Court File No. CV-23-00029205-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

MISSANABIE CREE FIRST NATION

Plaintiff

and

HIS MAJESTY THE KING IN RIGHT OF CANADA as represented by the ATTORNEY GENERAL OF CANADA, HIS MAJESTY THE KING IN RIGHT OF ONTARIO, as represented by the ATTORNEY GENERAL OF ONTARIO

Defendants

FACTUM of the ATTORNEY GENERAL OF CANADA on the Motion for Certification

Dated: December 1, 2025

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PART I - OVERVIEW

1. Canada recognizes and respects the rights of First Nations to choose their preferred means of resolving legal issues, including through litigation when necessary.

2. Canada acknowledges that the Plaintiff's claim raises important issues on the interpretation of treaty rights conferred by Treaty 9. Canada agrees that the claim discloses a cause of action and an identifiable class, and raises common issues. However, the claim is not appropriate for certification because a class action is not the preferable procedure. A representative action is the only fair, efficient, and manageable method for advancing the Plaintiff's claim.

3. The claims asserted by the Plaintiff are based on collectively held Indigenous treaty rights arising or alleged to arise from Treaty 9. Three appellate courts across the country have confirmed that the proper procedure for an action involving the interpretation of a collectively held Indigenous treaty right is a representative action, not a class action.

4. A class action permits necessary parties to "opt out" and thereby not be bound by the judicial determination of the rights in issue. For the determination of collectively held treaty rights, there can be no opting out. All of the treaty rightsholders are and must be bound by judicial findings that interpret their treaty rights. All of the treaty rightsholders must be given the opportunity to participate in the determination of their rights.

5. Unlike a class action, a representative action binds all treaty rightsholders and provides the opportunity for all affected First Nations to choose the way they participate, either by consenting to be represented by the representative plaintiff, or by being added as a party. A representative

action is not only the preferable procedure, it is the proper procedure for the Plaintiff's claim. It is the tried and true method for determining collectively held treaty rights, including claims for treaty annuities.

PART II - STATEMENT OF FACT

1. Canada takes no issue with the facts set out in the Plaintiff's factum

6. For the purpose of this motion for certification only and without prejudice to its defence, Canada accepts the facts as set out in the Plaintiff's factum. Canada elected not to cross-examine the Plaintiff's affiants, Dr. Miller and Mr. Hutchings, because Canada agrees with the Plaintiff that the claim discloses a cause of action, an identifiable class, and common issues. The only issue in dispute between the Plaintiff and Canada is a procedural issue that does not require expert evidence: whether a class action is the superior vehicle to determine the Treaty 9 First Nations' claims.

2. The claim is based on collectively held Indigenous treaty rights

7. The Plaintiff brings this action as a proposed class action on behalf of the thirty-seven First Nations that are recognized as the successors to the bands that signed or adhered to Treaty 9 (the "Treaty 9 First Nations").

8. There are three main components to the Plaintiff's claim. All of them are based on rights arising from or alleged to arise from Treaty 9: (i) whether the Crown was under an obligation to increase the $4 per person annuity provided for in Treaty 9; (ii) whether the Crown was under an obligation to include provision for agricultural and economic benefits in Treaty 9; and (iii) whether federal

and provincial legislation enacted in 1924 that provides Ontario a one-half interest in mineral rights on Indian Reserves[1] is contrary to Treaty 9.

9. The claims asserted by the Plaintiff require the court to interpret collectively held Indigenous rights, in particular rights under Treaty 9. The Plaintiff asserts in its statement of claim, and Canada admits, that "the promise to provide an annual payment to every Indian person was a promise made to the "bands" as the rights-bearing collectives recognized under Treaty 9. Annuity Payments are a collective right, and the holder of such rights is the First Nation collective which is the legal successor in interest to the Treaty Band."[2]

3. Canada has taken steps to ensure that the proper parties are before the court, so the action can proceed in a fair and efficient way

10. From the outset of this litigation, Canada has recognized the profound significance of the historical, treaty-based claims made in the statement of claim to all thirty-seven Treaty 9 First Nations, their members, and the Crown. Canada has taken steps to ensure that the proper rightsholders and proper parties are before the court, so that this action may be resolved in a just, inclusive, and judicially efficient manner.

