Federal Court  Cour fédérale

Date: 20130712

Docket: T-1804-10

Citation: 2013 FC 787

Ottawa, Ontario, July 12, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ANGEL SUE LARKMAN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application challenging the validity of Order in Council P.C. 4582, dated on December 4, 1952, enfranchising Laura Flood.

[2] The applicant seeks an order setting aside the Order in Council. Both parties seek costs on a partial indemnity basis.

Background

[3] The applicant's grandmother, Laura Flood (née Batisse), was enfranchised by Order in Council P.C. 4582, made on December 4, 1952. At that time, enfranchisement was done pursuant to the *Indian Act*, SC 1951, c 29 (the 1951 Act).

[4] I will begin by repeating the Court of Appeal's description of Canada's enfranchisement policy, from its ruling on a previous matter in this proceeding in *Canada (Attorney General) v Larkman*, 2012 FCA 204, [2012] FCJ No 880 (the FCA decision):

> 10 "Enfranchisement" is a euphemism for one of the most oppressive policies adopted by the Canadian government in its history of dealings with Aboriginal peoples: *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward*, vol. 1 (Ottawa: Canada Communication Group Publishing, 1996) at page 271.
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> 11 Beginning in 1857 and evolving into different forms until 1985, "enfranchisement" was aimed at assimilating Aboriginal peoples and eradicating their culture or, in the words of the 1857 Act, encouraging "the progress of [c]ivilization" among Aboriginal peoples: *An Act to Encourage the Gradual Civilization of Indian Tribes in the Province and the Amend the Laws Respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26 (initial law); *An Act to Amend the Indian Act*, S.C. 1985, c. 27 (the abolition).
>
> 12 Under one form of "enfranchisement" – the form at issue in this case – Aboriginal peoples received Canadian citizenship and the right to hold land in fee simple. In return, they had to renounce – on behalf of themselves and all their descendants, living and future – their legal recognition as an "Indian," their tax exemption, their membership in their Aboriginal community, their right to reside in that community, and their right to vote for their leaders in that community.
>
> 13 The Supreme Court has noted the disadvantage, stereotyping, prejudice and discrimination associated with "enfranchisement": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. With deep reluctance or at high personal cost, and sometimes under compulsion, many spent

> decades cut off from communities to which they had a deep cultural and spiritual bond.
>
> 14 On April 17, 1985, the day on which the equality provisions of the *Canadian Charter of Rights and Freedoms* came into force, amendments to the *Indian Act* also came into force, doing away with the last vestiges of "enfranchisement" and permitting those who lost Indian registration through "enfranchisement" to register and regain registration: *An Act to Amend the Indian Act, supra*. However, under these amendments, only some of the descendants of those who were "enfranchised" could be added to the Indian Register. In other words, only some were able to regain their recognition as an "Indian" and their membership in their Aboriginal community.

[5] Laura Flood was born on March 1, 1926, in Matachewan, Ontario. She was registered as an Indian under the Act and was a member of the Matachewan First Nation. The applicant says that in 1952, Laura Flood was unable to read or write, only able to write her first and last name.

[6] On July 14, 1952, the Indian Agent for Sturgeon Falls received a typed letter allegedly from Laura Flood, requesting the necessary papers to release her from her Treaty. According to the applicant, Laura Flood did not prepare the letter or request that the letter be prepared on her behalf.

[7] The Indian Agent wrote to Laura Flood requesting that she supply the Department of Citizenship and Immigration with several pieces of information, including her length of residence away from the reserve, a list of property owned on the reserve, her present means of livelihood and annual income.

[8] Answers to these questions were supplied in handwritten letter. According to the applicant, one of the answers is erroneous, as Laura Flood left the reserve when she was 19 years old, not 13.

She left the reserve in 1945 because an Indian Agent had told her family that if they did not move, the children would be put into a residential school. The Treaty Pay-List for the reserve from 1938 to 1954 provides circumstantial evidence of the timing of the family leaving.

[9] On July 28, 1952, the Indian Agent wrote the Department of Citizenship and Immigration requesting the application forms for enfranchisement. The letter indicated Laura Flood had lived away from the reserve since the age of 13 years.

[10] On August 16, 1952, a typed letter also alleged to be from Laura Flood, was sent to the Indian Agent requesting to be informed when he received the requested information. According to the applicant, Laura Flood did not prepare this letter nor did she instruct anyone else to write the letter on her behalf.

