CA 517998

NOVA SCOTIA COURT OF APPEAL

Between:

The Attorney General of Nova Scotia representing
His Majesty the King in Right of the Province of Nova Scotia

Appellant

- and -

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

Respondents

ORDER

UPON the Appellant filing a Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory) appealing the Certification Order dated September 9, 2022;

AND UPON leave having been granted by Order dated March 27, 2023;

AND UPON this matter being heard before a Panel of this Court on October 20, 2023;

AND UPON HEARING Sean Foreman, K.C. and Jeremy Smith, on behalf of the Appellant, and Andrew Lokan, Glynnis Hawe and Robert Pineo, on behalf of the Respondents;

AND UPON REVIEWING the material filed herein;

IT IS ORDERED that the appeal is dismissed with costs to be determined. The respondents shall file their written submissions on costs by February 9, 2024, the AGNS shall file its written submissions by February 23, 2024.

DATED at Halifax, Nova Scotia this 16th day of January, 2024.

Sharon MacLeod

Deputy Registrar

SHARON MACLEOD
Deputy Registrar
Nova Scotia Court of Appeal

IN THE NOVA SCOTIA
COURT OF APPEAL
I hereby certify that the foregoing document, identified by the Seal of the Court, is a true copy of the original document on file herein.
Dated the 16th day of January A.D., 2024

Sharon MacLeod
Deputy Registrar

NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Attorney General) v. Joyce*, 2024 NSCA 9

Date: 20240116
Docket: CA 517998
Registry: Halifax

Between:

The Attorney General of Nova Scotia representing His Majesty the King in Right of the Province of Nova Scotia

Appellant

v.

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

Respondents

Judges:	Farrar, Bryson and Bourgeois, JJ.A.
Appeal Heard:	October 20, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bourgeois, J.A.; Farrar and Bryson, JJ.A. concurring
Counsel:	Sean Foreman, K.C., and Jeremy Smith, for the appellant Andrew Lokan, Glynnis Hawe and Robert Pineo, for the respondents

IN THE NOVA SCOTIA
COURT OF APPEAL
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Dated the 16th day of January A.D., 2024
Sharon MacLeod
Deputy Registrar

Reasons for judgment:

[1] The Aboriginal peoples of Canada possess constitutionally enshrined rights. Section 35 of the *Constitution Act*, 1982, s. 35 provides in part:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

[2] The Canadian jurisprudential landscape reflects an ever-growing number of claims in which Aboriginal peoples seek to have their claimed rights recognized by governmental authorities. Arguably, this case is different.

[3] Here, the respondents say the Province of Nova Scotia has already recognized their s. 35 rights to hunt and fish as Aboriginal people. They assert that in 2017, the Province arbitrarily and without meaningful consultation, stripped them and others of these already established rights. In doing so, the respondents claim the Province has breached the duty to consult, has infringed their s. 35 rights, and has discriminated against them contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*.

[4] The respondents sought certification of the proceeding pursuant to the *Class Proceedings Act*, S.N.S. 2007, c. 28 (the "*Act*"). The certification judge, Justice Peter Rosinski, granted the application. The Attorney General of Nova Scotia ("AGNS") now appeals, asserting the matter does not satisfy the necessary criteria to proceed as a class proceeding, and the certification judge erred in concluding otherwise.

Factual background and decision under appeal

[5] In his lengthy written reasons (reported as 2022 NSSC 22) the certification judge extensively reviewed the nature of the respondents' claim, the relevant legal principles and the parties' submissions. To resolve the issues on appeal, it is not necessary to set out in detail the background giving rise to the claim or the certification judge's reasons. The following, however, will provide the reader with helpful context:

- The Mi'kmaq people are the original inhabitants of what is now the Province of Nova Scotia;

- A number of "Peace and Friendship" Treaties were entered into between the British Crown and the Mi'kmaq people, including in 1725, 1752 and 1760-61;

- Section 91(24) of the *Constitution Act, 1867* ascribed jurisdiction over "Indians, and Lands reserved for the Indians" to the Parliament of Canada. This jurisdiction has been acted upon by virtue of federal legislation, the cornerstone of which is the *Indian Act*, R.S.C. 1985, c. I-5, as amended;

- The respondents are not members of a "band" as defined in the *Indian Act*. There are 13 bands in Nova Scotia, the members of which are often referred to as "status" Indians. However, the respondents say they are direct descendants of the pre-contact Mi'kmaq peoples and are therefore the beneficiaries of treaty and Aboriginal rights to hunt and fish;

- The Native Council of Nova Scotia ("NCNS") is a society registered under the Nova Scotia *Societies Act*, R.S.N.S. 1989, c. 435. Since 1974, it has represented the interests of persons who self-identify as Mi'kmaq and who are not members of an *Indian Act* band. The respondents are members of the NCNS;

- Starting in 1989, the NCNS implemented a program whereby its members could make application to receive, based on their demonstrated Mi'kmaq heritage, an *Aboriginal and Treaty Rights Access* ("ATRA") Passport;

- The respondents claim that from 1989 to 2017, after negotiations with the NCNS, the Province of Nova Scotia recognized the holders of ATRA Passports as possessing s. 35 rights to hunt and harvest, and to exercise Aboriginal rights in relation to other matters within provincial jurisdiction;

- Canada recognizes the holders of ATRA Passports as possessing s. 35 Aboriginal rights for the purpose of matters falling under federal jurisdiction;

- The respondents were issued ATRA passports, and claim they relied on same to hunt;

- By way of letter dated July 13, 2017, the Minister of Natural Resources advised the NCNS the Province would no longer recognize holders of the ATRA Passport as possessing s. 35 rights. The Minister wrote:

> 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.
>
> . . .
>
> I would like to reiterate that this decision was not taken lightly. The Native Council has been a leader in resource conservation in administering its ATRA program, and continues to provide valued programs and services to the off reserve aboriginal community in Nova Scotia. 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.

