

**FEDERAL COURT**

**PROPOSED CLASS PROCEEDING**

**B E T W E E N :**

**GERALD BRAKE**

Applicant

- and -

**THE ATTORNEY GENERAL OF CANADA**

Respondent

**NOTICE OF MOTION**

**TAKE NOTICE THAT THE APPLICANT** will make a motion to the Court on a date to be determined or as soon thereafter as the motion can be heard, at 180 Queen West, Toronto, Ontario.

**THE MOTION IS FOR:**

1. An order converting the judicial review application commenced under Court File No. T-300-17 into an action pursuant to section 18.4(2) of the *Federal Courts Act*, R.S.C., 1985, c. F-7;
2. An order certifying the converted action as a class proceeding pursuant to Rule 334.16 the *Federal Courts Rules*;
3. An order defining the class as "all individuals whose applications for Qalipu Band membership were rejected in accordance with the 2013 Agreement";
4. An order that the within proceeding is certified on the basis of the following common issues:

- (1) Is the rejection of the applications for Qalipu Band membership for the Class under the 2013 Agreement, including its annexes and schedules, unlawful pursuant to section 18.1(4) of the *Federal Courts Act*?
  - (2) Did the conduct of Canada in the establishment and implementation of the 2013 Agreement breach a fiduciary duty owed to the class?
  - (3) Did the conduct of Canada in the establishment and implementation of the 2013 Agreement breach the rights of the class to the equal protection and equal benefits of the law without discrimination based on race, national origin, and ethnic origin under section 15 of the *Canadian Charter of Rights and Freedoms*?
  - (4) If the answer to common issue (3) is "yes", were Canada's actions saved by section 1 of the *Canadian Charter of Rights and Freedoms*, and if so, to what extent and for what time period?
  - (5) If the answer to common issue (3) is "yes", and the answer to common issue (4) is "no", do those breaches make damages an appropriate and just remedy under section 24 of the *Canadian Charter of Rights and Freedoms*?
  - (6) If the answer to any of the common issues (1), (2), and (5) is "yes", can the court make an aggregate assessment of damages under Rule 334.28 suffered by some or all class members as part of the common issues trial, and if so, in what amount?
  - (7) Has Canada's conduct resulted in unjust enrichment to Canada? If so, is Canada a constructive trustee holding ill-gotten gains for the benefit of the Applicant and the Class Members? What amount is held by Canada in the constructive trust?
  - (8) Does the conduct of Canada justify an award of punitive damages, and if so, what is an appropriate amount of punitive damages?
5. An order appointing Gerald Brake as representative plaintiff for the class;

6. An order requiring Canada to deliver to the proposed plaintiff an affidavit listing, to the best of its knowledge, information and belief, the number of class members, and their names and addresses, if known;
7. An order approving the proposed litigation plan;
8. An order declaring that no other class proceeding based upon the facts giving rise to this proceeding may be commenced without leave of the court;
9. An order approving the form, content and method of dissemination of notice to the class; and
10. Such other relief that counsel may advise and this Honourable Court may permit.

**THE GROUNDS FOR THE MOTION ARE:**

1. On June 23, 2008, Canada and the Federation of Newfoundland Indians entered into the "2008 Agreement", which provided for an enrolment process to assess applications for membership in the Qalipu Band;
2. After the submission of all applications, the requirements of the 2008 Agreement were to include a more stringent evidentiary burden provided in a "2013 Agreement";
3. Canada publicly stated, *inter alia*, that the number of applications that had been received was unreasonable, which necessitated the 2013 Agreement;
4. The terms of the 2013 Agreement constituted significant changes or restrictive interpretations to the original 2008 Agreement. It constituted a retroactive departure from the 2008 Agreement in terms of who could demonstrate they were a Qalipu Band member and the extent and/or nature of proof required to meet the new membership criteria;

