidavit 1 at para 28, AB Vol 4, Tab 11, p 1177.

<sup>25</sup> Desjardins Affidavit 1 at paras 29-31, AB Vol 4, Tab 11, p 1178.

<sup>26</sup> Desjardins Affidavit 1 at para 32, AB, Vol 4, Tab 11, p 1178

#### **D. The Federal Court dismisses Mr. Brake's motions**

24. Mr. Brake applied for founding membership in the QMFN during the second phase of the enrolment process and after the QMFN's creation. His application was rejected because he failed to provide the required objective evidence to prove that he self-identified as a Mi'kmaq member before the QMFN's creation.<sup>27</sup>

25. Mr. Brake brought a judicial review application challenging the decision rejecting his application for founding membership in the QMFN and the validity of the Supplemental Agreement. He then moved to convert his judicial review to an action and to have that action certified as a class proceeding.

26. The Motion Judge dismissed Mr. Brake's motions having found that conversion to an action was not warranted because the test for certification had not been met. In particular, the Motion Judge concluded that the class could not be identified until after the administrative law issues are decided and applicants are reassessed under the Supplemental Agreement's remaining valid clauses. Furthermore, the preferable procedure for dealing with the issues raised was through a judicial review application.<sup>28</sup>

#### **E. Other judicial reviews addressing the issues Mr. Brake raises**

27. Mr. Brake challenges the validity of the Supplemental Agreement's self-identification and group acceptance provisions. There are other judicial reviews raising these same challenges that are further advanced than Mr. Brake's proceeding.

##### **1) Wells judicial reviews challenged the self-identification criteria**

28. David Wells and Sandra Wells brought judicial review applications ("*Wells* test cases")<sup>29</sup> challenging the validity of the self-identification criteria in the Supplemental

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<sup>27</sup> Desjardins Affidavit 1 at paras 39-40, AB Vol 4, Tab 11, p 1180.

<sup>28</sup> Decision at para 79, AB Vol 1, Tab 2, p 38.

<sup>29</sup> *David Wells v Attorney General of Canada and the Federation of Newfoundland and Indians*, Court file No T-638-17 ("*David Wells*"); *Sandra Wells v Attorney General of Canada and the Federation of Newfoundland and Indians*, Court file No T-644-17 ("*Sandra Wells*").

Agreement and the Committee's decisions denying their applications on that basis.<sup>30</sup> The parties agreed that these judicial reviews would proceed as test cases.

29. The applicants in the *Wells* test cases were partly successful. Specifically, the Court:

- a. upheld the Supplemental Agreement's provision requiring those applicants who signed their applications after the Recognition Order to provide documentary evidence that they self-identified as a Mi'kmaq member before the QMFN's creation;<sup>31</sup>
- b. struck the requirement that the documentary evidence supporting self-identification before the QMFN's creation must pre-date June 23, 2008, the date of the 2008 Agreement;<sup>32</sup>
- c. struck the Supplemental Agreement's provision removing the right of appeal for applicants who were rejected because they failed to provide documentary evidence to prove that they had self-identified before the QMFN's creation;<sup>33</sup> and,
- d. set aside the decisions rejecting David Wells and Sandra Wells' applications for founding membership and remitted the matter back to the Committee for redetermination in accordance with the court's decision.<sup>34</sup>

30. The *Wells* decisions will be applied to approximately 58,000 similarly situated individuals who applied for founding membership and whose applications were denied on the basis that they failed to satisfy the self-identification criteria.<sup>35</sup> There has been no appeal of these decisions.

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<sup>30</sup> Affidavit of Katie Hammell sworn October 12, 2017 ("Hammell Affidavit") at para 2, AB Vol 4, Tab 10, p 1120, Hammell Affidavit Exhibits A & B, AB Vol 4, Tab 10A and 10B.

<sup>31</sup> *Wells v Canada (Attorney General)*, 2018 FC 483 ("*Wells*") at paras 75-82, 94-95, 126.

<sup>32</sup> *Wells* at paras 100-101, 110, 126.

<sup>33</sup> *Wells* at paras 86-90, 126.

<sup>34</sup> *Wells* at paras 124-126.

<sup>35</sup> Decision at paras 73-74, AB Vol 1, Tab 2, pp 36 - 37; Hammell Affidavit at paras 2-4, AB Vol 4, Tab 10, p 1120.

## 2) *Abbott* judicial review challenges the group acceptance criteria

31. On March 23, 2018 and after the Appeal Master had rendered decisions in all appeals involving applications rejected for group acceptance, Mr. Justin Philip Abbott brought a judicial review application challenging the group acceptance provisions of the Supplemental Agreement.<sup>36</sup>

31. Mr. Abbott was initially accepted as a founding member under the Agreement, but was subsequently found to be ineligible for such membership when his application was reassessed under the Supplemental Agreement. Mr. Abbott does not live in or around one of the 67 Mi'kmaq communities in Newfoundland and his application failed to provide the evidence needed to establish group acceptance. The *Abbott* judicial review challenges Canada and the FNI's decision to enter into the Supplemental Agreement and to issue a Directive related to group acceptance. It also challenges the Committee's decision denying Mr. Abbott's application for founding membership. In terms of the relief sought, the judicial review seeks declarations on the validity of the Supplemental Agreement's group acceptance provisions, as well as the related Directive. It also asks the Court to quash the Committee's decision denying his application for founding membership. The Federal Court has set a timetable for the *Abbott* application that provides for the filing of a requisition for hearing by September 18, 2018.<sup>37</sup>

## PART II – ISSUES

32. Did the Motion Judge err in his decisions to deny conversion of the Appellant's judicial review application to an action and to deny certification of that action?

