



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Barker v. Federation of Newfoundland Indians Inc.*,
2026 NLCA 18

Date: June 9, 2026

Docket Number: 202401H0033 and 202401H0065

BETWEEN:

ANDREW BARKER AND JENNIFER BRAKE

APPELLANTS/FIRST RESPONDENTS
BY CROSS-APPEAL

AND:

FEDERATION OF NEWFOUNDLAND INDIANS INC.

FIRST RESPONDENT/SECOND RESPONDENT
BY CROSS-APPEAL

AND:

SHAWN BENOIT, MATTHEW ANDERSON,
MARIE TAPP MELANSON, BOBBIE TAPP GOOSNEY,
AND JENNIFER SUE LE ROUX

SECOND RESPONDENTS/THIRD RESPONDENTS
BY CROSS-APPEAL

AND:

HIS MAJESTY THE KING (CANADA)

THIRD RESPONDENT/APPELLANT
BY CROSS-APPEAL

Coram: F.J. Knickle, D.M. Boone and K.J. O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 201801G1147
(2023 NLSC 90)

Application Heard: May 19, 2026

Judgment Rendered: June 9, 2026

Counsel for the Appellants/

First Respondents by Cross-Appeal: Philip J. Buckingham K.C. and
Adam G. Ronan

Counsel for the First Respondent/

Second Respondent by Cross-Appeal: Paul D. Dicks K.C. and
Megan S. Reynolds

Counsel for the Second Respondents/

Third Respondents by Cross-Appeal: Keith S. Morgan

Counsel for the Third Respondent/

Appellant by Cross-Appeal: Corinne Bedford and Kelly A. Peck

Authorities Cited:

CASES CITED: *Benoit v. Federation of Newfoundland Indians*, 2018 NLSC 141; *Benoit v. Federation of Newfoundland Indians Inc.*, 2023 NLSC 90; *Federation of Newfoundland Indians Inc. v. Benoit*, 2024 NLCA 13; *Barker v. Federation of Newfoundland Indians Inc.*, 2024 NLCA 31; *R. v. Reid*, 2021 NLCA 13; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *Shute v. Paradise (Town)*, 2024 NLCA 19; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *Humby v. Newfoundland and Labrador Housing Corporation*, 2013 NLCA 4; *King v. Cleary*, 2014 NLCA 33; *Wells v. Canada (Attorney General)*, 2018 FC 483; *Abbott v. Canada (Attorney General)*, 2019 FC 1302, aff'd 2021 FCA 109, leave to appeal to SCC refused, 39815 (10 March 2022); *Brake v. Canada (Attorney General)*, 2019 FCA 274; *Collins v. Canada (Attorney General)*, 2024 FC 636; *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39; *R. v. Badger*, [1996] 1 S.C.R. 771; *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576; *Davis v. Canada (Attorney General)*, 2008 NLCA 49.

REGULATIONS CONSIDERED: *Qalipu Mi’kmaq First Nation Band Order*, SOR/2011-180.

STATUTES CONSIDERED: *Corporations Act*, RSNL 1990, c. C-36, section 31; *Indian Act*, RSC 1985, c. I-5; *Qalipu Mi’kmaq First Nation Act*, SC 2014, c. 18; *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c. 14.

RULES CONSIDERED: *Court of Appeal Civil Rules*, 2025, NLR 44/25, rule 11(3); *Rules of the Supreme Court*, 1986, SNL 1986, c. 42, Schedule D, as it appeared on January 2013, rule 57.09(2).

D.M. Boone J.A.:

[1] Although this Court is the highest court in this province, we have restrictions on the arguments that we can hear. We are limited by our jurisdiction, by the record in the court appealed from, and by the way the parties structure the appeal. We must consider each of those limitations in deciding this application.

[2] After two full days of hearings of this appeal, the First Respondent (“FNI”) filed its first factum. Andrew Barker and Jennifer Brake (the “Appellants”), and His Majesty the King (“Canada”) apply to strike significant portions of that factum. I would grant the application in part and explain why in the following reasons.

BACKGROUND

[3] FNI is a not-for-profit corporation that continued under the *Corporations Act*, RSNL 1990, c. C-36. FNI stated in its Articles of Continuance that its primary corporate purpose was to obtain recognition and status, under the *Indian Act*, RSC 1985, c. I-5, for the Mi’kmaq people of the island of Newfoundland.

[4] FNI sued Canada in Federal Court as part of its effort to achieve its goals. Canada and FNI agreed in 2007 to settle that litigation by an Agreement in Principle (the “Settlement Agreement”). Canada agreed to recognize the Qalipu Mi’kmaq First Nation Band (“QMFNB”) as a non-reserve band under the *Indian Act*. The parties to the Settlement Agreement intended that QMFNB would consist of people with a substantial current connection to one of several Mi’kmaq communities in Newfoundland.

