Federal Court of Appeal  Cour d'appel fédérale

Date: 20210602

Docket: A-426-19

Citation: 2021 FCA 109

CORAM: **RENNIE J.A.**
RIVOALEN J.A.
LEBLANC J.A.

BETWEEN:

JUSTIN PHILIP ABBOTT

Appellant

and

CANADA (ATTORNEY GENERAL) and FEDERATION OF NEWFOUNDLAND INDIANS

Respondents

Heard by online videoconference hosted by the Registry

on May 12, 2021.

Judgment delivered at Ottawa, Ontario, on June 2, 2021.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: RENNIE J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. INTRODUCTION

[1] The present application for judicial review is a test case for applicants who were unsuccessful in their application for enrolment as founding members of the Qalipu Mi'kmaq First Nation Band (the QMFN).

[2] The QMFN is a band without a reserve created under the *Indian Act*, R.S.C. 1985, c. I-5 (the *Indian Act*) after several years of litigation and negotiations between the Federation of Newfoundland Indians (the FNI) and Canada (together, the respondents). The respondents agreed to create a landless band for the Mi'kmaq of the island of Newfoundland who had a current and substantial connection to certain identified Mi'kmaq communities on the island.

[3] On June 23, 2008, the FNI and Canada signed an agreement for the recognition of the QMFN (the original agreement) (Appeal Book, Vol. 2, Tab 6(D), p. 646). The original agreement established eligibility criteria for membership in the QMFN including proof of Canadian Indian ancestry, self-identification as a member of the Mi'kmaq Group of Indians of Newfoundland, and acceptance as a member by the Group (the group acceptance criterion).

[4] The original agreement also provided for a two-stage enrolment period to gain membership in the QMFN. The first stage consisted of applications for enrolment submitted between November 30, 2008 and November 30, 2009. The second stage was for applications for enrolment submitted between December 1, 2009 and November 30, 2012. Applications would not be accepted after November 30, 2012. In addition, the original agreement created an enrolment committee to assess applications for membership, assisted by an implementation committee, and authorized an appeal master to deal with any appeals of the decisions of the enrolment committee.

[5] In 1989, when the FNI sued Canada for the recognition of the QMFN, it estimated that 2,500 Mi'kmaq people were living on the island of Newfoundland. During the negotiations

leading up to the original agreement, the respondents estimated that the new First Nation band would be comprised of 8,700 to 12,000 members, since the 2006 census found there were approximately 23,450 residents of Newfoundland and Labrador who identified themselves as an Aboriginal person. Of this number, approximately 7,765 identified themselves as First Nation members. At the time of the negotiations, Canada and the FNI did not expect more than 20,000 individuals to apply for membership.

[6] Near the end of the second stage of the enrolment period, the respondents received an unexpectedly large number of applications for membership in the QMFN. By June 21, 2012, 23,877 applicants were registered as founding members of the QMFN under paragraph 6(1)(*b*) of the *Indian Act*. By the end of the second stage, over 75,000 applications were submitted. Of those applications, approximately 46,000 were received in the final three months of the second stage. Of the more than 104,000 applications submitted during the entire enrolment process, approximately two-thirds of the applicants lived outside of the Mi'kmaq communities identified in the original agreement.

[7] The overall number of applications, in particular the 46,000 applications for membership in the final three months of the four-year application period, raised questions for both Canada and the FNI. The respondents were concerned about the integrity and credibility of the QMFN, the legitimacy of its membership, and the enrolment committee's ability to review and process the applications within a reasonable timeframe.

[8] In reviewing decisions appealed by Canada and the FNI, the appeal master confirmed that certain applicants' evidence was insufficient to justify the enrolment committee's award of membership in the QMFN. Specifically, the appeal master found that the standard form affidavits used by many applicants were not determinative of involvement in and acceptance by the Mi'kmaq community.