5. Canada mandated that all applications, except for the approximately 3,000 already assessed and rejected solely pursuant to the 2008 Agreement, would be reviewed in accordance with the 2013 Agreement;
6. The Applicant and proposed plaintiff, Gerald Brake, submitted his application to become a founding member in the Qalipu Band prior to the November 30, 2012 deadline, prior to the advent of the 2013 Agreement;
7. By letter dated January 31, 2017, he was notified that his application for Qalipu Band membership was rejected;
8. He was notified that he was rejected because he did not meet the requirements for self-identification pursuant to the 2013 Agreement and its concordant Directive to the Enrolment Committee;
9. He was notified that the decision to reject his application was not subject to appeal pursuant to section 6(2)(b) of the 2013 Agreement, and that accordingly, his decision is final;
10. Failure to be accepted for Qalipu Band membership constitutes a denial of "Indian" status and a deprivation of certain otherwise available monetary and non-monetary benefits. Rejection imposes serious consequences for an applicant;
11. On March 2, 2017, the Applicant commenced an application for judicial review in the Federal Court in respect of the decision to reject his application for Qalipu Band membership as a proposed class proceeding;
12. It is alleged that by virtue of the Applicant's rejection, and the rejection of all other applicants' applications under the retroactively applied 2013 Agreement, Canada:
  - (a) failed to apply the 2008 Agreement appropriately and accordingly;
  - (b) established and applied the 2013 Agreement for improper purposes;
  - (c) invalidly and unlawfully established and applied the 2013 Agreement;

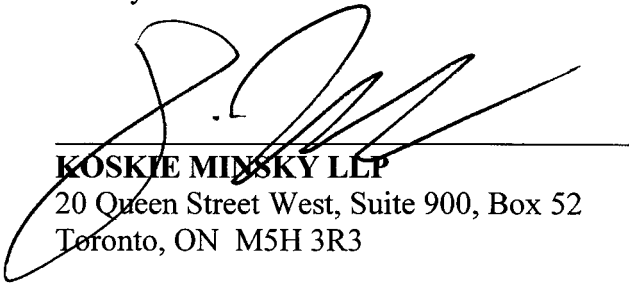
- (d) excluded material evidence submitted from consideration that otherwise would have been considered under the 2008 Agreement;
  - (e) failed to give appropriate consideration to material evidence submitted that otherwise would have been considered under the 2008 Agreement; and
  - (f) failed to adequately, properly, and effectively consider all applications pursuant to the 2008 Agreement only.
13. Accordingly, in respect of all rejections rendered under the 2013 Agreement, including the Applicant's rejection, Canada:
- (a) failed to accord with the principles of natural justice;
  - (b) mandated the Enrolment Committee to act without jurisdiction, act beyond its jurisdiction, or refuse to exercise its jurisdiction accordingly; and
  - (c) mandated the Enrolment Committee to base its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
  - (d) erred at law by implementing and requiring the implementation of the 2013 Agreement; and
  - (e) violated the *Charter of Rights and Freedoms*.
14. It is alleged that that Respondent's establishment and implementation of the 2013 Agreement breached fiduciary duties owed to the class, violated the class members' *Charter* rights and unjustly enriched the Respondent to the detriment of the class;
15. It is alleged that conversion of this application into an action will promote and facilitate access to justice and is necessary to address the proposed Plaintiff's claim for damages in the proposed Statement of Claim;

16. The Notice of Application and proposed Statement of Claim identify reasonable causes of action;
17. There are two or more individuals whose applications were rejected under the 2013 Agreement. There are indeed thousands of said rejections;
18. The proposed class definition uses objective criteria to determine membership in the class and is rationally linked to the proposed common issues;
19. The Notice of Application and proposed Statement of Claim raises common issues, the determination of which will move the litigation substantially forward;
20. In light of the access to justice concerns and with regard to achieving judicial economy, a class proceeding is the preferable procedure for resolving these claims;
21. A class proceeding in this case would constitute the fairest, most efficient and manageable means of adjudication of the common issues;
22. A class proceeding will ensure that all remedies available will be applicable to all class members;
23. The proposed representative plaintiff, Gerald Brake, can fairly and adequately represent the interests of the class with whom he has no conflict on the common issues;
24. The Applicant has produced a workable litigation plan for advancing the claims on behalf of the class up to the common issues and afterwards;
25. Sections 18.1, 18.4, 18.4(2) of the *Federal Courts Act*, R.S.C., 1985, c. F-7;
26. Rules 3, 300-319, 334.1-334.40 of the *Federal Courts Rules*, SOR/98-106;
27. Such other grounds as counsel may advise and this Honourable Court may permit.

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

1. Affidavit of Gerald Brake, sworn June 12, 2017;
2. Affidavit of James Sayce, sworn June 13 2017;
3. Affidavit of Gregory Collins, sworn June 16, 2017;
4. Notice of Application for Judicial Review issued March 2, 2017;
5. Such other and further evidence as counsel may submit and this Honourable Court may permit.

June 16, 2017



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**FEDERAL COURT**

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GERALD BRAKE

Applicant

- and -

ATTORNEY GENERAL OF CANADA

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**NOTICE OF MOTION  
(CERTIFICATION)**

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