Federal Court  Cour fédérale

Date: 20180703

Dockets: T-638-17
T-644-17

Citation: 2018 FC 483

Ottawa, Ontario, July 3, 2018

PRESENT: The Honourable Mr. Justice Zinn

Docket: T-638-17

BETWEEN:

DAVID ROBERT WELLS

Applicant

and

CANADA (ATTORNEY GENERAL) AND FEDERATION OF NEWFOUNDLAND INDIANS

Respondents

AND BETWEEN:

Docket: T-644-17

SANDRA FRANCES WELLS

Applicant

and

CANADA (ATTORNEY GENERAL) AND
FEDERATION OF NEWFOUNDLAND INDIANS

Respondents

AMENDED JUDGMENT AND REASONS

[1] Canada and the Federation of Newfoundland Indians [FNI] signed the Agreement for the Recognition of the Qalipu Mi'kmaq Band on June 23, 2008 [the Original Agreement], which established a process for the recognition of the Qalipu Mi'kmaq First Nation Band [QMFN], formed an Enrolment Committee to review and assess applications for membership in the QMFN, and set out criteria for membership in the QMFN [the Enrolment Committee Guidelines]. The Original Agreement also created an Appeal Master whose function is to consider and rule on appeals from decisions of the Enrolment Committee.

[2] The Original Agreement was amended by the responding parties by the Supplemental Agreement dated June 23, 2013 [the Supplemental Agreement]. The Supplemental Agreement amendments included changing the Enrolment Committee Guidelines regarding the evidence required to establish an applicant's self-identification as a member of the Mi'kmaq Group of Indians of Newfoundland [the Mi'kmaq], and limiting the availability of an appeal from decisions of the Enrolment Committee.

[3] Davis Robert Wells and Sandra Frances Wells are challenging decisions of the Enrolment Committee rejecting each of their applications for membership in the QMFN. Neither had a right to appeal these decisions to the Appeal Master. Their applications were rejected because

they had not provided the documentary evidence required by the Supplemental Agreement to prove that they self-identified as members of the Mi'kmaq at the date the QMFN was created.

[4] The applicants also challenge the legitimacy of the amendment to the Original Agreement and the reasonableness of the relevant terms of the Supplemental Agreement. The two decisions under review cannot be examined in isolation from these allegations.

[5] It is appropriate, pursuant to Rule 302 of the *Federal Courts Rules*, SOR/98-106, to order that each of these two applications proceed even though they are not, strictly speaking, limited to a single decision.

[6] These applications were heard together. While some of the facts are unique to each applicant, most of the facts relied upon to challenge these two decisions are common to both. Accordingly, these reasons apply to both of the applications and a copy shall be placed in each of the Court files.

Background

1. The Creation of the QMFN and its Membership

[7] Newfoundland joined Canada on March 31, 1949. No provision was made in the Terms of Union of Newfoundland with Canada for the recognition and registration of Newfoundland's Aboriginal Peoples under the *Indian Act*, RSC 1985, c I-5.

[8] The FNI was formed in 1972. One of its purposes was to secure recognition of the Mi'kmaq as status Indians under the *Indian Act*. Faced with little or no progress to this end, on January 12, 1989, the FNI initiated an action in the Federal Court of Canada [T-129-89] seeking, among other relief, a declaration that the "FNI Members are 'Indians' within the meaning of section 91(24) of The Constitution Act, 1867", and an order directing the Governor-in-Council to recognize its member bands as "bands" under the *Indian Act*. In settlement of that action, Canada and the FNI entered into negotiations to recognize the QMFN as a band and its members as status Indians under the *Indian Act*.

[9] On November 30, 2006, Canada and the FNI reached an Agreement-in-Principle [AIP] that identified the process for the creation of a landless band of the Mi'kmaq for purposes of the *Indian Act* and the enrolment in it of individual members as status Indians. On March 29, 2008, the FNI membership voted to ratify the AIP. 3,232 of the approximately 10,500 FNI members cast ballots, of which 2,913 or 90% were in favour of ratification. The AIP was signed by representatives of Canada and the FNI on June 23, 2008, whereupon it became the Original Agreement.

[10] The Original Agreement provided for a two-stage membership enrolment process over four years. Each application for membership required the approval by the Enrolment Committee. Each person accepted by the Enrolment Committee during this process was described in the Original Agreement as a "Founding Member" of the QMFN.

[11] The purpose of the first stage was to ensure that there were sufficient persons interested to justify the creation of a band under the *Indian Act*. Between November 30, 2008, and November 30, 2009, at least 5,025 persons (50% of the number of FNI members) had to be accepted by the Enrolment Committee as members of the QMFN, otherwise the Original Agreement would be terminated. If this threshold was met, then the second stage of the enrolment process would take place between December 1, 2009 and November 30, 2012. It was agreed that each Founding Member would be entitled to registration under paragraph 6(l)(b) of the *Indian Act*, as "a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act."

[12] Based on census records and a survey of the Mi'kmaq population, Canada and the FNI expected approximately 20,000 applications to be filed over the course of the four-year membership process. In fact, 25,912 applications for membership were submitted during the twelve months of the first stage.

[13] Due to the unexpectedly high number of applicants, not all applications received during the first stage were assessed by the Enrolment Committee within the time period prescribed in the Original Agreement. Nevertheless, since the membership numbers exceeded the minimum, the responding parties agreed that those who were found to be eligible should not have to wait until all first stage applications were assessed to receive Indian status. Thus, Canada created the QMFN by Order in Council PC 2011-928 [the Recognition Order] on September 22, 2011, and agreed that it would later amend the list of persons identified therein as members of the band until all eligible applicants who applied during the first stage became members.

[14] After the first stage and up to September 22, 2011, the date of the Recognition Order, another 4,816 individuals applied for membership. After the creation of the QMFN on September 22, 2011, and up to November 30, 2012, the deadline for membership application, 69,946 more individuals applied for membership with approximately 46,000 of these being received in the last 3 months of the enrolment process.

[15] In total, 100,674 applications for membership in the QMFN were received by the Enrolment Committee in the period provided for in the Original Agreement.

[16] In the fall of 2012, it became clear to the FNI that not all of the membership applications could be assessed by the Enrolment Committee before the March 23, 2013 deadline established in the Original Agreement. The FNI wrote to Canada on August 16, 2012, seeking its agreement to extend the deadline.

[17] The Original Agreement requires applicants to provide evidence of Mi'kmaq ancestry, community acceptance, and that he or she self-identified as a member of the Mi'kmaq prior to the date of the Recognition Order.

[18] In the fall of 2012, the FNI took the view that persons signing an application form after the date of the Recognition Order had not in so doing shown that they self-identified as a member of the Mi'kmaq prior to the date of the Recognition Order. The former President of the FNI attests that in light of this realization "the Federation appealed all four Enrolment Committee decisions made up to that time where Qalipu Founding Membership had been

approved based on the applicants self-identifying as Members of the Mi'kmaq Group of Indians of Newfoundland by signing the application after the date of the Recognition Order."

[19] Subparagraph 4.1(d)(i) of the Original Agreement states that "an individual is eligible to be enrolled as a Founding Member if … in the assessment of the Enrolment Committee on the date of the Recognition Order [the individual] self-identifies as a Member of the Mi'kmaq Group of Indians of Newfoundland" [emphasis added].

