

Court File No : T-1804-10

## FEDERAL COURT

BETWEEN:

ANGEL SUE LARKMAN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

## MEMORANDUM OF FACT AND LAW

## PART I – OVERVIEW

1. This is an application for judicial review of Order-in-Council, P.C. 4582, made on December 4, 1952, enfranchising the Applicant's grandmother, Laura Batisse<sup>1</sup>.

2 In 1952, Laura Batisse voluntarily requested and received enfranchisement, pursuant to section 108 of the *Indian Act*, R.S.C.1952. In doing so, she acquired full Canadian citizenship, including the right to vote, and received her share of band funds and an immediate payout of treaty annuities. She also abdicated any further benefits she may have had as an

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<sup>1</sup> Laura Batisse later married and assumed the name Laura Flood. These materials will refer to her by the name relevant at the time (Laura Batisse in 1952 and Laura Flood in 1985 and thereafter), but it is to be understood that these references are to the same individual.

Indian, under the *Indian Act*. She was re-registered as an Indian in 1987, after amendments were made to the *Indian Act*.

3 In 1996, forty-four years after her enfranchisement, Ms. Batisse raised for the first time the suggestion that she had been enfranchised without her consent. She did so to support her granddaughter's, the Applicant's, efforts to be registered as an Indian.

4 Ms. Batisse's central allegation is that Alfred Batisse, the Chief of her Band, asked her to sign something which unbeknownst to Ms. Batisse turned out to be an application for enfranchisement. As it turns out, Alfred Batisse was a sixteen year old boy in 1952, and therefore could not have been the Chief. The actual Chief was Ms. Batisse's own brother, George Batisse.

5 After repeated delays on the part of the Applicant, she brought this application in 2010, fifty-seven years after the enfranchisement.

6 As will be discussed below, the tribunal record no longer exists and the principals involved in 1952 are now unavailable. Laura Batisse died in 2010. George Batisse died in 2007. The Indian Agent is believed to have died as well. The Court is denied the evidence of both accuser and accused.

7 The Applicant's case rests upon the hearsay evidence of affidavits sworn previously by Laura Batisse. However, these affidavits are unreliable, being demonstrably incorrect in several respects. The Applicant

both embellishes upon and disavows aspects of her grandmother's evidence

8. In the absence of living witnesses, the Court is left with only the surviving documentary record, including three letters requesting enfranchisement, an application for enfranchisement, and a certificate of enfranchisement - all signed by Laura Batisse. This evidence establishes that the decision of the Governor-in-Council was reasonable.

9. It is important to note that the application is not a review of the decisions of the Office of the Indian Registrar or the subsequent appeals thereof<sup>2</sup>, nor is it an investigation into the fairness of the enfranchisement and registration provisions of historical Indian Acts. Such allegations have no relevance in this judicial review

## **PART II – STATEMENT OF FACTS**

### **Tribunal Record**

10. The decision under review is an order-in-council, P.C.4582, dated December 4, 1952. Due to the passage of nearly 60 years, there is no longer a record kept by the Privy Council of the material before the decision maker at the time of the decision.<sup>3</sup> In the absence of a record from the Privy Council, the Court is left with only the documentation that was before the

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<sup>2</sup> The Applicant makes references to errors on the part of the Registrar in her Notice of Application, at paras 29, 30: Applicant's Record, Vol.1, Notice of Application. The Applicant's submissions at paras 42-50, 64-65, relate only the Registrar and appeals and are irrelevant. As well the Applicant appears to challenge the Registrar at para.47 regarding an oral hearing and the decision of Justice Forestell in the Ontario Superior Court of Justice, at para.10, which decision was in any event overturned by the Ontario Court of Appeal. Applicant's Record, Vol 3, Applicant's Memorandum of Fact and Law.

<sup>3</sup> Respondent's Record, Vol.1, Affidavit of Gary Penner, sworn April 13, 2011, at para 3. In particular, the minister's report is not available

Indian Agent in making his recommendation regarding enfranchisement.

11. On July 17, 1952, the Indian Superintendent in Sturgeon Falls, J.A. Marleau, received a letter dated July 14, 1952, signed by Laura Batisse. This letter requested Mr. Marleau to “[k]indly forward the necessary papers to release me from the treaty.”<sup>4</sup> The Applicant has admitted that she believed this to be her grandmother’s signature.<sup>5</sup>

12. At that time, an Indian under the *Indian Act* could apply to be voluntarily enfranchised. Power to accomplish this enfranchisement was given to the Governor-in-Council, pursuant to subsection 108(1).<sup>6</sup>

13. An exchange of correspondence followed pertaining to the requested enfranchisement:

- On July 18, 1952, Mr. Marleau forwarded to Ms. Batisse a series of questions with regard to her request for enfranchisement;<sup>7</sup>
- The answers appear to have been typed directly onto the letter and returned to Mr. Marleau on July 28, 1952.<sup>8</sup>
- On July 28, 1952, J.A. Marleau, wrote to Indian Affairs, Ottawa stating his opinion that the criteria for enfranchisement has been met;<sup>9</sup>
- On August 19, 1952, Mr. Marleau received a letter, dated August 16, 1952, signed by Laura Batisse, stating that Ms. Batisse had received

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<sup>4</sup> Applicant’s Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit “F”. Near the bottom of the letter are the identification initials “LB: 11s”. It is commonly understood that such initials are used to indicate that the letter was typed by someone else, in this case with the initials “11s”, on behalf of the author, “LB” or “Laura Batisse”.

<sup>5</sup> Applicant’s Record, Vol 2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011, at 46, Q 217.

<sup>6</sup> *Indian Act*, R S C. 1952, c. 149, s.108(1).

<sup>7</sup> Applicant’s Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit “G”.

<sup>8</sup> Applicant’s Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit “G”.

<sup>9</sup> Applicant’s Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit “H”.

the form, filled it out, and returned it<sup>10</sup> She requested confirmation that he had received the form;

- On August 19, 1952, Mr. Marleau replied to Ms. Batisse, indicating that the form had been sent to the Department on July 28 and that it "may take several weeks before your enfranchisement is passed by an Order in Council";<sup>11</sup>
- On August 29, 1952, F.O.E Gilroy, Trusts & Annuities Division, prepared a memorandum calculating the amount of annuity and band funds Laura Batisse would be entitled to upon enfranchisement;<sup>12</sup>
- On September 30, 1952, A.G Leslie wrote to J.A. Marleau, enclosing an application form to be completed in connection with the enfranchisement of Laura Batisse;<sup>13</sup>
- On October 2, 1952, Mr. Marleau sent a letter to Ms. Batisse, enclosing the application form for enfranchisement. Mr. Marleau advised her that she "must also have someone other than a relative sign as a witness";<sup>14</sup>
- The application for enfranchisement, dated October 10, 1952, was signed by Laura Batisse, and witnessed by "Ron L. Scott" Laura Batisse admitted that this was her signature. The form included a typed note stating "I believe there should be some interest due me from the Timber rights to the Matachewan Reserve which have been sold";<sup>15</sup>
- On October 18, 1952, Mr. Marleau sent a letter to Ms. Batisse acknowledging receipt of the signed application for enfranchisement. Mr. Marleau warned Ms. Batisse that the timber dues had not yet been paid and that if the Band was not credited with the amount at the time of enfranchisement, she would not receive her proportionate share. He asked her to advise him if she still wished to be enfranchised "under these circumstances";<sup>16</sup>
- On November 5, 1952, Mr. Marleau received a letter, dated October 31, 1952, signed by Laura Batisse, noting Mr. Marleau's reply regarding timber rights, but stating "I would like you to send my

<sup>10</sup> Applicant's Record, Vol. I, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "I". This letter contained the identification initials "LB: s", indicating that someone with the initial "s" typed the letter on behalf of the author "LB" or "Laura Batisse".

<sup>11</sup> Applicant's Record, Vol. I, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "J".

<sup>12</sup> Applicant's Record, Vol. I, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "K".

<sup>13</sup> Applicant's Record, Vol. I, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "L".

<sup>14</sup> Applicant's Record, Vol. I, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "M".

