

Court File No. T-300-17

FEDERAL COURT

PROPOSED CLASS PROCEEDING

GERALD BRAKE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER S.18.1 OF *THE FEDERAL COURTS ACT*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Federal Court of Canada, 180 Queen Street West #200, Toronto ON, M5V 3L6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

March 2, 2017

SHERRI ALLY
REGISTRY OFFICER
AGENT DU GREFFE

Issued by:  _____

Address of local office: 180 Queen Street West
Suite 200
Toronto, ON M5V 3L6

TO:

The Attorney General of Canada
Department of Justice Canada
Ontario Regional Office
130 King Street West, Suite 3400
Toronto, Ontario M5X 1K6

APPLICATION

This is an application for judicial review of the Enrolment Committee's rejection dated January 31, 2017 of the Applicant's application, and the rejection of all other applicants' applications, for membership in the Qalipu Mi'kmaq First Nation Band in Newfoundland and Labrador under the *Supplemental Agreement for the Recognition of the Qalipu Mi'kmaq Band*.

The Applicant makes application for:

- a. an Order, pursuant to rule 317 of the *Federal Courts Rules*, for production of all Orders in Council, minutes of meetings, cabinet submissions, memoranda, agreements and constituting documents establishing the:
 - i. *Agreement for the Recognition of the Qalipu Mi'kmaq Band*;
 - ii. *Supplemental Agreement for the Recognition of the Qalipu Mi'kmaq Band*;
 - iii. *Qalipu Mi'kmaq First Nation Band Order*, SOR/2011-180; and
 - iv. All schedules and annexes thereto (i)-(iii) above.
- b. an Order declaring that the Applicant's rejection, and the rejection of all other applicants' applications, in the Qalipu Band membership determination process under the *Supplemental Agreement for the Recognition of the Qalipu Mi'kmaq Band* was manifestly unfair under the principles of natural justice and contrary to section 18.1(4) of the *Federal Courts Act*;
- c. an Order declaring that by virtue of the Applicant's rejection, and the rejection of all other applicants' applications, in the Qalipu Band membership determination process under the *Supplemental Agreement for the Recognition of the Qalipu Mi'kmaq Band*, the Respondent acted in bad faith;
- d. an Order declaring that by virtue of the Applicant's rejection, and the rejection of all other applicants' applications, in the Qalipu Band membership determination process under the *Supplemental Agreement for the Recognition of the Qalipu Mi'kmaq Band*, the Enrolment Committee:
 - i. acted without jurisdiction, acted beyond its jurisdiction, or refused to exercise its jurisdiction accordingly;
 - ii. failed to observe principles of natural justice;
 - iii. based its decisions on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; and
 - iv. erred in law;

- e. an Order quashing the Enrolment Committee's rejection of the Applicant's application, and the rejection of all other applicants' applications, in the Qalipu Band membership determination process under the *Supplemental Agreement for the Recognition of the Qalipu Mi'kmaq Band*;
- f. in the alternative, an Order setting aside the Enrolment Committee's rejection of the Applicant's application, and the rejection of all other applicants' applications, in the Qalipu Band membership determination process under the *Supplemental Agreement for the Recognition of the Qalipu Mi'kmaq Band* and referring the process back to the Enrolment Committee for determination of the application in accordance with:
 - i. the requirements of the *Agreement for the Recognition of the Qalipu Mi'kmaq Band* only; or
 - ii. such directions as this Honourable Court considers to be appropriate;
- g. an Order converting this application to an action pursuant to section 18.4(2) of the *Federal Courts Act*;
- h. an Order certifying the action as a class proceeding pursuant to rule 334.16 of the *Federal Courts Rules*;
- i. costs of this application on a substantial indemnity basis or in an amount that provides full indemnity; and
- j. such further and other relief as this Honourable Court deems just.