[11] On October 10, 1952, Laura Flood signed an application for enfranchisement at the request of the Chief of Matachewan First Nation and the Indian Agent. According to the applicant, she did not know what she was signing and had she known she was giving up her Indian status, she would not have signed it. The applicant also points to factual errors in the application.

[12] On October 18, 1952, the Indian Agent sent a letter to Laura Flood acknowledging receipt of the application and indicating she would not receive any timber royalty if enfranchised.

[13] On October 31, 1952, a typed letter, allegedly from Laura Flood, was sent to the Indian Agent requesting that her application be sent to the Department despite the loss of timber royalty.

According to the applicant, Laura Flood did not prepare or request that this letter be prepared on her behalf or know what a timber royalty was.

[14] On November 5, 1952, the Indian Agent forwarded the application to the Department.

[15] The Order in Council was passed on December 4, 1952. Laura Flood's signature appears on an enfranchisement card but the applicant argues she did not know she was signing a document that would strip her of her Indian status.

[16] At the time, upon enfranchisement, a person was entitled to a per capita share of the capital and revenue monies held on behalf of the Band and an amount equal to the amount they would have received during the next 20 years under any treaty in existence at the time if they had continued to be a member of the Band. The Minister calculated that Laura Flood was entitled to $82.23. According to the applicant, Laura Flood never received it, although she did receive $500 from the Chief for compensation for "stumpage" that was occurring on the First Nation's land at the time.

[17] A letter from the Indian Agent, purporting to send Laura Flood a cheque in the amount of $82.23 and an enfranchisement card is dated December 22, 1952 and is unexecuted. According to the applicant, it is clear that the enfranchisement card could not travel from Sturgeon Falls to Matachewan on the same day, so the certificate was sent prior to December 22, 1952 and the unexecuted letter is not accurate.

[18] As a result of enfranchisement, Laura Flood lost her interest in reserve land and all legislative benefits that flow to Indians.

[19] Laura Flood regained her Indian status pursuant to the passage of *An Act to Amend the Indian Act*, SC 1985, c 27 (the 1985 Act). While three of her children were born before the Order in Council and therefore entitled to register as Indians under subsection 6(1) of the 1985 Act since they had a parent of Indian status at the time of their birth, her daughter, Dorothy Flood was born after the enfranchisement and therefore subject to subsection 6(2). Had Laura Flood not been enfranchised, Dorothy Flood would have been registered under subsection 6(1) like her siblings.

[20] As a result of Dorothy Flood being registered under section 6(2), the applicant, her daughter, has been denied registration as an Indian. The applicant is a member of the Matachewan First Nation but not entitled to vote in Council elections or live on the reserve due to this lack of status. She was not entitled to receive funding for post-secondary education.

Previous Legal Proceedings

The Application for Registration

[21] On August 20, 1986, the applicant's mother, Dorothy Flood, applied to be added to the Indian Register, including the applicant's information in her application.

[22] In a letter dated February 3, 1988, the Registrar advised Dorothy Flood that she was registered under subsection 6(2) of the 1985 Act, but that the applicant was not entitled to be registered.

[23] On April 7, 1995, the applicant submitted an application for registration. In a letter dated September 13, 1995, the Registrar indicated there was no basis to revisit the earlier decision of February 3, 1988.

[24] On November 26, 1996, the applicant requested that the Registrar review the validity of Laura Flood's enfranchisement. The Acting Registrar indicated in a letter dated August 18, 1997, that the enfranchisement had been found to be valid.

[25] The applicant submitted a notice of protest against the decision of August 17, 1998. The Registrar upheld the decision of the Acting Registrar on July 21, 2000. The applicant requested an oral hearing pursuant to subsection 14.2(6) of the 1985 Act on November 13, 2000. The Registrar refused this request on July 8, 2004.

Proceedings in the Ontario Courts

[26] The applicant, along with Laura Flood, initiated a statutory appeal of the July 21, 2000, decision in the Ontario Superior Court of Justice pursuant to subsection 14.3(4) of the 1985 Act.

[27] Madame Justice Maureen Forestell of that Court held on March 5, 2008 that the applicant was entitled to be registered (see *Etches v Canada (Department of Indian Affairs and Northern Development (Registrar)*, 89 OR (3d) 599, [2008] OJ No 859 (the OSCJ decision)).

