

F I L E D	FEDERAL COURT COUR FÉDÉRALE	D É P O S É
	April 9, 2021	
Jonathan Macena		
Ottawa, ONT	47	

Court File Nos. T-402-19 / T-141-20

**FEDERAL COURT  
PROPOSED CLASS PROCEEDING**

BETWEEN:

**XAVIER MOUSHOOM and JEREMY MEAWASIGE (by his litigation guardian,  
Maurina Beadle)**

Plaintiffs

and

**THE ATTORNEY GENERAL OF CANADA**

Defendant

**FEDERAL COURT  
PROPOSED CLASS PROCEEDING**

BETWEEN:

**ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN  
OSACHOFF, and MELISSA WALTERSON**

Plaintiffs

and

**HER MAJESTY THE QUEEN  
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA**

Defendant

**WRITTEN REPRESENTATIONS OF THE MOVING PARTIES**

April 9, 2021

**SOTOS LLP**

180 Dundas Street West  
Suite 1200  
Toronto ON M5G 1Z8

David Sterns  
Mohsen Seddigh  
Jonathan Schachter

Tel: 416-977-0007  
Fax: 416-977-0717

**KUGLER KANDESTIN LLP**

Barristers & Solicitors  
1, Place Ville Marie, bureau 1170  
Montreal PQ H3B 2A7

Robert Kugler  
Pierre Boivin  
William Colish

Tel: 514-878-2861  
Fax: 514-875-8424

**MILLER TITERLE + CO.**

300 - 638 Smithe Street  
Vancouver BC V6B 1E3

Joelle Walker  
Erin Reimer

Tel: 604-681-4112  
Fax: 604-681-4113

Lawyers for the plaintiffs Xavier Moushoom,  
Jeremy Meawasige (by his litigation guardian,  
Jonavon Joseph Meawasige), Jonavon Joseph  
Meawasige

**NAHWEGAHBOW, CORBIERE**

5884 Rama Road, Suite 109  
Rama, ON L3V 6H6

Dianne G. Corbiere

Tel: 705.325.0520  
Fax: 705.325.7204

**FASKEN MARTINEAU DUMOULIN**

55 Metcalfe St., Suite 1300  
Ottawa, ON K1P 6L5

Peter N. Mantas

Tel: 613.236.3882  
Fax: 613.230.6423

Lawyers for the plaintiffs Assembly of First  
Nations, Ashley Dawn Louise Bach, Karen  
Osachoff, Melissa Walterson, Noah Buffalo-  
Jackson by his Litigation Guardian, Carolyn  
Buffalo, Carolyn Buffalo, and Dick Eugene  
Jackson also known as Richard Jackson

TO: **PAUL B. VICKERY**  
Barrister  
3 Forsyth Lane  
Ottawa ON K2H 9H1

Paul B. Vickery

Tel: 343-961-5625  
Fax: 514-283-9690

**DEPARTMENT OF JUSTICE CANADA**  
Duke Tower  
1400-5251 Duke Street  
Halifax NS B3J 1P3

Jonathan Tarlton

Tel: 902-426-5959  
Fax: 902-426-8796

Lawyers for the Defendant

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## **PART I - OVERVIEW**

1. These submissions supplement the plaintiffs' Written Representations on the conflict issue in the plaintiffs' Motion Record for Consolidation and Other Relief dated November 2, 2020, at pages marked 265-269 (pages 268-272 of the PDF) (the "**First Submissions**").

2. The factual context of these submissions is the requested bifurcation of the case into two separate proceedings: the Consolidated Proceeding on the one hand which will proceed on behalf of, among others, the Jordan's Principle class members whose claims arose from December 12, 2007 onward, and the Separated Proceeding on the other hand which will proceed on behalf of the Jordan's Principle class members whose claims arose from April 1, 1991 to December 11, 2007. The Crown consents to certification and mediation of the Consolidated Proceeding, but contests the certification of and does not agree at this time to mediate the Separated Proceeding. The Court has asked counsel to address in these additional submissions whether these facts create an actual or potential conflict of interest such that bifurcation should be refused or other court intervention should be warranted. The answer is no.

3. These submissions will consider actual and potential scenarios arising from the facts of this case, and demonstrate why none of the scenarios presents a conflict of interest.