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<sup>36</sup> *Abbott v AGC and FNI*, Court File No T-573-18 ("*Abbott*").

<sup>37</sup> *Abbott* Order of Justice Tabib dated July 18, 2018.

## PART III – SUBMISSIONS

### A. The Motion Judge’s decision is entitled to significant deference

33. The decision whether to convert a judicial review application into an action under subsection 18.4(2) of the *Federal Courts Act* is a discretionary one that turns on the distinct facts and circumstances of each case<sup>38</sup> and as a result is reviewed on a palpable and overriding error standard.

34. Where, as here, an applicant seeks to convert his judicial review into an action for the purposes of having it certified as a class proceeding, the motion judge may consider whether the test for certification has been met. Judges hearing certification motions have a special expertise and their decisions on these motions, which balance several factors, are owed significant deference.<sup>39</sup> In particular, the Motion Judge’s assessment of the identifiable class, common issues, and preferable procedure criteria<sup>40</sup> are entitled to substantial deference since they are questions of mixed fact and law involving an appreciation of the evidence and a certain field-sensitivity in trial management on which deference is to be accorded. These criteria are therefore also reviewed on the palpable and overriding error standard.<sup>41</sup>

35. Consequently, unless the Appellant overcomes the high threshold to demonstrate a palpable and overriding error, the Motion Judge’s decision must stand.

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<sup>38</sup> *Association des crabiers acadiens Inc v Attorney General*, 2009 FCA 357 (“*Crabiers*”) at paras 35-37.

<sup>39</sup> *Canada v John Doe*, 2016 FCA 191 (“*John Doe*”) at para 28, citing *Pearson v Inco Ltd*, 2006 CanLII 913 (ON CA).

<sup>40</sup> *Federal Court Rules*, SOR/98-106 (“*Rules*”), R. 334.16(1)(b), (c), and (d), respectively.

<sup>41</sup> *Horseman v Canada*, 2016 FCA 238 at para 4; *John Doe* at para 29; *South Yukon Forest Corp v Canada*, 2012 FCA 165 at para 46. See also *Benhaim v St-Germhain*, 2016 SCC 48 at paras 38-39.

**B. The Motion Judge roperly found that conversion to an action is not appropriate**

36. Subsection 18.4(1) of the *Federal Courts Act* provides that judicial review applications must be heard and determined in a summary way without delay.<sup>42</sup> As this Court noted in *Canada v MacInnis*<sup>43</sup>:

One should not lose sight of the clear intention of Parliament to have applications for judicial review determined whenever possible with as much speed and as little encumbrances and delays of the kind associated with trials as are possible.

37. In “exceptional circumstances” the Court may direct that a judicial review application proceed as an action.<sup>44</sup> In *Association des crabiers acadiens Inc v Canada*<sup>45</sup>, this Court summarized the factors that may support a request for conversion:

- i. when a judicial review application does not provide appropriate procedural safeguards where declaratory relief is sought;
- ii. when the facts allowing the Court to make a decision cannot be satisfactorily established through mere affidavit evidence;
- iii. when it is desirable to facilitate access to justice and avoid unnecessary cost and delay; and,
- iv. when it is necessary to address the remedial inadequacies of judicial review, such as the award of damages.

38. Where an applicant seeks to convert his judicial review application into an action for the purposes of having it certified as a class proceeding, the motions judge will weigh the advantages of a class action against the efficiency of a judicial review, which provides for the speedy and summary resolution of administrative law matters.<sup>46</sup> When the test for certification is not met, a motion to convert will also be denied.<sup>47</sup>

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<sup>42</sup> *Federal Courts Act*, RSC, 1985 at s 18.4(1) (“FCA”).

<sup>43</sup> *Macinnis v Canada*, [1994] 2 FC 464 (FCA) at para 9

<sup>44</sup> *FCA* at s 18.4(2); *Slansky v Canada*, 2013 FCA 199 at para 56.

<sup>45</sup> *Crabiers* at para 39.

<sup>46</sup> *Minister of Citizenship and Immigration v Tihomirovs*, 2005 FCA 308 at paras 14-16 (“*Tihomirovs FCA*”).

<sup>47</sup> *Tihomirovs FCA* at para 16.

39. No exceptional circumstances exist in this case to support conversion of the judicial review application to an action. The essential nature of the judicial review and the Proposed Claim involve administrative law issues, so access to justice and judicial economy favour the summary judicial review process.