[5] In the Settlement Agreement, the parties specified criteria and a process (administered by an enrolment committee) through which people claiming Mi'kmaq heritage could apply for acceptance as "Founding Members" of QMFNB. Qualified applicants would be entitled to registration under the *Indian Act* and to the incidents of that status.

[6] The Settlement Agreement by its terms required ratification by FNI members. FNI membership at that time included all members of nine affiliated Mi'kmaq bands. FNI membership voted to ratify the Settlement Agreement in March 2008. FNI Directors accepted the results of the ratification vote and authorized the FNI President to sign the Settlement Agreement in April 2008.

[7] Canada recognized the QMFNB as a Band under the *Indian Act* by the *Qalipu Mi'kmaq First Nation Band Order*, SOR/2011-180 (the "*Recognition Order*").

[8] Those who had qualified as Founding Members were listed in a Schedule to the *Recognition Order* (the "Founding Members List").

[9] Shawn Benoit, Mathew Anderson, Marie Tapp Melanson, Bobbie Tapp Goosney, and Jennifer Sue Le Roux (the "Second Respondents") were the plaintiffs at trial, and were FNI members at the time the Settlement Agreement was ratified. They each also qualified as Founding Members of QMFNB, were included in the Schedule to the *Recognition Order*, and were registered for status under the *Indian Act*.

[10] FNI amended its by-laws and Articles of Continuance to change its membership once Canada recognized QMFNB. After the change, FNI would only include the people on the QMFNB band council as members.

[11] After Canada recognized QMFNB, and the band council became the members of FNI, FNI agreed to a "Supplemental Agreement" with Canada.

[12] The Supplemental Agreement:

- amended the self-identification provisions in the Settlement Agreement;
- directed new guidelines for the assessment of applications for enrolment in QMFNB (the "Directive"); and

- required reassessment under the new guidelines of those who had already qualified.

[13] Parliament passed the *Qalipu Mi'kmaq First Nation Act*, SC 2014, c. 18 (the “*QMFN Act*”), on June 19, 2014. The *QMFN Act* gave the Governor-in-Council authority to amend the *Recognition Order* to add or remove names from the Founding Members List.

[14] The enrolment committee reassessed the Second Respondents under the new guidelines and found that they did not qualify for QMFNB membership or *Indian Act* status. Canada informed each of them that they no longer qualified. Some were informed in 2017 and the rest in 2018.

[15] In 2018, Canada published an amended Founding Members List containing only people who qualified under the new guidelines in the Directive (the “Amended Founding Members List”).

THE CASE AT TRIAL

[16] The Second Respondents sued both FNI and Canada seeking to restore their membership in QMFNB and their *Indian Act* status.

Interim Application: *Benoit v. Federation of Newfoundland Indians*

[17] The Second Respondents also applied for interim extraordinary relief against both FNI and Canada to stop them from using the Amended Founding Members List.

[18] In a decision on that application (*Benoit v. Federation of Newfoundland Indians*, 2018 NLSC 141, at para. 56 (“*Benoit 2018*”)), the applications judge described the Second Respondents’ claims as based on allegations that:

- a) the Supplemental Agreement is invalid because, as an amendment to the Settlement Agreement, it required member ratification;
- b) the Supplemental Agreement had an oppressive and unfairly prejudicial effect upon each of the [Second Respondents’] rights as members of the FNI; and

c) Canada knew the amendments required ratification and, its failure to ensure it occurred, represents contractual bad faith.

[19] The applications judge recognized that the Second Respondents' case against Canada was weak for four reasons:

- The Second Respondents did not have standing to assert collective rights on behalf of others and, therefore, could pursue only their own remedies (at para. 56);
- The Second Respondents did not plead any breach of fiduciary duty owed to them individually, and any fiduciary duties owed by Canada were owed to the indigenous collective and not to individuals (at paras. 65, 72);
- No remedy was available to the Second Respondents in respect of the legislative action of passing the *QMFN Act* (at para. 47); and
- Whether the Supplemental Agreement was valid without ratification was an issue that had also arisen in ongoing Federal Court litigation (at paras. 83-110).

[20] The applications judge dismissed the application against Canada but granted an order against FNI that declared that the Second Respondents had a right to remain on the Founding Members List until their case was otherwise resolved.