4. It should be noted by way of background that the Crown maintains that Jordan's Principle did not become actionable until Parliament passed a resolution formally recognizing it on December 12, 2007, and that the Jordan's Principle class members

whose claims arose before that time cannot succeed. Therefore, the Crown asserts, a claim on behalf of the 1991 to 2007 Jordan's Principle class should not be certified, and the Crown is not prepared to mediate those claims. The Crown wishes to advance its defence in court in respect of those claims.

5. While the plaintiffs disagree with the Crown on the legal issues, parties cannot be compelled to consent to certification or to mediate all or part of a claim against their will. There is no suggestion that the Crown is acting in bad faith in taking this position. It has been agreed that both sides will fully preserve their positions in respect of the 1991-2007 Jordan's Principle class and will have their day in court both at certification and, if necessary, at trial. No class member's rights in either the Consolidated or Separated Proceeding are being compromised in any way by what is being proposed. Moreover, it is submitted, the Crown's willingness to mediate a large portion of the case, while litigating another portion is consistent with best practices regarding aboriginal litigation. The alternative – holding up resolution until every disputed issue has been fully and finally litigated – is harmful to class members and inconsistent with the goal of reconciliation.

## **PART II - CONFLICTS OF INTEREST GENERALLY AND IN CLASS ACTIONS**

6. Conflicts of interest for lawyers concern: (a) whether the immediate **legal interests of clients are directly adverse** in the matters on which the lawyer is acting;<sup>1</sup> (b) the **misuse of confidential information** to a client's disadvantage;<sup>2</sup> and (c)

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<sup>1</sup> *Canadian National Railway Co. v. McKercher LLP*, [2013 SCC 39](#) at paras [32-34](#) [*McKercher*].

<sup>2</sup> *McKercher* at paras [23-24](#).

ineffective representation where the lawyer is **tempted to prefer other interests** over those of his client: the lawyer's own interests, those of a current client, of a former client, or of a third person.<sup>3</sup>

7. None of these concerns arise here.

8. The class members in the Separated Proceeding advance claims against the Crown that relate to the period between April 1, 1991 and December 11, 2007. The Jordan's Class members in the Consolidated Proceeding advance claims that date from December 12, 2007 to the present. Other than for this timing – or temporal – difference, the **interests of both classes are identical**. Where their interests are different, i.e. timing, **they are not in conflict**. If both cases were to proceed to trial and the court were to find, for example, that no claim under Jordan's Principle could be maintained for the pre-December 12, 2007 period, this would not affect the claims of the class members in the Consolidated Proceeding in any way.

9. There is **no potential for misuse of confidential information** to the detriment of either class. To the contrary, all factual and expert evidence and knowledge acquired by counsel in the prosecution of one action will benefit the other action. A significant economy is possible because counsel will act for both classes in what will be substantially similar factual cases.

10. There is **no potential for counsel to prefer the interests of one class over the other**. In both cases, counsel have the same motivation to seek the best result for both

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<sup>3</sup> *McKercher* at paras [25-26](#).

classes whether at trial or at settlement. Moreover, unlike in most other cases, class counsel must seek approval of any settlement from the court, on notice to all class members.<sup>4</sup> This mechanism exists to ensure that class counsel have fulfilled their duties and to ensure that any settlement is fair and reasonable to the class.

11. The majority of cases dealing with conflicts of interest and class counsel relate to instances in which class counsel also represents an individual, typically the representative plaintiff, in a related individual action. In these instances, courts have found that a conflict of interest arises due to the nature of the lawyer-client relationship in the individual claim.<sup>5</sup> Counsel's duty to pursue the best possible outcome for the *representative plaintiff* in its individual retainer may put counsel in conflict with the duty to pursue what is in the best interests of *the class as a whole* in the class action retainer. However, these conflicting duties do not arise in this instance.

12. Class counsel are not attempting to advance any individual claims that would be covered by either of the proceedings. Rather, class counsel are advancing claims against the same defendant which, although similar in nature, are distinct in that the conduct occurred during separate time periods.

13. In *Persaud*, Perell J. noted:<sup>6</sup>

In the context of class proceedings, there are three types of conflict of interest that require examination: (1) conflicts of interest arising from a lawyer's direct financial interest in the class proceedings, which are an inherent conflict allowed by the entrepreneurial model of the class

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<sup>4</sup> *Federal Court Rules*, [SOR/98-106](#), in particular r. [334.29](#) (Settlement Approval) and r. [334.34](#) (Notice of Settlement).