[9] Confronted with the volume of applications and the concerns noted above, Canada and the FNI re-entered into negotiations to resolve these questions. On June 30, 2013, the respondents executed a supplemental agreement addressing concerns surrounding criteria of self-identification and group acceptance in the application process (the supplemental agreement) (Appeal Book, Vol. 4, Tab 8(M), p. 1233). The supplemental agreement amended the timelines for the consideration of applications for enrolment but did not alter the November 30, 2012, deadline for the submission of applications. Additionally, the supplemental agreement required the reassessment of all previously approved applications for membership in the QMFN. A directive to the enrolment committee and appeal master relating to the objective evidence required to demonstrate the group acceptance criterion was annexed to the supplemental agreement (the directive) and established a point system for the assessment of applications by non-resident applicants (the point system document) (Appeal Book, Vol. 4, Tab 8(M), pp. 1260, 1268). In the following year, the respondents established a detailed point system grid (the detailed grid) to serve as guidance for the application of the point system (Appeal Book, Vol. 4, Tab 10(C), p. 1418).

II. THE APPELLANT

[10] The appellant, Justin Philip Abbott, was born in Grand Falls, Newfoundland and grew up in Musgrave Harbour, Newfoundland. He is of Mi'kmaq heritage. He has been residing outside of Newfoundland since 1999.

[11] In 2009, the appellant applied to be a founding member of the QMFN. In 2011, his application was approved.

[12] In 2014, the appellant provided further information and resubmitted his application for enrolment in the membership of the QMFN as was required of him under the supplemental agreement. In 2017, the appellant was informed that he failed to meet the requirements for the group acceptance criterion because he did not obtain the minimum 13 points across the five categories as required by the point system document. He obtained 12 points.

[13] Since his application as a founding member of the QMFN was denied, the appellant is no longer eligible to be registered as an Indian under paragraph 6(1)(*b*) of the *Indian Act*. He remains registered as a child of a founding member under subsection 6(2), but his own children no longer have any status under the *Indian Act*.

[14] In 2018, the appellant filed an application for judicial review in the Federal Court in respect of the decision of Canada and the FNI to enter into the supplemental agreement and to issue the directive. He also argued that he was denied procedural fairness because he was not

provided with the detailed grid used by the enrolment committee during the reassessment period to evaluate membership criteria for non-resident applicants. The Federal Court dismissed his application.

[15] These reasons relate to the appeal of the judgment of the Federal Court (*per* Lafrenière J.) (the Judge) rendered on October 16, 2019 (2019 FC 1302) (the FC Decision) dismissing the application for judicial review.

III. ISSUES

[16] The following issues are before this Court:

A. *What is the applicable standard of review?*

B. *Did the Judge err in finding that the respondents were authorized to issue the directive?*

C. *Did the Judge err in finding that the appellant was not denied procedural fairness?*

IV. ANALYSIS

A. *What is the applicable standard of review?*

[17] The standard set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 usually applies to an appeal from the judgment of a first instance court in an application for judicial review. However, this Court has held that "where the application judge made findings of fact or mixed fact and law based on the consideration of evidence at first instance, rather than on a review of the administrative decision, these findings

are reviewable on the *Housen* standard" (*Apotex Inc. v. Canada (Health)*, 2018 FCA 147, 157 C.P.R. (4th) 289, para. 57; *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131, 424 D.L.R. (4th) 366, paras. 36-37). This is effectively the case here. Therefore, the appellate standard of palpable and overriding error applies to the Judge's findings of fact, or mixed fact and law, regarding the respondents' authorization to issue the directive.

[18] The standard of palpable and overriding error is a high hurdle to overcome. As my colleague, Stratas J.A., has described it: "'[p]alpable' means an error that is obvious. 'Overriding' means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall." (*Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286, para. 46 [*South Yukon Forest*])

[19] With regard to the issue of procedural fairness, this Court noted that "[a]ttempting to shoehorn the question of procedural fairness into a standard of review analysis is … an unprofitable exercise." (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121, para. 55 [*Canadian Pacific*]) Although historically referred to as a review on the correctness standard, questions of procedural fairness are not decided according to any particular standard of review. Rather, "[a] court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific*, para. 54).