The Decision Under Appeal: *Benoit v. Federation of Newfoundland Indians Inc.*

[21] The Second Respondents refined their claims following the decision in *Benoit 2018*. The matter then proceeded to trial on just the oppression claims. The trial judge in *Benoit v. Federation of Newfoundland Indians Inc.*, 2023 NLSC 90 (the "Decision"), described the claims that were adjudicated at trial:

[7] The [Second Respondents] claim oppression against the [FNI and Canada], and they seek a remedy pursuant to section 371 of the *Corporations Act*, RSNL 1990, c. C-36. The [Second Respondents] assert that the oppressive conduct arises from the process engaged by the FNI to truncate the FNI's membership, and to then enter the Supplemental Agreement. The primary remedy sought by the [Second Respondents] is rescission of the Supplemental Agreement.

[22] In the Decision, the judge:

- agreed with *Benoit 2018* (at para. 145) that the Second Respondents could only assert their own rights and could not claim on behalf of others;
- found FNI liable for oppression;
- dismissed the claim against Canada;
- refused to order rescission of the Supplemental Agreement;
- ordered the reversal of changes to FNI by-laws and Articles of Continuance that had changed the membership from all members of affiliated bands to only the QMFNB band council; and
- ordered individual remedies for the Second Respondents including compensation for their loss of *Indian Act* status.

[23] The judge's order reversing the FNI membership by-laws created an unusual wrinkle in the fabric of this litigation. In broad strokes, the pre-Decision FNI leadership agrees with the changes to self-identification requirements and enrolment guidelines in the Supplemental Agreement; the post-Decision FNI leadership opposes those changes and wants the original requirements and guidelines reinstated. The pre-Decision FNI leadership filed a Notice of Appeal of the Decision before the judge's order became effective. The post-Decision FNI leadership later discontinued that appeal.

[24] These unusual circumstances, “where the remedy imposed at trial directly affects the former Board members (by affecting their ability to serve as the directing minds of the FNI) and has the potential unintended consequence of shielding the trial order from appellate review...[and] the authority of the current Board as the directing minds of FNI assumes the legal correctness of the decision under appeal” (*Federation of Newfoundland Indians Inc. v. Benoit*, 2024 NLCA 13, at para. 14) led this Court to grant standing to pursue this appeal to the pre-Decision FNI leadership (*Barker v. Federation of Newfoundland Indians Inc.*, 2024 NLCA 31). Members of the pre-Decision FNI leadership became Appellants when they filed the Notice of Appeal.

[25] These unusual circumstances continue to ruffle the fabric of this appeal. FNI (under the post-Decision leadership) finds itself in the unusual position of opposing the appeal from the Decision issued against it.

[26] However, FNI did not file a factum. The appeal was set to be heard on January 19, 2026. Before the hearing, the Court received correspondence from a new lawyer on behalf of FNI who applied to postpone the hearing. The panel dismissed that application. The appeal went ahead but did not conclude. It was scheduled to conclude on February 10, 2026. Another law firm then contacted the Court to say that it was representing FNI and had been instructed to file a factum. On February 10, 2026, those lawyers attended the hearing and applied to postpone it. The panel dismissed that application but, with the consent of the parties, gave FNI leave to file a factum and gave the other parties time to reply. The panel set another hearing date to conclude the appeal.

[27] FNI then filed the factum in issue on this application.

THIS APPLICATION

[28] FNI's factum is lengthy and argues many issues. The Appellants and Canada say that FNI should only be permitted to respond to issues raised by the appeal and cross-appeal. They apply to strike portions of FNI's Factum that they say go beyond responding to the appeal and cross-appeal.

Arguments and claims not made at trial

[29] The Appellants and Canada say that some of the issues raised by FNI in its Factum relate to claims the Second Respondents did not make at trial.

[30] The Appellants and Canada argue that the Court should not even consider whether to allow FNI to file a cross-appeal in respect of those issues. They rely on the principle, recognized by this Court in *R. v. Reid*, 2021 NLCA 13, at paragraph 10, that "[a]ppellate courts sit in review of decisions made in trial courts. The requirement that issues be raised and adjudicated at trial before they will be considered on appeal is inherent in the appellate function."

[31] That principle rests on a recognition that allowing argument about an issue that was not raised in evidence and argued at trial creates "the very real danger that the appellate record will not contain all of the relevant facts, or the trial judge's view

on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited” (*Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 32).

[32] Nevertheless, there are circumstances where an appellate court will hear new issues in civil appeals. In *Sylvan Lake*, the Supreme Court of Canada said, at paragraph 33, that an appellate court is “free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice”.

[33] An appellate court should not allow a party to raise a new issue unless that party meets a two-fold burden. First, it must persuade the court that all the evidence necessary to resolve the new issue is in the trial record and, therefore, the other side will not suffer prejudice (*Shute v. Paradise (Town)*, 2024 NLCA 19, at para. 46). Second, it must show that the court’s refusal to consider the issue would risk injustice (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 22).

[34] Finally, an appellate court should only consider constitutional issues raised for the first time on appeal in exceptional cases where the party raising the issue satisfies the court that it can be “sure that no attorney general has been denied the opportunity to address the constitutional question” (*Guindon*, at para. 23).