40. The Motion Judge properly found the criteria for certification were not satisfied.

**C. Administrative law issues are at the heart of the proceeding**

41. Mr. Brake applied for and was denied founding membership in the QMFN because he failed to meet the self-identification requirements in the Supplemental Agreement. He properly initiated his challenge to those requirements and the administrative decision rejecting his application by way of judicial review.<sup>48</sup>

42. At the same time, Mr. Brake wants to pursue a claim for damages because he says he was improperly denied founding membership in the QMFN. The claims he makes presume that but for the Supplemental Agreement he would otherwise be entitled to founding membership. However, this cannot be known until his application is reconsidered on all three criteria by the Committee.

43. Mr. Brake relies on the Supreme Court's decision in *Canada v Telezone* ("*Telezone*") to argue that he is permitted to advance a claim for damages without having to challenge the administrative decisions underlying his claim through a judicial review application. However, in *Telezone*, the Supreme Court confirmed that a challenge to an administrative decision must proceed by way of judicial review:

If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the

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<sup>48</sup> *Canada v Telezone*, 2010 SCC 62 ("*Telezone*") at paras 19 and 24.

extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks.<sup>49</sup>

44. The administrative law decisions Mr. Brake challenges cannot stand and must be set aside in order to determine whether he has a cause of action and a corresponding claim for damages.<sup>50</sup> In contrast, in *Telezone*, the plaintiffs did not initiate their proceedings by way of a judicial review application because they were not seeking to set aside or quash the administrative decisions, nor to deprive the decisions of any legal effect.<sup>51</sup>

45. At the heart of Mr. Brake's claim is a challenge to the "legality, reasonableness and fairness of procedures employed and actions taken by government decision makers".<sup>52</sup> As the Motion Judge found:

...Mr. Brake's proposed action is "predicated on his application having been improperly assessed" because the Supplemental Agreement was not ratified in accordance with the process outlined in the Original Agreement. Also, underlying the proposed action is his claim that the decision of the Enrolment Committee and the entire assessment process was unfair.<sup>53</sup>

46. In *Doucette v AGC and FNI* ("*Doucette*"), the Federal Court struck a claim challenging the Supplemental Agreement and the resulting Committee decision because it was "in its essential character, a claim for judicial review with only a thin pretense of a private wrong".<sup>54</sup> Since the only way to invalidate a federal board or tribunal's decision is through a judicial review application, this Court concluded that Mr. Doucette's claims were a collateral attack on the defendants' decisions.<sup>55</sup>

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<sup>49</sup> *Canada v Telezone*, 2010 SCC 62 at para 19.

<sup>50</sup> Applicant's Memorandum of Fact and Law at para 84.

<sup>51</sup> *Telezone* at para 79.

<sup>52</sup> *Telezone* at para 24.

<sup>53</sup> Motion decision, para 55.

<sup>54</sup> *Doucette v AGC and FNI* ("*Doucette*"), T-402-17 at paras 38, 42, appeal heard June 2018.

<sup>55</sup> *Doucette* at para 40.

### 1) Administrative law remedies provide effective relief

47. Mr. Brake ultimately seeks founding membership in the QMFN based on a reconsideration of his application in accordance with the 2008 Agreement. The only way for Mr. Brake to obtain this relief is through a successful challenge to the decisions of the FNI and Canada and the Committee, and through the administrative law remedies set out in Mr. Brake's Notice of Application.<sup>56</sup>

48. The only relief that is not available to Mr. Brake through the judicial review process is damages. However, any possible claim for damages cannot be known until after the administrative law issues have been determined and Mr. Brake's application for founding membership has been assessed on all three criteria.

49. While this Court has allowed applicants to pursue administrative law remedies and damages in the same proceeding in *Meggesson v Canada*<sup>57</sup> ("Meggesson") and *Hinton v Canada*<sup>58</sup> ("Hinton"), both of these decisions are distinguishable. In these cases the administrative law issues and the claim for damages were directly linked, such that a decision in favour of the applicant automatically gave rise to an entitlement to damages.

50. In this case, even if Mr. Brake is successful on the administrative law issues in his Proposed Claim, this does not mean that he is automatically entitled to damages or that a reasonable cause of action will be made out because both are predicated on a finding that Mr. Brake is entitled to founding membership in the QMFN. The Committee must first reconsider his application for founding membership in accordance with the decision of the Court and render a new decision. Since he failed the first criteria of self-identification, Mr. Brake's application was never assessed on the other two criteria and therefore success before the Committee is not guaranteed.

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<sup>56</sup> *Telezone* at para 19.

<sup>57</sup> *Meggesson v Canada*, 2012 FCA 175.

<sup>58</sup> *Hinton v Canada*, 2008 FCA 215.

51. Contrary to Mr. Brake's submissions,<sup>59</sup> a determination of individual eligibility for founding membership in the QMFN cannot be made by the Court. Such decisions are made by the Committee, the independent body created by the 2008 Agreement with the authority to render decisions on founding membership and whose power is derived from Acts of Parliament.<sup>60</sup> The Committee is a "federal board, commission or tribunal"<sup>61</sup> and therefore the matter of individual eligibility for founding membership should be sent back to the Committee for reconsideration if the Court finds errors in the administrative decisions.<sup>62</sup>

52. Furthermore, introducing judicial oversight and direction over the enrollment process, which will involve the consideration of in excess of 58,000 applications, is not efficient and does not further the goal of judicial economy.