- The Province is of the view that "the recognized representatives of the Mi'kmaq of Nova Scotia" for the purposes of consultation are the representatives of the 13 *Indian Act* bands in Nova Scotia; and

- The Department of Natural Resource's Mi'kmaq Harvest Policy was amended to provide:

    - Effective August 15, 2017, to be accepted as a Mi'kmaq of Nova Scotia Harvester, individuals must have a federal

> Indian status card associated with a Mi'kmaq of Nova Scotia First Nation.
>
> - Cards or identification issued by other organizations will not be accepted.

[6] At the heart of this matter is the respondents' claim the decision of the Province to no longer recognize the ATRA Passports after August 15, 2017, has:

1. Breached their right to be consulted, in particular through their chosen representative – the NCNS, and is a failure to uphold the Honour of the Crown;

2. Breached their s. 35 Aboriginal and treaty rights; and

3. Infringed their s. 15 *Charter* rights.

[7] The respondents sought to have the proceedings certified as a class proceeding. The Province opposed the application.

[8] The application for certification was granted and the certification judge certified the following as "common issues":

> 1. Whether the Defendant breached its September 1990 with prejudice agreement to recognize and affirm 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 safety, 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 Sub-Classes 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 Sub-Classes, 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 Sub-Classes 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 *Charter*, on the grounds of aboriginality, residence and lack of status under the *Indian Act*;

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 *Charter, 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 Sub-Classes?

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.

[9] The certification judge defined the class[1] for the purposes of the proceeding as follows:

> All persons who currently hold or held valid Aboriginal and Treaty Rights Access Passports ("ATRA Passports") as of July 13, 2017, excluding any persons who are Status Indians and also *Indian Act* band members.

Issues and Standard of Review

[10] Having considered the Notice of Appeal, the record and arguments advanced, I would frame the issues on appeal as follows:

1. Did the certification judge err in finding the pleadings disclose causes of action as required by s. 7(1)(a) of the *Act*?

2. Did the certification judge err in finding common issues were raised by the claims of the proposed class members as required by s. 7(1)(c) of the *Act*?

3. Did the certification judge err in finding a class proceeding would be the preferable procedure for the fair and efficient resolution of the disputes between the parties as required by s. 7(1)(d) of the *Act*?

[11] The standard of review applicable to each of the issues is not in dispute. Whether the pleadings give rise to a cause of action is a question of law and attracts a standard of correctness (*Nova Scotia (Health) v. Morrison Estate*, 2011 NSCA 68 at para. 11; *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143 at para. 42).

[12] The second and third issues give rise to questions of mixed law and fact. In *Wright Medical Technology Canada Ltd. v. Taylor*, 2015 NSCA 68, Justice Saunders wrote:

> [30] The governing standard of appellate review for the determination of the questions of common issues, and preferable procedure under the **Act**, was described by this Court in **Canada (Attorney General) v. MacQueen**, 2013 NSCA 143 at ¶111, leave to appeal refused [2014] S.C.C.A. 51:

[1] The certification judge also set out four sub-classes, which need not be listed for the purposes of the appeal.

> [111] Whether a common issue exists and whether a class action is the preferable procedure for the fair and efficient resolution of the dispute are questions of mixed fact and law. These questions are subject to a standard of review of palpable and overriding error unless the certification judge made some extricable error in principle with respect to the characterization of the standard or its application in which case it is an error of law reviewable on the standard of correctness (*Ring v. Canada (Attorney General)*, ¶6-7).

[13] Justice Saunders further emphasized the need for appellate deference provided that the certification in judge has not erred in principle:

> [31] The unique nature of certification proceedings attracts special considerations on appeal. Courts across the country have recognized that a decision to grant a certification order is entitled to substantial deference. **While of course no deference arises in cases where the motions judge has erred in principle, considerable deference is given to conclusions based on the weighing and balancing of factors that arise in certification proceedings.** Justice Cromwell makes this point in **AIC Limited v. Fischer**, 2013 SCC 69 at ¶65:
>
> > [65] I recognize that a decision by a certification judge is entitled to substantial deference: see e.g. *Pearson*, at para. 43; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33. Specifically, "[t]he decision as to preferable procedure is . . . entitled to special deference because it involves weighing and balancing a number of factors": *Pearson*, at para. 43. However, I conclude that deference does not protect the decision against review for errors in principle which are directly relevant to the conclusion reached such as, in my view, occurred here: see e.g. *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23, leave to appeal refused, [2008] 1 S.C.R. xiv; *Markson*, at para. 33; *Cloud*, at para. 39.
>
> (Emphasis added)

The legislative framework and principles of certification

[14] To put the issues on appeal in proper context, it is helpful to review the provisions of the *Act* engaged in this appeal, and the legal principles applicable thereto.

[15] Section 7(1) sets out a number of statutory criteria which must be met on a certification motion. A certification judge must certify a proceeding if the following criteria are met:

- the pleadings disclose or the notice of application discloses a cause of action: s. 7(1)(a);
- there is an identifiable class of two or more persons that would be represented by a representative party: s. 7(1)(b);
- the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members: s. 7(1)(c);
- a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute: s. 7(1)(d); and
- there is a representative party who (i) would fairly and adequately represent the interests of the class, (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members: s. 7(1)(e).

[16] This appeal engages a challenge to three of the above criteria: whether the pleadings disclose a cause of action, whether the claim raises a common issue, and whether a class proceeding is the preferable procedure in the present instance.

[17] In *Capital District Health Authority v. Murray*, 2017 NSCA 28, Justice Fichaud canvassed the principles guiding the application of the legislative criteria:

> [29] The authorities have explained the certification court's standards for these conditions.
>
> [30] **The plaintiff "must show some basis in fact for each of the certification requirements set out in … the *Act*, other than the requirement that the pleadings disclose a cause of action". The latter point is "governed by the rule that a pleading should not be struck for failure to disclose a cause**

of action unless it is 'plain and obvious' that no claim exists": *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, para. 25, per McLachlin, C.J.C. for the Court; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R. 477, paras. 63, 71 and 97; *Elder Advocates of Alberta Society v. Alberta*, [2011] S.C.R. 261, para. 20.

