

2019

No.

**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 Action**

**To: The Defendant**

**Action has been started against you**

The plaintiffs take action against you.

The plaintiffs started the action by filing this notice with the court on the date certified by the Prothonotary.

The plaintiffs claim the relief described in the attached statement of claim. The claim is based on the grounds stated in the statement of claim.

**Deadline for defending the action**

To defend the action, you or your counsel must file a notice of defence with the court no more than the following number of days after the day this notice of action is delivered to you:

- 15 days if delivery is made in Nova Scotia;
- 30 days if delivery is made elsewhere in Canada;



- 45 days if delivery is made anywhere else.

### **Judgment against you if you do not defend**

The court may grant an order for the relief claimed without further notice, unless you file the notice of defence before the deadline.

### **You may demand notice of steps in the action**

If you do not have a defence to the claim or you do not choose to defend it you may, if you wish to have further notice, file a demand for notice.

If you file a demand for notice, the plaintiff must notify you before obtaining an order for the relief claimed and, unless the court orders otherwise, you will be entitled to notice of each other step in the action.

### **Rule 57 – Action for Damages under \$100,000**

Civil Procedure Rule 57 limits pre-trial and trial procedures in a defended action so it will be more economical. The Rule applies if the plaintiff states the action is within the Rule. Otherwise, the Rule does not apply, except as a possible basis for costs against the plaintiff.

This action is not within Rule 57.

### **Filing and delivering documents**

Any documents you file with the Court must be filed at the office of the Prothonotary:

1815 Upper Water Street, Halifax, NS (Tel: 902-424-4900)

When you file a document you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

### **Contact information**

The plaintiffs designate the following address:

Patterson Law, 1801 Hollis Street, Suite 2100, Halifax, NS (Tel: 902-405-8000)

Documents delivered to this address are considered received by the plaintiffs on delivery. Further contact information is available from the Prothonotary.



### Proposed place of trial

The Plaintiffs propose that, if you defend this action, the trial will be held in Halifax, Nova Scotia.


### Signature

Signed July 12<sup>th</sup>, 2019

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## STATEMENT OF CLAIM

1. This proceeding is brought under the *Class Proceedings Act*, SNC 2007, c.28, on behalf of the following proposed class:

All persons who hold or held Aboriginal and Treaty Rights Access Passports (“ATRA Passports”) as defined below, in recognition of their Aboriginal and Treaty Rights to hunt and harvest in Nova Scotia under the Treaties of 1752, 1760/61 and all other applicable treaties, and under Aboriginal rights, as guaranteed by the *Constitution Act*, 1982, whose rights to hunt and harvest and equality rights under s.15 of the *Canadian Charter of Rights and Freedoms*, including the rights to be consulted with and to be treated honourably by the Crown, have been infringed by the decision (“Decision”) of Her Majesty the Queen in right of the Province of Nova Scotia (“Province”) dated July 13, 2017, as defined below.

### A. *The Parties*

2. The plaintiff Stephen Joyce (“Joyce”) is Mi’kmaq, and is a member of “the Tribe of [Mi’kmaq] Indians inhabiting the Eastern Coast” of Nova Scotia (the “Tribe”), and/or a descendant or Heir or included among “the Heirs of their Heirs forever” of the Tribe, within the meaning of the 1752 Treaty between Her Majesty and the Tribe (“1752 Treaty”, as recognized and affirmed pursuant to s.35 of the *Constitution Act*, 1982). He is not a person registered or entitled to be registered as an Indian under the *Indian Act* (“Status Indian”), but he self-identifies as Mi’kmaq, is of Mi’kmaq ancestry and is accepted by his community as such. Joyce brings this action as a class proceeding on behalf of the proposed class set out in para. 1 above. To the extent necessary, as a direct descendant of Jean-Baptiste Cope, a Mi’kmaq signatory to the 1752 Treaty, he represents the subclass of Mi’kmaq who are not Status Indians, who have or assert rights under the 1752 Treaty and/or the aboriginal right to hunt and harvest, and who hold valid ATRA Passports.
3. Joyce resides in Eastern Passage, Nova Scotia, and has held a valid ATRA Passport since 2003.
4. Until the Province’s Decision, Joyce was able to and did exercise his right to hunt and harvest in Nova Scotia under his ATRA Passport. In particular, Joyce exercised his rights as an ATRA Passport holder by participating in the annual moose hunt in Cape Breton Island. On average, Joyce harvested one moose per year, which he relied on to feed himself and other members of his family and community throughout the year. Participating in the annual moose hunt is a tradition in Joyce’s



family, and one he was responsible for carrying on following the death of the elder members of his family.