<sup>5</sup> See, for example, *Vaeth v North American Palladium Ltd.*, [2016 ONSC 5015](#) and *Persaud v Talon International Inc*, [2018 ONSC 5377](#) [*Persaud*].

<sup>6</sup> *Persaud* at para [175](#).



proceedings legislation; (2) conflicts arising from a divergence of interest between the representative plaintiff and class members; and (3) conflicts arising from the lawyer's divided loyalties arising outside of the class proceeding. In the immediate case, all three types of conflict of interest would be present should Levine, Sherkin, and Boussidan simultaneously act for the plaintiffs in the sixteen actions and for the Class Members.

14. None of the three types of conflicts of interest outlined by Perell J. are present in these proceedings. The interests of the class in one proceeding are not in conflict with the interests of the class in the other proceeding. The decision to proceed by way of separate proceedings with separate proposed class representatives in both will ensure that the interests of all class members are protected and fairly represented.

15. Even in circumstances where a class is composed of groups that may have claims that conflict with each other, a subclass and separate representation is not always required. In *Infineon*,<sup>7</sup> the class consisted of direct and indirect purchasers of microchips suing numerous manufacturers for allegedly fixing prices of microchips. The defendants opposed the appointment of the proposed representative plaintiffs on the grounds that, as indirect purchasers, they could not adequately represent the interests of the direct purchasers. The defendants argued that the indirect purchasers of microchips were in a direct conflict with the direct purchasers as both groups were claiming the same pot of money from the same defendants, and a dollar in the pocket of the indirect purchasers was a dollar that did not go into the pocket of the direct purchasers, and vice

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<sup>7</sup> *Infineon Technologies AG v Option consommateurs*, [2013 SCC 59](#) [*Infineon*].

versa.<sup>8</sup> The plaintiffs sought to represent both groups by the same indirect purchaser representatives and the same counsel.

16. The Supreme Court of Canada found that the direct and indirect purchasers shared a common interest in establishing an aggregate loss.<sup>9</sup> Despite the fact that there was a real possibility that the direct and indirect purchaser groups would have conflicting interests in the litigation, the Court did not find any actual conflict, and found that the class would be fairly and adequately represented by the proposed representative plaintiffs and class counsel.

### **PART III - ANALOGY TO SUBCLASSES**

17. What is proposed on these motions is equivalent to the creation of a subclass within the Consolidated Proceeding. Instead of creating a subclass for the 1991-2007 Jordan's Principle class members, the parties have decided to bifurcate the proceedings into two separate actions, with separate class representatives. Despite this procedural difference, the practical result is essentially the same.

18. The Federal Court Rules contemplate the creation of subclasses in r. 334.16(3):

#### **Subclasses**

**(3)** If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact that are not shared by all of the class members so that the protection of the interests of the subclass members requires that they be separately represented, the judge shall not certify the proceeding as a class proceeding unless there is a representative plaintiff or applicant who

**(a)** would fairly and adequately represent the interests of the subclass;

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<sup>8</sup> *Infineon* at para [152](#).

<sup>9</sup> *Infineon* at para [151](#).

**(b)** has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members as to how the proceeding is progressing;

**(c)** does not have, on the common questions of law or fact for the subclass, an interest that is in conflict with the interests of other subclass members; and

**(d)** provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

19. The existence of subclasses is a recognition by Parliament that there can be different groups within a class action, each with somewhat different interests and each potentially subject to different defences. Yet, each of the groups stands to benefit from a decision by the court on all or some of the proposed common issues. In some cases, the court must appoint a separate representative plaintiff who is able to advance the subclass's claims and who stands to benefit only if the subclass's claims succeed. However, that is only necessary where "the protection of the interests of the subclass members requires" it.

20. In order to ensure that the 1991-2007 Jordan's Principle class members' interests are fully and separately represented, class counsel propose a separate representative plaintiff for the Separated Proceeding whose claim will only succeed if the claims in the Separated Proceeding succeed. As outlined in the First Submissions, Mr. Trout, the proposed representative plaintiff for the Separated Proceeding, is motivated to vigorously advance the cause of the class members in the Separated Proceeding regardless of the outcome of the Consolidated Proceeding. Mr. Trout lost two of his children to serious illness and the essential service shortages that they suffered during

the proposed class period for the Separated Proceeding (*i.e.*, 1991-2007). The Separated Proceeding will allow Mr. Trout to advance the litigation in the best interests of his fellow class members. Mr. Trout will only receive compensation if the Separated Proceeding succeeds. Although the proper time to evaluate Mr. Trout's suitability as a class representative is at the certification hearing of the Separated Proceeding, there can be no doubt of his independence and desire to seek justice.