[20] For the reasons that follow, I would dismiss the appeal.

B. *Did the Judge err in finding that the respondents were authorized to issue the directive?*

[21] The appellant advances three main arguments regarding the respondents' ability to issue the directive to the enrolment committee and appeal master, and points to palpable and overriding errors made by the Judge when he found that:

A. The directive "merely provides guidance" which clarifies for the enrolment committee and appeal master the types and amount of evidence the parties to the agreement considered sufficient to meet the requirements for membership (FC Decision, para. 134);

B. The directive addresses "implementation issues" and was therefore authorized by section 10.4 of the original agreement (FC Decision, paras. 129, 138); or

C. In the alternative, the directive's changes to the group acceptance criterion were authorized by section 2.15(b) of the original agreement (FC Decision, para. 143).

(1) *The directive merely provides guidance*

[22] The appellant submits the Judge made a palpable and overriding error in finding that the directive "merely provides guidance" to the enrolment committee and the appeal master regarding the "types and amount of evidence" required to satisfy the group acceptance criterion (FC Decision, para. 134). The appellant submits that the directive went much further than clarifying the existing evidentiary standards or providing guidance to the enrolment committee;

rather, it imposed the point system document, which establishes new evidentiary requirements and mandates an entirely new method of assessment from that which was set out in the original agreement.

[23] Turning to the original agreement, the appellant argues that section 25 of the enrolment committee guidelines annexed to the original agreement (the guidelines) required the following:

> 25. Acceptance by the Mi'kmaq Group of Indians of Newfoundland as a Member of the Mi'kmaq Group of Indians of Newfoundland shall be established through substantial connection with that group through either:
>
> a) residency in or around a Mi'kmaq Group of Indians on the island of Newfoundland
>
> **OR**
>
> b) i) frequent visits and/or communications with resident members of the Mi'kmaq Group of Indians on the Island of Newfoundland
>
> AND
>
> ii) maintenance of the Mi'kmaq culture or way of life, that is, membership in an organization promoting Mi'kmaq interests; knowledge of Mi'kmaq customs, traditions, and beliefs; participation in cultural or religious ceremonies; or, pursuit of traditional activities.
>
> [Appeal Book, Vol. 2, Tab 6(D), p. 680]

[24] In comparison, the appellant refers this Court to section 14 of the directive, which the appellant says imposes new substantive requirements on non-resident applicants. That provision of the directive reads as follows:

> Visits and communications must not be limited to family members; the evidence must demonstrate contacts with other Members of the Mi'kmaq Group of Indians of Newfoundland and involvement in the cultural and social life of the Mi'kmaq community in one of the locations of the Mi'kmaq Group of Indians of Newfoundland.
>
> [Emphasis added.]

[25] In addition to section 14, the appellant refers this Court to section 5 of the directive, and suggests that this section overwrote the list of "disjunctive" examples set out in section 25(b)(ii) of the guidelines by expressly requiring non-resident applicants to demonstrate that they "participated in religious, ceremonial, traditional, or cultural activities" of an identified Mi'kmaq community (Appellant's Memorandum of Fact and Law, para. 81).

[26] The appellant argues that with these changes, the directive instituted the point system document, which he says is an entirely new method of assessing the group acceptance criterion for non-resident applicants. The appellant submits that under the original agreement, the enrolment committee had the discretion to assign weight to the evidence and to establish findings on a balance of probabilities (guidelines, sections 31-32). Now, under the supplemental agreement and the annexed directive, the enrolment committee is directed to assess visits and communications, and the maintenance for the Mi'kmaq culture and way of life, in accordance with the point system document. The point system document requires 13 points across five categories to satisfy the group acceptance criterion. As noted above, subsequently, and unbeknownst to the appellant, the respondents developed the detailed grid for the application of the point system document. The detailed grid was not provided to the appellant at the time he resubmitted his application and was not made available to the applicants.