5. Joyce has been unable to hunt since the Province's Decision.
6. The plaintiff Robert Cooper ("Cooper") is Mi'kmaq, and is registered as an Indian under the *Indian Act*, R.S.C. 1985 c.I-5. Cooper is not a member of a registered band of Indians in Nova Scotia or Canada, within the meaning of the *Indian Act*. He is a member of the Atlantic General List of Indians maintained by Crown-Indigenous Relations and Northern Affairs Canada. He is a direct descendant of members of the Mi'kmaq communities at Shubenacadie, Gold River, and New Germany, and is a beneficiary of the 1760/61 Treaty between the Mi'kmaq and Her Majesty, as recognized and affirmed pursuant to s.35 of the *Constitution Act*, 1982. He brings this action on behalf of the proposed class set out in para. 1 above. To the extent necessary, he represents the subclass of Mi'kmaq Status Indians who have or assert rights under applicable treaties between the Mi'kmaq and Her Majesty and/or Aboriginal rights to hunt and harvest, who are listed on the Atlantic General List, and who hold valid ATRA Passports.
7. Cooper resides in Lower Sackville, Nova Scotia, and has held a valid ATRA Passport since 1998.
8. Until the Province's Decision, he was able to and did exercise his right to hunt and harvest in Nova Scotia under his ATRA Passport. In particular, Cooper exercised his rights as an ATRA Passport holder by participating in the annual moose hunt in Cape Breton Island. On average, Cooper harvested one moose per year, which he relied on to feed himself and other members of his community throughout the year.
9. Cooper has been unable to hunt since the Province's Decision.
10. The plaintiff E. Dianne Langley ("Langley") is Mi'kmaq. She is not a Status Indian, but she self-identifies as Mi'kmaq, is of Mi'kmaq ancestry and is accepted by her community as such. She is a direct descendant of members of the Mi'kmaq communities at Shubenacadie, New Germany, and Sable River. She is a beneficiary of the 1760/61 Treaty, as recognized and affirmed pursuant to s.35 of the *Constitution Act*, 1982. She brings this action on behalf of the proposed class set out in para. 1 above. To the extent necessary, she represents the subclass of Mi'kmaq Indians who are not Status Indians, who have or assert rights under the 1760/61 Treaty and/or Aboriginal rights to hunt and harvest, and who hold valid ATRA Passports.
11. Langley resides in Shelbourne, Nova Scotia, and has held a valid ATRA Passport since 2000.



12. Until the Province's Decision, she was able to and did exercise her right to hunt and harvest in Nova Scotia under her ATRA Passport. In particular, Langley exercised her rights as an ATRA Passport holder by participating in the annual moose hunt in Cape Breton Island, as well as by hunting for deer and rabbit. As an ATRA passport holder, Langley hunted often with her father and other members of her family. Langley relied on the meat she harvested as an ATRA Passport holder to feed herself and her family throughout the year.
13. Langley has been unable to hunt since the Province's Decision.
14. The plaintiff Kenneth Langille ("Langille") is Mi'kmaq. He is not a Status Indian, but he self-identifies as Mi'kmaq, is of Mi'kmaq ancestry and is accepted by his community as such. He is a direct descendant of members of the Mi'kmaq community at Wycomocagh, Cape Breton Island. He is a beneficiary of the 1760/61 Treaty, as recognized and affirmed pursuant to s.35 of the *Constitution Act, 1982*. He brings this action on behalf of the proposed class set out in para. 1 above. To the extent necessary, he represents the subclass of Mi'kmaq Indians who are not Status Indians, who have or assert rights under the 1760/61 Treaty and/or Aboriginal rights to hunt and harvest, who are descended from Mi'kmaq communities on Cape Breton Island, and who hold valid ATRA Passports.
15. Langille resides in Aspen, Nova Scotia, and has held a valid ATRA Passport since 2010.
16. Until the Province's Decision, he was able to and did exercise his right to hunt and harvest in Nova Scotia under his ATRA Passport. In particular, Langille exercised his rights as an ATRA Passport holder by participating in the annual moose hunt in Cape Breton Island. On average, Langille harvested one moose per year.
17. Langille is retired and lives on a fixed income. Langille relied on the meat he harvested as an ATRA Passport holder to feed himself and his family throughout the year.
18. Langille has been unable to hunt since the Province's Decision. Because he is no longer permitted to hunt and harvest moose and other animals as an ATRA Passport holder, Langille has struggled to afford meat for himself and his family and is often forced to go without.
19. The Native Council of Nova Scotia ("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* (sometimes referred to as “Non-Status Indians”). The NCNS is a society registered under the *Societies Act*. It was formed in 1974 and has approximately 3300 to 3500 full members. The plaintiffs are all members of the NCNS. The NCNS is not a party to this proceeding, but has represented the interests of members of the class since its formation in 1974. The NCNS oversaw the creation of the ATRA Passport system, as set out below.

20. The Defendant, Her Majesty the Queen in right of the Province of Nova Scotia (the “Province”), governs the Province of Nova Scotia, acting through Ministers of the Crown including the Premier, the Minister of Natural Resources (“Minister”), and its other servants or agents.
21. The Province is vicariously liable for the actions of its servants or agents, and is directly liable for damages arising under the *Charter of Rights and Freedoms* (“Charter”) or s.35 of the *Constitution Act, 1982* arising from the actions of the Premier, Minister, or its other servants or agents.

