

Native American Recognition In Newfoundland: Part 2

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The supplemental agreement was established in response to the 101,000 people who applied to become members of the Qalipu. This number was far higher than the Canadian government or the Federation of Newfoundland Indians expected or found acceptable. According to these two parties, the primary purpose of the supplemental agreement was to clarify the requirements for enrollment set in the original agreement, require additional documentation for application and provide an extension of the Agreement timelines.[1] It is unclear why the parties felt compelled to make any changes apart from extending the original timelines so as to provide enough time to review all of the applications according to the enrollment standards set in the original agreement. Such a response would not only have been logical but also far more simple given that by 2011 about 23,877 applicants had already been found eligible under the original agreement and registered as members of the Qalipu.[2]



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The parties to the supplemental agreement, i.e. the Canadian government and the FNI, have argued from the beginning that the supplemental agreement merely “clarified the process for enrolment and resolved issues that emerged in the implementation of the [original Agreement].”[3] In addition, the parties still claim that “the enrolment criteria in section 4.1 of the [original] Agreement did not change.”[4] However, as previously discussed, the supplemental agreement changed the original Agreement with respect to the self-identification requirement and the acceptance by the Mi’kmaq Group of Indians of Newfoundland requirement. These changes will be further demonstrated if any of the 23,877 current members of the tribe, who were accepted according to the eligibility standards established by the original agreement, lose their membership as a result of the eligibility standards established by the supplemental agreement.

The argument that the supplemental agreement only “clarified” the original agreement has already been proven wrong by the case of *Howse v. AGC et al.*[5] One of the “clarifications” added in the supplemental agreement was that if an applicant was rejected for “one or more of the reasons set out in sections 1 to 7 of the Enrolment Committee Guidelines...[that rejected applicant] shall not have any right to appeal from a decision of the Enrolment Committee.”[6] Under this standard, applications could be invalidated for relatively minor deficiencies such as not providing the proper type of birth certificate or not signing a given form in the application. Two applicants, Alex Howse and Sterling Clyde Foster, whose applications were rejected under this section of the supplemental agreement without the right to appeal “took Canada and the Federation of Newfoundland Indians to court over the Enrolment Committee’s determination that their applications were invalid.”[7] The court ruled that the sections of

the supplemental agreement that allowed applicants to be rejected without a right to appeal should be invalidated because the applicants were not given notice of the missing information or an opportunity to correct their applications. As such, the court ordered that both applications be reevaluated for membership.[8] The ruling in *Howse* was then applied to over 6,500 applicants whose applications had been invalidated for similar reasons.[9] As one attorney reporting on the *Howse* decision said of the supplemental agreement, “the Federal Government and the Federation of Newfoundland Indians retroactively altered eligibility criteria, and began rejecting applications on purely technical grounds, while providing no recourse or right of appeal.”[10]

As with *Howse*, some involved in the Qalipu recognition process believe that the supplemental agreement, particularly as it relates to the apparent double standard it creates with respect to the self-identification requirement and the point system under the acceptance by the Mi’kmaq Group of Indians of Newfoundland requirement, will also give rise to litigation.

As discussed earlier, the problems arising out of the seeming double standard created by the supplemental agreement’s changes with respect to self-identification are largely clear. However, the point system raises more complex concerns.

The original agreement did not include a point system for determining eligibility. Rather, the point system was added by the supplemental agreement. Here again, the significant weight placed on geographic location is problematic.[11] As stated, the point system only applies to applicants who reside outside of certain Newfoundland communities. Of the 27 points that can be awarded to applicants under the supplemental agreement’s point system, 16 points require, at least to some extent, that the applicant either lived in or frequently visited Newfoundland in the five years preceding the submission of their application to the Qalipu. For example, up to four points can be awarded for “frequent visits to members of a location of the Mi’kmaq Group of Indians of Newfoundland,” with point allocation dependent on “strength of evidence and the frequency of the visits.” Up to nine points can be awarded for “maintenance of Mi’kmaq culture and way of life through knowledge of Mi’kmaq culture and participation in cultural, religious, ceremonial and traditional activities of the Mi’kmaq Group of Indians of Newfoundland.” For this, points are awarded based on, among other factors, the number of activities one attended, “frequency of the participation, long established history of participation, [and the] level of involvement (i.e. was the applicant an organizer, participant or spectator).” Finally, three points are awarded to an applicant for simply being a resident of Newfoundland at the time they applied.[12]