[20] Section 4.2.1 of the Original Agreement requires the Enrolment Committee to assess applications "in accordance with the procedures set out in section 4.4 and with the Enrolment Committee Guidelines." Section 24 of the Enrolment Committee Guidelines provides that "[a] signed application form constitutes sufficient evidence that the applicant self-identifies as a Member of the Mi'kmaq Group of Indians of Newfoundland."

[21] In its appeal, the FNI outlined its concern as follows:

> For applicants that signed an Application before the date of the Recognition Order, this guideline was consistent with the clause 4.1(d)(i) criteria since the band had yet to be established. In this case, the date of the application post-dates the Recognition Order and there [*sic*] cannot be presumed to reflect the fact that the Applicant had self-identified on the date of the Recognition Order.
>
> For applications that post-date the Recognition Order, the evidence addressed in the guideline; i.e. a signed application, does not speak to whether the clause 4.1(d)(i) criterion had been met on or before the date of the Recognition Order. It merely reflects that the applicant self-identified as of the application's date which is inconsistent with the clause 4.1(d)(i) requirement. Accordingly, further objective evidence must be supplied to show that the criterion has been met. If it is not provided, the application must be rejected on the basis that insufficient evidence has been provided to meet clause 4(1)(d)(i) criterion.

[22] No decision was made by the Appeal Master on the FNI appeals prior to the expiration of the time permitted. However, the concern regarding self-identification evidence and the requested extension of time to assess the unexpectedly large number of applications were discussed with Canada. Canada had the same concerns as the FNI.

[23] In addition to the concerns about timing and the self-identification evidence, both Canada and the FNI were concerned by the much greater than anticipated number of applications. Canada's affiant, Roy Gray, attests that "the submission of over 46,000 applications in the final three months of a four-year application period raised questions about the credibility of the applications." He attests that "[b]oth Canada and the FNI were concerned about the integrity and credibility of the Qalipu Mi'kmaq First Nation and the legitimacy of its membership." Brendan Sheppard of the FNI described his reaction to this number of applications in a similar manner:

> Based on my longstanding experience in the Federation, it was not fathomable that these individuals could have self-identified as Members of the Mi'kmaq Group of Indians before QMFN was formed. If they had, I would have expected a greater level of interest than had been experienced in the Federation membership or membership in the other organizations on the island of Newfoundland representing Mi'kmaq. There would have been greater numbers attending cultural events such as Conne River or Flat Bay pow-wows or St. Anne Day ceremonies. It therefore was not credible that all of these applicants could have self-identified as Members of the Mi'kmaq Group of Indians of Newfoundland before QMFN's formation. It raised a question as to how many of these new applicants applied to obtain benefits that band membership offered.
>
> I saw evidence of this after the Government of Canada issued what was commonly referred to as 'status cards' in early 2012 to QMFN members. Shortly after the issuance of the 'status cards', a Corner Brook car dealership started to advertise tax-free automobile sales to QMFN members who had their 'status cards' on CFCB, a Corner Brook radio station that broadcast to the western portion of the island of Newfoundland. After those advertisements were broadcast, hours long line-ups started appearing at the QMFN

> Corner Brook office, which also served as the Federation office, with people looking to file their applications to obtain their ‘status cards’.

[24] Mr. Gray pointed to census data as further support for the concerns expressed by Canada and the FNI. In his affidavit, he summarized that data:

> The 2001 census indicates that Canada's population was 30,007,094, of which 608,850, or 0.02% [*sic* it should be 2.0%], declared First Nation Identity. The population of the province of Newfoundland and Labrador in 2001 was 508,080, of whom 18,775 (3.6%) self-identified as aboriginal and 7,035 (or 1.4%) as First Nation, which included both Innu and Mi'kmaq. …
>
> The 2006 census indicates that Canada’s population was 31,234,030 of which 689,025, or 0.02% [*sic* it should be 2.0%], declared First Nation identity. The population of the province of Newfoundland and Labrador in 2006 was 500,610. Approximately 24,000 (or 4.6%) residents of Newfoundland and Labrador self-identified as aboriginal, of whom 7,765 (or 1.6%) identified as First Nation, which included both lnnu and Mi'kmaq. …
>
> The 2011 census indicates that Canada's population was 32,852,320 of which 851,560, or 0.025% [*sic* it should be 2.5%], declared First Nation identity. The population of Newfoundland and Labrador was 514,536. Approximately 36,000 (or 7%) residents of Newfoundland and Labrador self-identified as aboriginal, of whom 19,315 (or 3.7%) identified as First Nation, which included both Innu and Mi'kmaq.

[25] Based on his analysis of the census data and the number of applications received, Mr. Gray concluded that it was neither reasonable nor credible that all of the more than 100,000 applicants could validly claim that they met the membership requirements:

> Given these numbers, it was neither reasonable nor credible to expect that 104,000 applicants would claim to meet the requirements for membership in the Qalipu Mi’kmaq First Nation, as the number of applicants represented 1 in 5 (19%) of the population of Newfoundland and Labrador and about 11% of Canada’s First Nation population (whereas the population of

> Newfoundland and Labrador represented only 1.6% of the population of Canada in 2011).

[26] Canada and the FNI negotiated the Supplemental Agreement amending the Original Agreement in two significant respects related to these applications. It changed the evidence required to establish self-identification and changed the availability of an appeal from a negative decision of the Enrolment Committee based on an applicant's failure to provide the evidence of self-identification.

[27] Article 2.15 of the Original Agreement stipulates when and how its terms may be amended:

> This Agreement may only be varied, changed, amended, added to or replaced by written agreement between the Parties, ratified through the same procedures as this Agreement was ratified, save and except that the Parties may agree in writing from time to time to amend this Agreement, without further ratification or approval, for any of the following purposes
>
> a) to remove any conflicts or inconsistencies which may exist between any of the terms of this Agreement and any provision of any applicable law or regulation, so long as the Parties agree that such amendments will not be prejudicial to their respective interests
>
> b) to correct any typographical error in this Agreement or <u>to make corrections or changes required for the purpose curing or correcting clerical omissions, mistake, manifest error or ambiguity arising from defective or inconsistent provisions contained in this Agreement</u> or
>
> c) to extend any time limit set out in this Agreement.
>
> [emphasis added]

[28] Canada and the FNI were of the view that the self-identification evidence provision in the Enrolment Committee Guidelines constituted a "mistake, manifest error or ambiguity" under paragraph 2.15(b) of the Original Agreement. In their view, an application for membership signed after the date of the Recognition Order could not prove that the applicant self-identified as Mi'kmaq prior to that date, as required by subparagraph 4.1(d)(i) of the Original Agreement. As a result, they amended section 24 of the Enrolment Committee Guidelines to require that those making an application for membership after the date of the Recognition Order were required to establish that they self-identified as Mi'kmaq by showing: (1) that they were named on at least one of the lists in subparagraph 24(3)(i), or (2) by providing at least one of the documents listed in subparagraphs 24(3)(ii) to (v) of the amended Enrolment Committee Guidelines:

> i. Lists of the Federation of Newfoundland Indians, Ktaqamkuk Mi'kmaq Alliance, Benoit First Nation, or Sip'kop Mi'kmaq Band held by the Parties and submitted to the Enrolment Committee. Original membership cards may be submitted to assist the Enrolment Committee in verifying whether an applicant is named on one of these lists;
>
> ii. 2006 or earlier census return filed by a resident of the Island of Newfoundland, indicating that he or she identified as an Aboriginal person, a North American Indian or a member of an Indian Band/First Nation;
>
> iii. Copy of a Newfoundland newspaper article pre-dating the 23 June 2008 signing of the Agreement reporting the participation of the applicant as a member of the Mi'kmaq Group of Indians of Newfoundland in ceremonial, traditional, or cultural activities of the Mi'kmaq of Newfoundland;
>
> iv. Subject to the written approval of both Parties that the document represents acceptable evidence of self-identification, certified true copy of an application form filled out by a resident on the island of Newfoundland prior to the signing of the 23 June 2008 Agreement for:
>
> - a job in a government, other public institution or an aboriginal organization listed in (i) above; or

> - a program benefit sponsored by a government or governmental agency
>
> indicating that the applicant self-identified as Mi'kmaq, Indian, or Aboriginal for the purpose of being selected for the job or program benefit;
>
> v. Subject to the written approval from both Parties, other relevant documents submitted to or issued by a government, a public institution, the Federation of Newfoundland Indians, Ktaqamkuk Mi'kmaq Alliance, Benoit First Nation, Kitpu Band, and Sip'kop Mi'kmaq Band, prior to the signing of the 23 June 2008 Agreement, showing that the applicant self-identified as a Member of the Mi'kmaq Group of Indians of Newfoundland.

[29] Article 4.3.3 of the Original Agreement gives appeal rights to Canada, the FNI, and those whose applications for membership had been rejected:

> Within thirty (30) days of the mailing of its decision by the Enrolment Committee, the applicant and the Parties shall have the right to appeal the decision of the Enrolment Committee by sending an Appeal Notice to the Appeal Master, with a copy to the Enrolment Committee.

[30] The appeal was based on a review by the Appeal Master of the record before the Enrolment Committee including the application, documentation submitted by the applicant, written communication between the Enrolment Committee and the applicant, and the decision of the Enrolment Committee.

[31] The right of applicants rejected on the basis of self-identification to appeal was removed in subsection 6(2)(b) of the Supplemental Agreement, as follows:

> An applicant shall not have any right to appeal from a decision of the Enrolment Committee denying an application on the grounds that:

> …
>
> (b) that name of the applicant or either of the applicant's parents is not on one of the lists mentioned in paragraph 24(2)(i) of the Enrolment Guidelines and the applicant has not submitted any objective documentary evidence of self-identification under any of paragraphs 24(2)(ii) to (v).

[32] Section 2 of the Supplemental Agreement also provides that previously accepted applications made between December 1, 2008, and November 30, 2012, were to be reassessed by the Enrolment Committee. Section 4 of the Supplemental Agreement provides that everyone whose application is to be assessed or reassessed, is to be provided with written notification "of the evidentiary requirement pertinent to the assessment or reassessment under the terms of the criteria of subsection 4.1(d) of the Agreement and will be provided an opportunity to send documentation not already submitted to the Enrolment Committee, to address these evidentiary requirements."

2. David Robert Wells' Application for Membership

[33] Mr. Wells attests that it was during the negotiation of the Original Agreement that a number of his cousins informed him that his family had "Mi'kmaq heritage" and they began researching their ancestry. In April 2012, after the date of the Recognition Order, he located a copy of the 1921 census which identified his maternal aunts and uncles as Mi'kmaq. His mother was born the following year. He completed his membership application and submitted it on October 1, 2012.

[34] He attests: "On the date that I submitted my application for membership in the Band, I self-identified as a member of the Mi'kmaq Group of Indians of Newfoundland." He did not include any evidence of self-identification at the date of the Recognition Order, as it was not required under the terms of the Original Agreement in effect at the time he applied for membership.

[35] On November 10, 2013, Mr. Wells received a letter from the Enrolment Committee which reads in relevant part, as follows:

> This letter is to inform you that your application for enrolment in the Qalipu Mi'kmaq First Nation will be assessed in accordance with the 2008 *Agreement for the Recognition of the Qalipu Mi'kmaq Band* and the June 2013 *Supplemental Agreement* between the Government of Canada and the Federation of Newfoundland Indians.
>
> Pursuant to the June 2013 *Supplemental Agreement*, you have the opportunity to provide additional documentation to meet the criteria of self-identification and group acceptance. …
>
> The enclosed document titled "*November 2013 – Updated Information for applicants for membership in the Qalipu Mi'kmaq First Nation*" contains important information respecting the assessment of applications, as well as examples of acceptable documentation related to self-identification and group acceptance that may be provided in support of applications. …
>
> It is the sole responsibility of applicants to determine what additional documentation they wish to provide, if any, in support of their applications to demonstrate fulfillment of the criteria of self-identification and group acceptance.

[36] Mr. Wells read the letter and its enclosure and says that he understood that "applicants who submitted applications after September 22, 2011, were required to provide one of five documents all of which were required to be from June 23, 2008 or earlier." He had none, and

thus did not submit any additional documentation. He attests that if affidavit evidence been acceptable, he would have submitted an affidavit "outlining my personal and family history and attesting to my self-identification."

[37] He received a decision under cover of January 31, 2017, denying his application for membership on the basis that he did not meet the self-identification requirements as set out in the Supplemental Agreement. He was further advised that the decision was final and not subject to an appeal.

3. Sandra Wells' Application for Membership

[38] Ms. Wells, who has no relation to David Robert Wells, made her application for membership in the QMFN on September 27, 2012. She received a letter from the Enrolment Committee dated November 6, 2013, which was identical in form to that received by Mr. Wells.

[39] She reviewed the list of acceptable documents and concluded that she could provide none of them. She did however, provide other documents, including affidavits attesting to her "connection" to the Mi'kmaq communities in Newfoundland and a copy of a 2010 application to a government forming an employment pool of persons with Aboriginal heritage in which she identified herself as Aboriginal.

[40] Ms. Wells attests that when she applied for employment with the Government of Canada in 2006, the form did not allow an applicant to identify as Aboriginal; however, in cross-

examination, this was established not to be the case. When she applied in 2006, she did not identify as Aboriginal on her application but described herself as “black” and a member of a visible minority.

[41] Ms. Wells received a rejection letter dated January 31, 2017, identical to that received by Mr. Wells.

Issues

[42] The following issues were raised and require this Court’s attention:

1. Whether this Court has jurisdiction to hear these judicial review applications;

2. If the Court has jurisdiction, what is the applicable standard of review;

3. Whether the negotiation and implementation of the Supplemental Agreement was for an improper purpose;

4. Whether the decision of Canada and the FNI that there was a “mistake, manifest error or ambiguity arising from defective or inconsistent provisions contained” in the Original Agreement, was reasonable;

5. Whether the decision to address this alleged “mistake, manifest error or ambiguity” by the terms of the Supplemental Agreement was reasonable;

6. Whether the Supplemental Agreement fettered the Enrolment Committee's discretion;

7. Whether the applicants were denied procedural fairness;

8. Whether the amendments made by the Supplemental Agreement failed to balance the applicants' *Charter* rights with the objectives of the amendments; and

9. Whether the rejection of the applicants' applications by the Enrolment Committee was reasonable.

Analysis

1. Jurisdiction

[43] The applicants submit that this Court has jurisdiction to review the decisions of which they complain. Neither of the responding parties takes a contrary position.