21. Thus, to summarize: the bifurcation of the Separated Proceeding from the Consolidated Proceeding is analogous to the creation of a subclass within the Consolidated Proceeding; the protections afforded to the interests of the members of the Separated Proceeding as provided in r. 334.16(3) are addressed through the appointment of a separate class representative, Mr. Trout, who is solely motivated to advance the interests of the subclass as his own case arises exclusively in the time period of 1991 to 2007.

22. Should this court determine that the Separated Proceeding should not be bifurcated from the Consolidated Proceeding but, rather, should proceed by way of subclass, counsel will propose a subclass within the Consolidated Proceeding and seek to add Mr. Trout as a proposed representative plaintiff of the subclass. However, it is submitted that to do this would serve no practical purpose and would have the same practical effect as the bifurcation that is being jointly proposed by the parties.

#### **PART IV - NO RISK OF CONFLICT IN ANY OF THE LIKELY SCENARIOS**

23. As stated above, the parties have agreed to try to resolve the Consolidated Proceeding through a mediated settlement, but Canada has not agreed to mediate the

claims of the class members in the Separated Proceeding. This does not create an actual or potential conflict. If anything, it prevents one.

24. The parties have agreed to terms that ensure the litigation of the Separated Proceeding proceeds promptly without any timing impact from the mediation of the Consolidated Proceeding. At this time, no settlement has been reached in the Consolidated Proceeding, although the mediation is ongoing. The continuation of the mediation does not delay the hearing of the contested certification motion for the Separated Proceeding. The plaintiffs have delivered their motion for certification of the Separated Proceeding and wish to schedule the hearing as soon as the court can accommodate.

25. If parties were to reach a settlement of the Consolidated Proceeding, including a settlement of the 2007 to present Jordan's Principle class members, the interests of the 1991-2007 Jordan's Principle class members would not be prejudiced.

26. Although not the case here, placing class members on a separate track (one on a litigation track and one on a mediation track) might arguably be prejudicial if, for example, one group's claims were settled against a corporation leaving the corporation financially weakened and unable to pay future claims. This circumstance does not arise here, however, as the defendant has the full faith and credit of a sovereign nation.

27. In order to highlight why proceeding in the manner proposed is beneficial to all class members, consider the scenario in which the Crown agreed to certify and mediate the claims of all of the Jordan's Principle class members from 1991 to the present. Since the Crown believes it owes no duty to compensate the 1991-to-2007 Jordan's Principle

class members, it might have offered compensation only to the 2007-onward Jordan's Principle class members on condition that the plaintiffs agree to release all claims on behalf of all Jordan's Principle class members. This would potentially create a conflict between the class members as the 1991-2007 Jordan's Principle class members would potentially be required to release their claims in exchange for no consideration in order that the 2007-onward Jordan's Principle class members be compensated. In such circumstances, class counsel could either accept the condition, reject the condition and attempt to negotiate payment for the 1991-2007 class, or end the mediation. Under that scenario, counsel would be forced to use its best judgment to represent the class and would be expected to justify any decision at the settlement approval hearing if a settlement was reached. Proceeding in the manner proposed avoids that potential adversity of interests.

28. If the present mediation does not result in a settlement of the Consolidated Proceeding, both proceedings will proceed on a litigation track, with the only difference being that the Separated Proceeding will have a contested certification hearing.

29. This is not a situation where class counsel has attempted to use one proceeding as a test run for another or allowed the defendant to pit one group against another. Rather, class counsel identified a procedural solution that will allow the actions to proceed in an efficient manner, without compromising the interests of either class.

30. Furthermore, it is not uncommon for a defendant to wish to resolve the claims of certain, but not all class members, or for one of multiple defendants to wish to resolve the claims of the class members while other defendants do not wish to seek resolution.

Class representatives and class counsel should be encouraged to resolve the claims of as many class members as possible, so long as they do so without prejudicing the claims of the other class members that are being contested.

31. Respectfully, it cannot be that a conflict or an appearance of a conflict arises any time a defendant wishes to resolve certain, but not all class members' claims, or one of multiple defendants wishes to seek resolution, while others do not.

