

2019



Hfx No. 490119

**Supreme Court of Nova Scotia**

**Between:**

**Stephen Joyce, Robert Cooper, E. Dianne Langley, and Kenneth Langille**

**Plaintiffs**

**and**

**The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the  
Province of Nova Scotia**

**Defendant**

**NOTICE OF MOTION**

**THE MOTION IS FOR AN ORDER:**

- (a) certifying this action as a class proceeding pursuant to the *Class Proceedings Act*, SNS 2007, c 28;
- (b) defining the class (the "Class") as:

"All persons who currently hold or held valid Aboriginal and Treaty Rights Access Passports ("ATRA Passports") as of July 13, 2017"
- (c) to the extent necessary, defining the subclasses (collectively, the "Subclasses") as:
  - (i) "All members of the Class who are not Status Indians and who have or assert rights to hunt and harvest in Nova Scotia under the 1752 Treaty and/or the Aboriginal right to hunt and harvest in traditional Mi'kmaq hunting and fishing grounds (the "1752 Subclass");
  - (ii) "All members of the Class who are Status Indians listed on the Atlantic General List, and who have or assert Aboriginal and Treaty Rights to hunt and harvest in Nova Scotia under the Treaties of 1752, 1760/61, and

all other applicable treaties, and/or the Aboriginal right to hunt and harvest in traditional Mi'kmaq hunting and fishing grounds" (the "General List Subclass");

- (iii) "All members of the Class who are not Status Indians and who have or assert Aboriginal and Treaty Rights to hunt and harvest in Nova Scotia under the 1760/1761 Treaty and/or the Aboriginal right to hunt and harvest in traditional Mi'kmaq hunting and fishing grounds" (the "1760/1761 Subclass"); and
  - (iv) "All members of the Class who are not Status Indians and who have or assert Aboriginal and Treaty Rights to hunt and harvest in Nova Scotia under the 1760/1761 Treaty and/or the Aboriginal right to hunt and harvest in traditional Mi'kmaq hunting and fishing grounds, and who are descended from Mi'kmaq communities on Cape Breton Island" (the "Cape Breton Subclass");
- (d) appointing Stephen Joyce, Robert Cooper, E. Dianne Langley, and Kenneth Langille as representative plaintiffs (the "Plaintiffs") on behalf of the members of the Class and, to the extent necessary, the Subclasses;
  - (e) certifying the common issues listed in Schedule "A" to the Notice of Application, or such other common issues as counsel may advise and this Court deems just;
  - (f) approving the Plaintiffs' Litigation Plan attached as Schedule "B" to the Notice of Application;
  - (g) directing that notice of certification (the "Notice") to the Class, in the form attached as Schedule "C", shall be given in accordance with the Plaintiffs' Litigation Plan;
  - (h) directing that members of the Class who elect to opt-out of the class proceeding must do so within 180 days after the date of the order certifying the action;
  - (i) that the Defendant shall be responsible for all costs associated with the publication of the Notice;
  - (j) granting the Plaintiffs their costs of this application; and
  - (k) such further and other relief as this Honourable Court may deem just.

**THE GROUNDS FOR THE APPLICATION ARE:**

- (a) the proposed representative Plaintiffs assert claims arising out of the same or materially similar occurrences and/or events which give rise to common questions of law and fact;
- (b) the pleadings disclose causes of action against the Defendant;
- (c) there is an identifiable class of two or more persons that will be represented by the proposed representative Plaintiffs;
- (d) the claim raises common issues of fact and law;
- (e) a class proceeding will be the preferable procedure for the fair and efficient resolution of the common issues;
- (f) the Plaintiffs,
  - (i) will fairly and adequately represent the interests of the Class and Subclasses, as the case may be;
  - (ii) have a litigation plan that sets out a workable method of advancing the proceedings and notifying the Class; and
  - (iii) do not have interests in conflict with the interests of other Class members.
- (g) sections 4, 7, 10, 15 and 24 of the *Class Proceedings Act*, SNS 2007, c 28;
- (h) Rules 5, 35 and 22, 68 of the *N.S. Civ. Pro. Rules 2009*; and
- (i) such further and other grounds as counsel may advise and this Honourable Court permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the application:

- (j) the Affidavit of Stephen Joyce sworn January 30, 2020 ;
- (k) the Affidavit of Robert Cooper sworn January 30. 2020 ;
- (l) the Affidavit of E. Dianne Langley, sworn January 30. 2020;
- (m) the Affidavit of Kenneth Langille, sworn January 30. 2020;

- (n) the Affidavit of Odette Soriano, sworn February 7, 2020; and
- (o) such further and other documentary evidence as counsel may advise and this Honourable Court permit.



