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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MISSANABIE CREE FIRST NATION~~, on behalf of all TREATY 9 FIRST NATIONS, and CHIEF JASON GAUTHIER, on his own behalf and on behalf of all members of MISSANABIE CREE FIRST NATION and on behalf of all members of TREATY 9 FIRST NATIONS~~

Plaintiff~~s~~

-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

Defendant<u>s</u>

(Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6)

FACTUM OF THE PLAINTIFF
(Motion for Certification)

Dated: October 1, 2025

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Table of Contents

I. OVERVIEW 1

II. FACTS 3

A. TREATY 9 3

B. THE ANNUITY PAYMENT HAS NEVER BEEN INCREASED 5

C. THE POWER IMBALANCE BETWEEN CROWN AND FIRST NATIONS DURING HISTORIC TREATY-MAKING 5

D. THE FAILURE TO PROTECT TREATY 9 FIRST NATIONS' MINERAL RIGHTS 7

E. EXPERT EVIDENCE IN SUPPORT OF CERTIFICATION 7

F. REPRESENTATIVE PLAINTFF AND THE PUTATIVE CLASS 9

III. STATEMENT OF ISSUES 10

IV. LAW AND ARGUMENT 11

A. THE PLEADINGS DISCLOSE A CAUSE OF ACTION 11

i) Breach of Treaty Obligations 11

ii) Breach of Fiduciary Duty 12

B. IDENTIFIABLE CLASS 13

C. COMMON ISSUES SATISFY THE COMMONALITY TEST 13

i) PCIs 1, 2, 8– Duty to maintain real value of the Annuity Payments 14

ii) PCIs 4, 5, 6 – Crown's failure to provide economic assistance for agriculture and ammunition and twine 15

iii) PCI 8 – Crown's failure to protect mineral rights 15

iv) PCIs 10 and 11 – Negotiation of Treaty 9 on improvident terms 15

v) PCIs 3, 7, 12, 14-15 –Aggregate Damages 15

vi) PCI 13 – Unjust Enrichment 16

vii) Punitive or Exemplary Damages 16

D. A CLASS PROCEEDING IS PREFERABLE 17

i) Applicable test to determine preferability 17

ii) The design of the class proceeding is manageable 18

iii) A class action is superior to any alternatives 20

iv) No reasonable alternatives to a class proceeding 21

v) Representative action under Rule 12.08 is not preferable 21

vi) The common issues predominate over the individual issues 24

E. MISSANABIE IS A SUITABLE REPRESENTATIVE PLAINTIFF 24

F. CONCLUSION 25

V. RELIEF REQUESTED 25

SCHEDULE A - LIST OF AUTHORITIES.....iii

SCHEDULE B – LIST OF STATUTES.....v

I. OVERVIEW

1. Treaties are nation-to-nation agreements fundamental to Canada's history and constitutional landscape.[1] They are foundational to the relationships between Indigenous peoples and non-Indigenous peoples in Canada.[2] Treaties are inviolable, engender constitutionally protected rights, and their promises must not be rendered meaningless.[3] Despite the Supreme Court of Canada's emphatic pronouncements on treaty rights, the federal government ("Canada") and provincial government ("Ontario" and with Canada, the "Crown") have demonstrated a clear disregard for their treaty obligations and fiduciary duties at issue in this action.

2. This proceeding arises from the Crown's historic and ongoing breaches of Treaty No. 9 ("Treaty 9"). Treaty 9 was entered into by First Nations residing in central and northern Ontario and the Crown in 1905.[4] In exchange for ceding their traditional lands, members of Treaty 9 First Nations were promised, among other things, an annual payment of $4.00 under Treaty 9 ("Annuity Payment").[5] In the more than 120 years since Treaty 9 was signed, Canada and Ontario have shown a persistent pattern of indifference to the Crown's treaty obligations.

3. In direct violation of the Crown's promise to provide Treaty 9 First Nations with meaningful economic support under Treaty 9, the Annuity Payment was never indexed, augmented, or increased in the 120 years since Treaty 9 was executed. The Crown's conduct has decimated the Annuity Payment's contemporary economic value.[6] The Supreme Court described the Crown's same conduct (being the failure to index or augment the annuity payment promised under the Robinson Treaties) in *Restoule* as follows: "Today, in what can only be described as a mockery of the Crown's treaty promise to the Anishinaabe of the upper Great Lakes, the annuities are distributed to individual treaty

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[1] *Shot Both Sides v. Canada*, 2024 SCC 12 [*Shot Both Sides*] at para.1.
[2] *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 [*RestouleSCC*] at paras. 106-107.
[3] *Shot Both Sides* at paras. 41, 46 and 53.
[4] Exhibit "A" to the Affidavit of Dr. Jim R. Miller sworn July 24, 2024, Expert Report of Dr. Jim R. Miller dated August 8, 2023 [First Miller Report] at Plaintiff's Amended Certification Motion Record pages [MRP] 367-368.
[5] Affidavit of Chief Jason Gauthier sworn July 29, 2024 [Chief Gauthier Aff] at para. 6, MRP 43.
[6] First Miller Report at MRP 368.

beneficiaries by giving them $4 each."[7]

4. Missanabie Cree First Nation ("Missanabie") brings the proposed class action on behalf of 37 Treaty 9 First Nations, who are signatories, adherents, or successors to Treaty 9 ("Treaty 9 First Nations"). Missanabie alleges breach of treaty and breach of fiduciary duty against the Crown for its failure to index the Annuity Payment or otherwise maintain the real value of that payment.