[31] Winkler, *The Law of Class Actions in Canada*, pp. 29-30 explains what "some basis in fact" means:

> The Supreme Court of Canada has definitively rejected the argument that the standard of proof for meeting the certification requirements is a balance of probabilities. The "some basis in fact" standard is consistent with the fact that at the certification stage, the court is dealing with procedural issues, not substantive ones.
>
> The "some basis in fact" standard does not require the certification judge to resolve conflicting facts and evidence. At the certification stage, the court is ill-equipped to resolve conflicts in the evidence or to "engage in the finely calibrated assessments of evidentiary weight". A certification motion is not the time to resolve conflicts in the evidence or to resolve the conflicting opinions of experts.
>
> The evidentiary threshold of some basis in fact is an elastic concept, but it is not a requirement that (a) the action will probably or possibly succeed; (b) a *prima facie* case has been made out; or (c) there is a genuine issue for trial. **The evidentiary threshold for certification is not onerous, and courts must not impose undue technical requirements on plaintiffs**.
>
> Although the evidentiary threshold for meeting the statutory criteria is low, the court has a modest gatekeeper function and must consider the evidence adduced by both the moving party and the respondent in light of the statutory criteria. … The standard of "some basis in fact" does not "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny."

[32] As for disclosing a "cause of action", section 8(2) of the *Class Proceedings Act* says that a certification order "is not a determination of the merits of the proceeding". Hence the "plain and obvious" standard borrowed from jurisprudence regarding summary judgment on the pleadings. Winkler, *The Law of Class Actions in Canada*, page 24, elaborates:

> The question on a certification motion is not whether the plaintiff's claims are likely to succeed on the merits, but rather whether the

> claims in the action can appropriately be prosecuted as a class proceeding. Class action statutes are procedural and class action legislation expressly states that an order certifying a class proceeding is not a determination of the merits of the proceeding. The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the claim. In other words, the question for a judge on a certification motion is not "will it succeed as a class action?" but rather "can it *work* as a class action?" [Winkler's italics]

[33] In *Hollick*, the Chief Justice commented on the court's approach to a certification motion:

> 15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. … **In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.**
>
> 16 It is particularly important to keep this principle in mind at the certification stage. … Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead, it adopted a test that merely requires that a statement of claim "disclos[e] a cause of action". … Thus the certification stage is decidedly not meant to be a test of the merits of the action …. Rather the certification stage focuses on the <u>form</u> [McLachlin, C.J.C.'s underlining] of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action….

[34] In *Pro-Sys*, Justice Rothstein for the Court reiterated those points:

> [102] … The *Hollick* standard has never been judicially interpreted to require evidence on a balance of probabilities. … The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" [citations omitted]. **The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, [it] focuses on the form of the action in order to**

> **determine whether the action can appropriately go forward as a class proceeding"** [citation omitted].
>
> To the same effect: *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [2013] 3 S.C.R. 545, para. 48. See also *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143, supplementary decision 2014 NSCA 73, leave to appeal refused [2014] S.C.C.A. no. 51 and *Wright v. Taylor*, *supra*.
>
> (Emphasis added)

[18] The assessment of pleadings which advance aboriginal claims engage additional considerations. In *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, Chief Justice McLachlin said a functional approach to assessing pleadings was required and wrote:

> [23] . . .[C]ases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. **A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw [v. British Columbia*, [1997] 3 S.C.R. 1010] be achieved**.
>
> (Emphasis added)

[19] The Ontario Court of Appeal has recently echoed the same approach. In *Whiteduck v. Ontario*, 2023 ONCA 543, Justice Lauwers noted:

> [25] **This court must bring a somewhat generous and forgiving approach to what might be seen as imprecisions in pleading, particularly in Indigenous cases**, in line with McLachlin C.J.'s observations in *Tsilhqot'in Nation*, that "a functional approach should be taken to pleadings in Aboriginal cases", where "the legal principles may be unclear at the outset, making it difficult to frame the case with exactitude": at paras. 20-21. A "technical approach" to pleadings is to be avoided so that "rights issues [can] be resolved in a way that reflects the substance of the matter" in aid of the "project of reconciliation": *Tsilhqot'in Nation*, at para. 23.
>
> (Emphasis added)

[20] With respect to the determination of whether a proposed class proceeding involves a common issue, in *Capital Health* at para. 67, Justice Fichaud distilled the following principles from the *Act* and case authorities:

- The common issues may be factual or legal: s. 2(e).

- Commonality "should be approached purposively", and "the underlying question is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis": *Pro-Sys*, para. 108; *Vivendi [Canada Inc. v. Dell'Aniello*, 2014 SCC 1], para. 41; *Dutton [Western Canada Shopping Centres Inc. v. Dutton*, 2001 SCC 46], paras. 39-40.

- It is unnecessary that the common issue "predominates over issues affecting only individual members": s. 7(1)(c). But the common ingredient should be "substantial": *Pro-Sys*, para. 108; *Vivendi*, para. 41; *Dutton*, paras. 39-40. If the issues are common "only when stated in the most general terms" and would "ultimately break down into individual proceedings", then duplication is not avoided, the underlying objective is frustrated, and class certification is inappropriate: *Rumley [v. British Columbia*, 2001 SCC 69], para. 29.

- *Dutton*, paras. 39-40, said that all class members must benefit from the successful resolution of the common issue, though not necessarily to the same extent. *Vivendi*, para. 45, added a qualification that this view "need not be applied inflexibly", meaning "success for one member of the class does not necessarily have to lead to success for all the members", though "success for one member must not result in failure for another".

- Common issues are not necessarily identical for every member: s. 2(e). A class may include a sub-class with separated common issues: s. 10(e). A "significant level of difference among the class members does not preclude a finding of commonality" *Pro-Sys*, paras. 108 and 112; *Dutton*, para. 54. The prospect that these "variables … may well provide a significant challenge at the merits stage" does not preclude certification: *Pro-Sys*, para. 110. It is expected that pragmatic trial management will meet the challenge: i.e.

"[i]f material differences emerge, the court can deal with them when the time comes" (*Pro-Sys*, para. 112; *Dutton*, para. 54). The outcome may involve "nuanced and varied answers based on the situations of individual members" (*Vivendi*, para. 46).