<sup>15</sup> Applicant's Record, Vol. I, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "N"; Applicant's Record, Affidavit of Laura Mary Flood, sworn April 22, 1998, attached as Exhibit "E" to Applicant's Record, Vol. I, Affidavit of Angel Sue Larkman, sworn February 24, 2011 ("Affidavit of Laura Mary Flood, sworn April 22, 1998"), at para 16

<sup>16</sup> Applicant's Record, Vol. I, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "O".

application form to the Department as soon as possible in order that I can be enfranchised." Laura Batisse admitted that this was her signature<sup>17</sup>;

- On November 5, 1952, J.A. Marleau forwarded Ms. Batisse's application for enfranchisement to Indian Affairs;<sup>18</sup>
- On December 4, 1952, the Governor-in-Council issued an Order-in-Council, P.C. 4582, enfranchising Laura Batisse, among others.<sup>19</sup>
- On December 12, 1952, A.G. Leslie prepared a Requisition for Cheque in favour of Laura Batisse in the amount of \$82.23 for her share of band funds and annuity on enfranchisement.<sup>20</sup>
- On December 12, 1952, the Indian Affairs Branch sent a letter to Mr. Marleau advising him that Ms. Batisse had been enfranchised, and enclosing an "enfranchisement card" The letter stated that a cheque for Ms. Batisse would be sent separately.<sup>21</sup>
- On December 22, 1952, Mr. Marleau sent a letter to Laura Batisse advising that she had been declared enfranchised by Order-in-Council. The letter stated that enclosed with it was a cheque representing her share of Matachewan band funds and annuities. The letter also enclosed a certificate of enfranchisement (or enfranchisement card), which she was asked to sign and date and return to him.<sup>22</sup>
- The certificate bears the signature of Laura Batisse, dated December 22, 1952.<sup>23</sup> Laura Batisse admitted in her affidavit that this was her signature
- On January 23, 1953, Mr. Marleau wrote to the Indian Affairs Branch, enclosing the certificate of enfranchisement, signed by Laura Batisse, for completion by the Director.<sup>24</sup>
- On February 2, 1953, Mr. Marleau wrote to Laura Batisse, returning the certificate of enfranchisement, signed by the Director, and advising her not to lose it.<sup>25</sup>

14. In total, Mr. Marleau received three letters, signed by Laura

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<sup>17</sup> Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "P"; Applicant's Record, Vol 1, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para. 14.

<sup>18</sup> Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "Q".

<sup>19</sup> Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "R".

<sup>20</sup> Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "U".

<sup>21</sup> Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "T".

<sup>22</sup> Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "V".

<sup>23</sup> Applicant's Record, Vol 3, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para. 19, Exhibit "Q".

<sup>24</sup> Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "X".

<sup>25</sup> Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "Z".

Batisse, all requesting enfranchisement. In addition, Laura Batisse's signature appears on both the application for enfranchisement, with a witness, and a certificate of enfranchisement card. On his part, Mr. Marleau wrote seven letters, addressed directly to Laura Batisse in the Town of Matachewan, with respect to the enfranchisement.

### **Extrinsic Evidence**

15. Due to the exceptional delay of 57 years in bringing this application, all of the witnesses to these events have been lost. There were four relevant witnesses who could have spoken to the enfranchisement:

- **Laura Batisse:** She passed away just over a month before the motion for an extension of time was filed.<sup>26</sup>
- **Chief "Alfred Batisse":** the alleged perpetrator of the fraud. The actual chief of the Matachewan Band in 1952 was George Batisse, Laura's brother. George Batisse died on January 8, 2007 at the age of 86.<sup>27</sup>
- **J.A. Marleau:** the Indian Superintendent. Mr. Marleau retired on July 31, 1953.<sup>28</sup> He is likely deceased;
- **Ron L. Scott:** the witness to Laura Batisse's application and the presumed typist for the letters to Mr. Marleau.<sup>29</sup> He may also be assumed to be deceased, but in any event is untraceable at this late date.

16. With respect to the documentary record, documents created after the decision of the Privy Council on December 4, 1952, cannot be said to have been considered by them in reaching their decision. In particular,

<sup>26</sup> Applicant's Record, Vol. 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, at para. 9.

<sup>27</sup> Respondent's Record, Vol. 1, Affidavit of Gary Penner, sworn April 13, 2011, at paras. 8-11, Exhibit "A", "B", "C"; Applicant's Record, Vol. 3, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para. 19, Exhibit "G".

<sup>28</sup> Respondent's Record, Vol. 1, Affidavit of Gary Penner, sworn April 13, 2011, at para. 13, Exhibit "D".

<sup>29</sup> Applicant's Record, Vol. 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibits "N", "F", "I".

documents concerning the Registrar of Indian Affairs, and the court proceedings that ensued between 1987 and 2009 are irrelevant to an application for judicial review of a decision in 1952, except to the extent they are inconsistent with the Applicant's version of events.

17. On April 17, 1985, certain amendments to the *Indian Act* came into force. In particular, section 6(1) of the amended Act provided for the re-registration of individuals who had been previously removed from the Register under certain circumstances<sup>30</sup>

18. No evidence has been offered by the Applicant to demonstrate that Ms Batisse made any effort to challenge her enfranchisement between 1953 and 1985. However, Ms. Batisse kept her certificate of enfranchisement in her possession from 1953 until at least 1996.<sup>31</sup>

19. On September 12, 1985, Laura Batisse (now Laura Flood) applied to be registered, pursuant to the recent amendments. In her application, she made no reference to any deception, instead merely stating under "Grounds for Registration" - "Enfranchised Dec 1952". On March 25, 1987, she was registered pursuant to s 6(1)(d) of the *Indian Act*.<sup>32</sup> Similarly, when her daughter, Dorothy Flood, applied in 1986 on behalf of herself and her children (including the Applicant) there was no mention of impropriety in

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<sup>30</sup> *Indian Act*, R S C 1985, c I-5, ss 6(1),(2).

<sup>31</sup> Applicant's Record, Vol 2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011, at Q 138-144, 341-346; Respondent's Record, Vol 1, Affidavit of Gary Penner, sworn April 13, 2011, at para.38.

<sup>32</sup> Respondent's Record, Affidavit of Gary Penner, Exhibit "AA"; Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "AA".

her mother's enfranchisement. In 1988, Dorothy Flood was registered under s.6(2) but her children were found not to be entitled to registration.<sup>33</sup>

20. Not until some seven years later, on April 7, 1995, did the Applicant submit a second application for registration. In a letter dated September 13, 1995, the Registrar advised that there was no basis to revisit the earlier decision that she was not entitled to registration.<sup>34</sup>

21. On March 8, 1996, counsel on behalf of Angel Larkman wrote a letter to the Registrar, enclosing an affidavit of Laura Flood, and raising for the first time the suggestion that Ms. Batisse had been tricked<sup>35</sup>

22. The Applicant has provided hearsay evidence with respect to the enfranchisement in 1952. However, the Applicant has not properly characterized some of her evidence:

- Ms. Batisse did not sign an Application for Enfranchisement "at the request of the Chief of the Matachewan First Nation and the Indian Agent"<sup>36</sup>. As will be discussed below, Ms. Batisse made no such accusation against the Indian Agent;
- The Applicant states that Ms. Batisse "did not know what a timber royalty was". However, Ms. Batisse's evidence was that she did not

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<sup>33</sup> Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibits "BB", "CC".

<sup>34</sup> Applicant's Record, Vol.1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "DD", "EE".

<sup>35</sup> No allegation of fraud directly against the Indian Agent would be made until the hearing before the Ontario Superior Court of Justice in 2007. Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "FF"; Affidavit of Laura Mary Flood, sworn February 26, 1996, attached as Exhibit "C" to Applicant's Record, Vol.1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, at para 3 ("Affidavit of Laura Mary Flood, sworn February 26, 1996"); *Etches v Canada* (2008), 89 O R (3d) 599 (S.C.J.) at para 4.

<sup>36</sup> Applicant's Record, Vol.3, Applicant's Memorandum of Fact and Law, at para 28, emphasis added. Applicant's Record, Vol 1, Tab 3C, Affidavit of Laura Mary Flood, sworn February 26, 1996; Applicant's Record, Vol 1, Tab. 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para 16.

have any understanding of “the issue of my timber rights”<sup>37</sup>

- The Applicant states Ms. Batisse did not receive the money due her on enfranchisement, but Ms. Batisse’s evidence was that she did not recall receiving the money<sup>38</sup>;
- The Respondent has not “confirmed that the Indian Agent did not drive the [December 22, 1952] letter down to Matachewan”<sup>39</sup>. The fact is Canada has no knowledge of whether Mr. Marleau made such a trip.