**B. *The Mi’kmaq of Nova Scotia***

22. From time immemorial, and long before contact with European settlers, the Mi’kmaq of Nova Scotia have fished in the inland waters and coastal areas, and hunted in the forests, of their traditional territories in Nova Scotia. Hunting and fishing for food, social, and ceremonial purposes, including hunting for moose, was integral to their distinctive Aboriginal culture. The Mi’kmaq constituted one nation, and their traditional territories comprised parts of present-day New Brunswick, all of Nova Scotia (including Cape Breton Island), Prince Edward Island, and the eastern Gaspé peninsula. The arbitrary division of the Nova Scotia Mi’kmaq tribe into 11 (and later 13) Bands under the *Indian Act* did not take place until 1960.
23. Historically, the Mi’kmaq lived in organized communities, and governed themselves with respect to the stewardship of resources that they harvested through hunting and fishing. As they were dependent upon hunting and fishing for sustenance, they ensured that they always maintained responsible stewardship over the species that they harvested.
24. After the arrival of European settlers commencing in the early 1600’s, Nova Scotia came to be heavily contested in the struggle between the colonial ambitions of the French and the English. During the 18<sup>th</sup> century, in particular, conflict between the colonial powers led to wars on several occasions, and parts of Nova Scotia changed hands several times.



25. In this context, and with European settlers still largely confined to small settlements with few inhabitants, both the English and the French pursued military alliances and nation-to-nation relations with the Mi'kmaq and other Eastern Aboriginal nations. These Aboriginal nations were of great military significance in the ongoing struggle for control between the colonial powers.

C. *The "Peace and Friendship" Treaties between the British Crown and the Mi'kmaq*

26. Commencing in 1725, the British Crown, the predecessor to the Province and the Crown in Right of Canada ("Federal Government"), made a series of treaties with the Mi'kmaq and other Eastern Aboriginal nations, with a view to establishing peaceful and friendly relations with them and ensuring that they did not align with the French. Collectively, these treaties are known as "Peace and Friendship Treaties".
27. In 1725, the British Crown entered into a treaty with various Mi'kmaq communities (the "1725 Treaty"). The 1725 Treaty specifically refers to 'hunting.' This is found in the Reciprocal Promises portion of the document where the British Crown agreed as follows:

'And I do Further promise & in the absence of the honble the Lt. Govr of the Province in behalf of the this said Government, That the Said Indians shall not be Molested in their Persons, Hunting Fishing and Shooting & planting on their planting Ground nor in any other their lawful occasions...'

28. In 1752, the British Crown and the Mi'kmaq inhabiting the Eastern Coast of Nova Scotia entered into a further treaty (the "1752 Treaty"), which guaranteed the hunting and fishing rights of the Mi'kmaq as follows:

It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual...

29. The 1752 Treaty was made between the Crown and:

Major Jean Baptiste Cope, Chief Sachem of the Tribe of Mick Mack Indians inhabiting the Eastern Coast of the said Province, and Andrew Hadley Martin, Gabriel Martin & Francis Jeremiah, Members and Delegates of the Said Tribe, for themselves and their said Tribe, their Heirs and the Heirs of their Heirs forever...



30. The 1752 Treaty modifies the 1725 Treaty and specifically renews the 'Articles of Submission and Agreement' which had been part of the 1725 Treaty. The balance of the 1725 Treaty remains in force today.
31. A third treaty, or collection of treaties, entered into between the British Crown and Mi'kmaq communities in 1760/1761 (the "1760/1761 Treaty") further recognizes by necessary implication that the Mi'kmaq would continue to hunt and fish and otherwise engage in resource harvesting as they had done to that point. The 1760/1761 Treaty included a "Truck house" clause, which necessarily implied that the Mi'kmaq had the right to hunt and fish to have something to trade. The Maliseet-Passamaquoddy treaty of February 1760 formed the basis on which later treaties were signed by the British Crown with individual Mi'kmaq communities in a series of adhesions in 1760 and 1761. The first of these Mi'kmaq adhesions was signed on 10 March, 1760 with three communities: the Shubenacadie, La Have, and Richibuctou Mi'kmaq. Later treaties of adhesion were finalized with communities from Cape Breton, Miramichi, Pokemouche, Shediac (all signed on 25 June 1761), Chignecto/Missiquash (8 July 1761), and Pictou/Malogomich (12 October 1761).
32. Collectively, these "Peace and Friendship" Treaties were intended to establish nation-to-nation relations between the British Crown and the Mi'kmaq (and Maliseet-Passamaquoddy). It was inherent in these Treaties, and was understood by the Mi'kmaq signatories, that the Mi'kmaq would have the right to hunt and fish as they had done since time immemorial. Assurances given by the British Crown in the 1725 and 1752 Treaties were intended to and understood by the Mi'kmaq signatories to carry forward into the 1760/61 Treaty.
33. Beneficiaries of the 1725, 1752, and 1760/1761 Treaties, including the plaintiffs and their ancestors, exercised their hunting and fishing rights under the Treaties continuously from the date of the Treaty until 1982, when their rights gained protection under s.35 of the *Constitution Act, 1982*, and thereafter. Their treaty rights were never extinguished, and continue in full force and effect. In the modern context, the plaintiffs and the members of the class (including all holders of valid ATRA Passports) are all beneficiaries of the 1725, 1752, and 1760/61 Treaties.
34. Likewise, the Mi'kmaq, including Non-Status Mi'kmaq who are in the modern context represented by the NCNS, and specifically including the plaintiffs and their ancestors, exercised their aboriginal rights to hunt and fish in the traditional hunting and fishing grounds of the Mi'kmaq, including mainland Nova Scotia and Cape Breton Island, continuously throughout the colonial period, and since Confederation, until 1982, when their aboriginal rights gained protection under s.35 of the *Constitution Act, 1982*, and thereafter. Their aboriginal rights were likewise never extinguished, and continue in full force and effect. The plaintiffs and all



members of the class (including all holders of valid ATRA Passports) have an aboriginal right to hunt and fish in these traditional territories.