[27] The appellant submits that as a whole, the new evidentiary requirements and the mandatory imposition of the point system go well beyond “merely provid[ing] guidance” or “clarifi[cation]” to the existing evidentiary standards, contrary to what the Judge found at paragraph 134 of the FC Decision. The appellant contends the error is palpable based on the text of the directive and evidence on the record, and overriding as this finding underpins the Judge’s subsequent conclusions that the directive was authorized by the original agreement because of its remedial function under section 10.4, or in the alternative, its clarifying function under section 2.15(b).

(a) *Analysis*

[28] I have not been persuaded by the appellant’s arguments. I find that the Judge committed no errors when he found that the directive only provided guidance to the enrolment committee and the appeal master.

[29] Turning to the appellant’s submissions regarding sections 5 and 14 of the directive, I find that both must fail. It is clear from the record that the appeal master overturned previous decisions made by the enrolment committee because the appeal master found that the evidence provided in the standard form affidavits was insufficient to meet the group acceptance criterion. I am satisfied that sections 5 and 14 of the directive list examples of the appeal master’s determinations (as an example, the appeal master’s interpretation that frequent visits and/or communications must show more than a connection with family members). As such, section 5 of the directive does not override section 25(b) of the guidelines. It provides guidance on assessing the evidence and clarifies the type of detailed evidence of visits that must occur on a regular

basis over a reasonably extended period (Appeal Master Decisions, Appeal Book, Vol. 3, Tabs 6(I, J), pp. 813-14, 828, 836-37).

[30] Further, sections 5 and 14 of the directive and the appeal master's decisions reiterate what the Supreme Court in *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 at paragraph 33, found necessary for a member to be identified as belonging to a specific Aboriginal community [*Powley*]. That is, "[t]he core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups."

[31] The Supreme Court in *Powley* placed importance on the recognition of past and ongoing participation in a shared culture and in the customs and traditions of a community in an identified geographical location. The record here indicates that the respondents were aware of the importance of the *Powley* decision and drafted the original agreement to incorporate its import by devising the membership criteria of self-identification as a member of a historic community, acceptance of the individual by that community and Aboriginal ancestry.

[32] Finally, I am not convinced that the point system document usurps the enrolment committee's ability to exercise discretion when assessing evidence. Rather, the point system document provides guidance to the enrolment committee and appeal master on how to maintain consistency in their decision-making and on how the frequency of visits and communications are to be assessed. Sections 31 and 32 of the guidelines were not absolute and the evidence before the Judge demonstrated that the enrolment committee had the discretion to assess the overall

evidence and award points outside the point system document, using the detailed grid as a tool. Indeed, the enrolment committee exercised their discretion in favour of the appellant and awarded additional points to him, as will be explained in further detail at paragraph [51] of these reasons.

[33] In summary, I find that the Judge made no palpable and overriding error when he found that the directive merely provides guidance to the enrolment committee and the appeal master.

(2) *The directive was authorized under section 10.4 of the original agreement*

[34] The appellant submits the Judge made a palpable and overriding error when he found that the respondents were authorized to issue the directive under section 10.4 of the original agreement (FC Decision, paras. 129, 138).

[35] Section 10.4 of the original agreement reads as follows:

> The Implementation Committee shall oversee and coordinate the implementation of this Agreement and advise the Parties on issues relating to the establishment of the Band. The Implementation Committee shall have no authority to bind the Parties. Without limiting the generality of the foregoing, the Implementation Committee shall:
>
> - develop the Implementation Plan,
>
> - serve as a forum to negotiate the funding agreements referred to in this Chapter including any required amendments to such funding agreements,
>
> - assist the Enrolment Committee as required,
>
> - monitor the progress of the Enrolment Process,
>
> - facilitate the resolution of any implementation issues.