- Separate assessment of damages does not preclude class certification: s. 10(a).

- Individual issues are not lost in the shuffle. After the common issues trial determines the common matters, the residual individual issues will be determined separately: ss. 14, 30 and 31.

[21] Section 7(2) sets out a number of factors which guide a court in determining whether a class proceeding is the "preferable procedure" for determining the claim in question. A certification judge must consider:

- whether questions of fact or law common to the class members predominate over any questions affecting only individual members: s. 7(2)(a);

- whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings: s. 7(2)(b);

- whether the class proceeding would involve claims or defences that are or have been the subject of any other proceedings: s. 7(2)(c);

- whether other means of resolving the claims are less practical or less efficient: s. 7(2)(d);

- whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means: s. 7(2)(e); and

- any other matter the court considers relevant: s. 7(2)(f).

Analysis

ISSUE 1 - Did the certification judge err in finding the pleadings disclose causes of action as required by s. 7(1)(a) of the Act?

[22] In the court below the AGNS argued the respondents had failed to plead the material facts necessary to sustain the claims being advanced. The certification judge disagreed, and found the respondents' claims had been adequately set out in the Amended Statement of Claim. The AGNS says although the certification judge cited the proper law, he erred in its application in relation to each of the three claims being advanced by the respondents. I will address each in turn.

i) Alleged breach of the duty to consult

[23] On appeal the AGNS says the certification judge erred in finding the respondents had plead sufficient material facts to meet the test to establish a duty to consult. The AGNS says the respondents made a single reference to the duty to consult in paragraph 79 of the Amended Statement of Claim. It argues it does not set out material facts that could meet the test to establish the Province held a duty to consult with the respondents and class members either directly, or through the NCNS. Paragraph 79 says:

> 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 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.

[24] The AGNS also argues the pleadings are deficient because ". . .*nowhere* is it pleaded that the NCNS either has the capacity to act, is authorized to act within its governing bylaws, or indeed was or could be delegated the procedural rights of consultation by the proposed class members". Further, the AGNS says the pleadings are deficient because ". . .Nowhere is it pleaded that any of the Plaintiffs, as representatives of the main and four sub-classes, requested or authorized the NCNS to act as a delegated representative in formal Crown consultation. . .".

[25] In his reasons, the certification judge extensively set out the legal principles relating to the duty to consult. Although his reasons explaining why the pleadings were adequate to support the claim of a breach of the duty to consult were brief, I am satisfied his conclusion was correct.

[26] The duty to consult arises:

> 1. when the Crown has real or constructive knowledge of a potential Aboriginal claim or right;
>
> 2. there is contemplated Crown conduct; and
>
> 3. there is a potential the contemplated conduct may adversely affect an Aboriginal claim or right.
>
> (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 35)

[27] The duty to consult is grounded in the Honour of the Crown and seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 34). The nature of the duty varies with the context, and "[t]he richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right" (*Carrier Sekani* at para. 36).

[28] "The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature. But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights" (*Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 30 [citations omitted]).

[29] As noted earlier, a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists, and a functional and forgiving lens should apply in assessing the adequacy of pleadings in Aboriginal claims. From the Amended Statement of Claim it is readily apparent the respondents are alleging:

- They and members of the class are Mi'kmaq;

- They have a constitutional right to hunt by virtue of being descended from pre-contact Mi'kmaq peoples and are beneficiaries under the "Peace and Friendship" Treaties entered into with the British Crown;

- They are not members of any of the 13 *Indian Act* bands in Nova Scotia, but are members of the NCNS who have "represented the interests of the class since its formation in 1974";

- Through negotiation between the NCNS and the Province of Nova Scotia, members of NCNS who qualified for ATRA Passports by demonstrating their Mi'kmaq ancestry, were recognized by the Province as possessing s. 35 rights to hunt, specifically:

> **57.** 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. . . .
>
> . . .
>
> **62.** 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 plaintiffs state that the Province's with prejudice agreement to recognize and give effect to the class members' rights is binding, and cannot be abrogated unilaterally by the Province.
>
> (Emphasis in original)

- In July 2017, after inadequate consultation with Chief Conrad of the NCNS, the Province determined ATRA Passports would no longer be recognized, rather it would "only accept federal Indian status cards associated with Nova Scotia Mi'kmaq First Nations". As to the adverse consequences of the decision:

> **74.** 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.

- The Province only undertook meaningful consultation with the representatives of the 13 *Indian Act* bands with respect to the decision to no longer recognize the s. 35 rights of ATRA Passport holders. The Province should have known these representatives had no mandate to consult on behalf of the class, none of whom are members of said bands.

[30] The pleadings set out sufficient material facts which demonstrate how the claimed Aboriginal right arises, how the Province's actions impacted on that right, and why the respondents assert they were not adequately consulted. The involvement of the NCNS as the asserted representative of the respondents and class members for consultation purposes, is also sufficiently clear. The AGNS's complaints are, with respect, overly technical and have not demonstrated that it is plain and obvious the claim cannot succeed.

ii) Alleged breach of s. 35 Aboriginal and treaty rights

[31] The AGNS raises two broad complaints in relation to the assessment of the pleadings in relation to the respondents' claim of a breach of their s. 35 rights:

- the pleadings failed to adequately address the elements of the test for establishing a s. 35 right as set out in *R. v. Powley*, 2003 SCC 43, in

particular the failure to address the "community acceptance" factor; and

- the certification judge erred in law by making a "well-meaning but misplaced reference to reconciliation between the Crown and Aboriginal peoples" and the court's obligation of recognizing this in determining the sufficiency of the pleadings.