**D. *Fragmentation and Displacement of the Mi'kmaq in the 19<sup>th</sup>-20<sup>th</sup> Centuries***

35. In the 19<sup>th</sup> Century, both before and after Confederation, colonial authorities and subsequently the Federal Government acted to create reserves in Nova Scotia. The Mi'kmaq did not at any time surrender their Aboriginal rights or title, but in many cases were forced to move to reserves by the pressures of European settlement. The reserves established in Nova Scotia were small and scattered, and were often situated on marginal land in less desirable locations. These reserves were subject to pressures of encroachment by non-Indigenous squatters.
36. Neither colonial authorities nor the Federal Government took any steps to enumerate or register the Mi'kmaq in a systematic or reliable manner. Because no treaties with the Mi'kmaq provided for annuities, no lists of treaty annuitants were prepared. From the passage of the first *Indian Act* in 1876 until 1985, those who were treated as Indians by the Federal Government could become "enfranchised" (and thereby no longer be regarded as Indians) by various means, including marriage of a Mi'kmaq woman to a non-Indigenous man, becoming a member of the clergy, a lawyer, or other professional, serving in the military, or voluntary enfranchisement. As a result, many Mi'kmaq ceased to be treated as Indians.
37. In addition, the Federal Government sought to reduce costs by abolishing many smaller reserves, by arranging for a surrender of the inhabitants' interest in the reserve (whether properly or otherwise). Once a reserve was abolished, its Mi'kmaq inhabitants were no longer treated as Indians. Also, many Mi'kmaq were sent to Residential Schools, and thereby lost their connection to their communities.
38. In the 1940s, the Federal Government pursued a consolidation policy, whereby they sought to consolidate all of Nova Scotia's Indians in two reserves, at Shubenacadie and Eskasoni. This policy, which was abandoned in 1949, had disastrous consequences for the Mi'kmaq. Many were forced to relocate against their will, while others refused to relocate, but avoided contact with Federal Government authorities.
39. In 1951 the *Indian Act* was amended so as to create a registry of Indians whom the Federal Government regarded as having "status". This was the first time that the Federal Government had sought to create a registry for the purpose of creating a legal classification of "Indians". Those Indians who had enfranchised, and their descendants, were not eligible to be registered.



40. The Federal Government did not formally establish bands under the *Indian Act* in Nova Scotia until in or about 1960. At or around this time, the Mi'kmaq of Nova Scotia, which had previously been recognized as "one undivided band or tribe" was divided into 11 bands under the *Indian Act*, and the Federal Government sought to establish the membership of each band. Due to factors such as enfranchisement, distrust of Federal Government authorities, the abolition of smaller reserves, and the general fragmentation and dislocation of the Mi'kmaq, many Mi'kmaq did not become registered members of these bands. Some refused to become registered for fear of losing employment or facing discrimination.
  41. There are currently 13 recognized Indian bands in Nova Scotia under the *Indian Act* ("Nova Scotia *Indian Act* Bands"). Two of these Bands were formed years after the NCNS was established. As a result of the history of fragmentation and displacement set out above, these 13 Nova Scotia *Indian Act* Bands do not correspond to any traditional structure or social organization created by the Mi'kmaq themselves. Rather, they are a construct of colonialism, imposed to a large extent by the Federal Government. They do not and cannot represent the Mi'kmaq Nation as a whole, or all of its members.
  42. For members of these Nova Scotia *Indian Act* Bands, the Province has as a practical matter recognized this legacy of fragmentation and dislocation. The Province recognizes the harvesting rights of all Band members belonging to all 13 Nova Scotia *Indian Act* Bands throughout Nova Scotia, regardless of whether or not they are Mi'kmaq or even Indian. The Province makes no attempt to divide or allocate its recognition of their aboriginal and treaty rights according to specific treaty areas, or site-specific locations. Rather, the Province treats all Band members belonging to the 13 Nova Scotia *Indian Act* Bands as one Mi'kmaq nation for these purposes.
- E. *The Province's Recognition of NCNS Members' Hunting Rights from 1989-2017 and ATRA Passports from 1992-2017***
43. In or about 1982, the NCNS began to assert to the Province and to the Federal Government, the aboriginal and treaty rights of its members and constituents to hunt and fish. The rights of beneficiaries under the 1752 Treaty were tested in the courts in *Simon v. The Queen*, which the Supreme Court of Canada decided on November 21, 1985. The NCNS participated in the appeal to the Supreme Court. Notably, the Supreme Court determined that Simon was a beneficiary of the 1752 Treaty on the basis that he had established a "sufficient connection" to the Tribe of Mi'kmaq inhabiting the Eastern Coast of Nova Scotia.
  44. Following the *Simon* decision, on October 1, 1986, Donald Marshall, Grand Chief of the Mi'kmaq, proclaimed "Treaty Day" as an annual event to commemorate the



unique and special relationship that exists between the Mi'kmaq and Her Majesty. October 1 was the date set out in the 1752 Treaty as the annual date on which the Mi'kmaq would receive presents and "Renew their Friendship and Submissions".