[36] As a preliminary point, the appellant argues that “the parties” (that is, the respondents) are distinct from the implementation committee pursuant to the text of Chapter 10 of the original agreement. The text of Chapter 10 states “the Parties shall establish an Implementation Committee” (s. 10.2); “[t]he Implementation Committee shall consist of six (6) representatives; three (3) chosen by the FNI and three (3) chosen by Canada” (s. 10.3); and, “[t]he Implementation Committee shall … advise the Parties [and] shall have no authority to bind the Parties” (s. 10.4).

[37] Relying on the language of Chapter 10, the appellant submits that section 10.4 of the original agreement does not vest the implementation committee with the power to issue a mandatory directive to the enrolment committee; rather it states that it shall “assist the Enrolment Committee as required”. Of note, the appellant submits that prior to the directive being issued, the implementation committee only made submissions, observations or answered inquiries. The appellant says that the Judge properly found the directive was a “marked departure” from the respondents’ earlier dealings with the enrolment committee (FC Decision, para. 124).

[38] While the Judge did go further in his comments and stated that previous correspondence may have been intended to be treated as directives even if not framed as such, the appellant contends the intent is irrelevant to whether or not section 10.4 provides authorization to issue directives (FC Decision, para. 124).

[39] Finally, the appellant argues that the wide-ranging changes mandated by the directive are so fundamental that these changes implement an entirely different agreement with respect to

non-resident applicants' eligibility and assessment – not the agreement ratified by 90% of the members of the FNI.

[40] As such, the appellant argues that the error is palpable as the text of section 10.4 of the original agreement does not authorize the issuance of directives to the enrolment committee and the nature of the changes listed in the directive go beyond resolving "implementation issues". The error is also overriding because the respondents exceeded the authority granted to them by the original agreement in issuing the directive based on section 10.4. The appellant takes the position that the respondents were required to invoke the ratification process to make such changes.

(a) *Analysis*

[41] Once again, I am unable to accept the appellant's submissions with respect to the operation and interpretation of section 10.4 of the original agreement, and the authority of the respondents to enter into the terms of the supplementary agreement and issue the directive.

[42] In the present case, I am mindful of the special relationship between Canada and the FNI. The relationship informs the task asked of the Federal Court and this Court. The Federal Court conducted a judicial review of an agreement and supplementary agreement entered into between Canada and the FNI after years of litigation and negotiations. The Supreme Court has reminded us that reconciliation often demands judicial forbearance. Courts should generally leave space for the parties to govern together and work out their differences (*First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576, para. 4 [*Nacho Nyak Dun*]).

[43] Here, the respondents were successful in their negotiations and resolved the difficult challenges they faced from the unanticipated volume of applications submitted during the enrolment process after they entered into the original agreement. The supplemental agreement and directive were the fruits of these negotiations.

[44] I also am sensitive to the nature of the agreements reached. Although the original agreement and supplementary agreement do not meet the definition of a modern treaty, because no land was transferred between Canada and the QMFN, I am of the view that the agreements reached are as close as one can get to a modern treaty. I find that the role of the Federal Court was to assess whether Canada and the FNI were authorized by their agreements to issue the directive, and whether it was reasonable for them, given the factual record, to issue the directive. In the present case, Canada and the FNI are united in their support of the Judge's findings and are asking this Court to dismiss the appeal. They have raised no errors in the Judge's factual findings of their intentions when entering into the supplemental agreement. They also agree that the directive did not fetter the discretion of the enrolment committee and appeal master, but rather was there to offer guidance.

[45] I now turn to the appellant's arguments and focus on the two agreements. I am satisfied that section 10.4 of the original agreement, when read in light of section 9 of the supplemental agreement, authorizes the respondents to issue the directive. For the reasons that follow, I find that the appellant's narrow depiction of "implementation committee" versus "parties" and the assertion that neither were authorized to issue the directive mischaracterizes the nature and mandate of the implementation committee.