23. In addition, the Applicant has made statements with respect to the events post 1953. Although such assertions are irrelevant to the review of the OIC, the following observations are made for clarification of the record:

- The 1985 amendments did not “restore registration to those who lost it through enfranchisement”<sup>40</sup>. The new Act provided entitlement to registration. Registration had to be applied for;
- The Applicant requested an oral hearing before the Registrar on November 13, 2000, but brought a statutory appeal on January 19, 2001, without waiting for a response<sup>41</sup>;
- After filing the Notice of Appeal in 2001, the Applicant did not serve her factum until July 2007, after an unexplained delay of 6 years<sup>42</sup>;
- The issue of jurisdiction before the Superior Court was not whether the Court had the jurisdiction to hear a statutory appeal from the Registrar, but rather whether the Registrar had the jurisdiction to set aside an Order-in-Council<sup>43</sup>;
- Justice Forestell did not hold that the Order-in-Council was void<sup>44</sup>. Rather Justice Forestell stated “the Registrar had the jurisdiction to register the Appellants under s. 6(1)(a) without declaring the Order-in-Council void..... it is not necessary for the Order-in-Council to be declared void in order for the Appellants to be registered under s.

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<sup>37</sup> Applicant’s Record, Vol.3, Applicant’s Memorandum of Fact and Law, at para.31. Applicant’s Record, Vol.1, Tab 3C, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para 15.

<sup>38</sup> Applicant’s Record, Vol.1, Tab 3C, Affidavit of Laura Mary Flood, sworn February 26, 1996, at para 5; Applicant’s Record, Vol 1, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para 17; Applicant’s Record, Vol 3, Applicant’s Memorandum of Fact and Law, at para.33

<sup>39</sup> Applicant’s Record, Vol.3, Applicant’s Memorandum of Fact and Law, at para.35

<sup>40</sup> Applicant’s Record, Vol.3, Applicant’s Memorandum of Fact and Law, at paras 5, 15.

<sup>41</sup> Applicant’s Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit “QQ”; Respondent’s Record, Vol.2, Answers to Undertaking, August 3, 2011.

<sup>42</sup> Applicant’s Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit “QQ”

<sup>43</sup> *Etches*, *supra* note 35 at para 8

<sup>44</sup> Applicant’s Record, Vol.3, Applicant’s Memorandum of Fact and Law, at para 49

6(1)(a) of the Act<sup>45</sup>;

- Justice Forestell did not review “the evidence provided on this judicial review”<sup>46</sup>. The hearing before Justice Forestell was a statutory appeal on the record before the Registrar. The Respondent in the appeal had no opportunity to adduce contrary evidence. Thus Ms. Batisse’s affidavits were before Justice Forestell, but none of the Respondent’s affidavit or the Applicant’s current affidavit, or their respective cross-examinations were before the Court.
- The Applicant includes irrelevant passages from the Royal Commission on Aboriginal Peoples, concerning Indian Agents generally. However, the Applicant omits the preceding phrases, including “In many cases, Indian agents were persons of intelligence and integrity”.<sup>47</sup> This “character” evidence of Indian Agents generally is irrelevant and inadmissible to the question of what Mr. Marleau did in these circumstances.

### **PART III – POINTS IN ISSUE**

24. The following issues are relevant for this application:
- (a) What is the appropriate standard of review?
  - (b) Was the decision of the Governor-in-council that Laura Batisse had applied for enfranchisement reasonable?
  - (c) Has the Honour of the Crown been upheld?

### **PART IV – SUBMISSIONS**

#### **A. JURISDICTION OF THE FEDERAL COURT**

25. On June 1, 1971, the *Federal Court Act* transferred jurisdiction over judicial review of federal boards, commissions, or other tribunals exclusively to the Federal Court. The new Act contained transitional provisions that provided that if the matter was one going before the Federal

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<sup>45</sup> *Etches*, *supra* note 35 at para 81.

<sup>46</sup> Applicant’s Record, Vol.3, Applicant’s Memorandum of Fact and Law, at para 64.

Court of Appeal, pursuant to section 28, the right of judicial review applied only after the Act came into force; however, if the matter was before the Federal Court Trial Division, judicial review was available for matters arising both before and after the Act came into force.<sup>48</sup> The transitional provisions were repealed with the consolidation of statutes in 1985. The current Act contains no provisions either allowing or prohibiting review of decisions rendered prior to June 1, 1971.

26. Sections 18 and 18.1 of the *Federal Courts Act* provide that the Federal Court has the exclusive jurisdiction to review the lawfulness of decisions made by any federal board, commission or other tribunal, and to order judicial review remedies in respect of such decisions.<sup>49</sup>

27. In issuing orders pursuant to subsection 108(1) of the *Indian Act* 1952, the Governor in Council constitutes a federal board, commission or other tribunal as provided by subsection 2(1) of the *Federal Courts Act* and is subject to review in certain circumstances.<sup>50</sup>

28. Whether the Federal Court has the jurisdiction to review the lawfulness of an Order-in-Council pre-dating the Court's creation has never been judicially considered.

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<sup>47</sup> Applicant's Record, Vol.3, Applicant's Memorandum of Fact and Law at para 62; *Looking Forward, Looking Backward*. Report of the Royal Commission on Aboriginal Peoples, 1996, Volume 1, c.9, s.9.

<sup>48</sup> *Federal Court Act*, S.C.1970, c.1, s.18, 28(1), 61

<sup>49</sup> *Federal Courts Act*, R.S.C. 1985, c. F-7, s.18, 18.1; *Tremblay v Air Canada*, [2004] F.C.J. No. 787 (C.A.) (Q.L.) at para 10, leave to appeal denied: [2004] S.C.C.A. No. 307

<sup>50</sup> *Federal Courts Act*, R.S.C. 1985, c. F-7, s.2(1); *Inuit Tapirisat of Canada v Canada (Attorney General)*, [1980] 2 S.C.R. 735 at 741, 748.

**B. STANDARD OF REVIEW**

29. The present case involves an application for judicial review of an Order-in-Council made in 1952, enfranchising Laura Batisse, among others, pursuant to section 108(1) of the *Indian Act* which read:

On the report of the Minister that an Indian has applied for enfranchisement and that in his opinion the Indian

(a) is of the full age of twenty-one years

(b) is capable of assuming the duties and responsibilities of citizenship, and

(c) when enfranchised, will be capable of supporting himself and his dependants,

The Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised.<sup>51</sup>

30. The Applicant's specific allegation is that Ms. Batisse did not apply for enfranchisement, hence the Order-in-Council is said to be "without statutory authority".<sup>52</sup>

31. The Supreme Court of Canada, in *Dunsmuir v New Brunswick*, has stated that there are two standards of review: correctness and reasonableness.<sup>53</sup>

32. Generally speaking, the decisions of the Governor-in-Council are entitled to deference by the Courts and held to a standard of reasonableness.<sup>54</sup> Orders-in-Council are presumed valid until demonstrated otherwise and are rarely found invalid on jurisdictional grounds because the statutory attribution of power is generally broad. They are only reviewable

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<sup>51</sup> *Indian Act*, R S C. 1952, c 149, s 108(1)

<sup>52</sup> Applicant's Record, Vol 3, Applicant's Memorandum of Fact and Law at paras.53-55

<sup>53</sup> [2008] 1 SCR 190 at para.34

where the Governor-in-council failed to observe a condition precedent or exercised its power in bad faith or for an improper purpose.<sup>55</sup>

33. True questions of vires are subject to a standard of correctness.<sup>56</sup> This is equally true with respect to Orders-in-Council.<sup>57</sup>

34. In the present case, however, the statutory condition precedent has been met. The Governor-in-Council received a “report of the Minister that an Indian has applied for enfranchisement”<sup>58</sup>

35. What is at issue here is a purely factual issue – whether there was evidence for the Minister upon which to conclude that Ms. Batisse applied for enfranchisement.

36. The Supreme Court has specified that the correctness standard applied to questions of law, while the reasonableness standard applied to questions of mixed fact and law and questions of fact.<sup>59</sup>

37. Given the purely factual nature of the enquiry and the wide deference provided to the Governor-in-Council, the appropriate standard of review in the circumstances is reasonableness.

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<sup>54</sup> *League for Human Rights of B'nai B'rith Canada v Odynsky*, 2010 FCA 307 at paras 83-85.

<sup>55</sup> *Thorne's Hardware Ltd v The Queen*, [1983] 1 S.C.R. 106 at 111.

<sup>56</sup> *Dunsmuir*, *supra* note 53 at para 59.