Failure to plead Powley factors

[32] In its written submissions to the certification judge, the AGNS set out the argument regarding the deficiency of the pleadings as follows:

> [68] As such, to successfully establish they hold Aboriginal and treaty rights to hunt or fish in Nova Scotia, as a beneficiary of one of the listed treaties or otherwise, each individual Plaintiff must plead sufficient material facts to demonstrate each constituent element of the 3-stage *Powley* test:
>
> 1. **Self-identify as a member** of a Métis or Aboriginal community.
>
> 2. Provide **evidence of an ancestral connection** to a historic rights-bearing community.
>
> 3. Demonstrate that he or she is **accepted by the modern community** whose continuity with the historic community provides the legal foundation for the rights being claimed.
>
> [69] The deficiency with the Statement of Claim is almost identical for each named Plaintiff: there are conclusory statements using the appropriate language describing each element of the test, but little to no pleading of material facts to establish that each element is satisfied.
>
> [70] The most egregious aspect of this deficiency is regarding "community acceptance" (part 3). In the Amended Statement of Claim, each of Plaintiff Joyce (para. 2), Plaintiff Langley (para. 10), and Plaintiff Langille (para. 14) simply state "…and is accepted by [his/her] community as such".
>
> [71] Those are just concluding statements, not a pleading of even minimal material facts to support the conclusion. How and why do they conclude they are "accepted", and by what community, as such?
>
> (Footnote omitted, emphasis in original)

[33] The certification judge found the pleadings were sustainable. I am satisfied he was correct in reaching this conclusion, and in particular, that the AGNS did not demonstrate it was plain and obvious the s. 35 claim could not succeed. I will explain.

[34] Firstly, and as will be revisited later in these reasons, the claim being asserted is not one of attempting to establish s. 35 rights in the first instance. Rather, the respondents are saying the Province has already recognized them and members of the class as having Aboriginal rights as Mi'kmaq persons and by changing its policy, it has breached those rights. The Amended Statement of Claim sets out sufficient material facts upon which such a claim can be advanced. The AGNS's complaints about the lack of particulars as to how each individual respondent and member of the class ought to establish their s. 35 rights do not, in light of the nature of the claim, demonstrate the claim is doomed to fail.

[35] Further, even if there is a need for the respondents and class members to demonstrate they are s. 35 rights holders, I do not agree that the failure to plead the *Powley* factors makes the claim unstainable. The AGNS says there is no question *Powley* governs an assessment of whether non-status Indians possess s. 35 rights. With respect, I do not see the state of the law as being as clear as the AGNS asserts. Rather, there is a legitimate question whether *Powley* applies to the respondents and the members of the class, or whether the long-standing *Van der Peet [R. v. Van der Peet*, [1996] 2 S.C.R. 507] test would govern the claim.

[36] The Supreme Court of Canada has recently re-affirmed the continuing applicability of the *Van der Peet* test in assessing s. 35 claims. In *R. v. Desautel*, 2021 SCC 17, Justice Rowe wrote:

> [51] The analysis under *Van der Peet* was restated by this Court in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 46:
>
> a. Characterize the right claimed in light of the pleadings and evidence (*Van der Peet*, at para. 53; *Gladstone*, at para. 24; *Mitchell* at paras. 14-19).
>
> b. Determine whether the claimant has proven that a relevant pre-contact practice, tradition or custom existed and was integral to the distinctive culture of the pre-contact society (*Van der Peet*, at para. 46; *Mitchell*, at para. 12; *Sappier*, at paras. 40-45).

c. Determine whether the claimed modern right is "demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice" (*Lax Kw'alaams*, at para. 46).

[37] In *Powley*, the Supreme Court recognized the *Van der Peet* test, while still applicable, required modification when the s. 35 claimant was Métis. The Court explained the Métis are distinct from Indians and Inuit given their respective histories:

> 10 The term "Métis" in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears. Métis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers and political institutions became pre-eminent. …
>
> . . .
>
> The Métis developed separate and distinct identities, not reducible to the mere fact of their mixed ancestry: "What distinguishes Métis people from everyone else is that they associate themselves with a culture that is distinctly Métis" (*RCAP Report*, vol. 4, at p. 202).
>
> 11 The Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots. …

[38] Given the distinctive cultural nature and shared group identity of Métis communities, the Court in *Powley* recognized the need for those advancing s. 35 claims to establish a strong connection to those historic communities:

> 30 . . .In particular, we would look to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance.
>
> 31 First, the claimant must self-identify as a member of a Métis community. This self identification should not be of recent vintage: While an individual's self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement.

> 32 Second, the claimant must present evidence of an ancestral connection to a historic Métis community. This objective requirement ensures that beneficiaries of s. 35 rights have a real link to the historic community whose practices ground the right being claimed. We would not require a minimum "blood quantum", but we would require some proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption, or other means. Like the trial judge, we would abstain from further defining this requirement in the absence of more extensive argument by the parties in a case where this issue is determinative. In this case, the Powleys' Métis ancestry is not disputed.
>
> 33 Third, the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. . . .

[39] It is the above aspects of the *Powley* test that the AGNS says applies to the respondents and class members, and that the pleadings failed to address. It is important to observe that neither the respondents, nor the class members, purport to be Métis, or members of a Métis community. Their s. 35 claim is based on being "Indian" by virtue of being Mi'kmaq. The AGNS asserts that because they are not members of an *Indian Act* band, they must plead and prove their claim in accordance with *Powley*.

[40] In *Desautel*, a similar argument was rejected by the Supreme Court of Canada. There, the Court declined the Crown's request to apply *Powley* in considering the s. 35 claim of an aboriginal man who resided outside of Canada (and thus not a member of an *Indian Act* band). If the additional *Powley* criteria developed in the context of assessing Métis claims have been found not to apply to an aboriginal non-*Indian Act* claimant from outside of Canada, it raises the question of whether aboriginal non-*Indian Act* claimants living inside of Canada would be subject to that test. See also *R. v. Sappier*, 2006 SCC 54 at para. 34.

[41] Whether *Powley* applies in the context of non-*Indian Act* claimants in Canada is a question for a different day. That determination, if required at all in this case, will need to be made when the merits of the claim are addressed and with the benefit of full argument. For the purpose of assessing the adequacy of the pleadings at this stage, it is not plain and obvious the claim will fail due to the respondent's alleged failure to adequately set out the *Powley* factors.