#### **D. The Appellant failed to meet the test for certification**

53. The test for certification is conjunctive and Mr. Brake has the onus to establish "some basis in fact" for each of the certification requirements with the exception of the first criteria, which requires that each cause of action have a reasonable prospect of success.<sup>63</sup> Although the certification stage is not a test of the action's merits, the evidentiary standard involves more than a superficial analysis of the sufficiency of the evidence. At certification, the Court plays an important gatekeeper role.<sup>64</sup>

##### **1) No reasonable cause of action**

54. The Motion Judge committed no palpable and overriding error in his reasoning. He correctly identified the test and properly applied it. Mr. Brake was required to

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<sup>59</sup> Appellant's Memorandum of Fact and Law at paras 48, 103.

<sup>60</sup> *Foster v Canada*, 2015 FC 1065 ("*Foster*") at para 25; *Howse v Canada*, 2015 FC 1063 ("*Howse*") at para 19.

<sup>61</sup> *FCA* at s 18(1); *Thibaudeau v The Queen*, [1994] 2 FC 189 (CA) at para 78, reversed on other grounds and without comment on this point [1995] 2 SCR 627.

<sup>62</sup> *Canada (Commr of Competition) v Superior Propane Inc*, 2003 FCA 53 at para 54.

<sup>63</sup> *John Doe* at paras 23-24.

<sup>64</sup> *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 ("*Pro-Sys*") at para 103.

establish that each cause of action in his Proposed Claim has a reasonable prospect of success should the claim proceed toward trial. The “plain and obvious” test applies.<sup>65</sup>

***i. Reasonable cause of action for administrative law claims***

55. The Motion Judge determined that Mr. Brake had raised valid administrative law issues concerning the validity of the Supplemental Agreement and the Committee’s decision rejecting his application for founding membership under that agreement.<sup>66</sup> In so far as the administrative law issues are concerned, the Motion Judge found that the reasonable cause of action criteria was met and Mr. Brake does not challenge this finding for the purpose of this appeal.

***ii. Private law claims have no prospect of success***

56. The Motion Judge declined to decide whether the remaining private law causes of action were likely to succeed because he found that they were premature. He did not err in so doing. However, in response to the Appellant’s arguments, Canada maintains the position advanced below that the Proposed Claim discloses no reasonable cause of action. Mr. Brake must show that his Proposed Claim discloses that he has a reasonable cause of action against the Respondent. It is not enough that some other members of the class may have a claim.<sup>67</sup> To disclose a reasonable cause of action, a statement of claim must plead each constituent element of every cause of action with sufficient particularity, supporting each allegation with material facts. Where a plaintiff fails to do this, it is “plain and obvious” that the claim cannot succeed and it must be struck. Bare assertions without the requisite factual underpinnings do not meet this obligation.<sup>68</sup>

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<sup>65</sup> *John Doe* at para 23.

<sup>66</sup> Decision at para 56, AB Vol 1, Tab 2, p 31.

<sup>67</sup> *Taylor v Canada (Attorney General)* 2012 ONCA 479 at para 21.

<sup>68</sup> *John Doe* at para 23; *Mancuso v Canada*, 2015 FCA 227 at paras 16-20.

### Breach of fiduciary duty

57. The Federal Court recently confirmed in *Howse v Canada*<sup>69</sup> and *Foster v Canada*<sup>70</sup> that Canada does not owe a fiduciary duty to individuals applying for founding membership in the QMFN. Rather, any fiduciary duty owing in the context of the 2008 Agreement and the Supplemental Agreement “would be to the Aboriginal collective, *i.e.*, the Mi’kmaq Group of Indians of Newfoundland, as represented in negotiations by the FNI, or its successor by way of the implementation of the Agreement, the Qalipu Mi’kmaq First Nation.”<sup>71</sup>

58. The only way a fiduciary duty could arise at this stage is if Canada had made an undertaking, express or implied, to act in the best interest of applicants who did not meet the founding membership criteria, to the exclusion of all others.<sup>72</sup> However, there is no indication of any such undertaking in the Agreements. The Agreements were negotiated by the FNI and Canada, two sophisticated parties, so that the QMFN could be recognized as a band under the *Indian Act*. Canada enters into such agreements in the public interest. There is no language in the Agreements to support the assertion that Canada agreed the public interest would be subordinated to the interests of individual applicants generally, or more specifically to individual applicants who failed to meet the founding membership criteria.<sup>73</sup>

59. Furthermore, the Proposed Claim does not identify the legal or significant practical interest to which Mr. Brake has a pre-existing, distinct, and complete legal entitlement and over which Canada has exclusive control.<sup>74</sup> Mr. Brake is not entitled to founding membership. He is entitled to apply for it, which he has done. Canada has no control over whether he receives founding membership. It is up to Mr. Brake to

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<sup>69</sup> *Howse*.

<sup>70</sup> *Foster*.

<sup>71</sup> *Howse* at para 44.

<sup>72</sup> Sayce Affidavit, Exhibit B: Proposed Statement of Claim, at paras 37, 39, AB Vol 2, Tab 9B, p 313; Second Proposed Statement of Claim, at para 41, AB Vol 1, Tab 5.