[28] On appeal, the Court of Appeal for Ontario held on February 27, 2009, that the Registrar was bound by the Order in Council and only the Federal Court has jurisdiction to review the lawfulness of an Order in Council (see *Etches v Canada (Registrar, Department of Indian Affairs and Northern Development)*, 2009 ONCA 182 (the ONCA decision)).

[29] Leave was denied by the Supreme Court of Canada (see *Etches v Canada (Department of Indian Affairs and Northern Development)*, [2009] SCCA No 182).

Proceedings in the Federal Courts

[30] On September 10, 2010, the applicant brought a motion pursuant to Rule 369 of the *Federal Court Rules*, requesting an order for an extension of time to file a notice of application for judicial review, given that the 30 day time limit specified in subsection 18.1(2) of the *Federal Courts Act* was long expired.

[31] On October 18, 2010, Mr. Justice Roger Hughes granted the motion without reasons and provided the applicant with 15 days to file. The respondent appealed that order. The applicant filed her notice of application on November 1, 2010.

[32] On July 4, 2012, the Federal Court of Appeal upheld the order granting the extension in the FCA decision, above.

The Order in Council

[33] The text of the Order in Council reads:

> AT THE GOVERNMENT HOUSE AT OTTAWA
>
> THURSDAY, the 4th day of DECEMBER, 1952.
>
> PRESENT:
>
> HIS EXCELLENCY
>
> THE GOVERNOR GENERAL IN COUNCIL
>
> WHEREAS the Minister of Citizenship and Immigration reports that the Indians whose names are included in Schedule A hereto have applied for enfranchisement and that in his opinion the said applicants
>
> (a) are of the full age of twenty-one years;
>
> (b) are capable of assuming the duties and responsibilities of citizenship; and
>
> (c) when enfranchised, will be capable of supporting themselves and their dependents;
>
> AND WHEREAS the Minister reports further that the Indian women whose names are included in Schedule B hereto married persons who were not Indians on the respective dates specified therein;
>
> THEREFORE His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration, and by virtue of the powers conferred by The Indian Act, is pleased to declare the Indians named in Schedule A hereto, together with the wives and minor unmarried children named in the

> said Schedule, enfranchised, and they are hereby enfranchised, accordingly.
>
> His Excellency in Council, under and by virtue of the power conferred by subsection two of section 108 of The Indian Act, is pleased to declare enfranchised, as of their respective dates of marriage, the Indian women together with their minor unmarried children named in Schedule B hereto, and they are hereby enfranchised accordingly.

[34] Laura Flood's name is listed in Schedule A.

[35] Unlike in most judicial reviews, there is no certified tribunal record indicating what evidence was before the Governor in Council in deciding to issue the Order in Council, as the only document retained a half century later is the Order in Council itself. As described below, this leads to considerable difficulty in analyzing the legitimacy of the Order in Council. The respondent argues the correspondence between the Indian Agent and Laura Flood, as summarized above, can be assumed to have been relevant for consideration.

Issues

[36] The applicant's memorandum raises the following issue:

1. Is the Order in Council that purports to enfranchise Laura Flood valid?

[37] I would rephrase the issues as follows:

1. Does this Court have jurisdiction?
2. What is the appropriate standard of review?

3. Was the Governor in Council's decision reasonable?

Applicant's Written Submissions

[38] The applicant argues the Order in Council is *ultra vires*. When exercising a power given to it by statute, the Governor in Council must stay within the boundary of the enabling statute. The Governor in Council is otherwise free to exercise its statutory power without interference by the Court, except in an egregious case or where there is proof of absence of good faith.

[39] The Order in Council is *ultra vires* or was issued in bad faith as a result of the fraud perpetrated on Laura Flood. It was issued without an actual application from Laura Flood and therefore was issued without statutory authority.

[40] If the conditions listed in subsection 108(1) of the 1951 Act were not met, then the Governor in Council could not issue an Order in Council enfranchising an Indian. If an Order in Council was granted without the conditions precedent being established, then the Order in Council would be *ultra vires* and set aside. The application for enfranchisement had to be voluntary and on an informed basis and the applicant must have been the Indian, not the Indian Agent or Chief.

[41] A party to a contract must consent to its contents. A contract with a person who is not capable of both reading and understanding and the contents are fundamentally misunderstood, is void. The principle of *non est factum* is used to declare contracts void *ab initio* when they have been signed by a party who is illiterate.