Issues beyond the scope of the appeal and cross-appeal

[35] The Appellants and Canada argue that many of the issues raised in FNI’s Factum, although related to arguments and claims made at trial, go beyond the issues raised by the appeal and cross-appeal. They say that FNI would have had to cross-appeal to raise those issues and that it is too late under the *Court of Appeal Civil Rules*, 2025, NLR 44/25, for FNI to cross-appeal now.

[36] FNI acknowledges that some issues it addresses could have been the subject of a cross-appeal, but it says that the Court should still allow FNI to make these arguments. FNI relies on rule 11(3) of the *Court of Appeal Civil Rules*, 2025:

(3) Failure to file a notice of cross-appeal under subsection (2) shall not preclude a respondent from making submissions on the issues, but the omission may be grounds for an order as to costs.

[37] The Appellants and Canada say that rule does not support FNI's position.

[38] Rule 11(3) is similar in effect to the previous rule 57.09(2) of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, as it appeared on January 2013:

57.09(2) Failure of a respondent to file and serve a notice of cross-appeal shall not diminish the power of the Court to deal with any matter that arises, but it may be grounds for an adjournment of the appeal or a special order as to costs.

[39] This Court considered the limits of the previous rule 57.09(2) in *Humby v. Newfoundland and Labrador Housing Corporation*, 2013 NLCA 4. The Court adopted a narrow reading of the rule. The Court said that a respondent may only, without cross-appealing, raise a new issue if it arises "out of issues that are already engaged on the appeal and it is necessary or desirable to determine that issue incidental to deciding the other issues to ensure that the case is fully and effectively" decided (at para. 43).

[40] In *King v. Cleary*, 2014 NLCA 33, the Court echoed the comments in *Humby* and added, at paragraph 20, that the purpose of the rule "is to avoid appeal by "ambush", to avoid a situation of unfairness, where a respondent "hides in the weeds" and "springs up" with arguments that the appellant did not anticipate".

Leave to allow a late cross-appeal

[41] FNI asks that, if the Court decides that the issues raised in its Factum do not arise from the issues on appeal and Canada's cross-appeal, it be given an extension of time and leave to file a cross-appeal. The Appellants and Canada oppose that request.

[42] When this Court is deciding whether to allow leave to file a late cross-appeal, we consider the following factors: "(i) whether the appellant had a bona fide intention to appeal within the appeal period; (ii) whether there is a reasonable excuse for failure to comply with the rule; (iii) the potential merits of the appeal; and (iv) the presence of exceptional or special circumstances justifying or working against fairness of an extension" (*Humby*, at para. 37).

ANALYSIS

[43] The first question is whether the impugned paragraphs of FNI's Factum relate to claims not raised in evidence and argument at trial. If so, then the Court should only allow the arguments in those paragraphs if FNI shows that the evidence necessary to resolve the issue is in the record, and that refusing to allow FNI to raise the issue now risks serious injustice.

[44] For those paragraphs that raise issues that were raised at trial, I will consider whether they relate to issues that arise out of the issues on the appeal or cross-appeal. If the paragraph in question raises an issue not arising from the appeal or Canada's cross-appeal, then we should strike it unless FNI persuades us that we should grant leave to raise the issue by cross-appeal.

[45] The Appellants and Canada say that FNI did not demonstrate that it had either a *bona fide* intention to appeal within the appeal period or a reasonable excuse for failure to do so. The Appellants, however, do not rely on FNI's delay as a reason to strike its Factum. Canada does. We can deal with the question of leave to cross-appeal without determining the issues of *bona fide* intention or reasonable excuse because the other two factors – whether the proposed cross-appeal has merit, and whether exceptional circumstances either justify or work against the fairness of granting leave – do not support allowing a cross-appeal.

The Issues on Appeal and Canada's Cross-Appeal

[46] The Appellants in their Factum, at paragraph 2, identified the following issues raised by their appeal:

- Did the Learned Trial Judge err in finding that the *Limitations Act* did not prevent the [Second Respondents'] claim from proceeding?
- Did the Learned Trial Judge err in finding the actions of FNI oppressive, to wit: the reasonable expectations of [the Second Respondents] as members of FNI were not satisfied, and that [the Second Respondents] ha[ve] been oppressed?

[47] Canada filed a cross-appeal that raises the same issues and asks the Court to address two alternative issues if we uphold the judge's findings.

- Did the judge err in concluding the Second Respondents were entitled to compensation for their loss of *Indian Act* status?
- Did the judge exceed her jurisdiction when she ordered FNI to take steps to reinstate the Second Respondents' *Indian Act* status?