[44] This Court recently held that it has jurisdiction to judicially review decisions of the Enrolment Committee: *Howse v Attorney General of Canada*, 2015 FC 1063 [*Howse*] and *Foster v Attorney General of Canada*, 2015 FC 1065. The decision on jurisdiction rested on the fact that the powers of the Enrolment Committee flow from the process for band member recognition established under a federal statute. Justice Manson at paragraphs 19 to 21 of *Howse* put it this way:

> While the Enrolment Committee is an independent body created by the [Original] Agreement, contextually the Enrolment Committee's power is derived from the process that leads to recognition of individual members of the Qalipu Mi'kmaq First Nation by the Governor-in-Council [GIC], under the *Indian Act* and *Qalipu Mi'kmaq First Nation Act* – clearly Acts of Parliament.
>
> Moreover, in making the Qalipu Mi'kmaq First Nation Band Order and its Schedule, which identifies individuals who comprise First Nations' membership, the GIC has purported to act "pursuant to paragraph (c) of the definition of "band" in subsection 2(1) of the Indian Act and subsection 73(3) of that Act" (Qalipu Mi'kmaq First Nation Band Order, SOR/2011-180).
>
> Therefore, in purposefully considering the contextual scheme of the formation of the Enrolment Committee, to recognize members of the Qalipu Mi'kmaq First Nation under both the *Indian Act* and *Qalipu Mi'kmaq First Nation Act*, I find that this Court has jurisdiction to consider this judicial review.

[45] I agree with this analysis. Moreover, I find that this Court has jurisdiction to review the decisions made by Canada that the Original Agreement failed to properly address self-identification after the formation of the QMFN, and to review the decisions made as to how to amend those terms.

[46] The Original Agreement was entered into by Canada using its prerogative to constitute new bands and decide upon membership and Indian status under the provisions of the *Indian Act*. The decision of Canada, through its Minister, to amend the terms of the Original Agreement also flows from this prerogative power. That decision affects the rights of applicants for membership in the QMFN. As such, I find that both the decision made to enter into the Supplemental Agreement, and the decision made as to its terms, are reviewable by this Court under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

2. Standard of Review

[47] The applicants submit that all issues in dispute, except for those related to procedural fairness, are to be reviewed on the standard of reasonableness. Both of the responding parties concur.

[48] Canada's decision to enter into the Original Agreement was a decision made pursuant to the Crown's prerogative power to constitute new bands and to decide on band membership and Indian status. There is no specific guidance provided as to how, or when, such decisions are taken, and thus I agree with the applicants that the decision is best characterized as one of ministerial discretion. I am also of the view that the decisions as to the terms of the Supplemental Agreement are also best characterized as a matter of ministerial discretion.

[49] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 51, observed that "questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness." The decisions made as to the terms of the Supplemental Agreement are discretionary decisions and therefore are to be reviewed on the reasonableness standard.

[50] I further find that the decision made by Canada and the FNI that the terms of the Original Agreement contained a "mistake, manifest error or ambiguity" is a question of mixed fact and law and thus it too is reviewable on the reasonableness standard.

[51] The Supreme Court of Canada in *Dunsmuir* at para 47 taught that "[r]easonableness is a deferential standard." It went on at paras 48 and 49 to explain that deference means respect, not blind reverence to decision-makers:

> What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).
>
> Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[52] The matters currently before the Court are quite unlike most that come before this Court. They differ in that here the decision-makers, Canada and the FNI, are the authors of the Original Agreement, and therefore their decision that it contained a mistake is a decision of the original authors of the agreement. It is not, as is more usually the case, a decision of someone interpreting a provision that it did not create or a disagreement between the authors of an agreement as to its proper interpretation.

[53] Although the Original Agreement stipulates in section 2.1 that it is not a treaty within the meaning of section 35 of the *Constitution Act, 1982*, I agree with Canada that the guidance the Supreme Court of Canada offered in *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 [*Nacho Nyak Dun*], at para 33, when interpreting treaties is apt because, like there, this is a situation where the Court is required it to examine an agreement relating to Aboriginal rights:

> Modern treaties are intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership. In resolving disputes that arise under modern treaties, courts should generally leave space for the parties to govern together and work out their differences. Indeed, reconciliation often demands judicial forbearance. It is not the appropriate judicial role to closely supervise the conduct of the parties at every stage of the treaty relationship. This approach recognizes the *sui generis* nature of modern treaties, which, as in this case, may set out in precise terms a co-operative governance relationship. [citations omitted]

[54] While deference is called for from the Court when reviewing the decisions under review, at the same time, the agreements involve and safeguard the rights of the Mi'kmaq, and thus, as was observed in *Nacho Nyak Dun* at paragraph 34, judicial forbearance by way of deference cannot come at the expense of adequate scrutiny of the actions of Canada and the FNI, to ensure compliance with the terms of the creation of the QMFN and membership in it.

[55] Issues relating to procedural fairness are reviewable on a correctness standard and that issue is addressed below in section 7.

3. Whether the Supplemental Agreement was entered into for an Improper Purpose

[56] The responding parties entered into the Supplemental Agreement after they learned of the unexpectedly large number of applicants for membership. The applicants submit that the responding parties made the amendments they did "for the improper purpose of pre-emptively limiting the number of potential band members who would be entitled to registration, rather than taking steps to have each application considered on its merits." They further submit that "[i]nsofar as this decision frustrated the purpose of the Agreement and the Indian Act generally, the minister exceeded the scope of his discretion."

[57] I agree with the responding parties that the burden of establishing that they acted with an improper purpose rests with the applicants. I further agree that the applicants have provided no evidentiary basis for their assertion that the responding parties acted in a manner that was intended to frustrate the intention of the Original Agreement.

[58] The responding parties' objective when negotiating the terms of the Original Agreement was to create an Indian band and to admit to it those, and only those, who were members of the Mi'kmaq. They defined three factors that an applicant was required to meet in order to be admitted as a member of the band: Ancestry, self-identification, and group acceptance. The

requirement that these three factors be established was accepted by the Mi'kmaq members of the FNI when they ratified the AIP.

[59] There is no question that both of the responding parties were shocked by the number of applications received. It was five times the number they had anticipated. But there is no evidence that the number of applications caused them to take steps to restrict the number of persons admitted to the band. The applicants asked Canada's affiant Roy Gray that very question on cross-examination, and he testified that the number of applications triggered only a review of the application process, but it was this review that led the responding parties to see that there was a flaw in evidentiary requirements for self-identification in the Original Agreement:

> Q. Leading up to the negotiation of the supplemental agreement, is it your understanding that the parties entered into those discussions because there was an issue primarily of numbers -- of the number of applications received?
>
> A. No, I wouldn't put it that way. The way I would put it is that the numbers triggered I guess a sort of substantive review of what was going on, which led to the realization that, as I mentioned in Paragraph 36 of my Affidavit, the criteria of self-identification and group acceptance -- they were two areas where what was happening and how the 2008 agreement was being applied appeared to be out of line with the original objective of the 2008 agreement.

[60] This evidence satisfies me that the purpose behind the amendment to the evidence required to establish self-identification was, as Canada and the FNI submit, to correct the error in the Original Agreement that allowed for evidence from after the Recognition Order to prove self-identification prior to that date.

