



A-145-18

(Court File No. T-300-17)

**FEDERAL COURT  
PROPOSED CLASS PROCEEDING**

**GERALD BRAKE**

Appellant

and

**ATTORNEY GENERAL OF CANADA and  
THE FEDERATION OF NEWFOUNDLAND INDIANS**

Respondents

**NOTICE OF APPEAL**

**TO THE RESPONDENT:**

**A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the appellant. The relief claimed by the appellant appears on the following page.

**THIS APPEAL** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at place where Federal Court or Appeal (or Federal Court) ordinarily sits.

**IF YOU WISH TO OPPOSE THIS APPEAL**, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** of being served with this notice of appeal.

**IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION** of the order appealed from, you must serve and file a notice of cross-appeal in Form 341

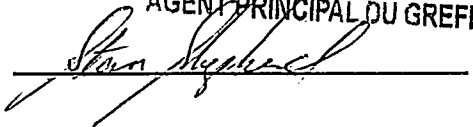
prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

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 APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

May 16, 2018

Issued by:

**STAN SHEPHERD**  
**SENIOR REGISTRY OFFICER**  
**AGENT PRINCIPAL DU GREFFE**  


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**APPEAL**

**THE APPELLANT APPEALS** to the Federal Court of Appeal from the order of the Honourable Mr. Justice Zinn dated May 8, 2018 denying the Appellant's motion for conversion of the within application into an action pursuant to subsection 18.4(2) of the *Federal Courts Act*, RSC 1985, c F-7, and the Appellant's motion for certification of the within matter as a class proceeding pursuant to Rule 334.16(1) the *Federal Court Rules*, SOR/98-106.

**THE APPELLANT ASKS:**

1. That the May 8, 2018 Order of Justice Zinn be set aside;
2. That the Federal Court of Appeal convert the within application into an action;
3. That the Federal Court of Appeal certify the within application as a class proceeding:
  - (a) appointing Gerald Brake and/or Gregory Collins as the representative plaintiffs;
  - (b) certifying the proposed class definition and common issues;
  - (c) providing for notice to the class as set out in the notice of motion and litigation plan; and
4. Such further and other relief as counsel may advise and this Honourable Court may permit.

**THE GROUNDS OF APPEAL** are as follows:

1. This appeal arises out of the Appellant's motion seeking conversion of the underlying application to an action, and certification of the proceeding as a class proceeding on behalf of all individuals whose applications for Qalipu Band membership were rejected in accordance with the *Supplemental Agreement for the*

*Recognition of the Qalipu Mi'kmaq Band* dated July 4, 2013 (the “Class” or “Class Members”).

2. The Qalipu Mi'kmaq Band was formed pursuant to the *Agreement for the Recognition of the Qalipu Mi'kmaq Band* dated June 23, 2008 (the “Original Agreement”). The application process commenced in 2008. During the application process, after receiving and approving 23,877 applications, Canada entered into the *Supplemental Agreement for the Recognition of the Qalipu Mi'kmaq Band* dated July 4, 2013 (the “Supplemental Agreement”).

3. The Appellant, *inter alia*, alleged that the establishment of the Supplemental Agreement unfairly retroactively changed the criteria to become a member and what proof requirements applicants would have to meet. In addition, it is alleged that the establishment and implementation of the Supplemental Agreement was unlawful, and Canada breached its fiduciary duties to the class and class members rights under the *Canadian Charter of Rights and Freedoms* by establishing and implementing the Supplemental Agreement for unlawful or improper purposes.

4. Justice Zinn denied the Appellant's motion for conversion and certification of the application as a class proceeding.

5. The Honourable Motions Judge erred failing to convert the application into an action and certify it as a class proceeding.

6. The Honourable Motions Judge erred in his assessment of the causes of action asserted in support of the Rule 334.16(1)(a) criterion. In particular, the Honourable Motions Judge made the following errors of principle, errors of fact and palpable and overriding errors in his assessment of that criterion:

- (a) in failing to consider the Amended Proposed Statement of Claim;
- (b) in failing to consider whether a private law cause of action exists as asserted;

- (c) in holding that the private law causes of action pled were premature; and,
- (d) in making an unsupported finding of fact that damages for the private law causes of action asserted were premature;

7. The Honourable Motions Judge erred by finding that an identifiable class did not exist (Rule 334.16(1)(b) criterion). The Honourable Judge made the following errors of principle, and palpable and overriding errors in making that finding:

- (a) by determining that a class can only encompass those who are ultimately successful on the merits contrary to class proceeding principles;
- (b) in finding that the class definition was overbroad;
- (c) in failing to consider Supreme Court of Canada case law, including *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, that permits common issues to be determined differently for different groups within a class;
- (d) by finding that the class could not be certified as a result of failing to consider evidence that specifically identified the class members;
- (e) by making a merits determination of the validity of the Supplemental Agreement; and
- (f) by failing to apply the Rule 334.18 and class proceeding jurisprudence that directs that only the common issues are determined at the common issues trial and that such common issues must only significantly advance the class members' cases and not determine their case in its entirety;

8. The Honourable Motions Judge erred by failing to find that the common issues proposed satisfied the Rule 334.16(c) criterion. The Honourable Judge made the

following errors of principle, and palpable and overriding errors in his assessment of that criterion:

- (a) by failing to consider the private law common issues as advancing the litigation;
- (b) by failing to consider whether the common issues could be determined in common and whether they would advance the class members' claims;
- (c) by failing to consider Supreme Court of Canada case law, including *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, that permits common issues to be determined differently for different groups within a class definition; and
- (d) by finding that only those who would ultimately be successful in their claims would have common issues to be determined;

9. The Honourable Motions Judge erred by finding that a class proceeding was no the preferable procedure (Rule 334.16(d) criterion). The Honourable Judge made the following errors of principle, and palpable and overriding errors in making that finding:

- (a) by failing to consider what preferable procedure exists for the private law causes of action asserted;
- (b) by determining a "lead case" was preferable to a class proceeding;
- (c) by considering a "lead case", for which there is no procedure provided for in the *Rules* and which does not exist at law;
- (d) by considering the existence of a "lead case" without evidence of the terms of that "lead case"; and,

- (e) by considering the result in the Federal Court matters *Wells v. Canada et al* (T-638-17, T-644,17) to be binding on Mr. Brake, without the benefit of the Appellant's evidence and argument in support of his underlying claims.

**THE COURT'S JURISDICTION IS:**

10. *Federal Courts Act*, RSC 1985, c F-7, specifically sections 18, 18.1, 27 and 52;
11. *Federal Courts Rules*, SOR/98-106, specifically Parts 5.1 and 6; and
12. Such further and other grounds as the Appellant advises and this Honourable Court may permit.
13. **THE APPELLANT REQUESTS** that this appeal be heard at Toronto, Ontario.

May 16, 2018



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Solicitors for the Appellant



**FEDERAL COURT**

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**PROPOSED CLASS PROCEEDING**

BETWEEN:

**GERALD BRAKE**

Applicant

and

**ATTORNEY GENERAL OF CANADA and  
THE FEDERATION OF NEWFOUNDLAND INDIANS**

Respondent

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**NOTICE OF APPEAL**

(Filed this \_\_\_ day of May, 2018)

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