[42] There is ample evidence before this Court that establishes on a balance of probabilities that Laura Flood did not knowingly or voluntarily apply for enfranchisement. The evidence of this is the following:

1. She was illiterate and did not have the capacity to either complete the application or type the various letters alleged to have been written by her.

2. There is no evidence that the Indian Agent or the Chief read the application in the presence of Laura Flood, that she understood, or that she signed the application in the Indian Agent's presence.

3. The correspondence exchanged contains significant errors concerning Laura Flood's residence on the reserve and the births of her children, mistakes that would not have been there if the correspondence was prepared on behalf of Laura Flood.

4. Laura Flood deposed that she never intended to give up her right to be recognized as an Indian.

[43] The applicant argues the Pay-List evidence is relevant to the question of when Laura Flood left the reserve, which is relevant in determining whether the letter with that error was prepared on behalf of Laura Flood. They are not conclusive of residence, but support Laura Flood's evidence that she left the reserve at the age of 19.

[44] As found by the Royal Commission on Aboriginal Peoples, manipulation by Indian Agents was common. Laura Flood's experience was therefore not unusual.

[45] In the Ontario Superior Court of Justice, Madame Justice Forestell reviewed the same evidence that has been provided on this judicial review and has made factual findings that thoroughly support the applicant's view of the evidence as described above. She was satisfied on a balance of probabilities that the enfranchisement was not valid. The Court of Appeal overturned this decision, but on jurisdictional grounds.

[46] The applicant argues the respondent has not provided this Court with any direct evidence contradicting Laura Flood's recollection of events. The credibility problems identified by the respondent are unconvincing:

1. The mistake in Laura Flood's 1998 affidavit regarding the identity of the Chief is reasonable given the passage of 46 years and the role that Alfred Batisse played in excluding non-status Indians from the reserve.

2. It is impossible to ascertain when or why an individual received their own line in the Treaty Pay-List. The Pay-List reflects the fact that the family left the reserve in 1945.

3. Laura Flood did in fact receive a $500 stumpage fee. The reference to 'timber rights' in the letter is irrelevant since her uncontested evidence is that she did prepare this correspondence.

4. Laura Flood did not receive the enfranchisement cheque. The unexecuted letter being sent and the enfranchisement card being signed on the same date nearly 250 miles apart is simply untenable.

5. Laura Flood did not raise the issue of her enfranchisement until 1996, but this is reasonably explained by her belief that she was enfranchised because she lived with a non-native. This is confirmed by her application for registration in 1985 and subsequent correspondence. It was

not until 1995 that Indian and Northern Affairs Canada advised the applicant or her family that Laura Flood was enfranchised by application.

[47] The applicant argues this Court must be cognizant of the honour of the Crown in analyzing this evidence. It is always at stake when dealing with Aboriginal people and it is to be assumed that no appearance of 'sharp dealing' will be sanctioned. The Honour of the Crown must be given full effect in order to promote the process of reconciliation. It is engaged in this case because of the sharp dealings and questionable circumstances surrounding the enfranchisement of Laura Flood, which amount to an allegation of fraud.

Respondent's Written Submissions

[48] The respondent notes that the question of whether the Federal Court has the jurisdiction to review the lawfulness of an Order in Council pre-dating the Court's creation has never been judicially considered. Despite raising this issue, the respondent does not argue that this Court lacks jurisdiction.

[49] The respondent argues reasonableness is the appropriate standard of review. Orders-in-Council are presumed valid until demonstrated otherwise. They are only reviewable where the Governor in Council failed to observe a condition precedent or exercised its power in bad faith or for an improper purpose.

[50] Here, the statutory condition precedent had been met, as the Governor in Council received a report from the Minister that an Indian had applied for enfranchisement. The dispute issued is a factual one. Therefore, reasonableness is appropriate.

[51] The evidence in this case supports the reasonableness of the conclusion that Laura Flood voluntarily applied for enfranchisement. Her signature, by her admission, appeared on the application for enfranchisement and the enfranchisement card. The Indian Agent received three letters signed by Laura Flood requesting enfranchisement: she admitted signing the October 31, 1952 letter, the applicant admitted the July 14, 1952 letter bears Laura Flood's signature and there is no evidence the signature on the August 16, 1952 letter is not genuine. The fact that these letters were typed by someone else does not mean they were prepared without her knowledge. The Indian Agent wrote seven letters to Laura Flood with respect to enfranchisement. This evidence supports the reasonableness of the Governor in Council's decision.