5. The three objectives of class proceedings complement the goals of reconciliation between Indigenous and non-Indigenous peoples. These synergies should and must be recognized in considering whether a class action is the preferable procedure to advance Treaty 9 First Nations' claims. Only a class action will provide for an efficient, manageable, and accessible procedure to resolve the centuries old (and continuing) breaches of treaty obligations for Treaty 9 First Nations.

6. Further, the proposed class action more than satisfies all criteria for certification under section 5(1) of the *Class Proceedings Act, 1992* (the "*CPA*"). The Plaintiff advances viable causes of action for breach of treaty obligations and breach of fiduciary duty. The Proposed Common Issues ("PCIs") relating to liability can be determined in common. The Crown made identical promises under Treaty 9 to each of the Treaty 9 First Nations, and owes the exact same duties and obligations to each Treaty 9 First Nation, entitling the Class Members to the same remedies.

7. A class action will achieve the goals of access to justice, behaviour modification and judicial economy. First, a class action will allow each Treaty 9 First Nation to advance their claims without commencing individual actions and retaining separate counsel. Access to justice is of paramount importance given the historic disenfranchisement and ongoing marginalization of First Nations.[8] A class proceeding will also facilitate the expeditious resolution or the determination of Class Members' claims. Second, a class proceeding will avoid a multiplicity of proceedings and inconsistent decisions.

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[7] *RestouleSCC* at para 2.
[8] *Joyce v. Nova Scotia (Attorney General)*, 2022 NSSC 22 [*JoyceSC*] at para. 176, citing *Nasogaluak v. Canada (Attorney General)*, 2021 FC 656 at para. 115; *Ewert v. Canada*, 2018 SCC 30 at para. 57; *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15 at para. 177.

Third, the availability of aggravated and punitive damages in the proposed class action serves as a considerable deterrent to the Crown and the prospect of judgment will promote behaviour modification.[9]

8. While there are no class proceedings predicated on treaty claims in Ontario, both the appellate courts of Manitoba and Nova Scotia have certified treaty class proceedings, with the Supreme Court of Nova Scotia (affirmed on appeal) finding that "…a class action is uniquely consistent with the purpose and principles of 'reconciliation'".[10]

9. Further, there are no viable alternatives to a class proceeding. A joinder action would render the litigation unwieldy, overly complex and unmanageable. A representation order under Rule 12.08 of the *Rules of Civil Procedure* is also untenable, as it would not provide for a streamlined discovery and common issues trial, nor important judicial oversight provided under the class proceedings regime. It is similarly not economically feasible for the 37 Treaty 9 First Nations to commence individual actions in this Court or in the Specific Claims Tribunal to resolve their claims. Therefore, a class proceeding is the preferable and superior procedure to resolve the claims of Treaty 9 First Nations and address the Crown's impugned conduct.

II. FACTS

A. TREATY 9

10. Treaty 9 was entered into between the Cree and Ojibwe peoples in the James Bay Region in Ontario and Canada in 1905 and 1906. Additional First Nations became parties to Treaty 9 through adhesions in 1908, 1929 and 1930. These additional First Nations were bound by the same promises as set out in the original 1905 text of Treaty 9.[11]

11. The text of Treaty 9 provides that the signatory and adhering bands agreed to "cede, release,

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[9] *Atlantic Lottery Corp. Inc v. Babstock*, 2020 SCC 19 [*Babstock*] at para. 169.
[10] *JoyceSC* at para. 194.
[11] First Miller Report at MRP 367-368.

surrender and yield… forever, all rights, titles and privileges" to approximately 90,000 square miles of land in Ontario to Canada and its successors.[12] The territory of Treaty 9 covers over two-thirds of what is now the Province of Ontario.[13]

12. Unlike earlier numbered treaties (Treaties 1 through 8), Ontario appointed a Treaty Commissioner alongside federal Treaty Commissioners to negotiate and finalize Treaty 9 with the Treaty 9 Nations.[14]

13. In exchange for ceding their territory, Treaty 9 Nations were promised the following specific and enforceable benefits, among other things:

a) reserve lands not to exceed "one square mile for each family of five, or in that proportion for larger or smaller families" with the location subject to approval by the Treaty Commissioners;

b) the right to hunt, fish and trap on unpatented Crown lands within Treaty 9 territory;

c) members of each Treaty 9 First Nation or band were to receive a one-time present or gratuity of $8.00 in cash; and

d) members of each Treaty 9 First Nation or band were to receive an annual payment of $4.00 per year "for ever" pursuant to the following clause (the "Annuities Clause"):

> His Majesty also agrees that next year, and annually afterwards for ever, He will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, four dollars, the same unless there be some exceptional reason, to be paid only to the heads of families and those belonging thereto.[15]

