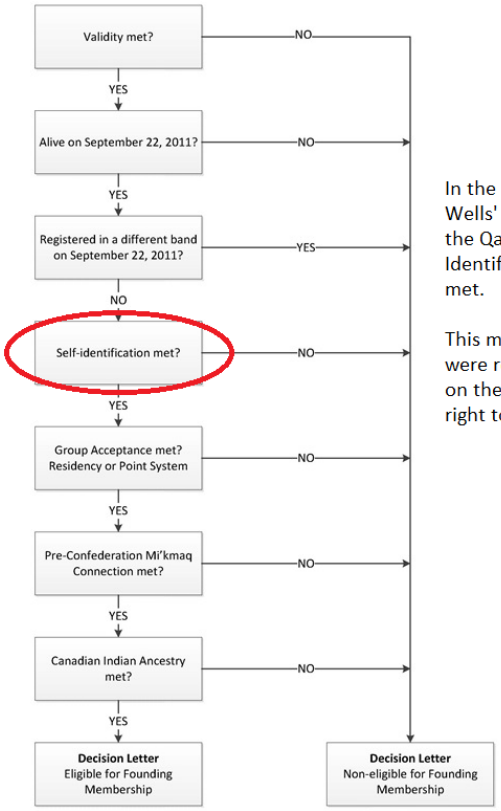
Outcomes from the Recent Court Ruling Involving Dave Wells, Sandra Wells, Canada and the FNI

Dave Wells and Sandra Wells had their applications for membership in the Qalipu First Nation rejected by the Enrolment Committee on the grounds of Self-Id. Self-Id was one part of the criteria that had to be met for an individual to become a Founding Member of the Band.

Sandra and Dave decided to challenge the decision of the Enrolment Committee that their applications should be rejected on the grounds of Self-Id.

They each brought their individual cases before the Federal Court to challenge not only the decision to reject their applications, but also to contest the legitimacy of the Supplemental Agreement, an amendment to the original agreement which we will look at later in this document.



In the case of Sandra and Dave Wells' application for membership in the Qalipu First Nation, the Self-Identification requirement was not met.

This meant that their applications were rejected without being assessed on the remaining criteria with no right to appeal that decision.

QUICK FACTS

The Wells/Wells ruling deals with the Self-ID criterion

Self-ID means an applicant formally declared themselves to be a Mi'kmaw person

Applicants who applied before the Band was formed met the self-id criterion by signing the application.

Applicants who applied after the Band was formed had to show other documentary evidence that predated -June 23 2008

The difference was due to a mistake in the Agreement, that was corrected in the Supplemental Agreement, explained here in "The Need for a Supplemental Agreement"

Important Dates:

Agreement Signing: June 23, 2008

Recognition Order/Band Formation: September 22, 2011

It is important to keep in mind that **the court rulings that are now being analyzed to determine impacts and next steps, deal with the self-id criterion,** and will affect those who were denied membership based on this criterion. The approximately 10,500 people who have been notified they will lose their status DO meet the self-ID criterion but, were rejected on Group Acceptance, the step that follows self-id in the graphic above.

Some Background

An Agreement in Principle to form the Qalipu First Nation was initialed in November 2007, ratified by FNI membership in March 2008 and ratified by Canada in June 2008. Once signed on Jun 23, 2008, it became the Agreement for the Recognition of the Qalipu Mi'kmaq Band. The Agreement, between the FNI and Canada, established a process for the recognition of the Band, established an enrolment committee to oversee applications, and set out the criteria for membership.

The Agreement came about after decades of fighting and negotiating for recognition by grassroots people, represented primarily by the FNI. You can find more about the timeline from the creation of the FNI in 1972 up to today on our website by clicking here.

There were around 10, 000 members in the FNI when that deal was signed in 2008. When registration opened, it was anticipated that approximately 20,000 individuals would be seeking membership in the First Nation which would only be formed if the conditions of the Agreement were met. By September 2011, close to 30,000 applications had been received. In excess of 70,000 new applications were filed before the deadline date of November 2012.

The Need for a Supplemental Agreement

It became clear to the FNI that not all the membership applications could be assessed by the Enrolment Committee by the deadline date of November 30, 2012, that had been set out in the Agreement. The FNI requested an extension from Canada.

At that time, the FNI also realized a mistake in the original Agreement. The Agreement, which allowed for applications to be received up to November 2012, stated that self-id had to be stated on or before Band formation [See Section 4.1 (d) (i)]. While those applying for membership before formation could show that they were declaring themselves to be Mi'kmaq just by signing the application (See section 4.2.1 of the Agreement, incl. Section 24 of the Enrolment Committee Guidelines), there was no criterion

NOTES

"The Applicants" refers to Dave Wells and Sandra Wells

"The Respondents" or "responding parties" refers to Canada and the Federation of Newfoundland Indians.

Important points, in summary:

The Supplemental Agreement was reasonable, and within the responding parties right to implement. It was intended to extend timelines, and correct a mistake. It did not require ratification.

The removal of a right of appeal for applicants rejected on self-identification was not reasonable or fair. This kind of amendment would require ratification.

The types of evidence required of post-Band formation applicants to demonstrate the self-id criterion was reasonable and fair.