[46] The implementation committee was mandated pursuant to section 10.4 to "assist the Enrolment Committee as required", "monitor the progress of the Enrolment Process" and "facilitate the resolution of any implementation issues". Contrary to the appellant's submissions, the facilitating role was in addition to the assistance to be provided, and therefore the means by which the parties could discuss issues and determine how to resolve them – here, by issuing the directive to clarify the types and amount of evidence required to meet the membership requirements.

[47] Section 9 of the supplemental agreement, which was not challenged by the appellant, supports this interpretation:

> **Supervision and Directives.** The Parties confirm that section 10.4 of the Agreement encompasses the Parties' authority to supervise the work of the Enrolment Committee and Appeal Master, request reports in the manner and form established by the Implementation Committee, issue joint Directives to the Enrolment Committee and Appeal Master and require the Enrolment Committee and Appeal Master to seek directions from the Parties, through the Implementation Committee, where a novel, unforeseen, situation arises, or where the wording of the Agreement needs further clarification.
>
> A. Directive on the application of paragraph 4.1(d)(ii) of the Agreement and section 25 of the Enrolment Committee Guidelines is attached as Annex A.
>
> [Appeal Book, Vol. 4, Tab M, p. 1257]
> [Bold in original; underline emphasis added.]

[48] It is also clear from the record that the respondents, through the implementation committee, developed the directive, the point system document and the detailed grid (Martin Reiher Affidavit, Appeal Book, Vol. 3, Tab 8, pp. 1033-34; Cross-Examination of Martin Reiher, Appeal Book, Vol. 4, Tab 10(C), pp. 1418-22). There is no merit to the appellant's attempt to draw a sharp distinction between the respondents and the implementation committee.

[49] I find that the Judge properly rejected a narrow interpretation of the scope of authority, as proposed by the appellant, and found that the directive was issued in response to implementation issues that arose during the course of the enrolment process (FC Decision, paras. 125, 128). The Judge's interpretation is consistent with contextual factors underlying the original agreement (*i.e.*, the intention to settle a Federal Court action between the Respondents regarding the registration of FNI members under the *Indian Act*) and the principle by analogy that parties of a modern treaty should be left to resolve their issues through mechanisms they have created (*i.e.*, the implementation committee) (*Nacho Nyak Dun*, para. 33).

[50] Given the evidence that the respondents had previously provided guidance to the enrolment committee to facilitate the resolution of implementation issues, even though these communications may not have been called directives, the Judge's finding was supported in that the enrolment committee was expected to act as directed (FC Decision, para. 127).

[51] The record supports the findings that the directive offered guidance and did not constrain the enrolment committee. As I found in paragraph [32] of these reasons, I am satisfied the directive was not binding on the enrolment committee or the appeal master; it did not impose new standards of evidence or otherwise change the evidentiary requirements for membership. The non-binding nature of the directive and detailed grid is illustrated from the enrolment committee's assessment of the appellant's evidence. For example, the enrolment committee awarded the appellant 2 points for the number of days he spent in Mi'kmaq communities despite his own evidence of visits and contacts that were solely with family members, demonstrating less than the suggested amount of days for 2 points (Cross-Examination of Justin Abbott, Appeal

Book, Vol. 4, Tab 10, pp. 1307-17; Justin Abbott Affidavit, Appeal Book, Vol. 1, Tab 4(G), p. 161).

[52] The terms of the original agreement and the supplemental agreement, as well as the respondents' intention as noted in the record, all support the Judge's findings, at paragraphs 129 and 138 of the FC Decision, that the respondents had the authority to issue the directive. The appellant has failed to show any palpable and overriding error in that regard.