<sup>57</sup> *Canada (Canadian Wheat Board) v Canada (Attorney General)*, 2009 FCA 214, [2009] FCJ No 695 (CA), at paras 36-37

<sup>58</sup> Although there is no record of the actual Minister's report, the Order-in-Council specifically states “Whereas the Minister of Citizenship and Immigration reports that the Indians whose names are included in Schedule A hereto have applied for enfranchisement...”: Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibits “R”, “S”

<sup>59</sup> *Dunsmuir*, *supra* note 53 at paras 51, 53.

**C. WAS THE DECISION OF THE GOVERNOR-IN-COUNCIL THAT LAURA BATISSE HAD APPLIED FOR ENFRANCHISEMENT REASONABLE?**

**(a) Onus of Proof**

38. Allegations of fraud are particularly grave as they include a moral stigma. While the Supreme Court of Canada in *F H v. McDougall* rejected the proposition that there is any shifting standard of proof depending on the gravity of the offense, it nonetheless cautioned courts to weigh the evidence carefully in all cases:

Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.<sup>60</sup>

39. Thus the Applicant must provide “clear, convincing and cogent” evidence that the Minister was aware that Ms. Batisse did not voluntarily apply for enfranchisement.

40. There is also a presumption of regularity in official acts.<sup>61</sup> This presumption is rebuttable, but absent contrary evidence, it may be assumed, for example, that the letters drafted by the Indian Agent were in fact sent and that the cheque prepared and sent was in fact received.

**(b) Reasonableness of the Decision on the Record**

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<sup>60</sup> *F.H v McDougall*, [2008] 3 S.C.R. 41 at para 46.

<sup>61</sup> *Tetzlaff v Canada*, [1992] 1 F.C. 261 (TD) at 269-270.

41 The evidence in this case supports the reasonableness of the conclusion that Ms. Batisse voluntarily applied for enfranchisement. Laura Batisse's signature appears on both the application for enfranchisement, with a witness, and a certificate of enfranchisement card. Ms. Batisse admitted that both of these signatures are genuine<sup>62</sup>

42. In addition, Mr. Marleau received three letters, signed by Laura Batisse, all requesting enfranchisement. Ms. Batisse admitted signing the October 31 letter, but provided no evidence as to whether the remaining two were her signature, as the documents were not before her. The Applicant admitted that the July 14 letter bears her grandmother's signature.<sup>63</sup> There is no evidence that the signature on the August 16 letter is not genuine.

43 That the body of these letters themselves were not actually physically written by Ms. Batisse is apparent from the face of them. Two of these letters indicate that they were typed by someone else on behalf of Ms. Batisse.<sup>64</sup> That does not mean they were prepared without her knowledge.

44. On his part, Mr. Marleau wrote seven letters, addressed directly to Laura Batisse in the Town of Matachewan, with respect to the enfranchisement.

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<sup>62</sup> Applicant's Record, Vol.1, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at paras 16, 19.

<sup>63</sup> Applicant's Record, Vol 1, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para 14; Applicant's Record, Vol 2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011 at Q 217.

<sup>64</sup> Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibits "F", "I".

45. The above evidence supports the conclusion that the application for enfranchisement was voluntary and that the Governor-in-Council's decision was reasonable.

**(c) Extrinsic Evidence Pertaining to the Enfranchisement**

**(i) Reliability of the Flood Affidavits**

46. The Applicant relies on three affidavits sworn by her grandmother in the course of the proceedings before the Registrar of Indian Affairs, dated February 26, 1996; August 13, 1996; and April 22, 1998.

47. Canada is bringing a motion to exclude the affidavit evidence of Laura Flood as hearsay, to be heard at the same time as this application. In the event that the Court finds that the Flood affidavits meet the requirement of threshold reliability, the affidavits should be given little weight as:

- the subject matter of the affidavits pertain to events that occurred over forty years prior to the swearing of the affidavits, yet Ms. Batisse's recollection cannot be tested. The Applicant herself casts doubt on Ms. Batisse's ability to recall the events in question<sup>65</sup>;
- the Court is deprived of the ability to observe the declarant's demeanour at the time the statement was made;
- Laura Flood allegedly could not read the affidavits she was signing. Instead, the affidavits were read to her. It is not clear that Ms. Batisse understood and accepted the wording of the affidavits. In response to a question about the wording of the affidavit, the Applicant stated on cross-examination: "Because English is not a first language, it's all about the way we ask her and how she answers to things"<sup>66</sup>;
- Canada has been deprived of the opportunity to cross-examine Laura Flood on her evidence. The affidavits were originally submitted to the Registrar with respect to the Applicant's application for registration. The process before the Registrar is non-adversarial and the Registrar

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<sup>65</sup> Applicant's Record, Vol 3, Applicant's Memorandum of Fact and Law at para 68.

<sup>66</sup> Applicant's Record, Vol 2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011 at Q 268. For the circumstances of the swearing of the affidavits, see Q 86-93, 123-128, 131-136.

is a finder of fact – there is no attempt to solicit contradictory evidence or to cross-examine witnesses. Once the statutory appeal process was initiated, there was no opportunity to cross-examine the grandmother – statutory appeals are true appeals on the record that was before the Registrar<sup>67</sup> Further, it cannot be said that the Registrar and the Attorney General are identical in their role or interest.

48. The affidavits are contradicted in several respects by the documentary record:

**(a) Chief of the Matachewan First Nation in 1952**

49. In her evidence, Ms. Batisse stated that she was asked by the Chief of the Matachewan Band, identified as Alfred Batisse, to sign what turned out to be an Application for Enfranchisement in December 1952.<sup>68</sup>

50. However, the evidence demonstrates that the Chief in 1952 was not Alfred Batisse, but George Batisse, Laura's own brother.<sup>69</sup> In none of her affidavits does Laura Batisse identify the Chief who asked her to sign the Application as her own brother.

51. Under cross-examination, the Applicant admitted that the Chief was not Alfred, but George.<sup>70</sup> The Applicant attempted to explain this discrepancy by relying on hearsay from her great-aunt, Elsie, as follows:

It's because Alfred made us not allowed on the Reserve anymore.

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<sup>67</sup> *Sanderson v. R.*, 2002 MBQB 239 (CanLII) at paras.15-18; *Buffalo v. Canada (Registrar of Indian and Northern Affairs)*, 2005 ABQB 372 (CanLII) at para 25.

<sup>68</sup> Applicant's Record, Vol 1, Tab 3C, Affidavit of Laura Mary Flood, sworn February 26, 1996 at para 3; Applicant's Record, Vol 1, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para 16

<sup>69</sup> Respondent's Record, Vol 1, Affidavit of Gary Penner, sworn April 13, 2011, at paras 8-11, Exhibits "A", "B", "C", "X", "Y"; Applicant's Record, Vol 1, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, Exhibit "G".

<sup>70</sup> Applicant's Record, Vol 2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011 at Q277-281, 294.

He's the one who actually told all of us who didn't have our status anymore that that's the reason why. So that is the reason why grandma believed it was him who had enfranchised her<sup>71</sup>

52. Even if this evidence were admissible, this explanation is mere speculation and does nothing to explain how Laura Batisse could make such a fundamental mistake.

53 In her submissions, the Applicant herself discounts the accuracy of her grandmother's recollections:

The affidavit was executed 46 years after the events at issue in this judicial review. In light of the passing of time, it is understandable that Laura Flood would be confused as to who the Chief was at the relevant time.<sup>72</sup>

**(b) Timber royalties**

54. In her affidavit, Laura Batisse alleged that she received \$500 for "stumpage" from the Chief at approximately the same time as the enfranchisement.<sup>73</sup> This allegation has no relevance whatsoever to the validity of the enfranchisement. However, as it is demonstrably incorrect, it further illustrates the unreliability of Ms. Batisse's evidence.

55. On September 28, 1950, the Matachewan Band surrendered the timber on 10,276 acres of reserve land. A timber license was granted on

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<sup>71</sup> Applicant's Record, Vol 2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011 at Q 296.

<sup>72</sup> Applicant's Record, Vol 3, Applicant's Memorandum of Fact and Law, at para 68.

<sup>73</sup> Applicant's Record, Vol 1, Tab 3A, Affidavit of Laura Mary Flood, sworn February 26, 1996, at para.5; Laura Batisse did not explain what she meant by the term "stumpage". However, a standard dictionary definition of "stumpage" is "(1) (US), (Canadian) standing timber or its value; (2) (US), (Canadian) the right to fell timber on another person's land; or (3) (Canadian) a tax or royalty payable on each tree felled, esp on crown land": stumpage. (n.d.). Collins English Dictionary - Complete & Unabridged 10th Edition. Retrieved September 13, 2011, from Dictionary.com website: <http://dictionary.reference.com/browse/stumpage>.