4. Whether the Decision that a "mistake, manifest error or ambiguity arising from defective or inconsistent provisions contained" in the Original Agreement, was reasonable

[61] There are two changes the responding parties made to the Original Agreement that are at issue in these applications. The first relates to the evidentiary requirements for establishing self-identification. The second relates to removing appeal rights for those whose membership was rejected because they failed to establish that they self-identified as Mi'kmaq. These will be discussed and analyzed separately after a discussion of the method used by the responding parties to make those changes.

[62] Section 2.15 of the Original Agreement contemplates that the agreement might be "varied, changed, amended, added to or replaced." The Original Agreement provides for two possible avenues to make an amendment, the avenue to be used is dependent on the reason for the change.

[63] The first avenue is a general rule authorizing amendment for any purpose so long as it is done by way of a written agreement between the parties "ratified through the same procedures" as the Original Agreement. Section 9 of the Original Agreement provides that it was to be ratified by the FNI when a majority of votes cast by members of the FNI approved of it and the President, duly authorized by the Board of the FNI, signed it. The Original Agreement was ratified by Canada when the Minister, authorized by the Governor in Council, signed it.

[64] The second avenue is an exception to be used in specific circumstances. It provides that the ratification process was not required when Canada and the FNI mutually agree to vary, change, amend, add to or replace the terms of the Original Agreement:

> (a) to remove any conflicts or inconsistencies which may exist between any of the terms of this Agreement and any provision of any applicable law or regulation, so long as the Parties agree that such amendments will not be prejudicial to their respective interests;
>
> (b) to correct any typographical error in this Agreement, or to make corrections or changes required for the purpose of curing or correcting any clerical omission, mistake, manifest error or ambiguity arising from defective or inconsistent provisions contained in this Agreement; or
>
> (c) to extend any time limit set out in this Agreement.
>
> [emphasis added]

[65] Both responding parties rely only on paragraph 2.15(b) of the Original Agreement as authorization for their amendment. They submit that they entered into the Supplemental Agreement "for the purpose of curing or correcting … [a] mistake, manifest error or ambiguity arising from defective or inconsistent provisions" in the Original Agreement.

a. Self-identification Amendment

[66] The responding parties submit that applicants who signed their application form after the date of the Recognition Order had not, and could not by so doing, provide evidence of self-identification prior to the date of the Recognition Order as required by subparagraph 4(1)(d)(i) of the Original Agreement.

[67] The application form was developed jointly by the responding parties pursuant to section 4.4.1 of the Original Agreement. Section 1 of the Enrolment Committee Guidelines specifies that all applications for membership were required to be submitted using this form. Part 2 of the membership application form contains a statement of the applicant that reads, in part, as follows:

> I, _____, am a member of the Mi'kmaq Group of Indians of Newfoundland and I hereby request that I be included in the Founding Members List of the Qalipu Mi'kmaq First Nation Band and, following the recognition of the Qalipu Mi'kmaq First Nation Band as a band under the *Indian Act*, that I be registered as an Indian in the Indian Register and that my name be entered on the Qalipu Mi'kmaq First Nation Band List. I hereby confirm that the information I have provided in and with this application is true and correct to the best of my knowledge and belief. [emphasis added]

The instructions provided with the application instructed that: "By signing it, adult applicants confirm that they identify as a member of the Mi'kmaq Group of Indians of Newfoundland, and that they want to be registered as an Indian under the federal Indian Act, once the Qalipu Mi'kmaq First Nation Band is recognized as a Band."

[68] Affiants on behalf of Canada and the FNI attested that when they were negotiating the Original Agreement and were considering the criteria to identify persons forming part of the Mi'kmaq they were guided by the decision of the Supreme Court of Canada in *R v Powley*, 2003 SCC 43 [*Powley*].

[69] *Powley* concerned two Métis men who killed a moose and were charged with contravening an Ontario hunting law. In their defence, they argued that section 35 of the *Constitution Act, 1982*, protects the right of Métis to hunt for food. In its reasons, the Supreme Court of Canada laid out criteria that might be used to determine who is entitled to Métis rights.

While not suggesting that the criteria it identified were complete, the Supreme Court of Canada at paragraph 30 held that there were "three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance."

[70] With respect to the factor of self-identification, the Supreme Court of Canada at paragraph 29 stated that there was "the need for the process of identification to be objectively verifiable" and at paragraph 31 stated that it should not be of recent origin:

> This self-identification should not be of recent vintage: While an individual's self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement.

[71] The responding parties say that they were guided by *Powley* when negotiating the agreements concerning the Mi'kmaq because they were unique in that the QMFN was a landless band. Brendan Sheppard of the FNI when cross-examined on his affidavit asserted that "[the QMFN] had nothing to model itself off as some of the other Indian Act bands across Canada where, you know, people were – have treaties, and probably land rights or something of that nature."

[72] Brendan Sheppard of the FNI also attested that "[w]hen the self-identification criterion was negotiated, neither party realized that individuals signing an application after QMFN was established would not be providing objective evidence that they had self-identified as a Member of the Mi'kmaq Group of Indians of Newfoundland prior to its creation."

[73] The responding parties submit that because signing the application after the creation of the QMFN provides no objective evidence that the applicant self-identified as a member of the Mi'kmaq prior to its creation, as is required by the terms of the Original Agreement, there was a "mistake, manifest error or ambiguity arising from defective or inconsistent provisions contained in the Agreement."

[74] The applicants suggest that the responding parties are disingenuous when they assert that they were guided by *Powley* and its finding that evidence of self-identification cannot be of recent vintage when they negotiated the Original Agreement. They submit that had this been the desire of the responding parties, "they would have required "objective documentary evidence" from all applicants and not merely relied on a signed application form."

[75] The applicants have not persuaded me. First, their submission is contrary to the affidavit evidence before the Court. Second, it is not obvious that an application form signed months before the creation of the QMFN is not sufficient and reasonable evidence of self-identification that is not of recent vintage. This is especially so when one considers that the establishment of the QMFN was far from a certainty when these applications were being made. Lastly, it was up to the parties to the Original Agreement to determine what evidence they would accept as sufficient to meet the self-identification factor.

[76] The applicants further submit that the responding parties cannot rely on paragraph 2.15(b) of the Original Agreement because section 24 of the Enrolment Committee Guidelines is neither a defective provision nor inconsistent with paragraph 4.1(d) of the Original Agreement.

That paragraph provides that one is eligible for membership if "on the date of the Recognition Order" one self-identifies as a member of the Mi'kmaq.

[77] A defective provision, they submit, is one that "is so lacking in clarity that it does not facilitate the parties' mutual understandings." They submit that the "text of section 24 is clear and the conduct of the parties before entering into the Supplemental Agreement does not indicate any lack of understanding of its meaning."

[78] In my opinion, the meaning of the phrase "defective provision" is not as limited as the applicants suggest. Something is defective if it is faulty, flawed, imperfect, shoddy, inoperative, malfunctioning, out of order, or unsound. In this instance, despite the meaning of section 24 being clear, it is flawed because an applicant stating on an application made after the date of the Recognition Order that "I … am a member of the Mi'kmaq Group of Indians of Newfoundland" does not establish that the applicant was a member prior to that date.