<sup>73</sup> *Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2014 NUCA 2 at paras 36-40; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 61.

<sup>74</sup> *Elder Advocates of Alberta Society v Alberta*, 2011 SCC 24 at para 51.

meet the criteria and it is for the Committee and the Appeal Master, who operate independently, to make that determination.

#### Unjust enrichment

60. The facts as plead do not support Mr. Brake's allegation that Canada was enriched because he was denied founding membership. Even if on their face the constituent elements of an unjust enrichment claim are plead, these are legal conclusions and this Court will consider whether the facts as plead can support a successful unjust enrichment claim.<sup>75</sup> The Proposed Claim states that Canada was enriched by not having to pay for services and benefits he would have been entitled to under the *Indian Act*.<sup>76</sup> However, until the Committee determines that Mr. Brake is a founding member, Mr. Brake has no entitlement to services and benefits under the *Indian Act*. Consequently, at this time, Mr. Brake cannot establish that Canada was unjustly enriched at his expense.<sup>77</sup>

#### Breach of *Charter* claim dismissed in *Wells*

61. The Proposed Claim alleges breaches of subsection 15(1) of the *Charter*.<sup>78</sup> The same allegations were considered and dismissed in the *Wells* decisions.<sup>79</sup> Like in *Wells*, the differential treatment complained of relates to the distinction between applicants like Mr. Brake, whose self-identification criteria was assessed under the Supplemental Agreement because they submitted their application after the Recognition Order, and those whose self-identification criteria was assessed under the Agreement because they submitted their application before the Recognition Order. This distinction is temporal

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<sup>75</sup> *Apotex Inc v Eli Lilly and Co*, 2015 ONCA 305 at para 21.

<sup>76</sup> Sayce Affidavit, Exhibit B: Proposed Statement of Claim at para 70, AB Vol 2, Tab 9B, p 321.

<sup>77</sup> *Professional Institute of the Public Service of Canada v Canada (Attorney General)*, 2012 SCC 71 at paras 149, 152.

<sup>78</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 at s 15(1).

<sup>79</sup> *Wells* at para 121.

and is not an enumerated or analogous ground of discrimination under section 15 of the *Charter*.

62. The Proposed Claim fails to plead discrimination on the basis of residency. Only the Amended Proposed Claim, which was held to be prejudicial to the responding parties, alleges that the Supplemental Agreement discriminates against proposed class members on the basis of where they live. In any event, the requirement that a founding member who does not live in Newfoundland have a current and substantial connection to one of Newfoundland's 67 Mi'kmaq communities is set out in sections 1.13 and 1.14 of the 2008 Agreement,<sup>80</sup> which Mr. Brake does not challenge.

63. While in *Corbiere*,<sup>81</sup> the Supreme Court found that "off-reserve band member status" was an analogous ground, it specifically stated that this finding did not apply to residency "in contexts other than as it affects band members who do not live on the reserve of the band to which they belong."

## **2) No identifiable class because proposed class is overbroad**

64. After considering the evidence before him and the relevant legal principles, the Motion Judge properly concluded that this proposed class definition was overbroad.<sup>82</sup>

65. Rule 334.16(1)(b) of the *Rules* requires the Appellant to satisfy the Court that there is an identifiable class before the proceeding can be certified. He must show that the proposed class is properly defined and is not overbroad.<sup>83</sup> The proposed class definition must describe persons who in fact have a claim asserted in the pleading. This requires some evidentiary basis supporting the factual conclusion that all proposed class members have suffered the loss claimed.<sup>84</sup>

66. Mr. Brake proposed the following class definition:

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<sup>80</sup> See also, Annex A to the 2008 Agreement, Enrolment Committee Guidelines at para 25, AB Vol 4, Tab 12G, p 1392-1401.

<sup>81</sup> *Corbiere v Canada*, [1999] 2 SCR 203 at para 62.

<sup>82</sup> Decision at paras 59-68, AB Vol 1 Tab 2, pp 32 – 34.

<sup>83</sup> *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 26 ("*Dutton*") at paras 38; *Hollick v Toronto (City)*, 2001 SCC 68 ("*Hollick*") at paras 17, 20, 21.

<sup>84</sup> *Hollick* at para 19.

All individuals whose applications for Qalipu Band membership were rejected in accordance with the 2013 Supplemental Agreement (the “Class” or “Class Members”).<sup>85</sup>

67. As found by the Motion Judge, the Proposed Claim is “predicated on his application having been improperly assessed” because the Supplemental Agreement was not ratified in accordance with the process outlined in the 2008 Agreement and because the decision of the Committee and the entire assessment process was unfair.<sup>86</sup>

68. Before a class of individuals can be properly identified, the administrative law issues must be determined. Merely applying for and subsequently being rejected for founding membership does not identify who may be entitled to relief. Such a class of individuals includes those who would not qualify for membership under either of the Agreements and those who may now qualify for membership as a result of the decision in the *Wells* test cases.

***j) No rational connection because private law claims are premature***

69. Mr. Brake’s private law causes of action—breach of fiduciary duty, breach of the *Charter*, and unjust enrichment—presume that, but for the Supplemental Agreement, Mr. Brake would have been entitled to founding membership.<sup>87</sup> However, the proposed class cannot be known until the administrative law issues – the validity of the Supplemental Agreement and a reconsideration of whether Mr. Brake qualifies as a founding member – are determined.