The certification judge's reference to reconciliation

[42] The AGNS' second complaint regarding the certification judge's use of the reconciliation objective in assessing the adequacy of the pleadings can be dealt with in short order. In his reasons the certification judge said:

> [60] However, although not technically constituting "the Crown", courts inherently also have an obligation to not lose sight of our responsibility to advance reconciliation, which is linked to maintaining the honour of the Crown, and where appropriate, to act in a manner that maintains the honour of the Crown vis-à-vis the aboriginal peoples.[19]

[43] In footnote 19, the certification judge observed:

> This may be particularly so on a procedural motion such as this one – which in this case significantly affects the Plaintiffs' "access to justice".

[44] Although set out earlier in these reasons, it is useful to recall what Chief Justice McLachlin said in *Tsilhqot'in*:

> [23] . . .[C]ases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

[45] Further, in *Whiteduck*, Justice Lauwers had this to say about the role of reconciliation:

> **(1) Reconciliation is the purpose of Aboriginal law**
>
> [16] The "grand purpose" and the "first principle" of Aboriginal law is the reconciliation of Aboriginal and non-Aboriginal Canadians. This "fundamental objective" flows from "the tension between the Crown's assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples" and the need to reconcile "respective claims, interests and ambitions." The commitment to reconciliation forms the backdrop to any lawsuit that engages Indigenous rights.
>
> (Footnotes omitted)

[46] Based on the above, the certification judge's reference to reconciliation does not constitute an error.

iii) *Alleged breach of s. 15 Charter rights*

[47] In the Amended Statement of Claim the respondents plead:

> **82.** 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*.

[48] Section 15 of the *Charter* states:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. …

[49] In *Fraser v. Canada (Attorney General)*, 2020 SCC 28, Justice Abella re-affirmed the two-step test for establishing a *prima facie* breach of s. 15. She wrote:

> [27] Section 15(1) reflects a profound commitment to promote equality and prevent discrimination against disadvantaged groups (*Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at para. 332; *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548, at paras. 19-20). To prove a *prima facie* violation of s. 15(1), a claimant must demonstrate that the impugned law or state action:
>
> - on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
>
> - imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.
>
> (*Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018] 1 S.C.R. 464, at para. 25; *Centrale des*

> *syndicats du Québec v. Quebec (Attorney General)*, [2018] 1 S.C.R. 522, at para. 22.)

[50] The first criterion references "enumerated or analogous grounds". Enumerated grounds are those specifically referenced in s. 15 – race, national or ethnic origin, colour, religion, sex, age or physical or mental disability. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, Justices McLachlin (as she then was) and Bastarache provided guidance as to the identification of analogous grounds:

> 13 What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 – race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. **It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.** This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* [*Law v. Canada (Minister of Employment and Immigration)*, [1999 1 S.C.R. 497] analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.
>
> (Emphasis added)

[51] The certification judge, after an extensive review of the legal principles, found the pleadings were sufficient in relation to the respondents' s. 15 claim. On appeal, the AGNS says this conclusion was erroneous because:

- Nowhere in the pleadings do the respondents plead material facts to establish a distinction, and do not even use the word "distinction";

- Nowhere in the pleadings do the respondents plead material facts to demonstrate a distinction is discriminatory by creating a disadvantage;

- Even if the pleadings are found to be sustainable, the respondents' reliance on the analogous ground of "aboriginality-residence" cannot be the basis of a viable cause of action.

[52] I will deal with the first two complaints together, as both suggest a much more rigorous approach to the sufficiency of pleadings than what the case authorities direct. I am satisfied the respondents have plead material facts to establish the required "distinction". For example, paragraph 72 of the Amended Statement of Claim asserts:

> **72.** 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.**
>
> . . .
>
> (Emphasis added)

[53] Each of the individual respondents plead that they and the class members are not members of any of the 13 Nova Scotia Mi'kmaq First Nations bands, but despite this, had previously been recognized by the Province as holding s. 35 rights as Mi'kmaq persons. The pleadings demonstrate the respondents are alleging they and the class members were treated differently by the Province of Nova Scotia because they are not members of an *Indian Act* band and state the material facts upon which that assertion is based.

[54] There is also no uncertainty in the pleadings as to why the respondents allege they and the class members are disadvantaged:

> **74.** 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.
>
> (Emphasis added)

[55] Further, it has long been recognized that all aboriginal persons have been affected "by the legacy of stereotyping and prejudice against Aboriginal peoples" (*Corbiere*, at para. 66). However, those without *Indian Act* status carry additional burdens. In *Lovelace v. Ontario*, 2000 SCC 37, Justice Iacobucci noted:

> **70** . . .Although the two appellant groups emphasize their respective cultural and historical distinctness as Métis and First Nations peoples, both appellant groups submit that **these particular disadvantages can be traced to their non-participation in, or exclusion from, the *Indian Act***. These disadvantages include: (i) a vulnerability to cultural assimilation, (ii) a compromised ability to protect their relationship with traditional homelands; (iii) a lack of access to culturally-specific health, educational, and social service programs, and (iv) a chronic pattern of being ignored by both federal and provincial governments. **These submissions were clearly supported in the findings of the *Report of the Royal Commission on Aboriginal Peoples***, vol. 3, supra, at p. 204:
>
> > In addition to the gap in health and social outcomes that separates Aboriginal and non-Aboriginal people, a number of speakers pointed to inequalities between groups of Aboriginal people. Registered (or status) Indians living on-reserve (sometimes also those living off-reserve) and Inuit living in the Northwest Territories have access to federal health and social programs that are unavailable to others. Since federal programs and services, with all their faults, typically are the only ones adapted to Aboriginal needs, they have long been a source of envy to non-status and urban Indians, to Inuit outside their northern communities, and to Métis people. . . .
>
> (Emphasis added)

[56] At trial, the respondents will be required to adduce evidence to establish the two criteria of a s. 15 breach. In my view, the pleadings have adequately set out the material facts on which the respondents base the s. 15 claim, and I would therefore not interfere with the certification judge's conclusion that it is sustainable.