14. At issue in this proposed class action is the interpretation of the Annuities Clause (whether it imposes an obligation on the Crown to maintain the real value of the payments) and the remedies and compensation owed by Canada and Ontario to the Class Members as a result of the Crown's breach

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[12] Exhibit "E" to the Chief Gauthier Aff, James Bay Treaty No. 9 [Treaty 9] at MRP 139.
[13] Exhibit "A" to the Affidavit of David J. Hutchings sworn July 23, 2024, Expert Report of David J. Hutchings dated May 31, 2024 [Hutchings Report] at para. 12, MRP 415.
[14] Treaty 9 at MRP 123.
[15] Chief Gauthier Aff at para. 6, MRP 43; Treaty 9 at MRP 145-147.

of this obligation. If the Plaintiff is successful in establishing these claims, the class action provides a collective remedy and compensation to all Treaty 9 First Nations, who suffered the same harm as a result of the Crown's misconduct.

B. THE ANNUITY PAYMENT HAS NEVER BEEN INCREASED

15. Since the ratification of Treaty 9, the Crown has never increased the amount of the Annuity Payment payable to Treaty 9 First Nations and their individual members. The Crown's failure to augment the value of the annuity to offset inflation has substantially eroded the buying power of the Annuity Payment over time. For example, the amount needed in 2023 to buy the same goods that $4.00 would have purchased in 1930 is $68.35 – reflecting an increase of approximately 1600%. Of course, the erosion of the value of the Annuity Payment between 1905 and today would be much greater.[16]

16. At the time Treaty 9 was entered into, Treaty 9 First Nations understood that the Annuity Payments would provide meaningful economic support to Treaty 9 First Nations and their members. Treaty 9 included an implied promise that the Annuity Payments would retain their value over time. It is consistent with the parties' understanding that the economic benefits from the development of Treaty 9 First Nations' ceded traditional lands would be shared between the Crown and Treaty 9 First Nations. Accordingly, the Crown has an obligation to increase through indexing the Annuity Payment to offset the impacts of inflation and maintain purchasing power.

C. THE POWER IMBALANCE BETWEEN CROWN AND FIRST NATIONS DURING HISTORIC TREATY-MAKING

17. The Supreme Court has recognized that historic treaties were framed in a legal system unfamiliar to First Nations and negotiated and drafted in a foreign language.[17] The power imbalance

[16] First Miller Report at MRP 3.
[17] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 [*MMF*] at para. 67.

between the Crown and First Nations resulted in the quick negotiation of historic treaties, with the Crown superimposing European laws and customs on pre-existing First Nations societies.[18]

18. The Crown has a well-recognized duty to negotiate treaties in good faith, while upholding the honour of the Crown with First Nations. As the Supreme Court of Canada held in *Haida Nation v. British Columbia*, "in making and applying treaties, the Crown must act with honour and integrity, avoiding even the *appearance* of "sharp dealing"" (emphasis added).[19]

19. First Nations across Canada have challenged the Crown's negotiation of historic treaties, arguing that historic treaty-making did not uphold the honour of the Crown and that the Crown has failed in its duty to diligently implement and uphold treaties.[20] The Crown's failure to negotiate in good faith at the time of treaty-making is amplified in Treaty 9, as Treaty 9 First Nations received substantially lesser benefits under Treaty 9 than those provided under earlier numbered treaties.[21] At the time Treaty 9 was negotiated, Treaty 9 First Nations had significantly less bargaining power than the Treaty Commissioners.[22] The Treaty 9 First Nations also did not have the benefit of independent financial or legal advice prior to entering into Treaty 9. The Treaty 9 First Nations' disadvantaged bargaining position, extreme vulnerability, and complete dependence on the King as "the great father of the Indians, watchful over their interests, and ever compassionate" was well known to the Crown, as evidenced in Federal Treaty Commissioner Duncan Campbell Scott's writings on Treaty 9:

> To individuals whose transactions had been heretofore limited to computation with sticks and skins our errand must have indeed been dark.
>
> They were to make certain promises and we were to make certain promises, but our purpose and our reasons were alike unknowable. What could they grasp of the pronouncement on the Indian tenure which had been delivered by the law lords of the Crown, what of the elaborate negotiations between a dominion and a province which

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[18] *MMF* at para. 67.
[19] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 19 [emphasis added].
[20] *RestouleSCC*; *Chief Derek Nepinak and Chief Bonny Lynn Acoose v. Canada,* 2025 FC 925 [*Nepinak and Acoose*]; *Shot Both Sides*; *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General)*, 2023 ONCA 565 [*Chippewas of Nawash Unceded*]; *Joyce v. Nova Scotia (Attorney General)*, 2024 NSCA 9 [*JoyceCA*]; *Anderson et al v. Manitoba et al,* 2017 MBCA 14 [*AndersonCA*].
[21] First Miller Report at MRP 368-369.
[22] First Miller Report at MRP 373.