45. Also in 1986, the Union of Nova Scotia Indians ("UNSI", representing on-reserve Status Indians in Nova Scotia) and the NCNS (representing off-reserve Status and Non-Status Indians in Nova Scotia) developed and released the Mi'kmaq Interim Hunting Guidelines ("Mi'kmaq Interim Hunting Guidelines") to ensure that the exercise of aboriginal and treaty hunting rights in Nova Scotia by Mi'kmaq was conducted in a safe and sustainable manner, in accordance with the Mi'kmaq concept of *netukulimk*, which refers to the Mi'kmaq practices, customs, and code of conduct governing the way in which the natural bounty provided by the Creator is harvested.
46. In 1986-87, the NCNS established the Netukulimkewé Commission as the natural life harvest management authority for NCNS members and constituents.
47. In or about October 1987, the NCNS, together with the five *Indian Act* Bands that were based in Cape Breton Island, organized a protest hunt for moose in Cape Breton Island, conducted in accordance with the Mi'kmaq Interim Hunting Guidelines, to assert their treaty and aboriginal hunting rights. The *Indian Act* Bands from mainland Nova Scotia did not participate. This resulted in charges being brought against 14 Mi'kmaq hunters. These hunters, with support from the NCNS and Cape Breton Island Bands, raised their treaty and aboriginal hunting rights in defence.
48. In September 1988, the UNSI and NCNS, together with other aboriginal representatives, jointly requested negotiations with the Province on the recognition of their treaty and aboriginal rights to hunt.
49. In or about 1989, the Province stayed all charges against the 14 Mi'kmaq hunters, and reimbursed their legal costs, as part of an agreement to recognize and regulate Mi'kmaq hunting rights. On October 13, 1989, in conjunction with these steps, the Province entered into interim conservation agreements (the "Interim Conservation Agreements") with the 13 Nova Scotia *Indian Act* Bands, the NCNS, and UNSI (the "Mi'kmaq Signatories"), under which the Mi'kmaq Signatories agreed to certain limits on the exercise of their members' aboriginal and treaty rights to hunt, and the Province agreed to allow their members to exercise their hunting rights without a Provincial licence in accordance with the Agreements. Specifically, the hunting rights described in the Agreements could be exercised by "a Micmac resident of Nova Scotia" who was either a member of a Band signatory, or "a full member of the [NCNS]", subject to certain conditions.



50. On October 24, 1989, the Province enacted a change to its regulations under the *Wildlife Act*, providing that the Interim Conservation Agreements, or any successor agreements, would prevail against the regulations to the extent of any inconsistency.
51. On September 20, 1990, the Province entered into a final conservation agreement (the "Conservation Agreement") with certain Nova Scotia *Indian Act* Bands, the Grand Chief of the Mi'kmaq, the NCNS, and the UNSI, under which the Province, expressly and on a with prejudice basis, recognized and affirmed "that the Mi'kmaq have an existing aboriginal right to harvest outside of reserves wildlife for food and fur, subject only to the needs of conservation and public safety". Again, the hunting rights described in the Agreement could be exercised by "a Micmac resident of Nova Scotia" who was either a member of a Band signatory, or "a full member of the [NCNS]", subject to certain conditions. The Conservation Agreement provided for a six month term that would renew automatically unless a 30 day notice was received prior to termination. The Province has never terminated this Agreement.
52. In or about 1989-90 the NCNS initiated the Aboriginal and Treaty Rights Access Passport ("ATRA Passport") identification system for NCNS members and constituents, to provide proof of their identity as Aboriginal persons who asserted the right to hunt in their traditional ancestral territory in present day Nova Scotia under s.35 of the *Constitution Act, 1982*. The NCNS established the Netukulimkewe'l Commission to oversee the ATRA Passport system.
53. The NCNS and the Netukulimkewe'l Commission administer the ATRA Passport system, which entails the following:
  - (a) Verification that applicants for ATRA Passports have a legitimate claim to be entitled to exercise aboriginal and treaty rights;
  - (b) Control over membership lists; and
  - (c) Monitoring of the food, social, and ceremonial harvesting activities of ATRA Passport holders, and the number of such holders, to ensure the ongoing responsible stewardship of resources harvested by holders of ATRA Passports.
54. In or about 1991, the Federal Government, acting through the Department of Fisheries and Oceans ("DFO"), which regulates fishing within areas of federal jurisdiction, entered into an agreement with the NCNS under the Aboriginal Fisheries Strategy. Since that time, the Federal Government has recognized and continues to recognize ATRA Passports issued by the NCNS as sufficient to support the exercise of their holders' aboriginal and treaty rights to fish.