11. The Plaintiff commenced this action by statement of claim dated May 8, 2023, purportedly on behalf of all Treaty 9 First Nations in Ontario. The original claim was against Canada only. It listed

[1] *The Indian Lands Act* (*An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*), 1924, S.O. 1924, c. 15; *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.C. 1924, c. 48.
[2] Amended Amended Fresh as Amended Statement of Claim dated July 31, 2025, para 9.

forty-nine First Nations as the proposed class, but fourteen of those listed were not Treaty 9 First Nations, and two Treaty 9 First Nations were excluded from the claim.[3]

12. At a case management conference on July 3, 2024, Canada raised three concerns and proposed solutions to ensure that the action could proceed in a fair and efficient manner:[4]

a. All thirty-seven Treaty 9 First Nations should be given notice of the claim made on their behalf, and the opportunity to participate in it.

b. Ontario should be added as a defendant, since the statement of claim recognizes that Ontario is a party to Treaty 9.

c. The action should proceed as a representative action rather than a class action.

13. The Plaintiff issued a Fresh as Amended Statement of Claim dated July 29, 2024, and an Amended Fresh as Amended Statement of Claim dated October 31, 2024, which clarified the members of the proposed class and added Ontario as a defendant.[5]

14. The Plaintiff delivered its first Notice of Motion for certification on July 29, 2024, seeking in the alternative an order authorizing the action to proceed as a representative action under Rule 12.08 of the *Rules of Civil Procedure*.[6] However, in its Amended Notice of Motion delivered July

[3] Statement of Claim dated May 8, 2023, Exhibit B to the First Affidavit of Chief Gauthier ("First Gauthier Affidavit"), Amended Motion Record of the Plaintiff ("AMRP"), Tab 2, page 61; see also First Gauthier Affidavit, AMRP, Tab 2, paras 9, 10.
[4] Endorsement of Justice Cullin, Case Management Conference July 3, 2024.
[5] Fresh as Amended Statement of Claim dated July 29, 2024, Exhibit C to the First Gauthier Affidavit, AMRP, Tab 2, page 88; Amended Fresh as Amended Statement of Claim dated October 31, 2024.
[6] RRO 1990, Reg. 194.

31, 2025, the Plaintiff no longer seeks in the alternative an order authorizing the action to proceed as a representative action.[7]

15. The Plaintiff did not have the support of the Treaty 9 First Nations it was proposing to represent at the time it commenced the claim.[8] The Amended Litigation Plan included in the Motion for Certification, dated July 31, 2025, explains that over the previous year, the Plaintiff was able to secure the support of "a number of Treaty 9 First Nations" for its proposed class action, but engagement with Treaty 9 First Nation governments was ongoing at that time.[9] This evidence suggests that some of the Treaty 9 First Nations may not support the proposed class action.

PART III - ISSUES

16. The sole issue for determination on this motion for certification is whether, pursuant to s. 5(1)(d) and 5(1.1)(a) of the *Class Proceedings Act, 1992*,[10] a class action is the preferable procedure for the resolution of the common issues. Canada submits that it is not. A representative action is the preferable – indeed, the proper – procedure for the resolution of the claims.

17. Canada agrees for the purpose of this motion for certification that three of the five criteria for certification set out in s. 5 of the *Class Proceedings Act, 1992*, are met: (a) the pleadings disclose a cause of action, (b) there is an identifiable class, and (c) the claims raise common issues.[11]

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[7] Amended Notice of Motion, AMRP, Tab 1; page 22.
[8] First Gauthier Affidavit, para 18 and Exhibit G, AMRP, Tab 2, pages 48 and 171.
[9] Amended Litigation Plan, AMRP, Tab 8, page 462, para 25.
[10] *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA").
[11] CPA, s. 5(1)(a), (b), (c). Canada notes that the Plaintiff's List of Revised Proposed Common Issues, attached as Appendix A to the Plaintiff's Factum, contains errors in paragraphs 8, 10, 11, 12 and 14, in that they refer to subparagraphs which do not exist. As a whole, however, the List of Revised Proposed Common Issues discloses common issues.

18. Whether the Plaintiff Missanabie Cree First Nation would fairly and adequately represent the interests of all Treaty 9 First Nations, and whether it does not have an interest in conflict with the interests of other Treaty 9 First Nations, are issues for the Treaty 9 First Nations to determine.[12] A representative action will allow the Treaty 9 First Nations to make that determination.

19. Canada disagrees that the Plaintiff's proposed Amended Litigation Plan provides a workable method of advancing the proceeding as required by s. 5(1)(e)(ii) of the *Class Proceedings Act, 1992*, regardless of whether it proceeds as a class action or a representative action. Rather than argue the merits of the proposed Amended Litigation Plan on this motion for certification, Canada submits that deficiencies in the Plaintiff's proposed litigation plan can be resolved between the parties or through the case management process after the resolution of this motion for certification.