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Co-Counsel for the Plaintiffs and on behalf  
of:

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## SCHEDULE "A"

### COMMON ISSUES

The Plaintiffs seek certification of the following common issues:

1. Whether the Defendant breached the terms of the Conservation Agreement, entered into by the Defendant on September 20, 1990, when the Defendant decided to accept only federal Indian status cards linked to Nova Scotia Indian Act bands for the purposes of harvesting renewable resources under provincial jurisdiction;
2. Whether the Defendant had knowledge, real or constructive, of a claim by the Class or the Subclasses to Treaty and/or Aboriginal rights to hunt and harvest in traditional Mi'kmaq hunting grounds throughout Nova Scotia, and in particular on Cape Breton Island, under s. 35 of the *Constitution Act, 1982* and/or the Treaties of 1725, 1752, and/or 1760/1761, such as to give rise to a duty on the part of the Defendant to consult members of the Class through their chosen representative, the Native Council of Nova Scotia;
3. If the answer to common issue 2 is "yes", whether the Defendant, in making and implementing the decision to accept only federal Indian status cards linked to Nova Scotia *Indian Act* bands for the purposes of harvesting renewable resources under provincial jurisdiction, breached its duty to consult with the Class and/or the Subclasses, through their chosen representative, the Native Council of Nova Scotia, and failed to uphold the honour of the Crown;
4. Whether the members of the Class or the Subclasses have the right to hunt and harvest in traditional Mi'kmaq hunting and fishing grounds throughout Nova Scotia, and in particular on Cape Breton Island, under the Treaties of 1725, 1752, and/or 1760/1761, or pursuant to their Aboriginal rights as recognized and affirmed by s. 35 of the *Constitution Act, 1982*;
5. If the answer to common issues 3 or 4 is "yes", whether the Defendant, in making and implementing the decision to accept only federal Indian status cards linked to Nova Scotia *Indian Act* bands for the purposes of harvesting renewable resources under provincial jurisdiction, infringed the rights of the Class or the Subclasses under s. 35 of the *Constitution Act, 1982*;
6. Whether the Defendant, in making and implementing the decision to accept only federal Indian status cards linked to Nova Scotia *Indian Act* bands for the purposes of harvesting renewable resources under provincial jurisdiction, infringed the rights of the members of the Class to equal protection and equal benefit of the law without discrimination, under s. 15 of the *Canadian Charter of Rights and Freedoms*;

7. If the answer to common issue 5 or 6 is “yes”, whether damages to the Class are a just and appropriate remedy under section 24 of the *Canadian Charter of Rights and Freedoms* or, by analogy, for a breach of rights under s. 35 of the *Constitution Act, 1982*;
8. If the answer to common issue 7 is “yes”, can the Court make an aggregate assessment of the damages suffered by the Class and/or the Subclasses?
9. If the answer to common issue 8 is yes, in what amount; and
10. If the answer to common issue 5 or 6 is “yes”, whether the court should grant other remedies, including declaratory relief and an order that the Defendant revert to recognizing ATRA Passport holders on the same basis as holders of federally-issued status cards linked to Nova Scotia *Indian Act* bands for the purposes of harvesting renewable resources under provincial jurisdiction, as was the case up to August 2017.

## **SCHEDULE "B"**

### **PLAINTIFFS' LITIGATION PLAN**

The plan to be filed pursuant to s. 7(1)(e)(iii) of the *Class Proceedings Act*, SNS 2007, c 28 is as follows:

#### **A. *Pre-Certification Communication with Members of the Class***

1. The Plaintiffs' law firms, Paliare Roland Rosenberg Rothstein LLP of Toronto, Ontario, and Patterson Law of Halifax, Nova Scotia (together, "Class Counsel"), have established a link on their respective firm websites for this proposed class proceeding. Current information on the status of the action is posted on these websites and they will be updated regularly. Copies of publicly-filed court documents, court decisions, notices and other information related to the proposed class proceeding will be accessible from the websites. A phone number and email contacts are also available on the websites.