February 28, 1951. It was not until December 22, 1953 that the first payment was made to the band members.<sup>74</sup>

56. Having been enfranchised on December 4, 1952, Ms. Batisse was no longer eligible to receive such moneys. According to the paylists for timber royalties to members of the Matachewan Band between 1953 and 1962, Laura Batisse did not receive any payment, and, in any event, none of the payments approximates the \$500 said to be received by Ms. Batisse.<sup>75</sup>

57. Thus, it is implausible that Ms. Batisse would have received a payment of \$500 from the Chief of any kind, at a time when her annual income was \$600<sup>76</sup> and the total band funds approximated \$250.<sup>77</sup>

**(c) Date of the signing of the documents**

58. The first affidavit indicates that Ms. Batisse was asked to "sign some papers" in December 1952, which turned out to be an Application for Enfranchisement. In fact, the Application was dated October 10, 1952; the Certificate of Enfranchisement was dated December 22, 1952. In her third affidavit, after reviewing her Application for Enfranchisement, Ms. Batisse did not correct the date, instead she apparently affirmed the evidence, stating "as I have stated before, I did not know what I was signing".<sup>78</sup>

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<sup>74</sup> Respondent's Record, Vol. 1, Affidavit of Gary Penner, sworn April 13, 2011, Exhibits "X", "Y", "Z".

<sup>75</sup> Respondent's Record, Vol. 1, Affidavit of Gary Penner, sworn April 13, 2011, Exhibit "Z".

<sup>76</sup> Applicant's Record, Vol. 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "G".

<sup>77</sup> Applicant's Record, Vol. 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "K".

<sup>78</sup> Applicant's Record, Vol. 1, Tab 3C, Affidavit of Laura Mary Flood, sworn February 26, 1996, at paras 3-4; Applicant's Record, Vol. 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibit "N"; Applicant's Record, Vol. 1, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para 16, Exhibit "Q".

**(ii) Credibility of the Larkman Evidence**

59. Rule 81(1) of the *Federal Courts Rules* requires that affidavits "be confined to facts within the deponent's personal knowledge"<sup>79</sup> Despite this, the most relevant portions of the Applicant's affidavit do not come from her own knowledge. At a minimum, she could have no personal knowledge of what transpired before she was born in 1972.<sup>80</sup> Despite this, the Applicant disagrees in her evidence in many crucial respects from Ms Batisse.

60. Most significantly, the Applicant makes several accusations of what amounts to fraud against J.A. Marleau, the Indian Superintendent<sup>81</sup>

61. Ms. Flood in her first affidavit made clear that her accusation was only against Alfred Batisse:

In December of 1952, the Chief of the Matachewan First Nation, Chief Alfred Batisse, requested that I sign some papers . . . I trusted the Chief's direction and signed the documentation as requested.<sup>82</sup>

62. There was no mention of the Indian Agent at all in this affidavit

63. In her later affidavit, the only statement regarding the Indian Agent, apart from mentioning his correspondence, was as follows:

I have reviewed my Application for Enfranchisement. The signature is my signature, however, as I have stated before, I did not know what I was signing. I could not read in 1952. I trusted my Chief and always

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<sup>79</sup> *Federal Courts Rules*, SOR/98-106 R 81(1)

<sup>80</sup> Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, at para 2, Exhibit "A", Applicant's Record, Vol.2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011 at Q74-76.

<sup>81</sup> Applicant's Record, Vol 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, at paras.21-22, 34; Applicant's Record, Vol 3, Applicant's Memorandum of Fact and Law at paras 3, 4, 28, 60, 62-63, 65, 75, 83, 89-90.

<sup>82</sup> Applicant's Record, Vol 1, Tab 3C, Affidavit of Laura Mary Flood, sworn February 26, 1996, at para 3

obeyed instructions from the Indian Agent.<sup>83</sup>

64. This statement by Ms Flood is not accompanied by any statement that Mr. Marleau was present during the signing of this or other documents or that he provided any instructions of any kind for her to do so. Neither affidavit provides any basis for any accusation of misconduct on the part of Mr. Marleau. Rather both affidavits clearly point the finger at the Chief.

65. On cross-examination, the Applicant admitted that her grandmother's affidavits contain no allegation that the Indian Agent requested Laura Batisse to do anything.<sup>84</sup> The Applicant remembered "nothing, in particular" with respect to her own discussions with her grandmother concerning the Agent, save that "when the Agent comes to visit you you were just supposed to listen, and you were supposed to do as you were directed".<sup>85</sup>

66. Thus the Applicant herself offers no evidence against Mr. Marleau other than the vague statement that at an unspecified time Ms. Batisse encountered an unspecified Indian Agent and if he gave her unspecified instructions, she was supposed to listen and to follow them.

67. Nor is this the only example in which the Applicant has embellished upon the evidence of Ms. Flood. Other inconsistencies include:

- The Applicant changes the date on which the Chief asked Ms. Batisse

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<sup>83</sup> Applicant's Record, Vol 1, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para. 16.

<sup>84</sup> Applicant's Record, Vol 2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011 at Q186-187

<sup>85</sup> Applicant's Record, Vol 2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011 at Q 332-337.

- to sign the Application from December 1952 to October 10, 1952<sup>86</sup>;
- The Applicant claims that the "affidavit of Laura Batisse included in these materials indicates that she did not prepare" the letter of August 16, 1952, "nor did she instruct anyone else to write the letter on her behalf"<sup>87</sup>. None of the Ms. Flood's affidavits make mention of this letter;
  - The Applicant asserts that the Application "was neither read to [Laura Batisse] nor explained", whereas Laura Flood made no such assertion<sup>88</sup>.
  - The Applicant asserts that Laura Batisse did not "know what 'timber royalty' was". The evidence of Laura Batisse was that she did not have any understanding of "the issue of my timber rights"<sup>89</sup>;
  - Ms. Flood stated that she "had no idea what the documents were that the Chief asked me to sign", whereas the Applicant states in her submissions "Laura Flood signed the documents believing she was confirming the fact that she was married to a non-Indian"<sup>90</sup>;
  - Laura Batisse specifically accused "Chief" Alfred Batisse of defrauding her in 1952. The Applicant admits that the Chief in 1952 was George Batisse, Laura's own brother<sup>91</sup>;
  - The Applicant admits that Laura Batisse's registration number was 67, not 32, as stated by Ms. Batisse<sup>92</sup>;
  - Ms. Batisse stated that she was still living with her family on reserve in 1945 at the time treaty annuities were paid out, whereas the Applicant

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<sup>86</sup> Applicant's Record, Vol. 1, Tab 3C, Affidavit of Laura Mary Flood, sworn February 26, 1996, at para. 3; Applicant's Record, Vol. 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, at para. 21.

<sup>87</sup> Applicant's Record, Vol. 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, at para. 16.

<sup>88</sup> Applicant's Record, Vol. 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, at para. 21.

<sup>89</sup> Applicant's Record, Vol. 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, at para. 27; Affidavit of Laura Mary Flood, sworn April 22, 1998, at para. 15, attached as Exhibit "E" to Applicant's Record, Vol. 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011.

<sup>90</sup> Applicant's Record, Vol. 1, Tab 3C, Affidavit of Laura Mary Flood, sworn February 26, 1996, at para. 3; Applicant's Record, Vol. 1, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para. 16; Applicant's Record, Vol. 2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011 at Q. 253; Applicant's Record, Vol. 3, Applicant's Memorandum of Fact and Law at para. 32.

<sup>91</sup> Applicant's Record, Vol. 1, Tab 3C, Affidavit of Laura Mary Flood, sworn February 26, 1996, at para. 3; Applicant's Record, Vol. 2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011, Q. 277-281, 294.

<sup>92</sup> Applicant's Record, Vol. 1, Tab 3C, Applicant's Record, Affidavit of Laura Mary Flood, sworn February 26, 1996, at para. 2; Affidavit of Laura Mary Flood, sworn August 13, 1996, attached as Exhibit "D" to Applicant's Record, Vol. 1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, at para. 2; Applicant's Record, Vol. 1, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para. 2; Applicant's Record, Vol. 2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011, Q94-97.

states that the family was off the reserve by that point<sup>93</sup>.