PART IV - LAW AND ARGUMENT

1. The key difference between a class action and a representative action is whether its resolution is binding

20. The key difference between a class action under the *Class Proceedings Act, 1992*, and a representative action under Rule 12.08 of the *Rules of Civil Procedure* is its binding nature. In a class proceeding, any potential class member may opt out, and if they opt out, they *will not be bound* by the judgment on the common issues[13] or by any settlement.[14] On the other hand, in a

[12] CPA, s. 5(1)(e)(i) and (iii).
[13] CPA, s. 27(2)(a).
[14] CPA, s. 27.1(4).

representative action under Rule 12.08, any judgment or settlement is legally binding on all of the represented parties.[15]

21. The *Class Proceedings Act, 1992*, permits the court to determine an aggregate assessment of monetary relief, and the shares to be allocated to individual class members where "it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members."[16] The Plaintiff suggests that the availability of an award of aggregate damages bolsters the preferability of a class proceeding over a representative action because it improves access to justice.

22. The court in a representative action is equally empowered to make an award of monetary relief that is appropriate and just in the circumstances. In this case, should the Plaintiff succeed, there is no need for the court to make an award of aggregate damages, since the identity of the thirty-seven Treaty 9 First Nations who may be entitled to monetary relief and the amount of such relief can be practically and efficiently determined. Monetary relief for any Treaty 9 First Nation for the asserted failure to increase annuity payments can be readily determined by multiplying the value of the alleged shortfall by the number of members of that First Nation over time and then adjusting for the time value of money, a point made by the Plaintiff's witness, Mr. Hutchings.[17]

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[15] *Kelly v Canada (Attorney General)*, 2013 ONSC 1220 at para 91 [*Kelly*], aff'd in part, 2014 ONCA 92 [*Kelly Appeal*]; *Lac La Ronge Indian Band v Canada*, 2025 SKKB 147 at paras 106, 126 [*Lac La Ronge*].
[16] CPA, s. 24(1), (3).
[17] Hutchings Report, AMRP, Tab 6, Exhibit A, page 416, para 15.

23. For the same reason, Justice Zinn of the Federal Court recently held in *Nepinak and Acoose v. Canada*[18] that the availability of an award of aggregate damages did not support the certification of an action for increased annuities under Treaty 4, finding that the calculation of individual entitlements was "straightforward," and did not require an aggregate damages assessment.[19]

24. Furthermore, the parts of the Plaintiff's claim that relate to the lack of agricultural and economic benefits provided and the denial of mineral rights are not amenable to the determination of an aggregate assessment of monetary relief. The traditional territories of the Treaty 9 First Nations are spread throughout a land base that covers over two-thirds of Ontario, with a wide range of agricultural and mineral potential. Some Treaty 9 First Nations' reserves have nearby "mineral occurrences," and others do not.[20] It is unlikely that all of the Treaty 9 First Nations have identical interests in these aspects of the Plaintiff's claims.[21] The statement of claim highlights these distinctions when it asserts that the Crown "failed to diligently implement the terms of Treaty 9 in a uniform and fair manner for all Treaty 9 Indians."[22]

25. The Plaintiff suggests that the availability of aggregate damages would achieve the goal of access to justice, as the court found it would in *Ramdath v. George Brown College*[23] and in *Richard v. Canada*.[24] This is not a case like *Ramdath,* where an assessment of aggregate damages was appropriate for certain types of loss because the class members were "scattered around the

[18] *Nepinak and Acoose v. Canada*, 2025 FC 925 [*Nepinak*].
[19] *Nepinak* at para 84.
[20] Hutchings Report, AMRP, Tab 6, Exhibit A, Figure 2, page 427.
[21] Hutchings Report, AMRP, Tab 6, Exhibit A, Figure 2, pages 427-428, para 42.
[22] Amended Amended Fresh as Amended Statement of Claim, para 66 (d); see also para 7(e)(ii).
[23] *Ramdath v. George Brown College*, 2014 ONSC 3066 [*Ramdath*].
[24] *Richard v. Canada*, 2024 ONSC 3800 [*Richard*].

world."[25] This is not a case like *Richard*, where the class members were incarcerated and their claims were uneconomical to pursue individually.[26] This is a case involving thirty-seven First Nations, each with access to legal counsel, asserting damages in the billions of dollars.