[52] The respondent questions the reliability of the affidavits provided by Laura Flood:

1. They were not subject to cross-examination before the Registrar or the Ontario Courts, as proceedings before the Registrar are non-adversarial and the Court proceedings were an appeal of that record.

2. The Court is deprived of the ability to observe the affiant's demeanour.

3. The events were forty years prior to the swearing of the affidavits, yet the affiant's recollection cannot be tested. The applicant's own testimony casts doubt on Laura Flood's ability to recall the events in question.

4. Laura Flood could not read the affidavits she was signing, so they were read to her. It is not clear she understood the wording. The applicant stated on cross-examination that "it's all about the way we ask her and how she answers to things".

[53] The respondent points to factual problems with the affidavit evidence:

1. The Chief of the Matachewan First Nation in 1952 was George Batisse, not Alfred. George Batisse was Laura Flood's own brother.

2. The $500 stumpage fee has no relevance to the validity of the enfranchisement, but it is incorrect that Laura Flood received it, which illustrates the unreliability of this evidence. The first payment for the timber surrendered was not until 1953, meaning she would have been ineligible due to enfranchisement. The timber royalty Pay-Lists make no mention of a payment to her and none of the payments approximates $500. The total Band funds at the time approximated $250.

3. The first affidavit indicates Laura Flood was asked to sign papers in December 1952, which turns out to have been October 10, 1952.

4. The applicant's own affidavit is based on facts that do not come from her own knowledge. She could have no personal knowledge of what transpired before her birth in 1952.

5. The applicant's affidavit accuses the Indian Agent of fraud, while Laura Flood's affidavits make no such accusation. There are other embellishments of Laura Flood's evidence in the applicant's own evidence.

[54] The credibility of the allegation of involuntary enfranchisement is weakened by the delay of 44 years before it was first raised. The certificate of enfranchisement was in Laura Flood's

possession since 1953 and she could have asked any number of people to read it to her at that time. The effect of enfranchisement would have been made apparent soon thereafter by the loss of benefits. The allegation that Laura Flood thought she was signing a document confirming she lived with a white man is contradicted by her evidence that she had "no idea" what the documents were.

[55] The errors in the correspondence do not indicate the letters were prepared without the consent or knowledge of Laura Flood and the error relating to the date of leaving the reserve is confirmed by no documentary evidence.

[56] The question of whether Laura Flood received her share of funds after enfranchisement is irrelevant to whether the Governor in Council acted reasonably in enfranchising her. Nonetheless, her evidence was only that she did not recall receiving a payment, while there is ample documentary evidence showing she did receive it.

[57] The honour of the Crown is not a reason to interpret this evidence to find fraud. The courts have rejected the suggestion that the fundamental precepts of evidence law change when an Aboriginal claim is made against the Crown. The honour of the Crown has no role in this case, as the Crown agent had no part in the alleged fraud. To the extent that the honour of the Crown arises on these facts, the respondent has met its burden by defending a First Nations Chief against an accusation of fraud.

Analysis and Decision

[58] **Issue 1**

Does this Court have jurisdiction?

The respondent suggests that the matter of whether the Federal Court has jurisdiction over a decision that pre-dates its own existence has never been decided. Yet, the respondent did not argue that this Court lacks jurisdiction. Without the benefit of full submissions on this issue, it would be inappropriate for me to decide the issue in a manner that would be given precedential weight. I therefore want to make clear that for the purposes of this case, I am assuming without deciding that the Court does in fact have jurisdiction.

[59] **Issue 2**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[60] The Court of Appeal held that reasonableness was the standard of review for Governor in Council decisions that involved a mix of fact and law (see *League for Human Rights of B'Nai Brith Canada v Canada*, 2010 FCA 307 at paragraphs 83 to 85, [2010] FCJ No 1424). It is similarly appropriate in this case. As the Court noted, "[i]n practical terms, then, a statute that vests decision-making in the Governor in Council implicates the decision-making of Cabinet, a body of diverse policy perspectives representing all constituencies within government" (at paragraph 78).