68. As the Applicant has no independent knowledge of these events, these inconsistencies undermine both of their evidence.

**(iii) Delay in raising the allegation**

69. The credibility of the allegation that Ms. Batisse was enfranchised against her will is undermined by the fact that she waited 44 years before first raising the allegation

70. The certificate of enfranchisement was returned to Ms Batisse on February 2, 1953 and has since been in her possession. She could have asked any number of people to read it to her at that time - she was living with Mr. Flood at the time and several of her siblings were attending school.<sup>94</sup> In any event, the effect of the enfranchisement would have been made apparent soon thereafter through the loss of benefits. Despite this, Ms. Batisse made no effort between 1953 and 1996 to protest this decision. It was only on March 8, 1996, that counsel on behalf of Angel Larkman raised for the first time, 43 years after the fact, the suggestion that Ms. Batisse had been fraudulently enfranchised (but only by the Chief).

71. The Applicant has attempted to explain this delay by stating that that Ms. Batisse believed in 1952 that by signing the documentation she was

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<sup>93</sup> Applicant's Record, Vol 1, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para. 13; Applicant's Record, Vol 2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011, at Q318-319, 322, Applicant's Record, Vol.3, Applicant's Memorandum of Fact and Law, at para 71.

<sup>94</sup> Applicant's Record, Vol.2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011, at Q138-144, 158, 161, 260, 341-356; Respondent's Record, Vol 1, Affidavit of Gary Penner, sworn April 13, 2011, at para.38.

confirming that she was living with a white man and that, until 1995, she was still of this belief. However, this is directly contradicted by Ms. Batisse's evidence that she had "no idea what the documents were that the Chief asked me to sign"<sup>95</sup> Moreover, nowhere in Ms. Batisse's affidavits does she state that she had been of the belief that she had been enfranchised due to living with a non-aboriginal person – an allegation that first surfaced under cross-examination in 2011.

**(iv) Alleged Errors in the Documentary Record**

72. The Applicant has alleged that the documentation pertaining to the enfranchisement contains two errors which demonstrate that they were not prepared by Laura Batisse.<sup>96</sup>

73. It is not suggested that the documents were physically prepared by Laura Batisse. Two of the letters contain identification initials which indicate that someone else prepared them on her behalf.<sup>97</sup> It is evident that Ms. Batisse had assistance in preparing these documents.

74. The errors in the record alleged by the Applicant are:

- that Laura Batisse had been living apart from the reserve for 13 years by 1952. The Applicant asserts that Ms. Batisse only moved off the Reserve when she was approximately 19 years old (1945). The

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<sup>95</sup> Applicant's Record, Vol 3, Applicant's Memorandum of Fact and Law, at paras.32, 78, 80; Applicant's Record, Vol.2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011 at Q 253; Applicant's Record, Vol.1, Tab 3C, Applicant's Record, Affidavit of Laura Mary Flood, sworn February 26, 1996, at para 3; Applicant's Record, Vol.1, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para 16.

<sup>96</sup> The Applicant has stated that "at least one of the answers is erroneous" in the July 18 questionnaire, but has only identified one. Similarly, the Applicant alleged that the Application for Enfranchisement had "several significant errors", but only identified one. Applicant's Record, Vol.3, Applicant's Memorandum of Fact and Law, at paras 24, 29

<sup>97</sup> Applicant's Record, Vol.1, Affidavit of Angel Sue Larkman, sworn February 24, 2011, Exhibits "F", "I".

Applicant refers to the treaty paylists for "circumstantial support" of this assertion in the treaty paylists – which show that starting in 1945, the annuities were occasionally picked up by someone other than the head of the family, Harry Batisse. However, the treaty paylists are simply no evidence of where a person was living at any given time, only whether they were physically present on the reserve that day. The only evidence of the "error" is Ms. Batisse's unsupported hearsay evidence<sup>98</sup>

- the omission of Ms. Batisse's children from the Application for Enfranchisement. It is not disputed that as of October 10, 1952, Laura Batisse had two children with a non-aboriginal man. It is impossible to determine at this late date why such an error was made in the Application for Enfranchisement. It may have been a mistake by the person completing the form on Ms. Batisse's behalf<sup>99</sup>, or it may have been deliberate on the part of Ms. Batisse, as she also chose not to include her children on the Treaty paylist, despite the loss of annuities.<sup>100</sup> The omission of the children does not indicate that the Application was completed without the consent or knowledge of Ms. Batisse.

**(v) Allegation that Laura Batisse did not receive her share of funds**

75. The Applicant alleges that Laura Batisse did not receive her share of funds after being enfranchised. This allegation is irrelevant to the question of whether the Governor-in-council acted reasonably in enfranchising Laura Batisse.

76. Nonetheless there is sufficient evidence, reinforced by the presumption of regularity, that can support a reasonable inference that Ms. Batisse received the money owed:

- Laura Batisse did not swear that she did not receive the payment. Her evidence was merely that she did not recall receiving a payment, not

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<sup>98</sup> Applicant's Record, Vol 1, Tab 3C, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para 5; Respondent's Record, Vol.1, Affidavit of Gary Penner, sworn April 13, 2011., at para 16, Exhibits "F"- "V"

<sup>99</sup> Ms. Batisse's affidavit evidence was that the Chief had her sign the documents, but George Batisse would presumably have been aware of the existence of his nephews

<sup>100</sup> Neither child appears on the Treaty paylists between 1947-1952. Respondent's Record, Vol 1, Affidavit of Gary Penner, sworn April 13, 2011, Exhibits "O"- "T"

that no payment was made.<sup>101</sup>

- On December 12, 1952, a memorandum was sent to J.A. Marleau from the Indian Affairs Branch which stated "Under separate cover, in your care, a cheque in the amount of \$82.23 is going forward to Laura Batisse"<sup>102</sup>;
- Also on December 12, 1952, a "Requisition for Cheque," was prepared and stamped "Audited for Payment, Dec.17"<sup>103</sup>. The requisition requests a cheque "in the favour of" Laura Batisse, "c/o J.A. Marleau."
- A document stamped received by December 22, 1952, by the Sturgeon Falls Indian Agency, refers specifically to the "enclosed cheque B22-20482."<sup>104</sup> The name "J.A. Marleau" appears in the address box. The document states that it is for "shares of band funds and annuity to Miss Laura Batisse Matachewan," pursuant to a statement dated December 12 [1952].
- On December 22, 1952, J.A. Marleau sent a letter to Laura Batisse, which stated that enclosed was a "cheque in your favour in the amount of \$82.23," as well as the certificate of enfranchisement.<sup>105</sup> Marleau requested that the latter document be signed, dated, and returned.
- Laura Batisse did in fact receive the certificate of enfranchisement which was enclosed with the letter, as she signed it and admitted that it was her signature<sup>106</sup>. She also followed the instructions in the letter by returning the certificate for signature by the Director.

77. The Applicant calls into question the date of the letter of December 22, 1952, alleging that, it is "simply untenable" that the letter was received the same day it was sent.

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<sup>101</sup> Applicant's Record, Vol 1, Tab 3C, Affidavit of Laura Mary Flood, sworn February 26, 1996, at para.5; Applicant's Record, Vol.1, Tab 3E, Affidavit of Laura Mary Flood, sworn April 22, 1998, at para.17; Applicant's Record, Vol.2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011 of Angel Larkman, dated June 10, 2011, at Q232-233.

<sup>102</sup> Applicant's Record, Vol.1, Affidavit of Angel Larkman, dated February 24, 2011, at Exhibit "T".

<sup>103</sup> Applicant's Record, Vol 1, Affidavit of Angel Larkman, dated February 24, 2011, at Exhibit "U"

<sup>104</sup> Applicant's Record, Vol 1, Affidavit of Angel Larkman, dated February 24, 2011, at Exhibit "W". The document also refers to "this remittance". The Applicant stated in her factum that this document is "a record of payment in this amount made out to J.A. Marleau". However, the Applicant admitted on cross-examination that it does not prove that the cheque was in the name of Marleau – Applicant's Record, Vol.2, Transcript of the Cross-Examination of Angel Sue Larkman, dated June 10, 2011 of Angel Larkman, dated June 10, 2011, at Q236, 240-241.