> had made the treaty possible, what of the sense of traditional policy which brooded over the whole? Nothing. So there was no basis for argument. The simpler facts had to be stated, and the parental idea developed that the King is the great father of the Indians, watchful over their interests, and ever compassionate.[23]

20. As a result of this power imbalance, Treaty 9 First Nations received fewer and less valuable benefits than First Nations bound by earlier numbered treaties.

21. Most significantly, all earlier numbered treaties provided for seed, implements, agricultural instruction, and the support of hunting and fishing through the annual distribution of ammunition and twine. None of these economic benefits were included in Treaty 9, evidencing a further breach of the Crown's fiduciary, equitable and honourable obligations owing to the proposed Class.

D. THE FAILURE TO PROTECT TREATY 9 FIRST NATIONS' MINERAL RIGHTS

22. In 1924, Canada purported to unilaterally give away the mineral rights of the Treaty 9 First Nations by granting Ontario a 50 percent interest in all mineral rights in Indian reserves in Ontario pursuant to *An Act for the Settlement Of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*.[24] There was no consultation or negotiation with the Treaty 9 First Nations prior to the enactment of the *Unlawful Mineral Appropriation Act*. Nor did Treaty 9 consent or authorize Canada or Ontario's appropriation of Treaty 9 First Nation' mineral rights.[25]

E. EXPERT EVIDENCE IN SUPPORT OF CERTIFICATION

23. In support of this motion to certify the action as a class proceeding, the Plaintiff filed evidence from two experts: Dr. J.R. Miller, a historian with over forty years of academic research experience focused on government and church policies affecting Indigenous peoples in Canada, and David Hutchings, a leading expert in the assessment of damages resulting from breaches of the Crowns'

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[23] First Miller Report at MRP 374.
[24] *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.C. 1924, c. 48.
[25] Treaty 9 at MRP 139-141.

obligations, including treaty-based obligations, to First Nations. Mr. Hutching provided expert evidence on behalf of the plaintiff First Nations in *Restoule*, the leading decision on the Crown's obligation to index annuity payments.[26] Neither Crown elected to cross-examine Dr. Miller or Mr. Hutchings. Further, no responding reports were filed by either Crown challenging the expert opinion evidence of either witness. Accordingly, their opinions remain unchallenged.

24. Dr. Miller's expert report dated August 8, 2023 establishes that the Crown never indexed, augmented, or increased the Annuity Payments for any of the Treaty 9 First Nations since the ratification of Treaty 9. Treaty 9 First Nations received fewer and less valuable benefits than First Nation signatories to earlier numbered treaties due to their weaker bargaining position in comparison to Canada and Ontario. Treaty 9 First Nations had little experience negotiating with the Crown and its agents and that the bulk of Treaty 9 First Nations' interactions with Euro-Canadians was with fur traders and Christian missionaries. While Treaty 9 First Nations' business dealings with fur traders was "imbued with First Nations['] cultural values and practices", the Crown's negotiators and agents lacked this cultural knowledge.[27] The "difference in outlook" between Treaty 9 First Nations and the Crown's agents placed Treaty 9 First Nations at a disadvantage when negotiating Treaty 9.[28]

25. Mr. Hutchings provided uncontested expert evidence on the methodologies available to calculate damages for the alleged breaches of treaty, fiduciary duty and equitable duties on a class-wide basis. There are well-accepted methodologies to calculate damages arising from the Crown's failure to increase the Annuity Payment over time. Such damages can be calculated by indexing the cash annuities to economic indicators and accounting for the foregone interest income on the unpaid annuities.[29] Methodologies exist to quantify the damages suffered by Treaty 9 First Nations as a result of the Crown's failure to provide economic support for agriculture operations ("agricultural support

[26] Hutchings Report at paras. 41-43, MRP 427-428.
[27] First Miller Report at MRP 378-379.
[28] First Miller Report at MRP 379-380.
[29] Hutchings Report at para. 15, MRP 416.

harm") and an ammunition and twine payment ("ammunition and twine harm"). The agricultural support harm can be quantified by: (i) estimating the initial capital and equipment costs to start an agricultural operation in present day; and (ii) analyzing the historical incomes earned by settlers who engaged in agriculture in Treaty 9 territory to capture the historical income disparity between settlers and Treaty 9 First Nations.[30]

26. The ammunition and twine harm can be quantified by determining the actual amount of ammunition and twine that was reasonably expected under Treaty 9 and the economic substance of such a payment, meaning the anticipated use of this payment to fish, hunt and trap available game and fish.[31]

27. Mr. Hutchings also proposed a methodology to estimate the damages relating to the Crown's failure to protect Treaty 9 First Nations' mineral rights. Ontario's revenues from these mineral interests can be estimated by analyzing Ontario's records. The full value of this mining activity can be estimated using the framework of economic rents, which assumes that the Treaty 9 First Nations were the full owners of the mine and not simply receiving royalty revenues (as Ontario had and continues to).[32]

F. REPRESENTATIVE PLAINTFF AND THE PUTATIVE CLASS

28. The proposed representative plaintiff, Missanabie, has accessed, occupied and exercised its jurisdiction as a Nation and as stewards of the land throughout its traditional territory since time immemorial. Missanabie became a beneficiary of Treaty 9 in 1906 and Missanabie members have been receiving Annuity Payments under Treaty 9 since that time.[33] As with all Treaty 9 First Nations, Missanabie has suffered from the Crown's failure to maintain the real value of those payments in the

[30] Hutchings Report at para. 30, MRP 423.
[31] Hutchings Report at para. 34, MRP 424.
[32] Hutchings Report at para. 42, MRP 428.
[33] Chief Gauthier Aff at para. 6, MPR 43.