[79] It might be thought that since identity is an immutable characteristic, one either self-identifies as a member of a particular group or one does not, and the fact of self-identification does not change. But that is not the case. Mr. Wells is an example of someone who did not previously identify as Mi'kmaq but now does.

[80] I find that the decision of the responding parties that a present statement that one self-identify as a member is not evidence that one so self-identified at a prior date was a reasonable decision. Accordingly, and that to this extent, their decision that section 24 of the Enrolment

Committee Guidelines was inconsistent with the terms of the Original Agreement was reasonable.

[81] The applicants submit that it is unbelievable that the responding parties were not aware that they agreed to accept a signed application alone as evidence of self-identification after the creation of the QMFN. The Original Agreement very clearly contemplated the creation of the QMFN long before the closing of the application period; in fact, it calls for its creation approximately 12-18 months into the process. Given this, they say that it is unbelievable that the responding parties completely failed to consider the question of what evidence should be required of applicants to prove self identification after the formation of the QMFN.

[82] It may raise questions when parties to an agreement overlook something which in hindsight appears obvious, and especially when they are sophisticated parties. However, contractual mistakes and omissions have been grist for courts since the time parties first agreed to reduce their agreements to writing. Parties do make mistakes and do overlook future consequences of agreed terms. In this case, the authors of the Original Agreement are *ad idem* that section 24 is defective – they agree that they made a mistake. In my view, as the authors of the agreement, their view is entitled to deference. Moreover, in my view, they did make a mistake.

b. Appeal Amendment

[83] Section 4.3.3 of the Original Agreement provides applicants, Canada, and the FNI with a right to appeal decisions of the Enrolment Committee:

> Within thirty (30) days of the mailing of its decision by the Enrolment Committee, the applicant and the Parties shall have the right to appeal the decision of the Enrolment Committee by sending an Appeal Notice to the Appeal Master, with a copy to the Enrolment Committee.

[84] This appeal right of applicants was removed in subparagraph 6(2)(b) of the Supplemental Agreement for decisions of the Enrolment Committee denying an application on the ground that "the name of the applicant or either of the applicant's parents is not on one of the lists mentioned in paragraph 24(2)(i) of the Enrolment Guidelines and the applicant has not submitted any objective documentary evidence of self-identification under any of paragraphs 24(2) (ii) to (v)."

[85] Canada submits that it was reasonable not to extend a right of appeal because it served no purpose when an application was rejected for failure to provide evidence of self-identification. In paragraphs 135 and 136 of its memorandum, Canada explains this submission:

> The amendments which altered the evidentiary requirements for proof of self-identification of those who applied after September 22, 2011 created a new category of applicants: those who had provided no objective evidence to meet the new evidentiary requirement in the 2013 [Supplemental Agreement]. Rather than removing an existing right of appeal, the 2013 [Supplemental Agreement] simply did not extend a right to this new group as it would have been unreasonable to do so.
>
> The decision of the parties not to extend a right of appeal to this new group of applicants was entirely reasonable in light of the fact that any such appeal would have been illusory. It would be a defective provision because it would serve no purpose. The 2008 Agreement provided the Appeal Master with a limited scope of discretion to grant an appeal. That discretion did not include allowing an appeal if an applicant

> did not meet eligibility requirements. Appeals were to be determined by the Appeal Master on the basis of the record before the Enrolment Committee and no new evidence is permitted. Without objective evidence, there would be no basis to meet the criterion of self-identification and therefore no possibility of a successful appeal.
>
> [emphasis added, footnotes removed]

[86] I find the argument that the Supplemental Agreement did not "remove" a right of appeal, but rather did not extend it to a new class of applicants to be specious. Even if one accepts the submission that the Supplemental Agreement created a new group of applicants, which I do not, the appeal provisions in section 4.3.3 of the Original Agreement would have automatically applied to them, but for the amendment in the Supplemental Agreement.

[87] Canada may be correct that most appeals from decisions of the Enrolment Committee on the basis that the applicant failed to provide documentary evidence of self-identification would have been futile. However, there is at least one situation where an appeal would have been of value and not futile, and that is when the Enrolment Committee made a mistake, overlooked, or failed to properly describe the evidence provided.

[88] Regardless, before one assesses whether the amendment made to the appeal provisions was reasonable, one must first determine that the decision to amend the appeal provisions without seeking ratification was within the power of Canada and the FNI pursuant to section 2.15 of the Original Agreement.

[89] I agree with the applicants' submission at paragraph 106 of their memorandum: "The Respondents have provided no evidence to show that the removal of the appeal mechanism was made to remove any conflicts or inconsistencies with existing law or regulation, such that it would have been permitted under section [sic] 2.15(a)." I also agree that the responding parties cannot rely on paragraph 2.15(b). In fact, neither Canada nor the FNI made any submission that the existing appeal provision required an amendment to cure or correct a "mistake, manifest error or ambiguity" and for good reason – it did not.

[90] The amendment the responding parties made to the appeal provisions therefore required ratification. Because the requirements of section 2.15 of the Original Agreement were not met, the amendment of the Supplemental Agreement as it affected the appeal provisions was improper and those amended provisions cannot stand. That being the case, there is no need to examine whether the amendment the responding parties agreed upon was reasonable.

5. Whether the Decision to Address the Mistake Regarding the Self-identification Evidentiary Criteria by the Terms of the Supplemental Agreement was Reasonable

[91] The applicants submit that the responding parties' amendment changing the evidence required to prove self-identification prior to the date of the Recognition Order was arbitrary and under-inclusive.

[92] First, they submit that the amendments arbitrarily provide for "differential treatment of applicants who signed their application forms on or before the date of the Recognition Order

("earlier applicants"), who, pursuant to section 24(2), may continue to rely on their signed application form, and all those who applied after the date of the recognition order ("later applicants"), who must meet the more onerous burden of providing one of the five documents set out in section 24(3)."

[93] Secondly, the applicants submit that the specified documentary evidence required for these later applicants is arbitrary and under-inclusive and cannot achieve the objective of including all persons who did self-identify as members of the Mi'kmaq prior to the date of the Recognition Order.

a. Is there anything arbitrary or unreasonable in fixing the dividing point of applications as September 22, 2011, the date of the Recognition Order?

[94] The requirement set out in paragraph 4.1(d) of the Original Agreement that the Enrolment Committee assess and determine that an applicant self-identified as a member of the Mi'kmaq on the date of the Recognition Order has not been changed, nor has this requirement been challenged in these applications. What changed was the acceptance of the previous guideline that stipulated that an application form signed after the date of the Recognition Order could satisfy the self-identification requirement in the Original Agreement. That decision has been found to be reasonable.

[95] Accordingly, there is nothing arbitrary or unreasonable in fixing the change at the date of the Recognition Order and requiring those dated afterwards to be assessed differently.

b. Whether the specified documentary evidence required for these later applicants arbitrary and under-inclusive.

[96] Applicants after September 22, 2011, were required to submit documentary evidence that showed that they self-identified prior to that date, and the documentary evidence they were required to provide had to pre-date June 23, 2008, the date of the Original Agreement. The applicants submit that this requirement that the supporting evidence be more than three years earlier, is arbitrary given that all that was required was that on the date of the Recognition Order, applicants self-identify as a member of the Mi'kmaq.

[97] The responding parties submit that requiring evidence that was more than three years prior to the date of the Recognition Order is reasonable as it is consistent with the principle in *Powley* that the self-identification not be of recent origin.