<sup>105</sup> Applicant's Record, Vol 1, Affidavit of Angel Larkman, dated February 24, 2011, at Exhibit "V"

<sup>106</sup> Applicant's Record, Vol 1, Tab 3C, Affidavit of Laura Mary Flood, dated April 28, 1998, Exhibit "Q"

78. Given the passage of time, it is impossible to reconstruct how this letter was delivered to Ms. Batisse. However, without evidence regarding the timetable of trains in the area and mail delivery schedules, it cannot be concluded that it was impossible that the letter was delivered as described.

79. In any event, even if the documents were not actually signed the same day, it is more likely that it is the certificate of enfranchisement itself which is incorrectly dated, as the Applicant herself states that the date was not written in her grandmother's handwriting. Such incorrect dating has no legal significance to the question of her enfranchisement.

#### **D. HONOUR OF THE CROWN**

80. The Notice of Application makes no reference to any allegations pertaining to the "honour of the Crown" and its relevance to these proceedings is unclear. It is alleged that the honour of the Crown is (1) the "lens with which this evidence should be examined" and (2) requires that "the details of the circumstances which resulted in Laura Flood's enfranchisement must be brought to light"<sup>107</sup>.

81. With respect to the first point, the reasoning appears to be that because it is alleged there is a fraud, the honour of the Crown is engaged, and because the honour of the Crown is engaged, the Court should interpret the evidence to find a fraud. The Courts have rejected the suggestion that "the fundamental precepts of evidentiary law change when a claim is made by an aboriginal band against the Crown for breach of fiduciary duty and honour

of the Crown”<sup>108</sup> In *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)*, the Ontario Court of Appeal stated:

A trial judge must weigh and assess conflicting evidence in the same way as he or she always does – dispassionately, against the record as a whole, and with due consideration for any particular sensibilities (cultural or otherwise) that may impact upon a witness’s testimony.<sup>109</sup>

82. The second argument, that the honour of the Crown requires “the details of the circumstances which resulted in Laura Flood’s enfranchisement must be brought to light” (para.89), is a meaningless assertion. The Court will deal with this application as it does with any other - on the merits of the evidence before it. To the extent the Applicant’s delay of 57 years has resulted in the loss of crucial evidence, the honour of the Crown cannot fill that gap.

83. If the suggestion is that Canada is not entitled to rely on available defences or rules of evidence in this litigation, this proposition was rejected by the Federal Court of Appeal in *Stoney Band v. Canada*.<sup>110</sup>

84. The honour of the Crown has no role in this case. The Manitoba Court of Appeal in *Manitoba Metis Federation* observed:

Just as not all interactions between the Crown and Aboriginal peoples engage the fiduciary relationship that has been recognized between the two, as will be discussed later, there must be something more than the fact that a person is Aboriginal to engage the honour of the

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<sup>107</sup> Applicant’s Record, Vol.3, Applicant’s Memorandum of Fact and Law, at paras.83, 89

<sup>108</sup> *Manitoba Métis Federation Inc. v. Canada (Attorney General) et al.*, 2010 MBCA 71 (CanLII) at paras 196-199; *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)*, 2010 ONCA 47 (CanLII) at para.220.

<sup>109</sup> *Chippewas of Mnjikaning First Nation. supra* at para 220.

<sup>110</sup> *Stoney Band v. Canada*, 2005 FCA 15, 249 D.L.R. (4<sup>th</sup>) 274 at paras 25, 32

Crown in dealing with that person.<sup>111</sup>

85. In the present case, the Crown agent had no part in the alleged fraud. Ms. Batisse made no accusation against Mr. Marleau.

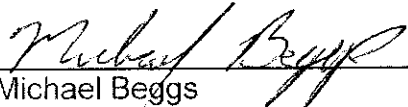
86. It is not the role of honour of the Crown to serve as a platform for false accusations levied against innocent third parties. To the extent that the honour of the Crown arises on these facts, Canada has met its burden by defending a First Nations Chief against a false accusation of fraud.

## PART V – ORDER SOUGHT

87. The Respondent respectfully requests an order:
- (a) Dismissing the Applicant's application for judicial review;
  - (b) Awarding costs on a partial indemnity basis; and,
  - (c) such other relief as this Honourable Court deems just.

## ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 26<sup>th</sup> day of September, 2011

  
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Michael Beggs  
Of Counsel for the Respondent

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<sup>111</sup> *Manitoba Métis Federation Inc.*, at para 405, 407; *Polchies v Canada*, 2007 FC 493 (CanLII) at para. 74; *Native Council of Nova Scotia v. Canada (Attorney General)*, 2011 FC 72 (CanLII), at paras 38-41

TO: The Administrator  
Federal Court of Canada  
180 Queen Street West  
Suite 200  
Toronto, Ontario  
M5V 3L6

AND TO: Sunil Mathai  
Falconer Charney LLP  
8 Prince Arthur Drive  
Toronto, Ontario  
M5R 1A9

**PART VI – LIST OF AUTHORITIES**

1. *Etches v. Canada* (2008), 89 O.R.(3d) 599 (S.C.J.)
2. *Tremblay v. Air Canada*, [2004] F.C.J. No. 787 (C.A.) (QL), leave to appeal denied: [2004] S.C.C.A. No. 307.
3. *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735.
4. *Dunsmuir v. Canada*, [2008] 1 SCR 190.
5. *League for Human Rights of B'nai Brith Canada v. Odynsky*, 2010 FCA 307.
6. *Thorne's Hardware Ltd v. The Queen*, [1983] 1 S.C.R. 106.
7. *Canada (Canadian Wheat Board) v Canada (Attorney General)*, 2009 FCA 214, [2009] FCJ No 695 (CA).
8. *F.H. v. McDougall*, [2008] 3 S.C.R. 41.
9. *Tetzlaff v. Canada*, [1992] 1 F.C. 261 (TD).
10. *Sanderson v. R.*, 2002 MBQB 239 (CanLII)
11. *Buffalo v. Canada (Registrar of Indian and Northern Affairs)*, 2005 ABQB 372 (CanLII).
12. *Manitoba Métis Federation Inc. v. Canada (Attorney General) et al.*, 2010 MBCA 71 (CanLII)
13. *Chippewas of Mnjikaning First Nation v Ontario (Minister of Native Affairs)*, 2010 ONCA 47 (CanLII)
14. *Stoney Band v. Canada*, 2005 FCA 15, 249 D.L.R. (4<sup>th</sup>) 274.
15. *Polchies v. Canada*, 2007 FC 493 (CanLII).
16. *Native Council of Nova Scotia v Canada (Attorney General)*, 2011 FC 72 (CanLII).

## APPENDIX A - STATUTES AND REGULATIONS

*Indian Act, R.S.C. 1952, c. 149, s. 108(1)*

<p>108(1) On the report of the Minister that an Indian has applied for enfranchisement and that in his opinion the Indian</p> <p>(a) is of the full age of twenty-one years</p> <p>(b) is capable of assuming the duties and responsibilities of citizenship, and</p> <p>(c) when enfranchised, will be capable of supporting himself and his dependants,</p> <p>The Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised</p>	<p>108(1) Lorsque le Ministre signale, dans un rapport, qu'un Indien a demandé l'émancipation et qu'à son avis, ce dernier</p> <p>(a) est âgé de vingt et un ans révolus;</p> <p>(b) est capable d'assumer les devoirs et les responsabilités de la citoyenneté; et</p> <p>(c) pourra, une fois émancipé, subvenir à ses besoins et à ceux des personnes à sa charge;</p> <p>le gouverneur en conseil peut déclarer par ordonnance que l'Indien, son épouse et ses enfants mineurs célibataires sont émancipés.</p>
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*Indian Act, R.S.C. 1985, s. 6(1)*