2. In addition, Class Counsel will request that the Native Council of Nova Scotia's ("NCNS") website contains links to the websites of Class Counsel. The NCNS is the Self-Governing Authority for Mi'kmaq/Aboriginal Peoples residing off-reserve in Nova Scotia throughout traditional Mi'kmaq Territory. The NCNS counts among its members and represents the interests of both Mi'kmaq/Aboriginal persons who are Status Indians and who reside off-reserve in Nova Scotia, and Mi'kmaq/Aboriginal persons in Nova Scotia who are not registered or entitled to be registered as Indians under the *Indian Act* ("Non-Status Indians"). The NCNS is a society registered under the *Societies Act*.

3. Most, if not all, of the putative Class members are members of the NCNS and it is expected that the identity of most, if not all, of the Class members is known to the NCNS.

#### **B. *Notification of Certification and Opt out Procedure***

4. If this proceeding is certified, Class Counsel propose that notice to members of the Class be provided in the form attached as Schedule "C" (the "Notice").

5. Class Counsel propose that the Notice be published as follows:

- (a) Class Counsel will issue a press release containing the Notice within 15 days of the date of the certification order;
- (b) the Notice shall be published on the webpages maintained by Class Counsel in respect of this proposed class proceeding; and



- (c) to the extent the NCNS has addresses for Class members, Class Counsel will send the Notice via email and/or regular mail to each member of the proposed Class at the addresses available.

6. The Plaintiffs will ask the Court to order that no person may opt out a person who is mentally incapable without leave of the Court.

7. The Plaintiffs will ask the Court to approve an opt out form to be used by class members wishing to opt out of the class action, which will require the class member to provide sufficient information to establish their membership in the Class.

8. Only written election to opt out will be accepted and must be delivered to Class Counsel within 180 days of the date of the order certifying the action.

9. Within 60 days after the expiration of the opt out period, Class Counsel will deliver to the Court and the parties an affidavit listing the names of all persons who have opted out of the action.

***C. Post-Certification Status Reports***

10. In addition to responding to individual inquiries, Class Counsel will continue to update the webpages dedicated to this proposed class proceeding. The phone number and email contact provided on the webpages will remain in effect until the class action is resolved.

***D. Certification Application***

11. The Plaintiffs will argue the application for certification on a date to be set by the Court.

12. If the action is certified as a class proceeding, the Court will be asked to:

- (a) set an opt out date 180 days after the date of the order certifying the action;
- (b) confirm the means by which notice of the certification and opt out period will be given; and
- (c) settle the form and content for notification of the certification and opt out period generally in accordance with the Notice attached as Schedule "C".

***E. Discovery, Document Management, and Expert Reports***

13. Within 90 days after the date of the certification order, or as otherwise agreed to by the parties, the parties shall develop a discovery plan. In developing the discovery plan, the parties shall consult the Sedona Canada Principles Addressing Electronic Discovery.



14. Class Counsel will manage the productions with a document management system called Relativity. All productions will be scanned electronically into a database and, where possible, will be converted to readable format using optical character recognition ("OCR"). This will enable Class Counsel to quickly access and organize the documents.

15. The Plaintiffs will ask the Court to order the exchange of any expert opinions within a reasonable period after the completion of examinations for discovery, and before the pre-trial conference is held.

***F. Case Management and Dispute Resolution***

16. Following certification, the completion of examinations for discovery, and the exchange of expert opinions, if necessary, the Plaintiffs will seek to attend before the Court in order to clarify and/or re-define the common issues, if required, and to schedule any further motions that may be required prior to the trial of the common issues.

17. The Plaintiffs are willing to participate in mediation or other non-binding alternative dispute resolution efforts.

***G. Final Determination of the Common Issues***

18. Following the discovery phase of the action, the Plaintiffs will assess whether any of the common issues are suitable for summary judgment and, if so, will seek to schedule such a motion. For those common issues not suitable for summary judgment, the common issues trial will proceed pursuant to the rules of the Court.

19. Assuming that the common issues are resolved by judgment in favour of the Class, the Court will be asked to settle the form and content of the notice of resolution of the common issues and to set a date by which the Defendant or the Plaintiffs (or both) will be required to deliver the notice of resolution to all class members.