70. As a result of the *Wells* decisions, which struck parts of the Supplemental Agreement related to the self-identification criteria, Mr. Brake’s application, along with those of other similarly situated applicants, can be reassessed under the Supplemental Agreement’s remaining provisions. However, even if Mr. Brake is now successful on the self-identification criteria, he will need to satisfy the remaining

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<sup>85</sup> Sayce Affidavit, Exhibit B: Proposed Statement of Claim at para 33 AB Vol 2, Tab 9B, pp 311 - 312.

<sup>86</sup> Decision at para 55, AB Vol 1, Tab 2, p 30.

<sup>87</sup> Decision at para 55, AB Vol 1, Tab 2, p 30.

criteria, namely group acceptance and Aboriginal ancestry, which were not previously assessed.<sup>88</sup> Therefore, until the Committee assesses all of the criteria, it is unknown whether Mr. Brake will be entitled to founding membership.

71. An identifiable class of individuals will only be known after this reassessment has taken place and any appeals have been exhausted.

72. The power to amend aspects of a proposed class action should be exercised with caution and restraint.<sup>89</sup> In this case, the Motion Judge properly declined the Appellant's urging to amend the overbroad proposed class definition, which included applicants who would be rejected for founding membership under either Agreement. Before the proposed class definition can be refined in any practical or meaningful way, the administrative law issues must be decided and the affected founding membership applications must be reassessed in accordance with the determinations on those issues. Only when that is completed will it be known who may comprise a proposed class.<sup>90</sup>

73. Neither Mr. Brake nor any future potential class member are prejudiced by the Motion Judge's decision. In finding that there is no identifiable class because the private law causes of action, and therefore the common issues, are premature, the Motion Judge left the door open for any future claims that may arise following the reassessment process by stating that "[t]he disposition of these motions is without prejudice to any future claim or claims being made by any rejected applicant for membership in the Qalipu Band who is subsequently found to qualify for membership or any subsequent motion for certification."<sup>91</sup>

### **3) The proposed common issues should not be certified**

74. Mr. Brake proposed eight common issues.<sup>92</sup> As the Motion Judge properly determined, only the first common issue, which addressed the administrative law issue

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<sup>88</sup> Desjardins Affidavit 1 at para 28, AB Vol 4, Tab 11, p 1177.

<sup>89</sup> *Brown v Canada*, 2013 ONCA 18 at para 45, citing *McCracken v Canadian National Railway Co*, 2012 ONCA 445 at para 144.

<sup>90</sup> Decision at paras 65-68, AB Vol 1 Tab 2, pp 33 - 34.

<sup>91</sup> Decision at para 79, AB Vol 1 Tab 2, p 38.

<sup>92</sup> Applicant's Notice of Motion, para 4 (1) – (8), AB Vol 1, Tab 6.

regarding lawfulness of the rejection of applications under the Supplemental Agreement, was appropriate. The remaining seven proposed common issues related to the private law causes of actions and remedies claimed and could not be determined in common for all class members until the class was properly defined.<sup>93</sup>

*i. Proposed common issues may arise only after public law issues determined*

75. As the Motion Judge concluded, whether any of the seven common issues related to the private law causes of actions and remedies claimed could be common to any class members can only be determined after the class can be properly defined. These proposed common issues could only be common to any applicants who were improperly denied founding membership under the Supplemental Agreement and could only arise after the public law issues are decided and the affected founding membership applications are reassessed.<sup>94</sup>

76. This is particularly evident when the proposed common issues related to damages are considered. The claims for damages are based on Mr. Brake's submissions that he has been improperly deprived of founding membership and the benefits that come with Indian status. However, these submissions presume that Mr. Brake would otherwise be entitled to founding membership but for the Supplemental Agreement. Mr. Brake's application was rejected for failing to meet the self-identification criteria in the Supplemental Agreement. Having failed to satisfy this criteria, his application was rejected without further consideration of the remaining criteria – group acceptance and ancestry.<sup>95</sup>

77. If upon reconsideration of his application, Mr. Brake is found to meet all the criteria and is entitled to founding membership, then he will be registered under the *Indian Act*. If Mr. Brake's application is rejected after reassessment, then he has suffered no damages because he has not been deprived of anything having failed to

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<sup>93</sup> Decision at para 70, AB Vol 1, Tab 2, p 35.

<sup>94</sup> Decision at paras 69-70, AB Vol 1, Tab 2, p 35.

<sup>95</sup> Desjardins Affidavit 1 at para 28, AB Vol 4, Tab 11, p 1177.

meet the founding membership criteria. In either case, any claim for damages is speculative and premature.