[98] The difficulty I have with the submission of the responding parties is that they accepted the mere filing of an application as late as September 21, 2011, to be sufficient non-recent evidence of self-identification. That self-identification could have been as recent as the day before. The explanation offered for accepting this as sufficient is offered by Roy Gray, who at paragraph 41 of his affidavit attests:

> The rationale behind permitting a signed application which pre-dated the establishment of the band to stand as evidence of self-identification was that a person was formally self-identifying in the same way that anyone did when they answered a question as to their aboriginal status on a census form or a job application where an affirmative action program existed. Doing so prior to the establishment of the band was viewed as a credible form of self-identification since it was uncertain whether a band would actually be formed.

[99] The applicants submit that this rationale is not credible because there "is no reason to believe that an earlier applicant is any more likely to have 'legitimately' self-identified on the date of the Recognition Order than a later applicant who signed their form one day later."

[100] I agree with the responding parties that when one files an application after the formation of the band and relies only on the application form statement that he or she self-identifies that some evidence of self-identification prior to September 22, 2011, is required in order to comply with the terms of the Original Agreement. However, I am not persuaded that their rationale in requiring that the evidence pre-dates June 23, 2008, is reasonable.

[101] If the responding parties accept a statement in an application filed on or before September 22, 2011, as sufficient evidence because it is like answering a question as to one's aboriginal status on a census form or a job application, then one must ask why an actual statement to that effect made prior to September 22, 2011, is not sufficient in an application filed after September 22, 2011? In short, what is the justification in requiring that the evidence date from June 23, 2008, and not some other date that precedes September 22, 2011? In my view, the following scenarios are indistinguishable, and yet each reaches a different result based on the agreements made by the responding parties:

1. An application dated September 22, 2011, in which the applicant states that he or she self identifies; and

2. An application dated September 23, 2011, which provides a copy of an application form or census form dated September 22, 2011, in which the applicant stated that he or she identified as Aboriginal.

The first results in membership; the second does not. Why the difference? The responding parties say it is because the latter evidence is of recent origin. In my view, it is no more recent than the evidence they agreed to accept in the first example. For this reason, I find that the decision that evidence had to be dated on June 23, 2008, or earlier to be arbitrary and thus unreasonable.

[102] The applicants further submit that the types of documentary evidence decided upon by the responding parties is under-inclusive and will not capture all those who do self-identify because:

1. Being named on the membership list of the FNI or another voluntary First Nation organization is contingent upon one's location and whether one meets the membership criteria of those organizations;

2. The 2006 short-form census did not provide individuals with a question as to whether they self-identified as Aboriginal, only 25% of the households received the long-form census which did ask, and some refused to fill out the census at all;

3. It is highly unlikely that a copy of a newspaper article prior to June 23, 2008, in which the applicant participated in ceremonial, traditional, or cultural activities would be available or discoverable; and

4. The availability of copies of applications on which persons self-identified would only be available to those who applied for a job with the government or a public institution, or a university or college where affirmative action hiring was in place.

[103] The applicants submit that the low number of persons who would have access to such evidence but might otherwise self-identify as a member of the Mi'kmaq, indicates this list is under-inclusive. They suggest that the responding parties should have accepted an affidavit from an applicant attesting that they self-identified as of the date of the Recognition Order.

[104] The responding parties submit that it was reasonable for them to require objective proof of self-identification given their concerns with what they considered to be an extraordinary number of applications filed near the end of the process, after the band had been created, and after the economic benefits of membership became better known.

[105] It is not the role of the Court to opine as to what evidence would have been reasonable in the circumstances, but only to assess whether the decision of the responding parties as to that which they selected was reasonable.

[106] Mr. Wells admitted that as of the date of the Recognition Order he did not self-identify as a member of the Mi'kmaq. It was only after the Recognition Order that he learned of his ancestral history. Accordingly, there is no evidence he can provide, or any affidavit he can swear, that would establish that he self-identified as Mi'kmaq at the date of the Recognition Order. Mr. Wells' circumstance tells us little about the reasonableness of respondents' chosen criteria.

[107] Ms. Wells had not been a member of any of the voluntary Mi'kmaq organizations listed in subsection 24(3) of the amended guidelines. She had attended cultural events but had no

pictures of her attendance printed in newspapers. She had requested a copy of her 2006 census from Statistics Canada but claims that she did not receive it. She made no job applications on or prior to June 23, 2008 in which she identified herself as Aboriginal. She provided a sworn affidavit attaching (i) a copy of her application for a government job in 2010, in which she identified herself as Aboriginal, (ii) a self-authored letter attesting to her life-long self-identification as a Mi'kmaq woman, and (iii) numerous photographs of herself and her family "practising a Mi'kmaq way of life."

[108] In her case, it is of interest that she had previously applied for a government job on March 8, 2006, on which she could have, but did not, identify as Aboriginal. She did provide a copy of an application dated in 2010, before the date of the Recognition Order but after the date the Original Agreement was signed, in which she did self-identify as Aboriginal, although that was a necessary requirement to be included in the list of candidates. Had the date the responding parties set for the objective documentary evidence been the date of the signing of the Recognition Order, it appears that she may have been able to fulfill their requirements, although this evidence required the written approval of both responding parties, and the Enrolment Committee might still have found, given the contrary evidence, that she did not self-identify as Mi'kmaq at the date of the Recognition Order.

[109] The data contained in the affidavit of Keith Desjardin shows that there were 69,946 applications for membership filed after September 22, 2011. Each would be required to meet the self-identification requirement set out in the Supplemental Agreement. Of those, 56,779 had no evidence of self-identification; 13,167, or 18.8% of the total, provided some evidence of self-

identification as required by the Supplemental Agreement; and only 41 were rejected as having provided insufficient evidence of self-identification. Given these facts, I am unable to find that the documents the responding parties stipulated as sufficient to provide objective evidence of self-identification was under-inclusive or unreasonable. In reaching that conclusion, I rely, in part, on the fact that so many fewer applications were filed prior to the date of the Recognition Order, despite the fact that the creation of the QMFN was widely publicized.

[110] However, as found earlier, it is unreasonable to restrict acceptable documents to those pre-dating June 23, 2008.

6. Whether the Enrolment Committee's Discretion was Fettered

[111] The applicants point to the reasons of Justice Evans in *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at paragraph 62, for its submission that the amended guideline, which created an assessment process that failed to permit the Enrolment Committee from considering the substance of an application or any other supporting documents, fettered the Enrolment Committee's discretion unfairly:

> [W]hile agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision-makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision-maker's exercise of discretion was unlawfully fettered: see, for example, *Maple Lodge Farms* at 7. This level of compliance may only be achieved through the exercise of a statutory power to make "hard" law, through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure. [emphasis added]

[112] I agree with the responding parties that this submission is without merit. The Enrolment Committee derives its existence and powers from the Original Agreement and the Supplemental Agreement. It must follow the terms of those agreements and in so doing it cannot be said that its discretion has been fettered because it is unable to exercise powers that were never given to it. If the Enrolment Committee were to consider, as the applicants suggest, the "substance" of an application or "other supporting documents" not specifically referenced in the agreements creating it and mandating the basis on which it must assess applications then it would be acting beyond its authority and such decisions would be overturned on review.