***H. Distribution and Determination of the Individual Issues***

20. If the common issues are resolved in favour of the Class, the Plaintiffs do not currently anticipate any significant individual issues.

21. Assuming that there is an award of aggregate damages, the Plaintiffs propose that the assessment and distribution of the award be distributed to the Class members on a *pro rata* basis.

22. This Litigation Plan is being prepared as part of the Plaintiffs' certification materials, before pleadings are closed and before being provided with the Defendant's productions and expert evidence. Until the common issues are determined, it remains uncertain as to which heads of damage will need to be calculated and distributed to the Class.

23. The Plaintiffs do not anticipate that the individual Class members will be required to give evidence at an individual trial to prove their losses. However, should the common issues trial judge direct that individual trials be conducted with respect to compensatory damages, then the Plaintiffs propose that the damages be assessed through an expedited reference procedure using a referee or arbitrator as agreed between the parties or, failing which, as appointed by the Court.

*I. Funding*

24. Support for the action is being provided in part by the NCNS. In the event that legal fees are charged to the Class that require court approval under the *Class Proceedings Act*, such approval will be sought.

*J. Settlement*

25. Class Counsel will conduct settlement negotiations with the Defendant from time to time, as circumstances dictate.

*K. Review of the Plan*

26. This Litigation Plan may be reconsidered and revised under the continuing case-management authority of this Court after the determination of the common issues or upon application by the parties.

## SCHEDULE "C"

**Attention: all persons who hold or held Aboriginal Treaty Rights Access Passports ("ATRA Passports").**

**This Notice may affect your rights. Please read carefully.**

### NOTICE OF CERTIFICATION AS A CLASS PROCEEDING

#### THE CLASS ACTION

A class proceeding has been certified by the Supreme Court of Nova Scotia against the Province of Nova Scotia on behalf of the class of:

*"All persons who currently hold or held valid Aboriginal and Treaty Rights Access Passports ("ATRA Passports") as of July 13, 2017"*

The lawsuit seeks damages for the Province's breach of the constitutional rights of all class members.

The Province of Nova Scotia denies the allegations made in the action. By certifying this action as a class proceed, the court has made no determination as to the merits of the plaintiffs' claim or the defendant's denial. The plaintiffs will be required to prove their allegations at a trial on the merits in order to obtain the relief that they seek for the Class.

#### THE CERTIFICATION ORDER

On \_\_\_\_\_, the Court certified the action, Halifax Court File No. 490119, as a class proceeding (the "Class Action").

If you are a member of the Class, your rights will be affected by the Class Action.

Each member of the Class who does not opt out of the Class Action will be bound by the terms of any judgment or settlement. Each member of the Class may be entitled to share in the amount of any judgment awarded or settlement reached in the Class Action.

#### LEGAL FEES AND DISBURSEMENTS

Counsel for the Class ("Class Counsel") have entered into a contingency fee agreement with the representative plaintiffs with respect to legal fees and disbursements. The agreement provides that Class Counsel will not receive payment for their work from the Class unless the Class Action is successful or costs are received from the defendant. The agreement must be approved by the court to be effective.

#### CLASS MEMBERS MUST OPT OUT IF THEY DO NOT WISH TO PARTICIPATE IN THE CLASS ACTION

*Class members who wish to participate in the Class Action need not do anything at this time. They are automatically included in the Class Action.*



Class members who do not wish to participate in the Class Action must opt out. If you wish to opt out of the Class Action, you must deliver a written and signed election to opt-out, including your full name and address on or before \_\_\_\_\_ at 5:00pm EST to Class Counsel at the following address:

Patterson Law  
1801 Hollis Street, Suite 2100  
Halifax, NS B3J 3N4  
Tel: 902-405-8000  
Fax: 902-405-8001

No Class member will be permitted to opt out after \_\_\_\_\_

#### **ADDITIONAL INFORMATION**

Any questions about the matters in this notice should be addressed to Class Counsel.

The certification order and contact information are available on the website:

[www.paliareroland.com](http://www.paliareroland.com) and  
<http://www.pattersonlaw.ca/>

#### **INTERPRETATION**

This notice is a summary of the terms of the certification order. If there is a conflict between the provisions of this notice and the terms of the certification order, the certification order prevails. The certification order can be viewed at \_\_\_\_\_

This notice was approved by the Supreme Court of Nova Scotia.