55. In or about 1992-1993, the Province and the NCNS further formalized their relationship, and the Province also began to recognize ATRA Passports issued by the NCNS as sufficient to support the exercise of their holders' aboriginal and treaty rights to hunt and fish. Specifically, in 1995 the Province included provisions as to the recognition of the exercise of aboriginal and treaty rights by Mi'kmaq ("Mi'kmaq Harvesting Policies") in the policies on hunting and fishing administered by the Department of Natural Resources ("DNR"). The Mi'kmaq Harvesting Policies were based on the Conservation Agreement, and recognized the aboriginal and treaty rights of holders of ATRA Passports to hunt. The Policies further provided that if there were incidents in the field in which DNR officials responsible for compliance were concerned with the activities of ATRA Passport holders, they should contact the Netukulimkewe'l Commission.
56. For 28 years, from the Interim Conservation agreement in 1989 until the 2017 Decision, the Province recognized the right to hunt of NCNS members. For approximately 25 years, from c.1992 to 2017, the Province accepted ATRA Passports as sufficient evidence that the bearer was entitled to exercise an aboriginal or treaty right to hunt, and did not prosecute holders of ATRA Passports for hunting for food or ceremonial purposes.
57. Throughout these years, the Netukulimkewe'l Commission successfully administered the ATRA Passport system, without any serious complaint from the Province – to the contrary, the Province at various times commended the NCNS on the integrity and successful administration of their natural life management system.
58. As of 2018, the total number of active ATRA Passports was 387, representing only a fraction of the full members of the NCNS, and an even smaller portion of the population of Non-Status Mi'kmaq in Nova Scotia. Of the 387 passport holders, 131 were Status Indians, and the rest were Non-Status Indians. Some of the Status Indians were included on the "General List" meaning they did not hold membership in any particular *Indian Act* Band. Holders of ATRA Passports were required to adhere to standards set by the Netukulimkewe'l Commission, and faced sanctions up to and including revocation of their ATRA Passport privileges if they failed to conduct themselves in accordance with the Netukulimkewe'l Commission's commitment to responsible stewardship of harvesting resources.
59. On several occasions, the Province advised NCNS that its ATRA Passport system was working well. As recently as July 12, 2016, the Premier and Minister Responsible for Aboriginal Affairs wrote to the NCNS that:

Your organization has a well deployed and organized system for serving members, and has developed and been meaningfully involved



in resources management and environmental protection respecting important Aboriginal concepts involving a balanced approach to science and traditional knowledge.

60. The plaintiffs state that the Province's with prejudice recognition of the class members' aboriginal and treaty rights to hunt, in the 1989 Interim Conservation Agreement, the 1990 Conservation Agreement, and the Mi'kmaq Harvesting Policies, which collectively remained in place for 28 years, was part of a negotiated agreement with the NCNS to resolve litigation over the scope of their members' rights under s.35 of the *Constitution Act, 1982*. The Supreme Court of Canada has repeatedly stressed that negotiated resolution of claims under s.35 of the *Constitution Act, 1982* is preferable to litigation. The plaintiffs state that the agreement to recognize and give effect to the class members' rights is binding, and cannot be abrogated unilaterally by the Province.

**F. *The Province's Decision to Revoke Recognition of ATRA Passports***

61. In or about September 2016, the Assembly of Nova Scotia Mi'kmaq Chiefs ("Assembly"), representing 11 of the 13 Nova Scotia *Indian Act* Bands, complained to the Province that the DNR should stop accepting ATRA Passports as evidence of an aboriginal or treaty right to hunt. In follow-up meetings, the Assembly set out their position that they would develop their own system to be known as Mi'kmaq Resource Access Cards to replace the ATRA Passports and *Indian Act* Band status cards, and that the Province should only accept Mi'kmaq Resource Access Cards as evidence of the right to hunt, once the system was in place.
62. On September 29, 2016, Chief Conrad of the NCNS received a letter from the Province's Deputy Minister of Natural Resources alleging that Mi'kmaq from outside of Nova Scotia (specifically, members of the Qalipu and Conne River *Indian Act* Bands based in Newfoundland) were harvesting Moose in Cape Breton Island. The Deputy Minister requested "a complete program description of the ATRA Passport", and included a detailed list of questions.
63. On October 28, 2016, Chief Conrad wrote to the Premier, the Hon. Stephen MacNeil, to protest the Deputy Minister's apparent lack of understanding of the ATRA Passport system, and his failure to contact the Netukulimkewe'l Commission in accordance with the Mi'kmaq Harvesting Policies that had been in place since 1995. She requested a meeting arranged through the Premier's office with the Minister, Deputy Minister, Commissioner Tim Martin of the Netukulimkewe'l Commission, and other relevant officials, to assist them in better understanding the natural life management responsibilities of the Netukulimkewe'l Commission.



64. By letter dated November 18, 2016, the Minister responded on behalf of the Premier, to advise of the Province's position that Aboriginal and treaty rights in Nova Scotia "are collective rights held by the appropriate rights-bearing community", which he stated "corresponds to the 13 Mi'kmaq First Nations, 11 of whom are represented by the Assembly of Nova Scotia Mi'kmaq Chiefs", and that the ATRA Passport system did not provide "an adequate connection to the recognized Mi'kmaq rights-bearing community". He advised that the Province's goal was to have "a single Mi'kmaq of Nova Scotia harvester identification system that is developed by the Mi'kmaq themselves", anticipated to be in place by the fall of 2017; and that the Assembly had already begun work on this initiative, with no consultation with the NCNS or its members by the Province or by the 13 *Indian Act* Bands.
65. In the interim, the Minister advised that "individual Mi'kmaq of Nova Scotia First Nations and/or the Assembly [will] provide an interim recommendation about an ATRA Passport holder's connection to their community", especially for Non-Status Mi'kmaq. He announced that the Province would hold a "consultation", as follows:
- Consequently, I am informing you that the Province is initiating Aboriginal consultation with the Assembly of Nova Scotia Mi'kmaq Chiefs and the Millbrook and Sipekne'katic First Nations to address this issue and hear their views about establishing a mechanism for confirming an individual's connection to an existing Mi'kmaq of Nova Scotia First Nation, particularly for potentially legitimate non-status Mi'kmaq of Nova Scotia. We trust they will ensure the perspectives of all Mi'kmaq of Nova Scotia, including off-reserve and non-status Mi'kmaq of Nova Scotia Section 35 rights-holders, are considered.
66. The Province knew at all material times that the Chiefs of the Nova Scotia *Indian Act* Bands have no mandate to speak for Non-Status Indians or non-members of their Bands (including those Status Indians on the General List). By letter to the Minister dated December 9, 2016, Chief Conrad of the NCNS protested the Province's position, reasserted the aboriginal and treaty rights to harvest of ATRA Passport holders, and again requested a meeting between the Province's key officials and the NCNS.
67. The Minister arranged a meeting with the NCNS, which was held on March 1, 2017. Neither the Minister nor his staff provided any concrete evidence of any problems with the ATRA Passport system, nor did they indicate any willingness to consider the information provided to them by the NCNS or to change their announced course. Up to this point, the Province had met several times with the Assembly to develop the interim process.