Arguments on the Appeal Proper: Paragraphs 1 to 46

[48] In these paragraphs, FNI directly addresses the issues raised by the appeal: whether the Second Respondents' action was barred by the expiry of a limitation period and whether the conduct of FNI was oppressive. These paragraphs should not be struck.

Arguments on the Application: Paragraphs 50 to 58

[49] In these paragraphs, FNI argues that it should be allowed leave to cross-appeal. Canada submits that these paragraphs should only be allowed to stand as arguments on that issue, and not as arguments on the appeal or cross-appeal. I agree with that submission. As the arguments in those paragraphs are now spent and do not relate to the issues on appeal or cross-appeal, I would strike paragraphs 50 to 58.

Containing Facts: Paragraphs 59 to 69, and 71 to 73

[50] These paragraphs mainly recite facts that FNI says are from the trial record. Canada objects to some sentences in these paragraphs that it says contain impermissible argument, but Canada can respond to these assertions if it chooses to do so. I would let these paragraphs stand, except for the last sentence of paragraph 68 that I will discuss later.

Fundamental Breach: Paragraph 47

The claim for breach of contract is a new claim

[51] In paragraph 47 of its Factum, FNI asserts in part that “[t]he removal of members from the Founding [Members] List was contrary to the FNI members’ reasonable expectations and a fundamental breach of the terms and purposes of the Settlement Agreement”. FNI does not develop this argument further or suggest any consequences that would flow from a finding of fundamental breach.

[52] The Amended Statement of Claim did claim for breach of contract. However, in *Benoit 2018*, at paragraph 63, the applications judge noted that “the FNI does not assert a breach by Canada of the terms of either the Settlement Agreement or Supplemental Agreement.” She then found that “Canada asserts (and I accept) that no contractual rights pertain to the individual [Second Respondents] against Canada.” No party appealed *Benoit 2018*. The judge accepted that the Settlement Agreement did not create individual rights for the Second Respondents (Decision, at paras. 130, 137).

[53] The breach of contract claim is therefore a new claim. FNI did not demonstrate that the evidence necessary to resolve a claim for breach of the Settlement Agreement is in the trial record, or that refusing to allow FNI to raise such a claim now would risk serious injustice.

Issues related to whether Canada breached the Settlement Agreement do not arise from the appeal or cross-appeal

[54] FNI argues that paragraph 47 ought nevertheless to be allowed to stand because resolving the question of whether Canada breached the Settlement Agreement is relevant to the claim that Canada should be held liable for oppression. The judge dismissed the claim against Canada. Neither the First nor Second Respondents cross-appealed that decision. The question whether Canada breached the Settlement Agreement does not arise out of the issues on appeal or cross-appeal.

[55] I would not allow FNI leave to raise the issue of breach of contract by way of cross-appeal. FNI has not demonstrated that its argument that Canada breached the Settlement Agreement by negotiating the Supplemental Agreement would have any merit. The parties to the Supplemental Agreement were Canada and FNI. The judge decided that FNI freely entered the Supplemental Agreement (Decision, at para. 241). There is no plausible argument that Canada breached the Settlement Agreement by negotiating the Supplemental Agreement. FNI’s argument is also largely contradicted by a decision of the Federal Court (albeit in the administrative law context) that most provisions of the Supplemental Agreement were reasonable amendments to correct an error in the Settlement Agreement, and that it was not made for improper purpose (*Wells v. Canada (Attorney General)*, 2018 FC 483).

[56] I would therefore deny FNI’s request to allow it to cross-appeal on this issue and strike the portion of paragraph 47 that alleges breach of the Settlement Agreement.

Assertion that Canada breached obligations owing to Indigenous peoples flowing from the honour of the Crown, fiduciary duties or the *United Nations Declaration on the Rights of Indigenous Peoples Act*: Paragraphs 47; last sentence of 68; 78 to 85; 88 and 102 to 104

[57] In these paragraphs, FNI sets out its position that Canada breached its fiduciary and good faith obligations to Indigenous peoples by agreeing to the assessment guidelines in the Supplemental Agreement, by removing people from the Founding Members List under those guidelines, and by enacting the *QMFN Act*.

[58] FNI asserts that Canada's obligations derive from the honour of the Crown, fiduciary duties, or the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c. 14 ("UNDRIP").

The claims based on the honour of the Crown, UNDRIP, or the passage of the QMFN Act

[59] The Second Respondents did not make these claims against Canada at trial.

[60] FNI has not demonstrated that the record is sufficient to resolve these claims.

[61] Canada did not call any evidence at trial. Canada says that this was because of the way in which the claim was framed (Decision, at para. 232).

[62] In *Benoit 2018*, Canada did present evidence related to the process by which the Supplemental Agreement was negotiated and put into effect. It has presented similar evidence in responding to administrative law claims in the Federal Court.