[53] Moreover, I accept that the directive was a reasonable response to address the respondents' concerns about the enrolment process in light of the unexpected and unsupported spike in applications attributed in part to standard form affidavits being submitted as evidence. The original agreement allowed affidavit evidence, however, section 28 of the guidelines stipulated that affidavits must describe "in detail the applicant's visits to the community or communications … as well as the frequency of the applicant's visits and communications." It was therefore reasonable for the respondents to require specific or individualized details in affidavits to substantiate the applicants' statements, particularly in light of their reasonable concerns regarding standard form affidavits.

[54] Given the Judge's findings that the respondents had the authority to issue the directive under section 10.4 of the original agreement, the Judge then reviewed the questions before him against the standard of reasonableness. I see no reviewable error in him finding that, on the standard of reasonableness, the directive was a reasonable response to the respondents' concerns regarding the high volume of applications (FC Decision, paras. 158, 162).

(3) *Is the directive authorized under section 2.15(b) of the original agreement?*

[55] In the alternative, the appellant submits the Judge made a palpable and overriding error in finding that the changes contained in the directive were authorized by section 2.15(b) of the original agreement (FC Decision, para. 143).

[56] In response, the respondents advise that neither Canada, nor the FNI, had raised this argument before the Judge. Before this Court, the respondents were content to rely on the Judge's interpretation of section 10.4 of the original agreement to demonstrate that they have the authority to enter into the supplemental agreement and issue the directive.

[57] In light of my conclusions regarding the authority of the respondents to issue the directive pursuant to section 10.4 of the original agreement, I find it is unnecessary to consider the application of section 2.15(b) of the original agreement. Even if I were to find that the Judge made a palpable error in his interpretation of section 2.15(b), I find that such an error would not be overriding as it would not affect the outcome of the case, given my conclusion regarding section 10.4 (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344, para. 64; *South Yukon Forest*, para. 46).

C. *Did the Judge err in finding that the appellant was not denied procedural fairness?*

[58] The appellant submits the Judge erred in finding that he was not denied procedural fairness (FC Decision, paras. 190-91). He raises two findings made by the Judge that were errors.

[59] First, the Judge found that “no evidence” substantiated the appellant’s assertion that if he had the detailed grid, he could have adduced more or better evidence (FC Decision, para. 186).

[60] Second, in citing *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation*, 2015 FCA 272, 479 N.R. 243 [*CGI Information Systems*], the Judge found that the directive and the point system document together with the brochure, provided the appellant with sufficient notice of the case he had to meet (FC Decision, para. 188).

[61] The appellant argues that both findings are in error. Regarding the first, the appellant says that the statements made in his affidavit and during cross-examination constitute evidence of additional relevant family trips, and substantiate his argument that he would have submitted additional evidence if he had been made aware of the stringent requirements.

[62] Regarding the second, the appellant submits the Judge erred in relying on, or applying, the standard purportedly set in *CGI Information Systems* and concluding that “it is not necessary to disclose evaluation criteria where the undisclosed evaluation criteria was reasonably related to, or could be reasonably inferred from, the published evaluation criteria” (FC Decision, para. 189).

[63] In support of his argument that he was denied procedural fairness, the appellant relies on two decisions of the Federal Court rendered in 2015, *Foster v. Canada (Attorney General)*, 2015 FC 1065 [*Foster*] and *Howse v. Canada (Attorney General)*, 2015 FC 1063 [*Howse*]. These cases also dealt with the application for enrolment of founding members in the QMFN. In those

decisions, the Federal Court concluded that while the applicants were not owed a fiduciary duty and the honour of the Crown was not engaged, given "the fact that the Agreement stems from the [Governor-in-Council]'s prerogative power to create new bands under the *Indian Act* – a higher level of procedural fairness [wa]s warranted. At a very minimum, this require[d] notice" (*Foster*, para. 43; *Howse*, para. 37).