26. There are procedural differences between a class action and a representative action, but they are easily addressed or accommodated through judicial orders. These include:

a. Settlement approval: The settlement of a class action must be approved by the court.[27] The settlement of a representative action under Rule 12.08 is not required to be approved by the court. Nevertheless, the parties may ask for and obtain court approval. There is recent precedent for this in *Restoule v. Canada*.[28]

b. Notice and opt out: A class action requires comprehensive, expensive, and time-consuming notice of certification and opt out processes. No such processes are required for a representative action. Nevertheless, in appropriate cases the court may order that affected parties be provided with notice and given an opportunity to participate in the action, including by consenting to representation or by becoming added party plaintiffs. Again, there is precedent for this.[29]

[25] *Ramdath* at para 4.
[26] *Richard* at paras 400-401; see also *Spira v Shoppers Drug Mart*, 2024 ONCA 642, at para 211.
[27] CPA, s. 27.1(1).
[28] *Restoule v Canada*, 2024 ONSC 1127 (Reasons for Decision of Chief Justice Morawetz).
[29] *Kelly* at paras 115-116; *Nepinak* (Court Order). Note that Rule 114(1)(b) of the *Federal Courts Rules* SOR/98-106 requires that a representative be authorized to act on behalf of the represented person.

c. Counsel fees: Counsel fees in a class action must be approved by the court.[30] Furthermore, class counsel are permitted to bring a motion to have their counsel fees "increased by a multiplier."[31] In a representative action, there is no requirement that counsel fees be approved by the court, and there are no special rules regarding fee multipliers. Nevertheless, the court can and does retain jurisdiction over counsel fees through Rules 57, 58, and the assessment process under the *Solicitors Act*.[32]

27. The only relevant difference for this case between a class action and a representative action is that a representative action will ensure that any judgment or settlement is legally binding on all of the relevant parties.

2. A class action is not "superior" to a representative action for this claim; only a representative action provides access to justice and judicial economy

28. The threshold question for the court in determining whether a class action is the preferable procedure is whether a class action would be a "fair, efficient, and manageable" method for advancing or determining the claim.[33] Assuming this threshold is met, the *Class Proceedings Act, 1992*, mandates that a class action must be "*superior to* all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of

[30] CPA, s. 32(2).
[31] CPA, s. 33(4).
[32] *Solicitors Act*, RSO, c. S.15, s. 3.
[33] *Nepinak* at para 30, citing *Rumley v. British Columbia*, 2001 SCC 69 at para 35 [*Rumley*].

the defendant" [emphasis added].[34] This comparative part of the analysis considers the three goals of behaviour modification, access to justice, and judicial economy.[35]

29. A class action would not be a fair, efficient, or manageable method for advancing or determining the Plaintiff's claim. This is because a class action would permit Treaty 9 First Nations to opt out of the judicial determination of their collectively held treaty rights, opening the door to duplicative litigation and the possibility of fragmented and contradictory judicial outcomes.[36]

30. Historic Crown-Indigenous treaties are binding not only on their direct signatories; they are binding on all Canadians.[37] The risk that identical treaty obligations may be interpreted differently in parallel litigation "stands in direct opposition to the objective of achieving a unified and consistent resolution of a treaty interpretation dispute through collective proceedings."[38]

31. While both a representative action and a class action can meet the goal of behaviour modification,[39] only a representative action can meet the goal of access to justice in this case. A representative action provides the only method to ensure that every Treaty 9 First Nation whose treaty rights are to be determined has the opportunity to participate in that determination, either by consenting to be represented by the Plaintiff, or by being joined as a party.[40]

32. Similarly, only a representative action serves judicial economy, since only a representative action that includes all Treaty 9 First Nations can prevent the risk of duplicative and possibly

[34] CPA, s. 5(1.1)(a).
[35] *Nepinak* at para 24, citing *Rumley*, at para 35.
[36] *Nepinak* at para 80.
[37] *Ontario v Restoule*, 2024 SCC 27 at para 113.
[38] *Nepinak* at paras 67, 70; *Lac La Ronge v. Canada* at para 114.
[39] *Nepinak* at para 55.
[40] *Kelly* at paras 115, 116, 121, aff'd on this point, *Kelly Appeal* at paras 20, 21.

conflicting litigation concerning the interpretation of the same treaty rights created by a class action. Duplicative litigation is a real risk in this case, where the evidence suggests that not all Treaty 9 First Nations support the Plaintiff's claim.[41]

33. In *Nepinak*, the Federal Court denied certification of a similar proposed class action for increased treaty annuity payments under Treaty 4, finding that a representative action was the preferable procedure. The Federal Court warned of the risks of a class action's opt out procedure to judicial economy and judicial coherence:

> Indeed, the jurisprudence on point cautions that even a small number of concurrent proceedings, including those brought by individuals or First Nations who opt out of a class action, can undermine judicial economy by creating the risk of conflicting interpretations regarding the "augmentability" of Treaty 4 annuities. Even a single conflicting ruling resulting from a group of opt-out litigants would further undercut the certainty that a resolution of treaty rights should provide.[42]

3. Every court faced with the question has determined that a representative action is the preferable procedure

34. Judicial determinations of collectively held Indigenous treaty rights necessarily bind all of the affected treaty rightsholders. No treaty rightsholder can choose to opt out of a court's determination of their collectively held treaty right. For this reason, every trial and appellate court that has faced the question of the proper procedure for an action involving the interpretation of a collectively held Indigenous treaty right has concluded that the proper procedure is not a class action, but a representative action.