The grounds for the application are:

The 2008 Agreement

1. On June 23, 2008, the Federal Crown ("the Respondent" or "Canada") and the Federation of Newfoundland Indians ("FNI") entered into the *Agreement for the Recognition of the Qalipu Mi'kmaq Band* ("2008 Agreement");
2. The FNI had ratified the 2008 Agreement previously on March 30, 2008 with a vote from its members;
3. The 2008 Agreement listed four (4) basic requirements to be a Band member:
 - a. Canadian Indian ancestry;
 - b. Substantial connection with Mi'kmaq Group of Indians of Newfoundland;
 - c. Self-identification as a member of the Mi'kmaq Group of Indians of Newfoundland; and
 - d. Acceptance by the Mi'kmaq Group of Indians of Newfoundland;
4. Other pertinent characteristics of the 2008 Agreement included the following:
 - a. There is to be no land reserve for the Qalipu Band;

- b. Qalipu Band members are entitled to "Indian" status under the *Indian Act*; and
 - c. All enrolment decisions of the Enrolment Committee can be appealed;
5. The 2008 Agreement provided for a two-stage enrolment process to assess applications for membership in the Band, to be assessed by an Enrolment Committee composed of an equal number of representatives from Canada and the FNI and a jointly appointed independent chair;

The enrolment process and creation of the Qalipu Band

- 6. During the period of November 30, 2008 to November 30, 2009, an initial phase of applications were accepted pursuant to the 2008 Agreement to create a founding members list for the Band ("Phase One");
- 7. 23,877 applicants were found eligible and approximately 3,000 applicants were rejected in Phase One;
- 8. From November 30, 2009 to November 30, 2012, a second phase of applications were accepted for consideration pursuant to the 2008 Agreement ("Phase Two");
- 9. The Qalipu Mi'kmaq First Nation was officially created as a "band" under the *Indian Act* by an Order in Council, the *Qalipu Mi'kmaq First Nation Band Order*, SOR/2011-180, on September 22, 2011;
- 10. Based on Phase One, the 23,877 accepted applicants were found eligible and registered as founding members of the Qalipu Band. These 23,877 Band members were also provided with status pursuant to the *Indian Act*;
- 11. By the Phase Two application deadline of November 30, 2012, more than 70,000 applications were received, bringing the total number of applications to over 104,000;

The 2013 Agreement

- 12. For the purposes of conducting the Phase Two review of applications, the requirements of the 2008 Agreement were altered to include a more stringent evidentiary burden provided in a *Supplemental Agreement for the Recognition of the Qalipu Mi'kmaq Band*, entered into on July 4, 2013 between Canada and the FNI ("2013 Agreement");
- 13. There was no ratifying vote by the FNI membership prior to entering into the 2013 Agreement;
- 14. Canada publicly stated, *inter alia*, that the number of applications received was unreasonable, which necessitated the 2013 Agreement;
- 15. The 2013 Agreement was a remarkable and retroactive departure from the 2008 Agreement in terms of who could demonstrate they were a Band member and the extent and/or nature of proof required to meet the new membership criteria;
- 16. The terms of the 2013 Agreement constituted significant changes or restrictive interpretations to the original 2008 Agreement, which had already been applied

for the 23,877 successful applicant founding members accepted in Phase One to determine their Band membership and concordant *Indian Act* status;

17. The 2013 Agreement, read in conjunction with the "Directive to the Enrolment Committee" being Annex A to the 2013 Agreement, indicate such changes or restrictive interpretations including, but not limited, to the following:
 - a. Certain appeal rights for certain Enrolment Committee decisions were removed;
 - b. Restrictions and thresholds were placed on how and when the following could be demonstrated or resolved:
 - i. connection to the Mi'kmaq community;
 - ii. connection with one's own family members;
 - iii. geographical residence in or around the Mi'kmaq Group of Indians of Newfoundland;
 - iv. non-residency and frequency of visits and communications with the Mi'kmaq Group of Indians of Newfoundland;
 - v. participation in religious, ceremonial, traditional or cultural activities of the Mi'kmaq Group of Indians of Newfoundland;
 - vi. a current and substantial connection to, and maintenance of, the Mi'kmaq culture and way of life; and
 - vii. the type, nature, quantity, and quality of evidence that could be used to substantiate the above;