120 years since Treaty 9 was entered into. Likewise, Missanabie has never received agricultural benefits, economic assistance or ammunition and twine, unlike the First Nations parties to the other numbered treaties.

29. Missanabie has advised all other Treaty 9 First Nations of this proposed class action. Missanabie is a member of Nishnawbe Aski Nation ("NAN"), a political territorial organization to which 35 Treaty 9 First Nations belong. Chief Jason Gautheir, the Chief of Missanabie, presented on the proposed class action at the NAN Assembly held on February 6-8, 2024. At that meeting, Missanabie's legal counsel explained the proposed class action to the attendees and the impact of certification.[34]

30. Chief Gauthier also corresponded with the two Treaty 9 First Nations that are not members of NAN: Conseil de la Premiere Abitibiwinni and Kitchenuhmaykoosib Inninuwug, located in Quebec and Northern Ontario, respectively, and advised them of the proposed class action. Further, Counsel to Missanabie has written to the Treaty 9 First Nations providing them with information on the proposed class action.[35]

31. Missanabie continues to engage Treaty 9 First Nations in the proposed class action. Most recently, Missanabie has collaborated with other Treaty 9 First Nations to develop an Oral History Protocol for use in this proceeding.[36]

III. STATEMENT OF ISSUES

32. The sole issue on this motion is whether the Plaintiff meets the certification criteria per section 5 of the *CPA*?

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[34] Chief Gauthier Aff at para. 18, MRP 48.
[35] Chief Gauthier Aff at para. 13, MRP 46.
[36] Supplemental Affidavit of Chief Jason Gauthier sworn July 31, 2025 at para. 4, MRP 446. Also see *R v. Marshall*, 2005 SCC 43 at para. 68, where the Supreme Court recognized that "orally transmitted history" in Indigenous litigation must be accepted where it meets the conditions of reliability and usefulness.

IV. LAW AND ARGUMENT

A. THE PLEADINGS DISCLOSE A CAUSE OF ACTION

33. Section 5(1)(a) of the *CPA* requires the pleadings to disclose a reasonable cause of action.[37] The threshold to strike a pleading is extremely high – the court must be satisfied that it is "plain and obvious" that the claim is "legally hopeless" and doomed to fail.[38] No evidence is admissible for the purpose of this analysis. The Court must read the pleadings liberally and generously, and assume that the facts pleaded are true, unless they are patently ridiculous or incapable of proof.[39] Further, in cases involving Indigenous issues, the Court should avoid a "technical approach" to pleadings to ensure that Indigenous rights issues (i.e. treaty rights, title claims and constitutional claims) are resolved in a manner that reflects the substance of the matter and furthers the "project of reconciliation".[40]

34. The Plaintiff pleads sufficient facts and cognizable breaches that are rooted in established law. Breach of treaty, breach of fiduciary duty and the failure to uphold the honour of the Crown are well-established causes of action nourished by an extensive body of jurisprudence. The Claim pleads tenable causes of action in breach of treaty, breach of fiduciary duty and breach of equitable duties.

i) Breach of Treaty Obligations

35. The Supreme Court has underscored that treaties are sacrosanct and create enforceable obligations which, if breached, are actionable.[41] In *Restoule*, the Supreme Court recently held that the Crown's failure to diligently implement treaty promises, including the requirement to augment annuity payments, constitutes an actionable breach of treaty.[42] In this case, Missanabie pleads the Crown breached Treaty 9 obligations by failing to: (i) increase, index or augment the amount of the

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[37] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at paras. 17-22; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 SCR 477 [*Pro-Sys*] at para. 63.
[38] *Carcillo* at para. 19; *Grant* at para. 45.
[39] *R. v. Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para. 17.
[40] *Whiteduck v. Ontario*, 2023 ONCA 543 at para. 25, citing *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.
[41] *Shot Both Sides* at paras. 37 and 50.
[42] *RestouleSCC* at para. 264.

annual payment under Treaty 9; (ii) provide agricultural benefits and economic assistance in the terms of Treaty 9; and (iii) protect Treaty 9 First Nations' mineral rights.[43] Based on the pleaded facts, it is not "plain and obvious" that the Plaintiff's breach of treaty claim will fail.

ii) Breach of Fiduciary Duty

36. The Plaintiff's breach of fiduciary duty claims satisfy section 5(1)(a) of the CPA. The Crown may owe fiduciary obligations to Indigenous peoples in two circumstances: (i) a *sui generis* fiduciary obligation where the Crown assumes discretionary control over a specific of cognizable Aboriginal interest; or (ii) an *ad hoc* fiduciary obligation where the Crown undertakes to exercise its discretionary control over a legal or substantial practical interest in the best interests of an Indigenous beneficiary.[44] The content and scope of the Crown's fiduciary duty varies with the nature and importance of the interest that is sought to be protected.[45]