[63] It would be unfair to Canada to allow a cross-appeal that essentially presents a newly framed fiduciary claim against Canada when Canada's decision not to call evidence was based on the claims it faced, and not these new claims.

Issues related to Canada's obligations to Indigenous Peoples

[64] The Second Respondents did advance claims at trial based on fiduciary duties owed by Canada. The judge found that "Canada does owe a fiduciary duty to the aboriginal collective, and it would be reasonable for the [Second Respondents] to expect Canada to abide by this" (Decision, at para. 239) but that Canada did not owe fiduciary duties to the individual Second Respondents. The Second Respondents

advanced only their individual claims and did not have standing to bring claims on behalf of the aboriginal collective.

[65] The judge dismissed the claim against Canada. She noted that the Second Respondents only claimed remedies for oppression, that such claims only lie against FNI and not Canada, and that the Second Respondents had not proven any oppressive conduct by Canada (Decision, at para. 237). Neither the Second Respondents nor FNI appealed or cross-appealed the dismissal of the claim against Canada.

[66] As to the specific claim alleging that Canada breached its obligations to indigenous peoples by enacting the *QMFN Act*, *Benoit 2018* decided that no remedy was available to the Second Respondents in respect of the legislative action of passing the *QMFN Act*. The Second Respondents did not appeal that decision.

[67] I would refuse FNI leave to raise these issues by cross-appeal and strike paragraph 47, the last sentence of paragraph 68, paragraphs 78 to 85, 88, and 102 to 104 of FNI's Factum.

The Failure to ratify the Supplemental Agreement: Paragraphs 48 to 49, 70 and 74 to 76

Issues related to the failure to ratify the Supplemental Agreement

[68] In these paragraphs, FNI argues that the Supplemental Agreement was invalid because it was not ratified by FNI membership.

[69] The Settlement Agreement said that it could only be amended by written agreement "ratified through the same procedures as this Agreement was ratified" except to remove conflicts or inconsistencies between the terms of the Settlement Agreement and any law or regulation; to correct typos, clerical errors, or ambiguities; or to extend a time limit.

[70] The Second Respondents argued at trial that the Supplemental Agreement was invalid because it was not ratified. The judge did not accept this argument:

[196] Although this is a persuasive submission, it appears to be inconsistent with the decision in *Abbott v. Canada (Attorney General)*, 2019 FC 1302. The *Abbott* decision was upheld by the Federal Court of Appeal at 2021 FCA 109, with leave to appeal to

the Supreme Court of Canada being dismissed without reasons at [2021] S.C.C.A. No. 300. In *Abbott*, Justice Lafrenière determined that section 10.4 of the 2008 Settlement Agreement gave authority to the parties to enter the Supplemental Agreement, and to issue the directive attached.

[197] Based on the *Abbott* decision, it is arguable that ratification of the Supplemental Agreement was not a requirement, and not a reasonable expectation, because the directive annexed to it was authorized by section 10.4 of the Settlement Agreement. That directive was the points system under which the [Second Respondents] were reassessed.

[71] In *Abbott v. Canada (Attorney General)*, 2019 FC 1302, aff'd 2021 FCA 109, leave to appeal to SCC refused, 39815 (10 March 2022), the Federal Court decided that the Directive appended to the Supplemental Agreement that provided for assessment/reassessment of applications could be issued under the Settlement Agreement and that the Directive did not require ratification.

[72] In citing *Abbott*, Marshall J. accepted that the Directive was not an amendment to the Settlement Agreement that required ratification.

[73] The Second Respondents did not appeal that decision of the judge. The issue of whether the Supplemental Agreement required ratification does not arise out of the issues on appeal or cross-appeal.

[74] FNI has not demonstrated that there is any merit in this argument justifying a cross-appeal. Its merits are doubtful considering that the Federal Court in *Abbott* rejected it.

[75] I would refuse FNI leave to file a cross-appeal on this issue and order paragraphs 48 to 49, 70, and 74 to 76 struck from the FNI Factum.

Did Canada enter the Supplemental Agreement for an Improper Purpose: Paragraph 77

[76] FNI argues that the Supplemental Agreement was invalid because it was negotiated solely to reduce the number of successful applicants for QMFNB membership.

[77] The judge made findings as to Canada's purpose (motivated by financial concerns) in pressuring FNI to agree to the Supplemental Agreement:

[240] In the meantime, based on the evidence, I am satisfied that Canada likely pressured the FNI to enter negotiations for the Supplemental Agreement. I am satisfied that this was due to the unanticipated huge volume of applications, and the financial obligations that could ensue. Further, it is reasonable to conclude that Canada likely also knew that reassessment under the Supplemental Agreement would result in a revocation of the section 6(1)(b) status for thousands of those who had already attained section 6(1)(b) status....