[57] Finally, the AGNS asks this Court to set aside the certification judge's conclusion that the s. 15 claim should proceed because one of the grounds pled, "aboriginality-residence", cannot succeed. The AGNS acknowledges that "aboriginality-residence" has been found to be an analogous ground in *Corbiere*, but submits the respondents' claim is entirely different and distinguishable from the circumstances in that case.

[58] The AGNS may be right. However, the argument being advanced is one that improperly invites this Court to delve into the merits of the claim. That is for another day. Here, the respondents have alleged discrimination on the basis of race, aboriginality-residence and lack of status. The pleadings set out sufficient material facts to demonstrate the foundation of that claim. Although the AGNS may eventually wish to defend against some or all of the asserted grounds, at this point, I am not satisfied it is plain and obvious the s. 15 claim will fail.

ISSUE 2 - Did the certification judge err in finding common issues were raised by the claims of the proposed class members as required by s. 7(1)(c) of the Act?

[59] The certification judge set out in his reasons the legal principles relating to the "common issue" analysis. In footnote 36 he reminded himself:

> There must be "some evidence" to support the proposed common issues, to allow for an assessment whether the proposed "common issues" satisfy the statutory definition in section 2(e) of the *CPA*; thereafter the court must still consider whether they are truly "common issues"; in the context of the pleadings and the evidence presented.

[60] The AGNS has not taken issue with the certification judge's articulation of the relevant legal principles.

[61] The certification judge then entered into a lengthy analysis of the common issues advanced. He referenced the evidence adduced, relevant case authorities

and the pleadings, and concluded the respondents had raised common issues as contemplated by the *Act*.

[62] The crux of the AGNS's complaint is a familiar one. It asserts the certification judge failed to recognize that as a preliminary determination at trial, the respondents along with each and every member of the class will need to individually establish they hold s. 35 rights as Aboriginal people. In its factum, the AGNS explains:

> [104] As reviewed under the s. 7(1)(a) analysis (as to whether causes of action exist and have been sufficiently pleaded with material facts) every non-status, off-reserve, self-identified Mi'kmaq who held an ATRA Passport will need an individual determination of questions of fact and law to decide if they meet the required *Powley* factors to legally establish that they do have s. 35 Aboriginal or treaty rights to hunt or fish.
>
> [105] To put it simply, the question of whether each class member has an Aboriginal or treaty right that is the foundation of all the common issues defined by the Plaintiffs, is not a real common issue as defined at law but a common cause of action.

[63] In response, the respondents say the AGNS is attempting to reframe the claim in order to derogate from the common issues that are clearly being raised. In their factum, they assert:

> 83. The Province perverts the order in which the Court would have to decide the factual and legal basis for the common issues. It is not the case that individual determinations of whether each class member has an Aboriginal or treaty right to hunt must be decided before the Respondents have claims in common, or that those issues would require individual trials. Rather, nearly all of the factual and legal issues can be determined in this case on a common basis before any inquiry into individual eligibility must be determined, if at all. . . .
>
> (Footnote omitted)

[64] I do not agree with the AGNS that the certification judge failed to recognize the "overwhelming" individualized nature of the claim being advanced. Based on his reasons, I am satisfied the certification judge fully grasped the commonality of the issues arising from the Amended Statement of Claim. The AGNS has failed to demonstrate a material error which would justify this Court's intervention.

[65] As set out earlier, at the heart of the claim is the respondents' assertion the Province has already recognized them and the class members as being Mi'kmaq, having s. 35 rights, and permitted them to act on these rights for many years. Then, without adequate consultation, the Province decided to no longer recognize these rights. If the respondents are correct the Province was bound by its "with prejudice" recognition of their Aboriginal rights and identity as Mi'kmaq persons, then the individualized assessment suggested by the AGNS may not be necessary at all.

[66] I would dismiss this ground of appeal.

ISSUE 3 - Did the certification judge err in finding a class proceeding would be the preferable procedure for the fair and efficient resolution of the disputes between the parties as required by s. 7(1)(d) of the Act?

[67] The AGNS asks this Court to set aside the certification judge's finding that a class proceeding was the preferable procedure for resolving the respondents' claim. It asserts the certification judge fell into error by

- ". . .failing to consider the impact of the significant number of individual issues that would remain after the common issues were resolved.", notably the ". . .threshold question of whether each individual class and subclass member can establish in fact and law that they possess s. 35 rights. . .";

- Failing to adequately consider the two concepts informing preferability identified in *Hollick*: 1) whether the proceeding would be a fair, efficient, and manageable method of advancing the claim, and 2) whether the class proceeding would be preferable to other methods of advancing the claim; and

- Using the promotion of reconciliation as a relevant factor in the preferability analysis.

[68] The certification judge set out the appropriate legislative factors governing the preferability analysis, as well as relevant case authorities. His reasons

demonstrate that he considered the concerns raised by the AGNS regarding the purported lack of commonality.

[69] As I have explained earlier in these reasons, the AGNS' assertion of the need for the individualized determination of entitlement to s. 35 rights as a threshold issue, is not consistent with how the respondents have framed the action. I have already concluded the certification judge did not err in finding there were common issues. I similarly conclude that he did not err in deciding the purported individual issues did not preclude finding a class proceeding as preferable in the present case.

[70] I am further satisfied the certification judge did consider other methods of advancing the claim, and provided cogent reasons for concluding a class proceeding was preferable, including that proceeding in such fashion would be fair and provide an economical means of advancing the claim. While the AGNS may disagree with the certification judge's determination, it has not demonstrated an error which would justify this Court's reversal of those conclusions.

[71] Finally, along with other considerations, the judge did find the objective of reconciliation as being relevant to the preferability analysis. He wrote:

> [194] I have considered carefully the factors listed in s. 7(2)(a) to (e) of the *CPA*. I find that under section 7(2)(f) of the *CPA* [i.e. "any other matter the court considers relevant"] a significant factor is that a class action is uniquely consistent with the purpose and principles of "reconciliation". As the Commissioners of the Truth and Reconciliation Commission of Canada put it in Volume 1 (Introduction) of their Final Report [James Lorimer and Co. Ltd., Toronto, Ontario, Canada, 2015]:
>
> > Reconciliation is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples.