37. The Crown's failure to act with sufficient diligence in fulfilling or implementing a treaty promise can constitute a breach of fiduciary duty.[46]

38. The Plaintiff pleads that Canada and Ontario also owed an *ad hoc* fiduciary duty to Treaty 9 First Nations, as Canada and Ontario undertook to negotiate and implement Treaty 9 in the best interests of Treaty 9 First Nations.[47] Canada and Ontario breached this fiduciary duty by negotiating and implementing Treaty 9 on unconscionable, improvident and unfair terms, which caused a corresponding harm to Treaty 9 First Nations.[48]

39. The facts pleaded alleging breach of fiduciary duties against Canada and Ontario establish a tenable claim that is not doomed to fail.

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[43] Plaintiff's Amended Amended Fresh as Amended Statement of Claim dated July 31, 2025 ("AAFASOC") at paras. 66, 67, 81, 82.
[44] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 44.
[45] *MMF* at para. 49.
[46] *Chippewas of Nawash Unceded* at para. 207.
[47] AAFASC at paras. 66, 67, 69-75, 81.
[48] AAFASC at paras. 73-75.

B. IDENTIFIABLE CLASS

40. The proposed class definition satisfies section 5(1)(b) of the *CPA*. The class must not be overly broad, must be defined by reference to objective criteria and must allow Class Members to be identified without reference to the merits of the action.[49] In order to satisfy section 5(1)(b), the plaintiff must establish "some basis in fact" that there are two or more persons who could prove that they suffered individual harm.[50] The proposed "First Nations Class" is defined as "any First Nation who is a successor in interest to the bands that signed or adhered to Treaty 9." The proposed Class is not overly broad, is rationally connected to the proposed common issues and is also constrained by objective criteria.

C. COMMON ISSUES SATISFY THE COMMONALITY TEST

41. The Plaintiff's revised PCIs, as set out in Appendix "A", satisfy the commonality test under section 5(1)(c) of the *CPA*. To satisfy section 5(1)(c), the plaintiff must demonstrate "some basis in fact" that the PCIs exist and can be determined on a class wide basis.[51] As the Court of Appeal for Ontario very recently observed in *Carcillo v. Ontario Major Junior Hockey League* ("*Carcillo*"), the common issues threshold is "intentionally low" and the plaintiff's evidentiary requirement to establish "some basis in fact" reflects this low bar.[52] An issue is considered common where (i) it does not inevitably break down into individual issues; and (ii) represents a substantial and necessary component of each member's claim, such that resolving it would meaningfully advance those claims.[53] The commonality analysis must be conducted purposively to determine whether allowing a class proceeding will avoid duplication of fact-finding or legal analysis.[54]

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[49] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 17.
[50] *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 at para 72.
[51] *Price v. Smith & Wesson Corporation*, 2025 ONCA 452 at para. 99.
[52] *Carcillo v. Ontario Major Junior Hockey League*, 2025 ONCA 652 [*Carcillo*] at paras. 40-41; *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718 at para. 85.
[53] *Carcillo* at para. 39.
[54] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39.

42. The Plaintiff has met the commonality criterion. The PCIs in this case are "substantial ingredient of every class member's claim" and their resolution will meaningfully advance each of the class members' claims.[55] Common issues relating to the existence of class-wide duties, the content of those duties, and breaches of those duties are routinely certified where, as here, the focus of the analysis is on the defendant's conduct.[56]

43. All Class Members have the same rights under, and the same interest in the interpretation, implementation, and enforcement of Treaty 9, which contains a single set of promises that the Crown extended to each and every signatory without variation. The PCIs concern three specific breaches of treaty obligations and fiduciary duty: the failure to maintain the real value of the Annuity Payment, the failure to provide for agricultural benefits and assistance and the failure to protect mineral rights. Although the relationship between the Crown and each Treaty 9 First Nation is independent and distinct, the determination of the PCIs apply equally to all Treaty 9 First Nations.

i) PCIs 1, 2, 8– Duty to maintain real value of the Annuity Payments

44. There is "some basis in fact" that PCIs relating to whether the Crown had a duty to maintain the real value of the Annuity Payment and whether it breached this duty can be answered in common for all Treaty 9 First Nations. Similarly, whether the Crown's failure to increase, index or augment the Annuity Payment breached the Crown's treaty obligations, fiduciary duties, honour of the Crown, or other equitable duties applies equally to all Treaty 9 First Nations. Missanabie has also adduced evidence that the Crown failed to maintain the real value of the Annuity Payment for all Treaty 9 First Nations. The resolution of PCIs 1, and 2 and 8 will advance all Treaty 9 First Nations' claims.