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[41] First Gauthier Affidavit, para 18 and Exhibit G, AMRP, Tab 2, pages 48 and 171; Amended Litigation Plan, AMRP, Tab 8, page 462, para 25.
[42] *Nepinak* at para 75.

35. The most recent judicial determination of the preferable procedure for the resolution of a claim based on a collectively held Indigenous treaty right is the September 2025 decision of the King's Bench for Saskatchewan in *Lac La Ronge v. Canada*, an action brought on behalf of all Treaty 6 First Nations to enforce rights under the "medicine chest" and "pestilence" clauses of Treaty 6.[43] In concluding that a representative action was the preferable procedure, the court explained that the ability to opt out of a class action and thereby avoid the binding effect of the ultimate determination in the action was "intrinsically at odds with the spirit and purpose of treaty rights enforcement."[44]

36. The Federal Court came to a similar conclusion a few months earlier in *Nepinak*,[45] discussed above. *Nepinak*, like the case at bar, involved a claim for increases to treaty annuity payments to account for lost purchasing power. The court in *Nepinak* relied on a suite of cases from the Supreme Court,[46] the Ontario Court of Appeal,[47] the Manitoba Court of Appeal,[48] and the British Columbia Court of Appeal[49] to conclude that a class action was not the preferable procedure:

> …the central question now is therefore whether a class action is the appropriate vehicle for resolving the interpretive question concerning Treaty 4's annuity obligations…

[43] *Lac La Ronge* at para 5.
[44] *Lac La Ronge* at para 108.
[45] *Nepinak* at para 67.
[46] *Nepainak* at para 73, citing: *R v Sparrow*, [1990] 1 SCR 1075 at p. 1112; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 115; *R v Sundown*, [1999] 1 SCR 393 at para 36; *R v Marshall*, [1999] 3 SCR 533 at paras 17 and 37; *R v Sappier*, 2006 SCC 54 at para 31; *Behn v Moulton Contracting Ltd.*, 2013 SCC 26 at para 33.
[47] *Kelly Appeal*.
[48] *Soldier v Canada, Bone v Canada*, 2006 MBQB 50, aff'd 2009 MBCA 12.
[49] *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada*, 2012 BCCA 193 [*Kwicksutaineuk/Ah-Kwa-Mish First Nation*].

> The answer is no. I repeat – a well-established body of Supreme Court jurisprudence confirms that treaty rights are inherently collective in a legal sense; [citations omitted]….[T]he plaintiffs overlook the fundamental legal requirement that interpretation of such collective rights must yield one single, binding resolution applicable to the entire signatory group, not fragmented outcomes for different subgroups. This requirement is precisely why courts have recognized that treaty interpretation disputes are incompatible with class actions.[50]

37. The Federal Court identified a "practical distinction" between class actions and representative actions. A class action is suitable "where distinct individuals advance *personal* claims that happen to raise *common issues* [emphasis in the original]."[51] A representative action is suitable "where claimants assert the same *collective* right because the right is inherently *communal* [emphasis in the original]."[52] The right to an annuity payment is a right derived from the treaty, which the Supreme Court has held is a collective right.[53] The Plaintiff also claims rights to agricultural and economic treaty benefits, and to mineral rights on reserve. The plaintiff asserts that these rights derive from the treaty, and are also communal in nature.

38. The Plaintiff cites *Joyce v. Nova Scotia*[54] and *Anderson v. Manitoba*[55] as the two certified class actions in which treaty-related claims were made. But neither case involved a question of treaty interpretation. The central issue in *Joyce* was whether the province was required to recognize a group of self-identifying Mi'kmaq as having harvesting rights under s. 35 of the *Constitution Act*,

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[50] *Nepinak* at para 73.
[51] *Nepinak* at para 41.
[52] *Nepinak* at para 41.
[53] *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 33. Some collectively held treaty rights are nevertheless exercised by individual members, and may be asserted by individuals. However, the issue of standing should not be conflated with the issue of preferable procedure: *Nepinak*, at paras 71-72.
[54] *Joyce v Nova Scotia*, 2024 NSCA 9.
[55] *Anderson v. Manitoba*, 2017 MBCA 14 [*Anderson*].