Review under the 2013 Agreement

18. Canada mandated that all applications, except for the approximately 3,000 applications already assessed and rejected under Phase One, would be reviewed in accordance with the 2013 Agreement;
19. Such a review entailed a retroactive application of the 2013 Agreement to the applications of the 23,877 individuals already registered as founding members of the Band and provided with status and benefits under the *Indian Act* as a result of the Phase One review;

Decisions on January 31, 2017

20. The review process under the 2013 Agreement was completed and decisions on Band membership were mailed out on January 31, 2017;
21. As a result of the January 31, 2017 decisions, out of the approximately 104,000 total applicants, ultimately 18,044 applicants were accepted for founding membership. Approximately 68,134 applications were rejected;
22. There remain 10,512 applicants out the original 23,877 members accepted in Phase One under the 2008 Agreement and placed on the original founding members list that were not determined to meet the heightened criteria set under

the 2013 Agreement, after it that had been retroactively applied to their previously successful applications;

23. In accordance with removal of certain appeal rights under s. 6(2) of the 2013 Agreement, some persons denied after January 31, 2017 are not permitted a right to appeal their enrolment decision;

Consequences of rejection

24. In the circumstances of the Qalipu Band membership process, Band membership equates to a granting of Indian status if the applicant does not already have said status;
25. The Qalipu Band and its members will be eligible for certain federal programs, including but not limited to: post-secondary student support; Band support funding; Band employee benefits; community economic development organizations; community support services; community economic opportunities; and non-insured health benefits;
26. Consequently, failure to be accepted for Qalipu Band membership constitutes a denial of Indian status and a deprivation of these otherwise available benefits;

The Applicant

27. The Applicant, Gerald Brake, submitted his application to become a founding member in the Qalipu Band prior to the November 30, 2012 Phase Two deadline;
28. By letter dated January 31, 2017, he was notified that his application for Band membership was rejected;
29. He was notified that he was rejected because he did not meet the requirements for self-identification pursuant to the 2013 Agreement and the Directive to the Enrolment Committee;
30. He was notified that the Enrolment Committee's decision to reject his application was not subject to appeal pursuant to section 6(2)(b) of the 2013 Agreement, and that accordingly, his decision is final;

Grounds for judicial review

31. By virtue of the Applicant's rejection, and the rejection of all other applicants' applications, under the retroactively applied 2013 Agreement, Canada:
 - a. failed to apply the 2008 Agreement appropriately and accordingly;
 - b. established and applied the 2013 Agreement for improper purposes;
 - c. invalidly and unlawfully established and applied the 2013 Agreement;
 - d. excluded material evidence submitted from consideration that otherwise would have been considered under the 2008 Agreement;
 - e. failed to give appropriate consideration to material evidence submitted that otherwise would have been considered under the 2008 Agreement;
 - f. failed to adequately, properly, and effectively consider all applications pursuant to the 2008 Agreement only;

- g. failed to accord with procedural fairness by denying certain persons an opportunity to appeal that had previously been granted under the 2008 Agreement;
 - h. failed to accord with procedural fairness and principles of natural justice by revoking Indian status from certain applicants to whom it had been previously granted; and
 - i. fettered the discretion of the Enrolment Committee by virtue of the 2013 Agreement and the Directive to the Enrolment Committee.
32. Accordingly, in respect of all rejections rendered under the 2013 Agreement, including the Applicant's rejection, Canada:
- a. failed to accord with the principles of natural justice;
 - b. mandated the Enrolment Committee to act without jurisdiction, act beyond its jurisdiction, or refuse to exercise its jurisdiction accordingly; and
 - c. mandated the Enrolment Committee to base its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
 - d. erred at law by implementing and requiring the implementation of the 2013 Agreement;
33. Sections 18.1, 18.4 of the *Federal Courts Act*, R.S.C., 1985, c. F-7; and
34. Rules 3, 300-319, 334.1-334.40 of the *Federal Courts Rules*, SOR/98-106.

This application will be supported by the following material:

- 1. the affidavit of the Applicant, GERALD BRAKE, to be sworn, and the exhibits thereto;
- 2. such other materials as counsel may advise and this Honourable Court may permit.

March 2, 2017



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