[78] Canada put those findings at issue in the cross-appeal by arguing, at paragraphs 39 to 41 of its Factum, that those findings were made in error.

[79] I would let paragraph 77 stand as a contest to Canada's position on the factual findings of the judge.

[80] However, there is also a legal meaning to improper purpose. It is pleaded in a Federal Court class action to support administrative law claims and a claim for breach of fiduciary duty (*Brake v. Canada (Attorney General)*, 2019 FCA 274; and *Collins v. Canada (Attorney General)*, 2024 FC 636). The Second Respondents did not plead a claim for improper purpose at trial, and I would not allow such a claim to be advanced by cross-appeal as the record is not complete. Therefore, although I would not strike paragraph 77, I would find that the question of improper purpose must be confined to its implications for the factual findings against Canada related to the oppression remedies that were claimed.

The passage of the *QMFN Act*, the lack of consideration, and the Indemnity Agreement are all supportive of the argument that the Supplemental Agreement was invalid: Paragraphs 86 to 87 and 89 to 90, and 97 to 98

[81] As discussed above, the Second Respondents argued at trial that the Supplemental Agreement was invalid because it was not ratified. However, they only raised this argument in support of their claim that the oppressive conduct of FNI and Canada failed to meet their reasonable expectations as FNI members. Their claim for rescission of the Supplemental Agreement was based on it being oppressive to their interests as FNI members, not on alleged invalidity.

[82] I would refuse leave to cross-appeal on the issue of the validity of the Supplemental Agreement and strike paragraphs 86, 87, 89, 90, and 97 to 98 of FNI's Factum.

The Indoor Management Rule: Paragraphs 91 to 96 and 110

[83] The judge found FNI liable for oppression, but she dismissed the claim that Canada participated in that oppression. Part of the judge's reasoning for dismissing the claim against Canada was her application of the indoor management rule, as codified in the *Corporations Act*, section 31. That rule says that a person at arm's length from a corporation is entitled to accept that the corporation is properly authorized by its internal rules to enter legal arrangements with that person. The judge decided:

[243] It was not established that Canada knew that the Special Resolution was *ultra vires*, and that the Replacement By-Laws were adopted without proper corporate authority. In turn, it was not established that Canada would have known that this compromised the validity of any ensuing resolutions of the FNI. Because of the indoor management rule, Canada was entitled to assume that the FNI had the corporate authority to sign off on the Supplemental Agreement.

[84] Neither the Second Respondents nor the Appellants appealed this finding or the dismissal of the claim against Canada. The judge's application of the indoor management rule does not arise from the appeal or cross-appeal.

[85] Therefore, these paragraphs should be struck unless FNI demonstrates that its intended cross-appeal has potential merit and that there are exceptional or special circumstances justifying the fairness of an extension of time to cross-appeal.

[86] FNI fails to establish that there is merit to a cross-appeal on this issue.

[87] The judge's application of the indoor management rule required her to apply a legal standard - in this case one codified in the *Corporations Act*, section 31 - to the facts she found. This Court would review that decision on a standard of palpable and overriding error, unless FNI showed that the judge made an extricable error of law in characterizing or applying the indoor management rule.

[88] FNI says that the judge's application of the indoor management rule was based on an error of law because, as a matter of law, Canada ought to be precluded from relying on the indoor management rule when dealing with its treaty obligations to indigenous people. FNI did not cite any authority that establishes that proposition as a matter of law. The content of the obligations imposed on Canada by the honour of the Crown varies with the circumstances (*Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39). The Crown must avoid even the

“appearance of “sharp dealing”” in negotiating agreements (*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41) and must perform its treaty and contractual obligations with honour and integrity. But it is not apparent as a matter of principle that the honour of the Crown imposes an obligation on Canada to inquire into the internal dealings of indigenous groups or organizations with whom it is negotiating. In the absence of authority or reasoned argument that supports such a principle, I would find that FNI has not demonstrated that this argument has merit.

[89] FNI argues that the judge also erred in her factual findings because she did not consider certain facts, including some which were not the subject of evidence at trial, or did not give sufficient weight to other facts that she did consider. The judge’s decision as to which facts to consider and the weight to be assigned to the facts is not reviewable on appeal absent a showing of palpable or overriding error. FNI does not say that the judge made palpable or overriding error in her factual findings related to the indoor management rule. That ground of intended cross-appeal has no chance of success.

[90] I would therefore refuse leave to file a cross-appeal on this issue and strike paragraphs 91 to 96 of FNI’s Factum.

Special Resolution # 1: Paragraphs 99 to 101

[91] In these paragraphs, FNI argues for a different interpretation of this resolution than the Appellants accepted. However, as the interpretation of this resolution is an issue on appeal, there is no reason that we should not allow FNI to make these arguments. I would allow these paragraphs to stand.