1982. *Anderson* was a claim based in negligence and nuisance for flooding of reserve lands. In both cases, treaty rights were, at most, incidental to the main dispute. In *Anderson*, the court specifically noted that "the idea of a representative action was not raised or argued by the parties."[56]

39. Courts considering claims based on collectively held Aboriginal or treaty rights, including claims for increases to annuity payments under treaties, have repeatedly held that a representative action is the preferable procedure:

a. In 2005 in *Gill v. Canada*,[57] a case concerning registration under the *Indian Act*, the Federal Court concluded that the preferable procedure for an action concerning collective Aboriginal and treaty rights was a representative action:

> Given the collective nature of aboriginal rights and claims under treaty, they are difficult to reconcile with class action procedure. By way of example, Crown counsel point to [the opt out provision], which allows an individual to opt out of a class proceeding. This observation is pertinent because a declaration as to aboriginal and treaty benefits is not a remedy of an individual nature, accruing to only those individuals who participate in the litigation, but a collective right, not amenable to opting out, the result binding each and every member of the entity…[58]

b. In 2009 in *Soldier v. Canada; Bone v. Canada*,[59] a claim for treaty annuity increases, the Manitoba Court of Appeal upheld the trial judge's dismissal of certification, finding that a representative action was the preferable procedure:

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[56] *Anderson* at para 24.
[57] *Gill v Canada*, 2005 FC 192 [*Gill*].
[58] *Gill* at para 13.
[59] *Soldier v Canada; Bone v Canada*, 2006 MBQB 50, aff'd 2009 MBCA 12.

> …Individuals who opt out may properly take the position they are not bound by the court's decision, and bring another action against the Crown seeking different relief, and upon different evidence…There is the potential for a multiplicity of proceedings and conflicting decisions in respect of a single document [the treaty]…As the certification judge noted, there should not be more than one interpretation of the treaty depending upon whether individuals opt out of the class. Such a result would not lead to judicial economy.[60]

c. In 2012 in *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada*,[61] a proposed class action on behalf of First Nations with Aboriginal or treaty rights to fish wild salmon within a coastal region in British Columbia, the British Columbia Court of Appeal rejected certification on the ground that the requirement of an identifiable class had not been met. Justice Smith added:

> The *Class Proceedings Act* provides a procedure for the advancement of multiple individual claims arising from a common wrong. It is not designed to advance multiple collective rights claims for multiple collective entities. Claims of this nature (for collective rights) are generally made through a representative action, where a member (or members) of the Aboriginal entity asserting the rights, sues in a representative capacity on behalf of himself or herself and all of the other members of the Aboriginal entity.[62]

d. In 2014 in *Kelly v. Canada*,[63] a proposed representative action to enforce the "maintain schools" term of Treaty 3, the Ontario Court of Appeal upheld the motions judge's determination that all Treaty 3 First Nations would have to be represented or added as parties to the action:

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[60] *Soldier v Canada; Bone v Canada*, 2009 MBCA 12 at para 78.
[61] *Kwicksutaineuk/Ah-Kwa-Mish First Nation.*
[62] *Kwicksutaineuk/Ah-Kwa-Mish First Nation* at para 107.
[63] *Kelly Appeal*.

> Because the rights under Treaty 3 are communal rights and because the court's decision about the treaty rights will bind all the rights holders, it is necessary that all the persons affected by the decision be before the court. The rights holders are necessary parties to the action, and there can be no opting-out.[64]

e. In 2015 in *Horseman v. Canada*,[65] a proposed class action for increases to treaty annuity payments across all of the Numbered Treaties, the Federal Court denied certification for the lack of a common issue as between all eleven Numbered Treaties. The motions judge noted in *obiter* that the statutory ability to opt out of a class proceeding:

> …brings into sharp focus why class actions are not generally appropriate when the fundamental issue to be determined is the proper interpretation of a treaty provision. The Court cannot accept that different courts or judges may reach differing interpretations of the treaty (a result that is possible in a class action proceeding that is followed by other representative or individual actions). This alone is reason to find that where, as here, the claim rests upon the interpretation of a treaty, the claim will be better advanced by way of representative action, where opting out is not an option.[66]

40. The Plaintiff suggests that a representative action under Rule 12.08 is not available, because the Treaty 9 First Nations are not unincorporated associations or trade unions as those terms are used in Rule 12.08. Each Treaty 9 First Nation has legal standing and capacity to commence proceedings. Nevertheless, any group of Treaty 9 First Nations is an unincorporated association, just as any group of juridical persons can be an unincorporated association, for the purpose of Rule 12.08.

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[64] *Kelly* at para 16.
[65] *Horseman v Canada*, 2015 FC 1149 [*Horseman*]; aff'd on other grounds, 2016 FCA 238.
[66] *Horseman* at para 82.