<p>Persons entitled to be registered</p> <p><b>6. (1)</b> Subject to section 7, a person is entitled to be registered if</p> <p>(a) that person was registered or entitled to be registered immediately prior to April 17, 1985;</p> <p>(b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;</p> <p>(c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;</p> <p>(d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4,</p>	<p>Personnes ayant droit à l'inscription</p> <p><b>6. (1)</b> Sous réserve de l'article 7, une personne a le droit d'être inscrite si elle remplit une des conditions suivantes :</p> <p>a) elle était inscrite ou avait le droit de l'être le 16 avril 1985;</p> <p>b) elle est membre d'un groupe de personnes déclaré par le gouverneur en conseil après le 16 avril 1985 être une bande pour l'application de la présente loi;</p> <p>c) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)a)(iv), de l'alinéa 12(1)b) ou du paragraphe 12(2) ou en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;</p> <p>d) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)a)(iii)</p>
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<p>1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;</p> <p>(e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,</p> <p>(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or</p> <p>(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or</p> <p>(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section</p> <p>Idem</p> <p>(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1)</p>	<p>conformément à une ordonnance prise en vertu du paragraphe 109(1), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;</p> <p>e) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande :</p> <p>(i) soit en vertu de l'article 13, dans sa version antérieure au 4 septembre 1951, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article,</p> <p>(ii) soit en vertu de l'article 111, dans sa version antérieure au 1<sup>er</sup> juillet 1920, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article;</p> <p>f) ses parents ont tous deux le droit d'être inscrits en vertu du présent article ou, s'ils sont décédés, avaient ce droit à la date de leur décès</p> <p>Idem</p> <p>(2) Sous réserve de l'article 7, une personne a le droit d'être inscrite si l'un de ses parents a le droit d'être inscrit en vertu du paragraphe (1) ou, s'il est décédé, avait ce droit à la date de son décès</p>
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*Federal Courts Act, R.S.C. 1985, c. F-7, s.2(1), 18, 18.1*

<p>2. (1) In this Act, "federal board, commission or other tribunal" « <i>office fédéral</i> »</p> <p>"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province</p>	<p>2. (1) Les définitions qui suivent s'appliquent à la présente loi</p> <p>« <i>office fédéral</i> »</p> <p>" <i>federal board, commission or other tribunal</i> »</p> <p>« <i>office fédéral</i> » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour</p>
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<p>or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the <i>Constitution Act 1867</i> ;</p>	<p>canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la <i>Loi constitutionnelle de 1867</i></p>
<p>Extraordinary remedies, federal tribunals</p> <p><b>18.</b> (1) Subject to section 28, the Federal Court has exclusive original jurisdiction</p> <p>(a) to issue an injunction, writ of <i>certiorari</i>, writ of prohibition, writ of <i>mandamus</i> or writ of <i>quo warranto</i>, or grant declaratory relief, against any federal board, commission or other tribunal; and</p> <p>(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal</p> <p>Extraordinary remedies, members of Canadian Forces</p> <p>(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of <i>habeas corpus ad subjiciendum</i>, writ of <i>certiorari</i>, writ of prohibition or writ of <i>mandamus</i> in relation to any member of the Canadian Forces serving outside Canada</p> <p>Remedies to be obtained on application</p> <p>(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18 1</p> <p>R.S., 1985, c F-7, s. 18; 1990, c 8, s. 4; 2002, c 8, s. 26</p>	<p>Recours extraordinaires : offices fédéraux</p> <p><b>18.</b> (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :</p> <p>a) décerner une injonction, un bref de <i>certiorari</i>, de <i>mandamus</i>, de prohibition ou de <i>quo warranto</i>, ou pour rendre un jugement déclaratoire contre tout office fédéral;</p> <p>b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral</p> <p>Recours extraordinaires : Forces canadiennes</p> <p>(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'<i>habeas corpus ad subjiciendum</i>, de <i>certiorari</i>, de prohibition ou de <i>mandamus</i>.</p> <p>Exercice des recours</p> <p>(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire</p> <p>L R (1985), ch F-7, art. 18; 1990, ch 8, art 4; 2002, ch. 8, art 26</p>
<p>Application for judicial review</p> <p><b>18.1</b> (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought</p> <p>Time limitation</p> <p>(2) An application for judicial review in respect of a decision or an order of a federal</p>	<p>Demande de contrôle judiciaire</p> <p><b>18.1</b> (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande</p> <p>Délai de présentation</p> <p>(2) Les demandes de contrôle judiciaire</p>

<p>board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days</p>	<p>sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder</p>
<p>Powers of Federal Court</p>	<p>Pouvoirs de la Cour fédérale</p>
<p>(3) On an application for judicial review, the Federal Court may</p>	<p>(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :</p>
<p>(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or</p> <p>(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.</p>	<p>a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;</p> <p>b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.</p>
<p>Grounds of review</p>	<p>Motifs</p>
<p>(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal</p>	<p>(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :</p>
<p>(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;</p> <p>(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;</p> <p>(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;</p> <p>(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;</p> <p>(e) acted, or failed to act, by reason of fraud or perjured evidence; or</p>	<p>a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;</p> <p>b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;</p> <p>c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;</p> <p>d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;</p> <p>e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;</p>

<p>(f) acted in any other way that was contrary to law</p> <p>Defect in form or technical irregularity</p> <p>(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may</p> <p>(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and</p> <p>(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate</p> <p>1990, c 8, s 5; 2002, c 8, s 27</p>	<p>f) a agi de toute autre façon contraire à la loi</p> <p>Vice de forme</p> <p>(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.</p> <p>1990, ch. 8, art 5; 2002, ch 8, art 27</p>
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*Federal Court Act, S.C. 1970, c 1, s.18, 28, 61*

<p>18. The Trial Division has exclusive original jurisdiction</p> <p>(a) to issue an injunction, writ of <i>certiorari</i>, writ of prohibition, writ of <i>mandamus</i> or writ of <i>quo warranto</i>, or grant declaratory relief, against any federal board, commission or other tribunal; and</p> <p>(b) to hear and determine any application or other proceeding for relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal</p>	<p>18 La Division de première instance a compétence exclusive en première instance</p> <p>(a) pour émettre une injonction, un bref de <i>certiorari</i>, un bref de <i>mandamus</i>, un bref de prohibition ou un bref de <i>quo warranto</i>, ou pour rendre un jugement déclaratoire, contre tout office, tout commission ou tout autre tribunal federal; et</p> <p>(b) pour entendre et juger toute demande de redressement de la nature de celui qu'envisage l'alinéa a), et notamment toute procédure engage contre le procureur general du Canada aux fins d'obtenir le redressement contre un office, une commission ou à autre tribunal federal.</p>
<p>28 (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board,</p>	<p>28 (1) Nonobstant l'article 18 ou les dispositions de toute autre loi, la Cour d'appel a compétence pour entendre et juger une demande d'examen et d'annulation d'une décision ou ordonnance, autre qu'une décision ou ordonnance de nature administrative qui n'est pas légalement soumise à un processus judiciaire ou quasi judiciaire, rendue par un office, une</p>

<p>commission or other tribunal, upon the ground that the board, commission or tribunal</p> <p>(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;</p> <p>(b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or</p> <p>(c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it</p>	<p>commission ou un autre tribunal fédéral ou à l'occasion de procédures devant un office, une commission ou un autre tribunal fédéral, au motif que l'office, la commission ou le tribunal</p> <p>a) n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;</p> <p>b) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier; ou</p> <p>c) a fondé sa décision ou son ordonnance sur une conclusion de fait erronée, tirée de façon absurde ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.</p>
<p>61(1) Where this Act creates a right of appeal to the Court of Appeal or a right to apply to the Court of Appeal under section 28 to have a decision or order reviewed and set aside, such right applies, to the exclusion of any other right of appeal, in respect of a judgement, decision or order given or made after this Act comes into force, unless in the case of a right of appeal, there was at that time a right of appeal to the Exchequer Court of Canada</p> <p>(2) Subject to subsection (1), any jurisdiction created by this Act shall be exercised in respect of matters arising as well before as after the coming into force of this Act.</p>	<p>61(1) Lorsque la présente loi crée un droit d'appel devant la Cour d'appel ou le droit de demander à la Cour d'appel, en vertu de l'article 28, d'examiner et rejeter une décision ou ordonnance, ce droit s'applique, à l'exclusion de tout autre droit d'appel, à un jugement, une décision ou une ordonnance rendus ou établis après l'entrée en vigueur de la présente loi, à moins que, dans le cas d'un droit d'appel, il n'y ait eu à ce moment un droit d'appel devant la Cour de l'Échiquier du Canada</p> <p>(2) Sous réserve du paragraphe (1), toute compétence conférée par la présente loi doit être exercée relativement aux questions soulevées soit avant soit après l'entrée en vigueur de la présente loi.</p>

*Federal Courts Rules, SOR/98-106 R.81(1).*

<p>Content of affidavits</p> <p><b>81.</b> (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included</p> <p>Affidavits on belief</p> <p>(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of</p>	<p>Contenu</p> <p><b>81.</b> (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui</p> <p>Poids de l'affidavit</p>
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<p>persons having personal knowledge of material facts.</p> <p>SOR/2009-331, s 2</p>	<p>(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.</p> <p>DORS/2009-331, art 2</p>
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