[61] In reviewing the Order in Council on the standard of reasonableness, the Court should not intervene unless the Governor in Council came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 4). As the Supreme Court held in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59). It should also be noted that the Order in Council contained the following statement:

> WHEREAS the Minister of Citizenship and Immigration reports that the Indians whose names are included in Schedule A hereto have applied for enfranchisement and that in his opinion the said applicants
>
> (a) are of the full age of twenty-one years;
>
> (b) are capable of assuming the duties and responsibilities of citizenship; and
>
> (c) when enfranchised, will be capable of supporting themselves and their dependents;

Thus, the Governor in Council appeared to have been authorized to issue an Order in Council.

[62] **Issue 3**

Was the Governor in Council's decision reasonable?

I completely agree with the comments in the FCA decision above, and the OSCJ decision above, regarding the nature of the enfranchisement system. Contemporary litigation concerning its ongoing effects is a reminder of this country's colonial past.

[63] Nothing in this proceeding, however, challenges the legal validity of that system. This Court is therefore put in the difficult position of evaluating the internal validity of an administrative decision made within a legal regime which is repugnant to modern eyes. While I accept that task, I wish to make clear that nothing in these reasons should be understood as a statement on the legal validity of enfranchisement policies. The applicant has challenged her enfranchisement on the grounds that it was invalid by the standard of the enfranchisement system's own internal workings and it is on those grounds alone that I evaluate her claim.

The OSCJ Decision

[64] I begin by addressing the judgment of Madame Justice Forestell, which the applicant would have me agree with in outcome on the facts, despite its being reversed on jurisdictional grounds. While this Court is certainly not bound by the Ontario Superior Court and it would be unwise to follow the factual findings of any court that made a decision without the proper jurisdiction to do so, I wish to make clear that I understand that decision as being unhelpful to this Court's determination.

[65] Madame Justice Forestell did not preside over the matter in a Court of first instance. Her Court's role was to review the decision of the Registrar. Notably, she appears to have reviewed the Registrar's decision on a standard of correctness and the statutory standard of "clearly wrong" (OSCJ decision above, at paragraph 58). While she did conclude that the applicant and her family had "met the onus upon them to prove on the balance of probabilities that the enfranchisement of Laura Floor was not valid" (at paragraph 82), this was based on the process of evaluating how the evidence should have been considered by the Registrar. Indeed, her conclusion indicates that her

chief concern was with the Registrar's flawed procedure rather than with her Court's independent factual findings (at paragraphs 76 to 78). Since she found that the Registrar was not bound by the Order in Council, her analysis also did not consider the presumption of validity or the standard of review attached to the decisions of the Governor in Council. Her Court also did not have the benefit of the cross-examination of the applicant, or the affidavit, exhibits and cross-examination of Gary Penner, the respondent's witness. In short, while that decision concerned a factual matrix that overlaps greatly with this proceeding, it is a decision that answered a different question by applying a different standard of review to different evidence.

[66] In the FCA decision above, Mr. Justice David Stratas alluded to the doctrine of abuse of process: "Further, the Crown might not be able to challenge the factual findings underlying the Ontario Superior Court of Justice's overall ruling" (at paragraph 74). I interpret his tentative language ("might") as an indication that this holding is not binding on this Court.

[67] I find that this doctrine does not prevent the Crown from defending the validity of Laura Flood's enfranchisement. Although the OCA decision above, was only concerned with jurisdiction, this does not mean that the OSCJ decision's factual findings remain undisturbed. As Madam Prothonotary Mireille Tabib held in *Eli Lilly Canada Inc v Novopharm Ltd*, 2008 FC 513 at paragraphs 19 and 20, [2008] FCJ No 649, re-litigation is not abusive where the first proceeding was found to be outside of a court's jurisdiction (emphasis added):

> 19 It seems to me that the question of whether a decision under appeal should justify the dismissal of a second proceeding on