41. Two recent cases in Ontario involving claims for augmented treaty annuities under the Robinson Huron Treaty of 1850 and the Robinson Superior Treaty of 1850, *Restoule v. Canada* and *Red Rock and Whitesand v. Canada*, proceeded as representative actions.[67]

4. A representative action respects the interests of all Treaty 9 First Nations

42. In finding that a representative action provides better access to justice than a class action for a collectively held treaty right, the Federal Court in *Nepinak* noted that a representative action typically requires each participating First Nation to authorize collective litigation.[68]

43. Indeed, this is the process that was ordered by the motions judge, Justice Perell, and affirmed by the Ontario Court of Appeal in *Kelly*. Justice Perell found that a representative action for the determination of a collectively held treaty right to education in Treaty 3 required that all Treaty 3 First Nations either (i) authorize, by band council resolution, their representation by the proposed representative plaintiff, or (ii) if they did not authorize representation, be added as parties.[69] Unless all Treaty 3 First Nations were included, the claim would be deficient, because necessary parties would not be before the court.[70]

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[67] *Red Rock and Whitesand v Canada*, 2022 ONSC 2309 at para 12 [*Red Rock and Whitesand*]; *Restoule v Canada*, 2024 ONSC 1127 at para 4.
[68] *Nepinak* at paras 58-59.
[69] *Kelly* at para 16. Justice Perell suggested that if a Treaty 3 First Nation did not consent to representation by the proposed representative plaintiff, that First Nation should be joined as a *defendant*. Such a First Nation can also be joined as an added party *plaintiff* and be represented by different counsel than the representative plaintiff. See *Red Rock and Whitesand v Canada*, and *Nepinak* (Order).
[70] *Kelly* at paras 103, 108: "Persons belonging to the community to which the Aboriginal right adheres are necessary parties and should be joined as parties in an action to vindicate those rights: *Oregon Jack Creek Indian Band v Canadian National Railway Co*., [1989] 2 SCR 1069; *Attorney General for Ontario v Bear Island Foundation*. 1984 CanLII 2136 (ON SC) at pages 331-332; *Twinn v The Queen*, [1987] 2 FC 450 at page 462."

44. Similarly, in *Nepinak*, the Federal Court ordered the representative plaintiff to notify each of the Treaty 4 First Nations of their right to participate in the representative action. Each First Nation could, by band council resolution, choose to be represented by the representative plaintiff. If a First Nation chose not to be represented by the representative plaintiff, that First Nation could join the action as an added party plaintiff and be represented by their own counsel.[71]

45. The Ontario Court of Appeal has recognized the importance of a party having the option to choose their own counsel and participate in the development of strategy for litigation that concerns them. Although written in the context of the legislative right to opt out of a class proceeding, the same point applies to the Treaty 9 First Nations in this case, each of which should have the option to choose whether they wish to be represented by the Plaintiff:

> Our society places a high premium on a person's ability to initiate and participate in litigation as an incident of personal autonomy. Along with it goes the right to appoint counsel of one's choice, the right to participate meaningfully in the development of litigation strategy, to participate in settlement negotiations, and to settle the action.[72]

46. Allowing each Treaty 9 First Nation to confirm whether they wish to be represented by the Plaintiff, or whether they prefer to be joined as an added party plaintiff represented by their own counsel, respects the interests of all Treaty 9 First Nations. It allows them to participate meaningfully in the determination of their treaty rights. This meets the goal of access to justice.

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[71] *Nepinak* at para 88.
[72] *Johnson v Ontario*, 2021 ONCA 650 at para 16.

47. The Plaintiff seeks orders "staying any other proceeding before the Superior Court of Justice based on the facts giving rise to this proposed class proceeding,"[73] and "declaring that no other proceeding based upon the facts giving rise to this proceeding may be commenced" without leave of the court.[74] The facts giving rise to this proceeding could be interpreted to include the entire treaty-making process for Treaty 9. These requested orders are exceptionally broad and could significantly impact the rights of Treaty 9 First Nations. There are at least eight existing actions and one application brought against the Crown by Treaty 9 First Nations involving treaty interpretation or implementation claims.[75]

48. Allowing the Treaty 9 First Nations to confirm whether they wish to be represented by the Plaintiff, or whether they prefer to be joined as an added party plaintiff, will allow the Treaty 9 First Nations to consider and address the potential impact of these requested orders on their other existing or potential claims.