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[55] *Carcillo* at para. 39; *Grossman v. Nissan Canada*, 2019 ONSC 6180 [*Grossman*] at para. 38.
[56] *Banman v. Ontario*, 2023 ONSC 6187 [*Banman*] paras. 285-289; *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (ONCA), paras. 32 and 71; *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444 [*Fresco*] at para. 103.

ii) PCIs 4, 5, 6 – Crown's failure to provide economic assistance for agriculture and ammunition and twine

45. Similarly, there is "some basis in fact" that the Crown owed a duty to provide economic assistance for agriculture, stock-raising, hunting or fishing under Treaty 9, its fiduciary obligations, honour of the Crown, or equitable duties and breached that duty. PCIS 4, 5, and 6 are class-wide issues amenable to a class-wide resolution. Missanabie's evidence is that the Crown failed to provide economic assistance for the Treaty 9 First Nations, while providing these same benefits to signatories of earlier numbered treaties.[57] The determination of these PCIs applies equally to each Treaty 9 First Nations entitlements under Treaty 9, the common law, and equitable doctrines.

iii) PCI 8 – Crown's failure to protect mineral rights

46. There is "some basis in fact" that Canada's transfer of Treaty 9 First Nations' mineral rights to Ontario constituted a breach of treaty, breach of fiduciary duty, and breach of the honour of the Crown. PCI 6 is common to all Treaty 9 First Nations.[58] Whether Canada's transfer breached any duties owing to Treaty 9 First Nations applies to each Treaty 9 First Nations equally.

iv) PCIs 10 and 11 – Negotiation of Treaty 9 on improvident terms

47. The PCIs concerning the Crown's negotiation of Treaty 9 on improvident terms and whether the Crown's failure to correct this error constitutes additional breaches of duty applies equally to all Treaty 9 First Nations. Under Treaty 9, all Treaty 9 First Nations are entitled to the same benefits and promises. The resolution of this PCI will apply equally to all Treaty 9 First Nations.

v) PCIs 3, 7, 12, 14-15 –Aggregate Damages

48. The PCIs with respect to the availability of damages applies equally to all Treaty 9 First Nations. In order to certify aggregate damages, the plaintiff must establish "some basis in fact" that

[57] First Miller Report at MRP 368-369, 373.
[58] Hutchings Report at MRP 426-427, 429.

the methodology is sufficiently credible or plausible.[59] This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis. Missanabie has advanced workable methodologies, grounded in Mr. Hutchings' expert evidence, to determine damages on an aggregate basis for each of the alleged breaches of treaty, fiduciary duty and equitable duties. The proposed methodologies are uncontested by Canada and Ontario. They also reflect sound and well-accepted methodologies to calculate damages including aggregate damages. Further, the application of the proposed methodologies can be applied on a class-wide basis.

vi) PCI 13 – Unjust Enrichment

49. PCIs relating to unjust enrichment are routinely certified.[60] Such common issues are amenable to class-wide resolution because the focus is on the defendant's actions and not the actions of individual class members.[61] Here, the determination of whether the Crown was unjustly enriched through the granting of mineral rights on Treaty 9 First Nations' reserves applies equally to each Class Member.

vii) Punitive or Exemplary Damages

50. Ontario courts have routinely certified PCIs relating to punitive damages.[62] As this Court previously held "the question of whether the defendant's conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue",[63] and "[t]he issue of exemplary or punitive damages turns on the conduct of the defendants and therefore can be appropriately determined on a class-wide basis."[64]

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[59] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 118.
[60] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para. 106; *Fresco* at paras. 103, 105-107.
[61] *Omarali v Just Energy*, 2016 ONSC 4094 at paras. 90-91; *Baroch v. Canada Cartage Diversified GP Inc.*, 2015 ONSC 40 at paras. 49-50.
[62] *Hodge v. Neinstein*, 2017 ONCA 494 at para. 203; *Good v. Toronto Police Services Board*, 2016 ONCA 250 at para. 82; *Grossman* at paras. 57-60; *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423 at paras. 365-366.
[63] *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53, para. 205.
[64] *Banerjee v. Shire Biochem Inc. et al.*, 2010 ONSC 889 at para. 34.

51. The availability of punitive damages in this case turns solely on the Crown's conduct and here, the Plaintiff has adduced evidence of the egregious, reprehensible and high-handed conduct of the Crown. Further, whether restitution is available under equitable doctrines is also something that can be determined in common.

D. A CLASS PROCEEDING IS PREFERABLE

i) Applicable test to determine preferability

52. The proposed class action is the preferable procedure to resolve Class Members' claims pursuant to section 5(1)(d) of the *CPA*. This action is governed by the amended *CPA* which includes s. 5(1.1)'s requirements that: (i) the proposed class proceeding be the superior vehicle to determine class members' claims; and (ii) the PCIs predominate over any individual issues.[65] In *Banman*, in interpreting the amended preferability test, Perell J. held that the analysis of superiority and predominance is to be conducted through the lens of the objectives of class proceedings – access to justice, behaviour modification, and judicial economy.[66] He further held that the question of whether the common issues "predominate" requires a qualitative, not quantitative analysis.[67] In considering preferability under the amended *CPA*, the Court must consider whether:

a) the design of the class action is manageable as a class action;

b) there are reasonable alternatives to a class action;

c) the common issues predominate over the individual issues; and

d) the proposed class action is superior to the alternatives.[68]