Compliance with By-Laws: Paragraphs 105 to 109

[92] In these paragraphs, FNI responds to arguments raised by the Appellants. I would allow these paragraphs to stand.

Order or Relief Sought: Paragraph 111

Paragraphs 111(a) – Recission and Declaration of Invalidity of Supplemental Agreement

[93] The Second Respondents claimed recission of the Supplemental Agreement as the primary remedy for oppression.

[94] The judge found that rescission was an available remedy (Decision, at para. 246). But she refused to order rescission for two reasons.

[95] First, she found that rescission was not appropriate because the Supplemental Agreement had already been performed through the assessment of over 100,000 applications for QMFNB membership (Decision, at para. 247). This Decision is consistent with her decision that the Second Respondents were entitled only to pursue remedies for themselves and not others; rescission would have affected the interests of all the other applicants for membership.

[96] Second, the judge found “that rescission is not appropriate as judicial forbearance is often required in the context of reconciliation”, relying on *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576, at paragraph 4 (Decision, at para. 248).

[97] FNI does not argue in its Factum that the judge’s decision was wrong in law. They merely ask the Court to order it now. In argument on the hearing of this application, FNI said that the judge did not order rescission because of her application of the indoor management rule, and that because she was wrong on the application of that rule, she was wrong to refuse to order rescission.

[98] But the judge did not refuse to order rescission because of her application of the indoor management rule. She refused to order rescission for the two reasons set out above.

[99] I would refuse leave to seek this remedy by way of cross-appeal, and strike paragraph 48 and paragraph 111(a) of FNI’s Factum.

Paragraph 111(b) and (c) – Declaration that the QMFN Act is invalid and that is be struck down

[100] The Second Respondents did not ask for this remedy at trial. Allowing FNI to raise this remedy by cross-appeal would be inconsistent with the decision in *Benoit 2018* (which was neither appealed nor contested at trial) that no remedy was available to the Second Respondents in respect of legislative action. We should also not entertain this remedy because FNI did not provide notice to the Attorney General that it wants to raise the constitutional issues involved in considering those remedies (*Guindon*, at para. 23). FNI abandoned this argument during the hearing of this application, but for certainty I would strike paragraphs 111(b) and (c).

Paragraph 111 (d) to (f) – Restoring the membership of 10,396 members whose names were removed from the Founding Members List

[101] These remedies are collective remedies, inconsistent with the judge’s Decision that the Second Respondents were entitled only to pursue individual remedies. The Second Respondents did not appeal that decision, and no issues related to that decision are raised by the appeal or cross-appeal.

[102] The remedy of reinstatement of *Indian Act* status is “not within the jurisdiction of the courts” (*Davis v. Canada (Attorney General)*, 2008 NLCA 49, at para. 38).

[103] FNI argues that it should nevertheless be allowed to seek these remedies in this matter because otherwise the existence and violation of the collective rights engaged will not be adjudicated. This is not the case. The Federal Court of Appeal certified a class action on behalf of a class defined as “all individuals whose applications for Qalipu Band membership were rejected in accordance with the 2013 Supplemental Agreement.” (*Brake*, at para. 100). The certified claims seek administrative remedies through judicial review and damages for unjust enrichment, breach of fiduciary duty and *Charter* damages, as well as deprivation of status and related monetary and non-monetary benefits for Band Members, including seeking disgorgement of all cost savings realized by Canada as a result of its breaches of fiduciary duties and unjust enrichment, which flow from Canada’s misconduct.

[104] I would refuse leave to seek these remedies by cross-appeal and strike paragraphs 111(d) to (f) of FNI’s Factum.

SUMMARY AND DISPOSITION

[105] I would refuse FNI leave to cross-appeal. I would order the following paragraphs struck from FNI’s Factum:

- Paragraphs 47; last sentence of 68; 78 to 85; 88 and 102 to 104;
- Paragraphs 50 to 58;
- Paragraphs 48 to 49, 70 and 74 to 76;
- Paragraphs 86 to 87, 89 to 90 and 97 to 98;

- Paragraphs 91 to 96 and 110;
- Paragraph 111.

[106] I would order that FNI pay Column III costs on this application to the Appellants and Canada.

[107] I would allow the Appellants, Canada, and the Second Respondents 14 days from this decision to file Supplemental Factums replying to the portions of the FNI Factum that are not struck. After each party has filed, or indicated that it will not file, responding Factums or the expiry of those 14 days, any party may file a Form 20 Request for a date to continue the appeal. The hearing date of June 18, 2026 is vacated.

D.M. Boone J.A.

I concur : _____
F.J. Knickle J.A.

I concur : _____
K.J. O'Brien J.A.