78. Contrary to Mr. Brake's submissions, neither *Rumley v British Columbia*<sup>96</sup> ("*Rumley*") nor *Cloud v Canada (Attorney General)*<sup>97</sup> ("*Cloud*") support certifying the common issues pertaining to Mr. Brake's claims of breach of fiduciary duty and the *Charter*.<sup>98</sup> In *Rumley* and *Cloud*, the courts certified common questions related to allegations of the respondent's systemic negligence, which could be determined without reference to the circumstances of individual class members. However, unlike this case, in *Rumley* and *Cloud*, it was already known who would be affected by a finding of any duty and corresponding breach, even if some differences in liability remained among class members. In this case, it is impossible to know who may form a potential class let alone whether Canada owed a fiduciary duty to any potential class member, who will remain unknown until the administrative law issues are determined and founding membership applications are reassessed. Until then, there can be no common issues and certifying any common issue at this stage would not be fair or efficient.

79. Mr. Brake relies on the Supreme Court decision *Vivendi Canada Inc v Dell'Aniello* ["*Vivendi*"], which provides that "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 members claim."<sup>99</sup> Unlike *Vivendi*, however, the issue is not whether the resolution of the proposed common issues would be determinative of some, but not all of the class members' claims. In this case, until the proposed class can be defined, it is impossible to know whether there are any claims to be advanced, let alone what proposed common issues may be determinative.

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<sup>96</sup> *Rumley v British Columbia*, 2001 SCC 69.

<sup>97</sup> *Cloud v Canada (Attorney General)*, [2004] OJ No 4929 (Ont CA).

<sup>98</sup> See Appellant's Memorandum of Fact and Law at paras 37-38, 87. The common issues related to allegations of breach of fiduciary duty and *Charter* are common issues 2, 3, 4, and 7.

<sup>99</sup> *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at para 41.

#### 4) The *Wells* test cases are the preferable procedure

80. The Motion Judge concluded that a class action will not result in the just and efficient resolution of the issues. There was already a preferable procedure that would achieve these goals: the *Wells* test cases. This conclusion is supported by the evidence, the factors in Rule 334.16(2), and the relevant caselaw. There is no overriding and palpable error and the Motion Judge's conclusion is entitled to substantial deference.

##### *i. Assessing preferable procedure is a matter of broad discretion*

81. Rule 334.16(2) of the *Rules* sets out the factors that must be considered in determining whether a class proceeding is the preferable procedure.

82. Most importantly, the consideration of whether a class proceeding is the preferable procedure is "a matter of broad discretion".<sup>100</sup> Preferability is a comparative analysis that weighs class proceedings with other methods of advancing the claims, such as test cases.<sup>101</sup>

83. For a class proceeding to be the preferable procedure, it must represent a fair, efficient, and manageable procedure compared to any alternative methods. Ordinarily, this is assessed by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.<sup>102</sup>

##### *ii. Wells test cases provide effective redress for the substance of the claim*

84. In *AIC Limited v Fischer*, the Supreme Court stated that the preferability requirement is broad requiring "the court to look to all reasonably available means of resolving the class members' claims".<sup>103</sup> An alternative process need not decide the

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<sup>100</sup> *Samson Cree Nation v Samson Cree Nation (Chief and Council)*, 2008 FC 1308 ("*Samson Cree Nation*") at para 97.

<sup>101</sup> *Hollick* at paras 28, 31.

<sup>102</sup> *Hollick* at paras 27-31.

<sup>103</sup> *AIC Limited v Fischer, et al*, 2013 SCC 69 ("*AIC Limited*") at paras 19, 34, emphasis is in original.

precise legal and/or factual questions raised by the common issues.<sup>104</sup> Rather, “[t]he question is whether the alternative has the potential to provide effective redress for the substance of the plaintiff’s claim and to do so in a manner that accords suitable procedural rights.”<sup>105</sup> In considering what alternatives to class proceedings may exist, the Supreme Court listed “joinder, test cases, consolidation” as examples of those that a motion judge may consider in assessing the preferable procedure criteria.<sup>106</sup>

85. The *Wells* test cases challenged the Supplemental Agreement’s validity, sought to quash the Committee’s decisions and have applications for founding membership determined in accordance with the self-identification requirements set out in the 2008 Agreement. The issues sought to be determined in Mr. Brake’s proceeding and the *Wells* test cases were effectively the same.

86. Brought as judicial reviews, the *Wells* test cases “already embod[y] access to justice features” since they are “summary proceeding[s] with specific timelines.”<sup>107</sup> As proof that they provide an efficient and timely resolution of the issues, the *Wells* test cases have already been decided on their merits and will impact nearly 58,000 applicants.<sup>108</sup> As noted above, the *Wells* decisions have not been appealed.

87. Canada provided evidence that the *Wells* judicial reviews were to proceed as test cases on the validity of the self-identification aspects of the Supplemental Agreement and that the results in the *Wells* judicial reviews would be applied to applicants who were rejected on the self-identification criteria in the Supplemental Agreement, like Mr. Brake.<sup>109</sup> As a result of the *Wells* decisions, Mr. Brake and other similarly rejected applicants may have their founding membership applications reassessed under the Supplemental Agreement’s remaining clauses.

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<sup>104</sup> *AIC Limited* at para 19.

<sup>105</sup> *AIC Limited* at para 37.

<sup>106</sup> *Hollick* at para 31; *AIC Limited* at para 35.

<sup>107</sup> *Wenham v Canada (Attorney General)*, 2017 FC 658 at para 39.

<sup>108</sup> Desjardin affidavit at para 24, AB Vol 4, Tab 11, p 1176.