32. It is further not in the interests of justice that the law should be set up in a manner so as to encourage a multiplicity of law firms to be retained. While counsel must of course ensure that they can advance their client's interests free of a conflict of interest, the test cannot be so rigid that the inevitable result is the need for and proliferation of lawyers. Such an approach would run counter to two pillars of class actions in Canada, being judicial economy and access to justice.

33. In matters involving First Nations in particular, the Federal Court's Practice Guidelines for Aboriginal Law Proceedings<sup>10</sup> specifically encourage partial settlements:<sup>11</sup>

Although the Court will encourage parties to reach a settlement or narrow their issues in dispute through agreement, ultimately the parties must decide whether they want to pursue this avenue, understanding that there is also a cost to settlement discussions, which do not always lead to a settlement of the dispute. **It is recognized that if successful, settlement by agreement helps to restore the relationship and trust between the parties, a form of reconciliation.**

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<sup>10</sup> Federal Court's Practice Guidelines for Aboriginal Law Proceedings (April 2016), <[https://www.fct-cf.gc.ca/content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20\(En\).pdf](https://www.fct-cf.gc.ca/content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf)> [Aboriginal Guidelines].

<sup>11</sup> Aboriginal Guidelines at p 5 (emphasis added).

It is important to keep in mind that there is often overlap between settlement and judicial adjudication: many disputes that begin as adversarial proceedings may shift over to dialogue and resolution by agreement, **even if only for some of the issues in dispute...**

34. This demonstrates that class representatives and class counsel *should* seek to resolve claims partially if, despite their best efforts, they are unable to resolve *all* claims.<sup>12</sup>

35. Bifurcating the proceedings as proposed is the optimal manner of proceeding under the circumstances. On the one hand, the class members in the Consolidated Proceeding are afforded the opportunity to resolve their claims through negotiation and mediation, and certification of their claims is not contested. On the other hand, class members of the Separated Proceeding benefit from the work and efforts of class counsel in relation to Jordan's Principle, to advance their claims to certification as expeditiously as possible.

36. For the reasons stated, no actual or potential conflict of interest arises from the relief requested.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 9<sup>th</sup> day of April, 2021.



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<sup>12</sup> In addition to the Aboriginal Guidelines, The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples (2018) < <https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.pdf>> also encourages parties to settle part or all of a claim where possible.



**SCHEDULE A**  
**STATUTES OR REGULATIONS**

1. *Federal Courts Rules*, SOR/98-106, rr [334.16](#), [334.29](#) and [334.34](#)

**Certification**

**Conditions**

**334.16 (1)** Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

- (a) the pleadings disclose a reasonable cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
- (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
- (e) there is a representative plaintiff or applicant who
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,
  - (iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and
  - (iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

**Matters to be considered**

**(2)** All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

- (a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;
- (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

- (c) the class proceeding would involve claims that are or have been the subject of any other proceeding;
- (d) other means of resolving the claims are less practical or less efficient; and
- (e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

### **Subclasses**

(3) If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact that are not shared by all of the class members so that the protection of the interests of the subclass members requires that they be separately represented, the judge shall not certify the proceeding as a class proceeding unless there is a representative plaintiff or applicant who

- (a) would fairly and adequately represent the interests of the subclass;
- (b) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members as to how the proceeding is progressing;
- (c) does not have, on the common questions of law or fact for the subclass, an interest that is in conflict with the interests of other subclass members; and
- (d) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

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### **Approval**

**334.29 (1)** A class proceeding may be settled only with the approval of a judge.

Binding effect

(2) On approval, a settlement binds every class or subclass member who has not opted out of or been excluded from the class proceeding.

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### **Notice of settlement**

**334.34** Notice that an offer to settle has been made or that a settlement has been approved under rule 334.29 shall be given by the representative plaintiff or applicant to the class or subclass members in accordance with the directions of a judge in respect of the content of and means of giving the notice.

**SCHEDULE B**  
**BOOK OF AUTHORITIES**

1. *Canadian National Railway Co. v. McKercher LLP*, [2013 SCC 39](#)
2. *Vaeth v North American Palladium Ltd*, [2016 ONSC 5015](#)
3. *Persaud v Talon International Inc*, [2018 ONSC 5377](#)
4. *Infineon Technologies AG v Option consommateurs*, [2013 SCC 59](#)

***Guidelines***

5. Federal Court ~ Aboriginal Law Bar Liaison Committee, Practice Guidelines for Aboriginal Law Proceedings (April 2016)
6. The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples (2018)