[72] As noted by the certification judge, s. 7(2)(f) of the *Act* provides:

> 7(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider
>
> . . .

(f) any other matter the court considers relevant.

[73] It appears the Legislature intended certification judges to have the flexibility to consider matters that may be relevant in particular circumstances. It has not attempted to constrict the types of matters a certification judge may consider as relevant. The AGNS has provided no authority in support of its proposition that the certification judge was precluded from considering the objective of reconciliation in his preferability analysis. I am not convinced it was improper for him to do so.

[74] I would dismiss this ground of appeal.

Disposition

[75] For the reasons above, I would dismiss the appeal.

[76] At the appeal hearing, the parties requested that the issue of costs be deferred, citing the approach used by the Court in *MacQueen*. If the parties are unable to come to an agreement regarding the costs on appeal, I would direct that the respondents file their written submissions by February 9, 2024. The AGNS shall file its written submissions by February 23, 2024.

Bourgeois, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.

NOVA SCOTIA COURT OF APPEAL
Citation: *Nova Scotia (Attorney General) v. Joyce*,
2023 NSCA 9

Date: 20240116
Docket: CA 517998
Registry: Halifax

Between:

The Attorney General of Nova Scotia representing
His Majesty the King in Right of the Province of Nova Scotia

Appellant

v.

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

Respondents

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal Heard:	October 20, 2023, in Halifax, Nova Scotia
Subject:	Certification of Class proceedings; Sufficiency of pleadings; Determination of "common issues"; Determination of "preferable procedure".
Statutes Considered:	*Canadian Charter of Rights and Freedoms*, s. 15; *Class Proceedings Act*, S.N.S. 2007, c. 28; *Constitution Act*, 1982, s. 35; and *Indian Act*, R.S.C. 1985, c. I-5.
Cases Considered:	*Nova Scotia (Health) v. Morrison Estate*, 2011 NSCA 68; *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143; *Wright Medical Technology Canada Ltd. v. Taylor*, 2015 NSCA 68; *Capital District Health Authority v. Murray*, 2017 NSCA 28; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44; *Whiteduck v. Ontario*, 2023 ONCA 543; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26; *R. v.*

Cases Considered (cont'd): *Powley*, 2003 SCC 43; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Desautel*, 2021 SCC 17; *R. v. Sappier*, 2006 SCC 54; *Fraser v. Canada (Attorney General)*, 2020 SCC 28; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; and *Lovelace v. Ontario*, 2000 SCC 37.

Summary: The Mi'kmaq people are the original inhabitants of what is now the Province of Nova Scotia. A number of "Peace and Friendship" Treaties were entered into between the British Crown and the Mi'kmaq people, including in 1725, 1752 and 1760-61.

The respondents are not members of a "band" as defined in the *Indian Act*. There are 13 bands in Nova Scotia, the members of which are often referred to as "status" Indians. However, the respondents say they are direct descendants of the pre-contact Mi'kmaq peoples and are therefore the beneficiaries of treaty and aboriginal rights to hunt and fish.

The Native Council of Nova Scotia ("NCNS") is a society registered under the Nova Scotia *Societies Act*, R.S.N.S. 1989, c. 435. Since 1974, it has represented the interests of persons who self-identify as being Mi'kmaq and who are not members of an *Indian Act* band. The respondents are members of the NCNS.

Starting in 1989, the NCNS implemented a program whereby its members could make application to receive, based on their demonstrated Mi'kmaq heritage, an *Aboriginal and Treaty Rights Access* ("ATRA") Passport. The respondents claim that from 1989 to 2017, the Province of Nova Scotia after negotiations with the NCNS, recognized the holders of ATRA Passports as possessing s. 35 rights to hunt and harvest, and to exercise other Aboriginal rights in relation to other matters within provincial jurisdiction. The respondents were issued ATRA passports, and claim they relied on same to hunt.

By way of letter dated July 13, 2017, the Minister of Natural Resources advised the NCNS the Province would no longer

Summary (cont'd):

recognize holders of the ATRA Passport as possessing s. 35 Aboriginal rights. The Province is of the view that "the recognized representatives of the Mi'kmaq of Nova Scotia" for the purposes of consultation are the representatives of the 13 *Indian Act* bands in Nova Scotia. The Department of Natural Resource's Mi'kmaq Harvest Policy was amended to provide:

- Effective August 15, 2017, to be accepted as a Mi'kmaq of Nova Scotia Harvester, individuals must have a federal Indian status card associated with a Mi'kmaq of Nova Scotia First Nation.

- Cards or identification issued by other organizations will not be accepted.

The respondents brought a claim alleging the decision of the Province to no longer recognize the ATRA Passports after August 15, 2017, has:

1. Breached their right to be consulted, in particular through their chosen representative – the NCNS, and is a failure to uphold the Honour of the Crown;

2. Breached their s. 35 Aboriginal and treaty rights; and

3. Infringed their s. 15 *Charter* rights.

The respondents sought to have the proceedings certified as a class proceeding. The Province opposed the application.

On January 27, 2022, a certification judge granted certification to the respondents. AGNS appeals that decision.

Issues:

(1) Did the certification judge err in finding the pleadings disclose causes of action as required by s. 7(1)(a) of the *Act*?

Issues (cont'd):

(2) Did the certification judge err in finding common issues were raised by the claims of the proposed class members as required by s. 7(1)(c) of the *Act*?

(3) Did the certification judge err in finding a class proceeding would be the preferable procedure for the fair and efficient resolution of the disputes between the parties as required by s. 7(1)(d) of the *Act*?

Result:

Appeal dismissed.

The certification judge identified the correct legal principles governing the sufficiency of pleadings. The appellant did not demonstrate the certification judge erred in concluding the pleadings sufficiently disclose causes of action.

The appellant did not demonstrate the certification judge erred in concluding the claims gave rise to common issues as contemplated in the *Class Proceedings Act*.

The appellant did not demonstrate the certification judge erred in concluding a class proceeding was the preferable procedure for resolving the claims advanced.

Further submissions on costs directed.