<sup>109</sup> Decision at para 74, AB Vol 1, Tab 2, p 37; Hammell Affidavit at para 3, AB Vol 4, Tab 10, p 1120.

88. The *Wells* judicial reviews did not challenge the group acceptance criteria in the Supplemental Agreement. The Committee's decisions on group acceptance could have been appealed to the Appeal Master when the *Wells* judicial reviews were brought. However, now that the Appeal Master has rendered decisions in all appeals involving applications rejected for group acceptance, a second judicial review challenging the group acceptance provisions of the Supplemental Agreement has been brought – *Abbott v AGC and FNI*.<sup>110</sup> Mr. Brake's Proposed Claim raises the same administrative law issues about the group acceptance criteria as the *Abbott* judicial review.

89. Mr. Abbott was accepted as a founding member under the Agreement, but was subsequently found ineligible for founding membership based on the group acceptance criteria when his application was reassessed under the Supplemental Agreement.

90. Mr. Abbott's judicial review seeks declarations on the validity of the Supplemental Agreement's group acceptance provisions and the Directive related to group acceptance. If successful, these declarations will apply broadly and will determine that issue for a group of applicants in much the same way as a class proceeding. The results of the *Abbott* judicial review have the potential to impact approximately 20,000 applicants<sup>111</sup>. Together the *Wells* and *Abbott* judicial reviews will comprise the class that Mr. Brake seeks to represent.

91. The Court has set a timetable for the *Abbott* application that provides for the filing of a requisition for hearing by September 18, 2018.<sup>112</sup> Therefore, the administrative law issues raised in the *Abbott* judicial review concerning the group acceptance provisions, and that are also being challenged in Mr. Brake's Proposed Claim, will be determined by the Federal Court in a more efficient and timely way.

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<sup>110</sup> *Abbott*.

<sup>111</sup> Desjardins Affidavit 1 at para 27, AB Vol 4, Tab 11, p 1177.


<sup>112</sup> *Abbott* Order of Justice Tabib dated July 18, 2018.

**PART IV – ORDER SOUGHT**

92. Canada seeks an order:
- a. dismissing this appeal;
  - b. awarding its costs; and,
  - c. such other relief as this Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Ottawa, in the Province of Ontario, this 13<sup>th</sup> day of September 2018.



Elizabeth Kikuchi



Sarah Sherhols

Counsel for the Respondent, the Attorney General of Canada

## **PART V – APPEAL FACTUM AUTHORITIES**

### **STATUTES & ACTS**

*Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982  
Canada Act 1982 (UK), 1982, c 11*

*Federal Courts Act, RSC, 1985, c-F-7*

*Federal Court Rules, SOR/98-106*

*Qalipu Mi'kmaq First Nation Act, SC 2014*

### **CASE LAW**

*Association des Crabiers Acadiens Inc v Attorney General, 2009 FCA 357*

*Apotex Inc v Eli Lilly and Co, 2015 ONCA 305*

*Benhaim v St-Germhain, 2016 SCC 48*

*Brown v Canada, 2013 ONCA 18*

*Canada (Commr of Competition) v Superior Propane Inc, 2003 FCA 53*

*Canada v John Doe, 2016 FCA 191*

*Canada v Telezone, 2010 SCC 62*

*Cloud v Canada (Attorney General), [2004] OJ No 4929 (Ont CA)*

*Corbiere v Canada, [1999] 2 SCR 203*

*Doucette v AGC and FNI, T-402-17*

*Elder Advocates of Alberta Society v Alberta, 2011 SCC 24*

*Foster v Canada, 2015 FC 1065*

*Hinton v Canada, 2008 FCA 215*

*Hollick v Toronto (City), 2001 SCC 68*

*Horseman v Canada 2016 FCA 238*

*Howse v Canada*, 2015 FC 1063

*Macinnis v Canada*, [1994] 2 FC 464 (FCA)

*Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14  
*Mancuso v Canada*, 2015 FCA 227

*McCracken v Canadian National Railway Co*, 2012 ONCA 445

*Minister of Citizenship and Immigration v Tihomirovs*, 2005 FCA 308

*Meggeson v Canada*, 2012 FCA 175

*Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2014 NUCA 2

*Professional Institute of the Public Service of Canada v Canada (Attorney General)*,  
2012 SCC 71

*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57

*Rumley v British Columbia*, 2001 SCC 69

*Samson Cree Nation v Samson Cree Nation (Chief and Council)*, 2008 FC 1308

*Slansky v Canada*, 2013 FCA 199

*South Yukon Forest Corp v Canada*, 2012 FCA 165

*Taylor v Canada (Attorney General)* 2012 ONCA 479

*Thibaudeau v The Queen*, [1994] 2 FC 189 (CA)

*Vivendi Canada Inc v Dell’Aniello*, 2014 SCC 1

*Wells v Canada*, 2018 FC 483

*Wenham v Canada (Attorney General)*, 2017 FC 658

*Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 26

## **OTHER**

*Abbott v AGC and FNI*, Court File No T-573-18, Notice of Application

*Abbott v AGC and FNI*, Court File No T-573-18, Order of Justice Tabib dated July 18,  
2018