7. Whether the Applicants were Denied Procedural Fairness

[113] The applicants submit that the retroactive nature of the amendments they complain of in the Supplemental Agreement precluded those applying for membership from knowing that later applicants would be subject to a higher evidentiary burden. They also submit they were provided insufficient notice of the case to be met, as the November 6, 2013 form letter from the Enrolment Committee failed to clearly state that their applications would be denied unless they provided additional documentary evidence meeting the standard required in the section 24 of the amended Enrolment Committee Guidelines. They submit that it was only on the second page of the enclosed bulletin that applicants were advised that those who submitted their application after the Recognition Order would be rejected if they did not provide the necessary documentation. They further submit the deadline of 10 weeks over a holiday period was inadequate, particularly given the difficulty of locating the documents required.

[114] The responding parties submit that the evidentiary requirements of the Supplemental Agreement were publicized and that the brochures sent to applicants clearly explain that they are required to submit objective evidence of the required type or their claims would be rejected. They further submit the applicants did not have vested rights which would engage the presumption against retrospective application of the terms of the Supplemental Agreement. They submit that applicants generally have the right to have their applications considered on the provisions in effect at the time of assessment, not the time they made their application. Further, they submit the clear language of the Supplemental Agreement shows that the parties intended a retrospective amendment to the evidentiary requirements.

[115] I accept the submission of the responding parties that as they were unaware of the perceived inconsistency in the Original Agreement, they could not have provided notice to applicants of the alleged increased evidentiary burden for applications after the date of the Recognition Order until they became aware of this issue.

[116] It may be that the responding parties could have done a better job clarifying that a failure to submit the additional information would result in a rejection, and that ten weeks over a holiday period is a short timeline to produce the materials the Supplemental Agreement required. However, neither rises to the level of a breach of procedural fairness. The applicants were provided sufficient information with the case they had to meet and there is no evidence that if given a longer period of time either applicant would have been able to produce the required documents. I further agree that the respondents clearly intended the amendments to be retrospective. As such, there was no breach of procedural fairness on this ground.

[117] Moreover, both applicants admit that they understood the requirement to provide additional documentation and that the consequences if they did not were clearly stated in the brochure included with the notice letters they received.

[118] There was no breach of procedural fairness.

8. Whether the Applicants' Charter Rights were Balanced with the Amendments

[119] The applicants submit that the decision of the responding parties to enter into the Supplemental Agreement "failed to appropriately balance the charter values of liberty and equality engaged by the decision with the objective of ensuring the 'integrity' and 'credibility' of the Enrolment Process and the reputation of the to-be-formed band."

[120] Nowhere in the three paragraphs outlining this submission in their written memorandum, nor in their oral submissions, do the applicants provide any detail as to how the Supplemental Agreement impacts their right to life, liberty and security of the person as provided for in section 7 of the *Charter*. Similarly, they provide no explanation of how it affects their right to equality before and under law and the equal protection and benefit of the law as provided for in section 15 of the *Charter*.

[121] I agree with Canada that the applicants' section 7 rights are not engaged because "there is no effect on their physical liberty or any fundamental personal choice as recognized by the jurisprudence." Additionally, I agree with Canada that the applicants' section 15 rights are not

engaged as the distinction between the applicants and those whose self-identification was assessed under the terms of the Original Agreement is one based on the date the application form is signed and that this is not an analogous ground of discrimination under section 15 of the Charter.

9. The Decisions Rejecting the Applicants' Applications for Membership

[122] Both applications were rejected by the Enrolment Committee because of the failure to provide the documentary evidence specified in the Supplemental Agreement.

[123] It has been found that the decision of the FNI and Canada to amend the evidence required to establish self-identification as of the Recognition Date was reasonable, as was their decision on the types of documentation required. However, the temporal limitation on that evidence has been found not to be reasonable.

[124] There is no evidence in the record that Mr. Wells can provide any evidence of the sort described in the Supplemental Agreement to prove that that he self-identified as a member of the Mi'kmaq prior to or on the date of the Recognition Order. However, the decision made to reject his application was made in accordance with the terms of the Supplemental Agreement, some of which have been found to be invalid as unreasonable. Moreover, he was denied any right of appeal, which has also been found to be invalid as unreasonable. While he may ultimately fail to satisfy the Enrolment Committee of his self-identification prior to the date of the Recognition Order, he should be permitted the opportunity to have his application re-evaluated.

[125] It is equally clear that Ms. Wells has the evidence of her 2010 application for employment in which she self-identified as a member of the Mi'kmaq and it predates the Recognition Order. She may succeed in having her application accepted by the Enrolment Committee. The decision to reject her application must be set aside and her application returned to the Enrolment Committee for reconsideration.

10. Disposition and Costs

[126] In light of the above, the Court makes the following findings:

1. The decision of the responding parties that an application form signed after the date of the Recognition Order is not evidence that the applicant self-identified as a member of the Mi'kmaq prior to that date was reasonable;

2. The decision of the responding parties that they could amend the self-identification provisions in the Original Agreement and the Enrolment Committee Guidelines pursuant to paragraph 2.15(b) of the Original Agreement was reasonable;

3. The decision of the responding parties that they could amend the appeal provisions in the Original Agreement and the Enrolment Committee Guidelines pursuant to paragraph 2.15(a) or (b) of the Original Agreement was unreasonable, and must be set aside;

4. The decision of the responding parties regarding the types of evidence required to support a finding of self-identification on or prior to the date of the Recognition Order was reasonable;

5. The decision of the responding parties to require that the evidence to support a finding of self-identification must pre-date June 23, 2008, the date of the Original Agreement, was not reasonable; and

6. The two decisions of the Enrolment Committee under review are set aside and returned to the Enrolment Committee for reconsideration in keeping with these reasons.

[127] Given that success has been divided, it is appropriate not to make any order as to costs.

AMENDED JUDGMENT IN COURT FILES T-638-17 AND T-644-17

THIS COURT'S JUDGMENT IS that:

1. The Court declares that:

   a) The responding parties had no authority pursuant to paragraph 2.15(a) or (b) of the Original Agreement to amend its appeal provisions in respect of individuals who failed to provide objective evidence of self-identification and accordingly paragraph 6(2)(b) of the Supplemental Agreement is invalid and unenforceable; and

   b) While the responding parties had authority pursuant to paragraph 2.15(b) of the Original Agreement to amend section 24 of the Enrolment Committee Guidelines regarding self-identification evidence, and the types of evidence they required are reasonable, the requirement that such evidence must pre-date June 23, 2008, is not reasonable and that limitation is set aside;

3. The decisions of the Enrolment Committee rejecting the applications for membership of David Robert Wells and Sandra Frances Wells, without appeal, are set aside and are to be reconsidered by the Enrolment Committee in keeping with these reasons; and

4. No Order is made as to costs.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-638-17
STYLE OF CAUSE:	DAVID ROBERT WELLS v CANADA (ATTORNEY GENERAL) ET AL
DOCKET:	T-644-17
STYLE OF CAUSE:	SANDRA FRANCES WELLS V CANADA (ATTORNEY GENERAL) ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 22, 2018
AMENDED JUDGMENT AND REASONS:	ZINN J.
DATED:	JULY 3, 2018

APPEARANCES:

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Stephen J. May	FOR THE RESPONDENT FEDERATION OF NEWFOUNDLAND INDIANS

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