The date before which post-Band formation applicants had to demonstrate self-id (June 23, 2008) was not fair. If signing the application form on or before Band formation (September 22, 2011) was good, then the evidentiary requirements for post-Band formation applications should have matched that date.

established for those who applied after that date. The FNI worked with Canada to amend the Agreement to correct this mistake, and provide an answer to the question *how could an applicant show self-id after the Band was formed?*

It's important to note that Article 2.1.5 of the Agreement stipulates when and how its terms may be amended. This included, "correcting a mistake, manifest error or ambiguity arising from defective or inconsistent provisions contained within this Agreement." It also included the ability to "extend any time limit set out in this Agreement." **This type of amendment did not require ratification, it required that the two parties mutually agree on the amendment**.

So, the Supplemental Agreement was signed in June 2013. It was an amendment to the original agreement that allowed for an extension of the timeline to review the more than 70,000 outstanding applications, and also gave clarification on how applicants could show they self-identified as Mi'kmaq people before the Band was formed.

Documentation to show such self-identification for these applicants could include proof of membership in one of the recognized Mi'kmaq bands in Newfoundland, census records, newspaper articles, job and program applications.

Wells/Wells: Their Claims, and the Courts Decisions

Since the cases of Sandra and Dave Wells were heard together, and the facts that they relied upon to make their cases were similar in nature, the court combined its response. Let's take a look at the arguments Wells and Wells were making and explore the rulings that the court made on each of those arguments.

Argument: Issues with Self-Identification Requirements and the Inability to Appeal

The court examined the kinds of amendments, impacting these cases, that were made in the Supplemental Agreement to determine whether they fit within the description of correcting "a mistake, manifest error or ambiguity…" which, as we discussed earlier, were within the responding parties' rights to do so.

The court considered two changes that the responding parties had made to the original agreement.

1. The evidentiary requirements introduced to establish self-identification if you applied after the Band formed.
2. The removal of a right of appeal for those applicants who were required to submit the self-id documentation.

Argument: Evidentiary Requirements for Those Who Applied After Band Formation was Unfair

The applicants submitted that the amendment to require evidence to prove self-identification allowed for unfair and differential treatment of applicants who signed their application forms on or before the date of the Recognition Order and those who applied later.

They also claimed that the types of documentation required to show self-id was "arbitrary and under-inclusive".

The Court ruled that the Agreement, which stated that the applicant self-identify as a Mi'kmaq on the date of the Recognition Order, had not been changed in the Supplemental Agreement. **The court**

deemed that it was reasonable that a criterion was introduced to assess those applicants who applied after that date.

The court also ruled that there was nothing unreasonable or under-inclusive in the types of documentation that a post-Band formation applicant could use to show they had self-identified.

However, the court also determined that the date specified in the Supplemental Agreement, before which the self-id evidence had to be dated (June 23, 2008), was unreasonable. The court determined that if Applicant A could show self-id on the same day as Band Formation, then that date should be the benchmark for the evidence required of those who applied after Band formation.

For instance, a government job application in which I self-identify as an aboriginal person, dated on or before September 22, 2011, should satisfy the self-id requirement.

Argument: Should Have Been Given the Right of Appeal

The Supplemental Agreement had not allowed for a right of appeal for applicants rejected because they failed to establish that they self-identified as Mi'kmaq. Canada submitted that it was reasonable not to extend a right of appeal because it served no purpose when an application was rejected for failure to provide evidence of self-identification. **While the court stated that Canada may be correct that an appeal where the applicant failed to provide documentary evidence of self-identification would have been futile, it deemed there would be at least one situation where an appeal would have been of value and not futile, and that is when the Enrolment Committee made a mistake, overlooked or failed to properly describe the evidence provided.**

Other Outcomes

Argument: You Just Wanted to Keep the Numbers Down

The applicants argued that the responding parties made the amendments they did (the Supplemental Agreement) "for the improper purpose of pre-emptively limiting the number of potential band members who would be entitled to registration, rather than taking steps to have each application considered on its merits."

The court ruled that this was not the case. Considering the evidence and testimony provided to the court, **the judge ruled that the purpose of the amendment was indeed to correct an error in the original agreement regarding self-identification prior to the date of formation, not to improperly pre-emptively limit numbers.**

Argument: Denied Procedural Fairness

The applicants claimed that applicants were not provided sufficient notice regarding details of the Supplemental Agreement, that the ten weeks to respond was insufficient, and that because the Supplemental Agreement was signed after the registration period had ended, applicants who applied after formation were precluded from knowing there would be a higher evidentiary burden for those who applied after formation.

While the court recognized that perhaps the responding parties could have done a better job clarifying that a failure to submit the additional information would result in a rejection, and that ten weeks is a short timeline to produce the materials the Supplemental Agreement required, **neither however, rose to the level of a breach of procedural fairness.**

The court also found that since the responding parties were unaware of the mistake in the original agreement, it could not have reasonably been expected to provide notice to applicants until they realized and made arrangement to correct the mistake.

Argument: Charter Rights Breached

The applicants submitted that the decision of the responding parties to enter into the Supplemental Agreement "failed to appropriately balance the charter values of liberty and equality engaged by the decision with the objective of ensuring the 'integrity' and 'credibility' of the Enrolment Process and the reputation of the to-be-formed band."

The court ruled that nowhere in the applicant's submission was it shown that there was any impact to their right of life, liberty and security, and there was no explanation therein of how it affected their right to equality before and under law. There are no grounds for discrimination under Section 15 of the Charter.

Next Steps-where do we go from here?

The next steps regarding how Canada and the FNI will implement the Federal Court decision have yet to be determined. Once the parties have had the chance to meet, and discuss next steps, more information will be communicated on the path forward.