Like the supplemental agreement itself, the point system’s focus on recent and frequent physical proximity to the Qalipu Band was likely created as a response to the over 100,000 people who applied to the Qalipu under the original agreement. This focus on location may yield markedly unjust results. Newfoundland is a beautiful province, but it has faced several difficult economic periods over the years and it only has one major university. In particular, the decimation of the commercial fisheries by foreign fleets in the 1980s and '90s forced many Newfoundlanders to move to mainland Canada for work.[13][14] The point system’s focus on residency and frequency of visits made during the five-year period prior to submitting an application will essentially punish people who have moved away from Newfoundland in search of higher education and jobs, many of whom may not have the time or resources to frequently visit home.

Under the point system created by the supplemental agreement, if two otherwise identical Mi’kmaq siblings both applied to become members of the Qalipu, one having moved to Toronto as an adult in the 1990s to find work and the other having stayed in Newfoundland, where they were both raised, it is entirely possible that only the sibling who stayed in Newfoundland would be granted enrollment,

regardless of the siblings' shared childhood and ancestry. A number of similar situations will undoubtedly arise when the Qalipu application results are released later this month. The concerning consequences of the point system are not lost on the Chief of the Qalipu, Brendan Mitchell. In a recent interview Chief Mitchell was quoted as saying, "the point system makes it very difficult to get Qalipu status — especially for people living outside Newfoundland." [15] In short, the supplemental agreement, as it relates to eligibility and enrollment, appears to emphasize proximity over heritage.

For the reasons discussed throughout this article, Howse may not be the last litigation arising out of the Qalipu enrollment process. Some applicants, however, may mistakenly believe they are unable to pursue litigation given a release they were required to sign in order to apply to become a member of the Qalipu. [16] This release, known as the final release, stated that,

"any applicant for enrollment pursuant to Chapter 4 shall complete and sign an application form developed by the Parties, which will include a full and final release in favour of Canada with respect to any claims or proceedings against Canada...seeking recognition as an Indian under the Indian Act or damages as a result of the failure by Canada...to, at any time, provide to the applicant benefits comparable to those available to Indians." [17]

Importantly, the agreement also stipulated that,

"in the event that the Recognition Order is not issued or that the applicant is denied the right to have his name added to the Founding Members List, the Executed Release shall be of no force or effect." [18]

In short, if an applicant is denied enrollment in the Qalipu the final release they signed is no longer binding on them.

According to a recent announcement on the Qalipu First Nation Website, "The Qalipu enrolment process is coming to an end." [19] However, this important story of Indian rights and recognition in Newfoundland and Canada may be far from over.

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[1] End of Enrolment Q&A, The Qalipu Mi'kmaq First Nation Band, <http://qalipu.ca/end-of-enrollment-q-a/#1483471487589-214d8635-0920>

[2] See Supra at 5.

[3] See Supra at 25.

[4] Id.

[5] Alex Howse v. AGC et al., 2015 FC 1053, (2015).

[6] Qalipu Mi'kmaq supplemental agreement, S.C., 2013 (Can.).

[7] Backgrounder: Qalipu Mi'kmaq First Nation Enrolment Process, Indigenous and Northern Affairs Canada, (Mar. 18, 2016), <http://news.gc.ca/web/article-en.do?nid=1041549&%3Btp=930>.

[8] Id.

[9] Id.

[10] Jamie Lickers, Canada: Federal Court Declares Rejection Of Qalipu First Nation Applications Unfair, (Sept. 17, 2015), <http://www.mondaq.com/canada/x/427746/indigenous+peoples/Federal+Court+Declares+Rejection+Of+Qalipu+First+Nation+Applications+Unfair>

[11] See Supra at 6.

[12] See Supra at 10.

[13] Fisheries, Heritage Newfoundland & Labrador, <http://www.heritage.nf.ca/articles/economy/fishery.php>; Dr. Noel Roy, The Newfoundland Fishery - A Descriptive Analysis, Department of Economics Memorial University of Newfoundland St. John's NF, Canada, (Oct. 30, 1997), <http://www.ucs.mun.ca/~noelroy/NfFishery.text.html>.

[14] About, Memorial University, <http://www.mun.ca/memorial/about/>.

[15] See Supra at 6.

[16] See Supra at 17.

[17] See Supra at 18.

[18] Id.

[19] See Supra 2.