[64] In summary, according to the appellant, the duty of fairness engaged by the QMFN enrolment process is high and is not discharged in this case as the applicants were left unaware of the detailed grid and the rigid criteria applied to non-resident applicants. The Judge's finding in this regard was therefore a reviewable error (FC Decision, para. 190).

(a) *Analysis*

[65] Turning to the first argument, I accept that the Judge erred when he found at paragraph 186 of the FC Decision that there was "no evidence" to substantiate the appellant's assertion that he could have adduced more or better evidence had he access to the detailed grid; however, I find that that such an error is not overriding as it is not relevant to my analysis regarding procedural fairness.

[66] Overall, I find that the Judge made no error in determining that there was no breach of procedural fairness in the assessment of the appellant's application for membership. While I do agree that the duty of procedural fairness owed to the appellant is on the high end of the spectrum, I note that during the reassessment process, all previously accepted applications gave non-resident applicants, such as the appellant, sufficient time and opportunity to provide

additional evidence. The appellant had access to the brochure detailing the documentation he should provide, as well as the directive and the point system document annexed to the supplemental agreement. Here, unlike in the *Foster* and *Howse* decisions, the record is clear that the appellant was made aware that evidence of visits and communications would be awarded points separately, on the "strength of evidence and frequency" of each form of contact. The appellant was aware of a point system, and he stopped attempting to obtain further evidence based on what he considered "frequent".

[67] It is true that the appellant did not have access to and was not aware of the detailed grid. However, as mentioned above, he was aware of the point system document and this information was available to him. I am satisfied that he was provided with sufficient information to know the case he had to meet.

[68] I would make a comment regarding the Judge's reliance on the decision of this Court in *CGI Information Systems*, wherein this Court found in that case that there was no basis to interfere with a tribunal's finding that undisclosed guiding methods to evaluate the criteria did not change the criteria and therefore did not have to be disclosed (*CGI Information Systems*, paras. 82-86). I agree with the appellant that *CGI Information Systems* has little application here. *CGI Information Systems* is a commercial case that deals with a competitive procurement process in the specific context of an alleged breach under the North American Fair Trade Agreement (paras. 45-46, 58, 60). In my view, it has limited precedential value in the context of an Aboriginal law case that examines the assessment criteria of self-identification as a member

of a historic community, acceptance of the individual by that community and Aboriginal ancestry, as enunciated in *Powley*.

[69] Notwithstanding my comments, I am satisfied that the respondents discharged the high duty of procedural fairness owed to the appellant by providing non-resident applicants, such as the appellant, an opportunity to provide additional evidence and access to information detailing the documentation they should provide. It would appear that the respondents were alive to potential issues of procedural fairness, sought to prevent them, and effectively achieved that objective by providing time and information to non-resident applicants to submit their further evidence. A fair and just process was followed.

[70] In summary, the appellant was provided clear and unambiguous notification that he should provide as much documentation as possible. He was aware that evidence of visits and communications would be awarded points separately on the "strength of evidence and frequency" of each form of contact, and he was aware of a point system. The manner in which his evidence would be evaluated could be reasonably related to or inferred from the criteria available to him. Thus, I am satisfied that the appellant knew the case to meet and had a full and fair chance to respond.

[71] The Judge did not err in finding that the appellant was not denied procedural fairness.

V. CONCLUSION

[72] For these reasons, I would dismiss the appeal. Costs were not sought, and therefore I would propose that none be awarded.

"Marianne Rivoalen"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-426-19
STYLE OF CAUSE:	JUSTIN PHILIP ABBOTT v. CANADA (ATTORNEY GENERAL) AND FEDERATION OF NEWFOUNDLAND INDIANS
PLACE OF HEARING:	BY ONLINE VIDEOCONFERENCE
DATE OF HEARING:	MAY 12, 2021
REASONS FOR JUDGMENT BY:	RIVOALEN J.A.
CONCURRED IN BY:	RENNIE J.A. LEBLANC J.A.
DATED:	JUNE 2, 2021

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