> grounds of abuse of process must, in all cases, be informed by a consideration of whether the outcome of the appeal would have any bearing on the first decision's effect on the second proceeding. For example, in a case of abuse of process by re-litigation of the same issues between the same parties, where it is the mere fact of multiple duplicative proceedings that gives rise to the abuse, the resolution of the appeal, irrespective of the result, will not generally lessen the abusive nature of the second proceeding. However, if, as here, the result of a successful appeal would be to void the first decision's effect as a cause of abuse of process in the second proceeding, a dismissal of the second proceeding as an abuse of process may be premature and lead to both injustice to the parties and unnecessary litigation to redress the injustice.
>
> 20 One such example would be where the jurisdiction of the Court to render the initial decision is challenged on appeal. A second proceeding, involving the same issues in another forum, may well be an abuse of process assuming the validity of the first decision, but would clearly not be abusive if the first Court was found to have lacked jurisdiction. The fact situation in *Toronto v C.U.P.E.*, supra, also provides an example of how the results of a pending appeal could affect the Court's conclusion as to the abusive nature of the second proceeding. There, an employee previously convicted of sexual assault was subsequently fired as a result of the assault. The employee's grievance of the dismissal, in which he sought to challenge the employer's allegation of assault, was held to be an abuse of process in light of the prior conviction. There is no doubt in my mind that, had the employee's criminal conviction been appealed and reversed, his challenge as to whether or not the alleged abuse had taken place could not have been found abusive. In this light, Justice Arbour's express mention of the fact that the employee had exhausted all his avenues of appeal of the conviction, at par. 56 of the decision in *C.U.P.E.*, is likely significant.

Post-Decision Evidence

[68] The respondent is correct that the general rule is that the evidence that was not before the decision maker is not relevant to a judicial review. In this case, it is not clear what exactly was before the Governor in Council, but it is clear that evidence post-dating the decision could certainly not have been. For example, the Governor in Council could not

have considered in making its decision whether Laura Flood would receive an enfranchisement cheque.

[69] I do, however, consider such evidence relevant if it is used for the purpose of proving that the documents that were (or ought to have been) before the Governor in Council were fraudulently created. To hold otherwise would mean that even a full admission of fabricating evidence would be inadmissible on a judicial review, a perverse result.

[70] When I do consider one type of such evidence, the payment to Laura Flood, I find it difficult to see how it speaks to the validity of the correspondence in the record or the consent of Laura Flood. The applicant has offered no theory as to how the stumpage payment suggests her request for enfranchisement is more or less likely to have been valid. Similarly, I am unable to connect the disputed enfranchisement cheque to the validity of the enfranchisement, as the failure to deliver that cheque has no legal implication for the Order in Council and no factual implication has been made out; perhaps I am meant to presume that the Chief or Indian Agent kept these funds for himself, and that this profit provided the motive for fraudulent enfranchisement. There is, however, no other evidence to support this theory.

The Identity of the Chief

[71] The parties agree that Laura Flood's affidavits misidentify the Chief of the Matchewan First Nation. I, of course, agree with the applicant that it is reasonable for an

affiant to make mistakes in describing events four decades later (although the respondent is also correct to point out that this passage of time hurts the applicant's evidence for the same reason).

[72] However, it does not appear to me to be as simple as Laura Flood mistaking the title of the person who instructed her to sign the application. Instead, based on this record, it remains unknown to me whether it was George Batisse or Alfred Batisse who is alleged to have instructed her. That is, I cannot discern whether it was a mistake of title or a mistake of identity.

[73] The applicant's initial affidavit in this proceeding identified Alfred Batisse as the Chief. On cross-examination, after admitting the error, the applicant offered the following explanation:

> I know that because my aunt Elsie was my grandmother's sister who told me. To give a bit of an explanation. She was talking about Alfred being Chief when we asked for correction on why grandma would think it was Alfred who initially had her sign the documents, and Elsie said: It's because Alfred made us not allowed on the Reserve anymore. He's the one who actually told all of us who didn't have our status anymore that that's the reason why. So that is the reason why grandma believed it was him who had enfranchised her. [emphasis added]

[74] The applicant's memorandum argues "it is understandable that Laura Flood would be confused as to who the Chief was at the relevant time". This suggests Laura Flood's confusion was related to the title of Alfred Batisse.

[75] The underlined sentences in the passage above, however, seem to indicate the applicant was under the impression that Laura Flood had misidentified the person, not the title: the applicant asked her great-aunt for correction on why Laura Flood thought it was Alfred who asked her to sign, not a correction on why she had misunderstood the title of Alfred. The final sentence of the passage, in fact, even hints that Laura Flood only based her identification of Alfred on his role as Chief and had no independent recollection of the person who instructed her.

[76] The central allegation of the applicant's case is that someone told Laura Flood to sign the application and related correspondence. Yet it is completely unclear from this evidence, even assuming the uncontested truth of the applicant's affidavit, who that person was.