68. On March 23, 2017, the Assembly wrote to the Minister and formally requested that the Province conclude its consultations. The Assembly reiterated its position that only the 13 Nova Scotia *Indian Act* Bands could decide who had an Aboriginal or treaty right to hunt in Nova Scotia. On or before that date, the Assembly and Province had discussed in principle an interim proposal under which the Province would no longer accept ATRA Passports to support a claimed Aboriginal or treaty right to hunt, but would accept either a federally-issued status card from a Nova Scotia *Indian Act* Band, or alternatively a provincially-issued Wildlife Resources Card. The Wildlife Resources Card would be issued to ATRA Passport holders only if they applied to the DNR, declared that they were not a Status Indian, identified the Nova Scotia Mi'kmaq community to which they were connected, the DNR forwarded their application to the Assembly, and the Assembly and/or Millbrook and Sipekne'katik *Indian Act* Bands did not object to their application. This was a change from the Assembly's and Province's previous position that the Assembly would develop Mi'kmaq Resource Access Cards which the Province would accept. As of the date of this Claim, there is still no Mi'kmaq Resource Access Card system in place, and the Province continues to accept *Indian Act* Band status cards as proof of the bearer's aboriginal and treaty right to hunt.
69. On April 25, 2017, Chief Conrad of the NCNS wrote to the Minister and requested a follow-up meeting to discuss the aspersions that had been made by the Assembly against the NCNS ATRA Passport system. On July 4, 2017 a second meeting was held between the Minister and his staff and the NCNS. Again, neither the Minister nor his staff provided any concrete evidence of any problems with the ATRA Passport system, nor did they indicate any willingness to consider the information provided to them by the NCNS or to change their announced course. Instead, the Minister stated that they had made up their mind, and left the meeting.
70. By letter dated July 13, 2017, the Minister formally advised Chief Conrad of the NCNS that it had made a decision regarding the ATRA Passport system (the "Decision"). The Minister advised that the Province had consulted with the Assembly and Sipekni'katik and Millbrook *Indian Act* Bands between November 2016 and May 2017, and that the Assembly and Sipekni'katik and Millbrook *Indian Act* Bands did not support an interim process whereby ATRA Passport holders could apply to DNR for a temporary Wildlife Resources Card. He advised that there was a consensus among the Assembly and Sipekni'katik and Millbrook *Indian Act* Bands that the Province should "only accept federal Indian status cards associated with Nova Scotia Mi'kmaq First Nations". Accordingly, he advised as follows:

Effective August 15, 2017, the beginning of the Mi'kmaq moose hunting season (as per the Assembly of Nova Scotia Mi'kmaq Chiefs Moose Hunting Guidelines), the Province will only accept status cards



from Nova Scotia Mi'kmaq First Nations for the purpose of harvesting renewable resources under provincial jurisdiction.

DNR maintains that the long-term solution to this issue relies on the success of the beneficiaries' work that is currently being led by the Assembly of Nova Scotia Mi'kmaq Chiefs, and which the Province hopes will result in a single Mi'kmaq of Nova Scotia Harvesting Card that reflects the collective view of the Mi'kmaq...

This issue is fundamentally about how the Mi'kmaq of Nova Scotia, as a section 35 rights-bearing community, identifies its harvesters. The Province, in making this decision will respect the consensus position of the recognized representatives of the Mi'kmaq of Nova Scotia.

71. On July 25, 2017 Chief Conrad of the NCNS protested the Decision, and asked for clarification of the resources that come within the scope of the decision. By reply dated August 24, 2017, the Minister clarified that it did not apply in circumstances where provincial conservation authorities administered federal jurisdiction, and federal licensing authorities continued to accept the ATRA Passport. The Minister further claimed that the Province's position was based in part on *Daniels v. Canada* (Min. Indian and Northern Affairs), 2016 SCC 12.
72. As a result of the Decision, the plaintiffs and all other beneficiaries of the 1725, 1752, and 1760/1761 Treaties and/or other holders of Mi'kmaq Aboriginal rights who do not hold a federally-issued status card associated with a Nova Scotia *Indian Act* Band, including all members of the class, are no longer able to hunt in accordance with their Aboriginal and treaty rights, without fear of being charged by DNR officers and prosecuted by the Province in the courts.
73. There are more than 16,000 Status Indians in Nova Scotia registered to Nova Scotia *Indian Act* Bands, all of whom have or are eligible to obtain a status card from the Federal Government. The Province allows each of these Status Indians to exercise their treaty and aboriginal rights to harvest resources, including by hunting moose and other species, despite the lack of any program to ensure responsible stewardship of harvesting resources, and whether or not they are Mi'kmaq or even Indian. The Nova Scotia *Indian Act* Bands do not have a system of natural life resource management similar to the ATRA Passport system, nor do they have any body that is comparable to the Netukulimkewé'l Commission.
74. Objectively, the 387 harvesters who hold ATRA Passports and exercise their harvesting rights under the responsible stewardship of the Netukulimkewé'l Commission, represent far less of a threat to the sustainability of harvesting resources in Nova Scotia than the much larger and less regulated population of