5. The proposed litigation plan is deficient

49. The Plaintiff's litigation plan is deficient. The Amended Litigation Plan contemplates the appointment of a Class Action Administrator who would determine which Treaty 9 First Nations qualify as "approved" class members and which individual band members of Treaty 9 First Nations qualify as "approved" individuals to receive compensation. The Class Action Administrator would also determine how compensation would be distributed as between the Treaty 9 First Nations and how much would be distributed to individuals. These kinds of issues are not administrative in

[73] Amended Notice of Motion, AMRP, Tab 1, para 1(i), page 34.
[74] Amended Notice of Motion, AMRP, Tab 1, para 1(j), page 34.
[75] Endorsement of Justice Cullin, Case Management Conference July 3, 2024, para 2; Affidavit of Gabriela Verdicchio, Exhibits A-I, Motion Record of Ontario, Tab 1, pages 12-267.

nature and are not suitable for a Class Action Administrator. Some of them are governed by the *Indian Act.*[76] Some of them should be determined by the First Nations themselves, or between the First Nations and the Crown with the assistance of the Court if necessary, rather than by an Administrator.

50. Since the Amended Litigation Plan presupposes that the action will proceed as a class action, it includes provisions, such as for notice and opting out, which will be redundant if the action proceeds as a representative action. Furthermore, depending on the resolution of this motion for certification, some Treaty 9 First Nations may be joined as added party plaintiffs and may wish to contribute to the litigation plan.

51. For these reasons, Canada submits that a new litigation plan can be co-operatively developed by the parties after the resolution of this motion for certification. The parties can seek the assistance of the court if necessary through the case management system. It is therefore not necessary for this court to address deficiencies in the Amended Litigation Plan on this motion for certification.

PART V - ORDER SOUGHT

52. Canada therefore requests an order as follows:

a. The Plaintiff's motion for certification as a class proceeding be dismissed.

b. The action shall proceed as a representative action, on the following terms.

[76] *Indian Act*, RSC., 1985, c. I-5.

c. The Plaintiff shall notify each and every Treaty 9 First Nation of this action and their right to participate as set out below:

(i) The Plaintiff shall represent itself and any other Treaty 9 First Nation which chooses, by band council resolution, to be represented by the Plaintiff;

(ii) Any Treaty 9 First Nation that does not consent to representation by the Plaintiff may elect to join the action as an added party plaintiff.

53. Canada does not seek costs.

DATED AT TORONTO, this 1st day of December, 2025.

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PART VI - TABLE OF AUTHORITIES

Case Law		**Cited at paragraphs**
1.	*Anderson v. Manitoba*, 2017 MBCA 14	38
2.	*Behn v. Moulton Contracting Ltd.*, 2013 SCC 26	36, 37
3.	*Gill v. Canada*, 2005 FC 192	39(a)
4.	*Horseman v. Canada*, 2015 FC 1149; 2016 FCA 238	39(e)
5.	*Johnson v. Ontario*, 2021 ONCA 650	45
6.	*Joyce v. Nova Scotia*, 2024 NSCA 9	38
7.	*Kelly v. Canada*, 2013 ONSC 1220; 2014 ONCA 92	20, 26(b), 31, 36, 39(d), 43
8.	*Kwicksutaineuk / Ah-Kwa-Mish First Nation v.* Canada, 2012 BCCA 193	36, 39(c)
9.	*Lac La Ronge v. Canada*, 2025 SKKB 147	20, 30, 35
10.	*Nepinak and Acoose v. Canada*, 2025 FC 925	23, 28, 29, 30, 31, 33, 36, 37, 42, 43, 44
11.	*Ontario v. Restoule*, 2024 SCC 27	30
12.	*Ramdath v. George Brown College*, 2014 ONSC 3066	25
13.	*Red Rock and Whitesand v. Canada*, 2022 ONSC 2309	41, 43
14.	*Richard v. Canada*, 2024 ONSC 3800	25
15.	*Rumley v. British Columbia*, 2001 SCC 69	28
16.	*Restoule v. Canada*, 2024 ONSC 1127	26(a), 41
17.	*Soldier v. Canada*, 2006 MBQB 50; 2009 MBCA 12	36, 39(b)
18.	*Spina v. Shoppers Drug Mart*, 2024 ONCA 642	25

Legislation (Other authorities)
Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5, 24, 27, 32
Solicitors Act, R.S.O. 1990, c. S.15, s.3

I certify, pursuant to Rule 4.06.1(2.1), that I am satisfied as to the authenticity of every authority cited in this factum.

Date: December 1, 2025

Glynis Evans
LSO # 38204E

Court File No. CV-23-00029205-00CP

MISSINABIE CREE FIRST NATION	AND	**ATTORNEY GENERAL OF CANADA ET AL.**
Plaintiff		Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced in
Sault Ste. Marie

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