The Honour of the Crown

[77] I agree with the respondent that the concept of the honour of the Crown has little to offer this application. It is not a freestanding reason for voiding an otherwise legitimate Order in Council. It also does not allow this Court to weigh the evidence in a fashion more favourable to the applicant: "A trial judge must weigh and assess conflicting evidence in the same way as he or she always does - dispassionately, against the record as a whole, and with due consideration for any particular sensibilities (cultural or otherwise) that may impact upon a witness's testimony" (see *Chippewas of Mnjikaning First Nation v Ontario (Minister*

of Native Affairs), 2010 ONCA 47 at paragraph 220, [2010] OJ No 212, leave to appeal refused, [2010] SCCA No 91).

[78] If the applicant establishes that the documents were created fraudulently, then the Order in Council would be unreasonable and she would not need the assistance of the honour of the Crown to prevail in her claim.

The Reasonableness of the Governor in Council Decision

[79] The above analysis leaves two main grounds for challenging the Order in Council: the factual errors contained in the correspondence and Laura Flood's evidence that she did not know what she was signing.

[80] The factual errors, even to their maximum extent as alleged by the applicant, are of little assistance in demonstrating the Governor in Council's decision to be unreasonable. To the extent that the errors are contained in otherwise legitimate correspondence, they do not show the decision to be unreasonable as they are irrelevant to the statutory criteria for enfranchisement under the 1951 Act: Laura Flood met the age requirement and the Indian Agent found her to be capable of assuming responsibilities of citizenship. Her capability to support herself was presumably based on her employment mentioned in the Agent's letter to the Indian Affairs Branch of July 28, 1952.

[81] The factual errors are more relevant to the applicant's theory that the correspondence was prepared for a fraudulent purpose without the knowledge of Laura Flood. This theory is supported by the affidavits of Laura Flood, which are presumed to be true unless there are reasons to doubt their truthfulness (see *Maldonado v Canada (Minister of Employment and Immigration)*, [1979] FCJ No 248 (CA).

[82] In this case, however, there are such reasons to doubt their truth: chiefly, the confusion relating to who exactly it was who asked Laura Flood to sign the application for enfranchisement. The passage of time is also a reason to doubt the truth of affidavit evidence, if only because it is the applicant's own explanation for that evidence's errors. I also must agree with the respondent that Laura Flood's possession of the enfranchisement certificate and the explanation of her voluntary enfranchisement it represents between 1953 and 1996, provides another reason to doubt the truthfulness of Laura Flood's description of her understanding of the terms of her enfranchisement.

[83] I appreciate the immense frustration that results from the death of a key witness in an important dispute such as this one, which affects such significant rights of the applicant and her family going forward. I also appreciate that litigation relating to Aboriginal rights is often necessarily limited by a historical record.

[84] These sentiments, however, do not allow me to deviate from the Court's role in deciding this case based on the evidence before it. In this case, the Governor in Council made a decision based on statutory criteria which have been established by correspondence

bearing the applicant's signature and collected by a public servant, whose official acts this Court has no reason to doubt. The applicant's evidence certainly raises doubts regarding that decision, but it must be considered against the presumption of validity attached to the Governor in Council's decision. In reviewing the Govenor in Council's decision on the standard of reasonableness, I cannot find that this record has established that it was outside of the range of acceptable outcomes.

[85] For these reasons, the application is dismissed. Given that the applicant had good reason to pursue this application based on the reasons of the FCA decision above, and the OSCJ decision above, costs are not appropriate.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There shall be no order of costs.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Indian Act, SC 1951, c 29:

108. (1) On a report of the Minister that an Indian has applied for enfranchisement and that in his opinion the Indian	108. (1) Lorsque le Ministre signale, dans un rapport, qu'un Indian a demandé l'émanicipation et a qu'à son avis, ce dernier
(a) is of the full age of twenty-one years;	a) est âgé de vingt et unans révolus;
(b) is capable of assuming the duties and responsibilities of citizenship,	b) est capable d'assumer les devoirs et responsabilités de la citoyenneté, et
(c) when enfranchised, will be capable of supporting himself and his dependants,	c) pourra, une fois émancipé subvenir à ses besoins et à ceux des personnes à sa charge,
the Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised.	le gouverneur en conseil peut déclaré que l'Indien, son épouse et ses enfants mineurs célibataires sont émancipés.

FEDERAL COURT

SOLICITORS OF RECORD

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