Nova Scotia's Status Indians who belong to the 13 *Indian Act* Bands. Moreover, for the past two years, the Federal Government has provided funding for the herd to be partially culled due to moose population pressure in the Cape Breton Highlands National Park. In this context, the Province cannot credibly assert any conservation-related grounds for refusing to allow ATRA Passport holders to hunt.

75. The plaintiffs, on their own behalf and on behalf of the class, state that the 13 Nova Scotia *Indian Act* Bands do not and cannot speak exclusively for the Mi'kmaq of Nova Scotia, and have no right or ability to determine whether or not Non-Status Mi'kmaq are entitled to exercise their treaty and aboriginal rights to hunt. The Nova Scotia *Indian Act* Bands are creatures of the *Indian Act*, whose membership has historically been determined by federal statute without regard to the actual composition of the Mi'kmaq Nation, or "Tribe of [Mi'kmaq] Indians inhabiting the Eastern Coast" of Nova Scotia, or the heirs of heirs of the heirs of the Tribe, within the meaning of the 1752 Treaty, or the beneficiaries of the 1760/61 Treaty.

76. The plaintiffs, on their own behalf and on behalf of the class, state that the 13 Nova Scotia *Indian Act* Bands are governed by elected band councils and Chiefs who are politically accountable to the band membership and Federal Government only, and therefore have no mandate to represent or consider the interests of General List and Non-Status Mi'kmaq, no incentive to protect their rights, and no legitimate claim to speak for them in their dealings with the Province. The plaintiffs further state that all of these facts were known to the Province at all material times, and the Province did not act in good faith.

**G. *The Defendant's Breaches of the Duty to Consult, Honour of the Crown, and aboriginal, treaty and Charter rights***

77. The plaintiffs, on their own behalf and on behalf of the class, state that the conduct of the Province and its servants or agents as outlined above was in breach of the Province's duty to consult and failed to uphold the honour of the Crown. The Province's consultation efforts were woefully inadequate given the Province's longstanding prior recognition of the class members' rights, in settlement of litigation, as embodied in agreements and provincial policies over a 28-year period. The Province's meetings with the NCNS, which represented the interests of the class, were perfunctory, held for appearance only, and a sham.

78. The plaintiffs, on their own behalf and on behalf of the class, further state that the Province has breached the terms of the Conservation Agreement, which has never been terminated and remains in force.

79. The plaintiffs, on their own behalf and on behalf of the class, state that the conduct of the Province and its servants or agents as outlined above constituted interference



with and a breach of the constitutional rights of the plaintiffs under s.35 of the *Constitution Act, 1982*, for which the Province is liable in damages. The conduct of the Province is such that an award of damages is necessary to compensate the members of the class for the loss of their rights, vindicate their rights, and provide a deterrent against future breaches.

80. The plaintiffs, on their own behalf and on behalf of the class, further state that the conduct of the Province and its servants or agents as outlined above constituted a breach of their rights to equal protection and equal benefit of the law without discrimination under s.15 of the *Canadian Charter of Rights and Freedoms*, for which the Province is liable in damages. The Province has discriminated against the plaintiffs and the other members of the class on the basis of race (including the Province's inaccurate and discriminatory perception that the members of the class are not Aboriginal because they do not have status under the *Indian Act*), aboriginality-residence, and lack of status under the *Indian Act*.

#### ***H. Relief Requested***

81. The plaintiffs therefore seek the following relief on their own behalf and on behalf of the class:
- (a) A declaration that their rights under s.35 of the *Constitution Act, 1982* and s.15 of the *Canadian Charter of Rights and Freedoms* have been infringed;
  - (b) A declaration that they have aboriginal and treaty rights to hunt and fish throughout Nova Scotia under s.35 of the *Constitution Act, 1982*;
  - (c) A declaration that the Province breached its duty to consult with them through their chosen representative, the NCNS, and failed to uphold the honour of the Crown;
  - (d) Damages for breach of constitutional rights in the amount of \$40 million;
  - (e) An order that the Province 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 purpose of recognizing aboriginal and treaty rights to harvest, as was the case up to August 2017;
  - (f) Certification of this action as a class proceeding pursuant to the *Class Proceedings Act*, and an order appointing the Plaintiffs as representative plaintiffs on behalf of the class, and/or as representatives of the subclasses described above as may be necessary;
  - (g) Their costs of this action; and



(h) Such further relief as counsel may advise and this court deems just.


**Signature**

Signed July 12<sup>th</sup>, 2019

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