53. The Supreme Court's leading authority on the preferability analysis – *AIC Limited v. Fischer* – continues to govern the analysis of preferability under the amended *CPA*, and requires that the

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[65] *Banman* at paras. 317-318.
[66] *Banman* at paras. 185(g), 313, 320.
[67] *Banman* at paras. 321-322.
[68] *Banman* at para. 320; *Lockhart v. Attorney General of Canada*, 2024 ONSC 6573 at para. 262.

representative plaintiff must show "some basis in fact" that the class proceeding is (i) a fair, efficient and manageable method of advancing the claim, and (ii) preferable to any other reasonably available means of resolving the Class Members' claims.[69] As explained below, this proposed class proceeding will facilitate the most expeditious, fair and efficient resolution of the Treaty 9 First Nations' claims, thereby satisfying the preferability test as articulated in *Banman*.[70]

ii) The design of the class proceeding is manageable

54. As the Court of Appeal for Ontario recently underscored in *Carcillo*, "[t]he scope and complexity of a proposed proceeding are central to assessing manageability."[71] Manageability requires consideration of factors including the size, breadth, and complexity of the case.[72]

55. This proposed class action is brought by and on behalf of Treaty 9 First Nations. It concerns the interpretation, implementation and enforcement of a single treaty entered into by Treaty 9 First Nations and the Crown. It is neither "unwieldy" nor "overwhelming" in design and complexity.

56. The PCIs, while of significant importance to the parties, are not complex. They are issues of fact and law that can be resolved efficiently, without the need to delve into the individual circumstances of each Class Member. PCIs relating to the interpretation and enforcement of the Class Members' collective rights, enshrined in treaty and protected by s. 35 of the *Constitution Act, 1982*, can be determined without individualized inquiries. Similarly, the PCIs relating to punitive and aggravated damages can be determined based on the conduct of Canada and Ontario in their treatment of the Class Members throughout the negotiation, execution, and implementation of Treaty 9.

57. While Ontario courts have not previously considered the certification of class proceedings arising from treaty breaches, courts of other jurisdictions have found that class actions are the

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[69] *AIC Limited v. Fischer*, 2013 SCC 69 [*AIC Limited*] at para. 48.
[70] *Banman* at paras. 317, 320-322.
[71] *Carcillo* at para. 52.
[72] *Carcillo* at para. 52.

preferable procedure for addressing treaty breaches, consistent with the goal of reconciliation. In *Joyce v. Nova Scotia (AG)*,[73] the Nova Scotia Court of Appeal referenced the Commissioners of the Truth and Reconciliation Commission of Canada's definition of reconciliation as "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples".[74]

58. Similarly, in *Anderson et al v. Manitoba et. al*, the Manitoba Court of Appeal overturned the Manitoba Court of King's Bench and certified a class action brought by several First Nations alleging among other things, breach of treaty rights against the Manitoba government for in the flooding of their communities.[75] The Court that the class proceeding was superior as the PCIs, which all arose from the defendants' alleged misconduct – the Manitoba government's operation of various dams – were a "substantial ingredient of each of the class member's claims" and necessary to resolve each class members' claims.[76] Here, the PCIs also flow from the Crown's alleged misconduct in relation to the breach of its promises and duties under Treaty 9.

59. The same reasoning applies equally here. This class proceeding is a manageable means by which to resolve the common claims of all 37 Treaty 9 First Nations. The alleged breaches of treaty, fiduciary duties, and equitable duties affect all Treaty 9 First Nations equally. The availability of aggregate damages, while not required, bolsters the preferability of a class proceeding over alternatives.[77] Similarly, the applicability of the same legal principles to the claims of all class members militates in favour of the manageability of a class proceeding.[78]

60. As discussed above, the PCIs address the key issues of liability advanced by each of the Treaty 9 First Nations. The PCIs can be determined at a common issues trial with common evidence led by

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[73] *JoyceCA*, the Nova Scotia Court of Appeal affirmed the lower court's certification of a class proceeding brought on behalf of the Mi'kmaw peoples of Nova Scotia, alleging breaches of their right to hunt, fish and harvest pursuant to s. 35 of the *Constitution Act, 1982*.
[74] *JoyceCA* at paras. 71-73.
[75] *AndersonCA*. In *Anderson*, the proposed class of affected First Nations alleged breach of treaty rights, nuisance, negligence, breach of fiduciary duty and punitive damages against the Manitoba government.
[76] *AndersonCA* at para. 47.
[77] *Carcillo* at para. 73; *Richard v. The Attorney General of Canada*, 2024 ONSC 3800 [*Richard*] at para. 400.
[78] *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 at paras. 40-41, 43.

the Treaty 9 First Nations. Damages can also be determined on a class-wide basis and resolved at a common issues trial. Further, the Plaintiff does not anticipate that there will be any individual issues that require resolution at an individual issues trial.

61. While there is no requirement that the Class be homogenous, the interests of Treaty 9 Nations are aligned. This class proceeding provides a fair mechanism for advancing the collective claims of the Class Members. It does so by yielding a single interpretation of treaty which will bind the Class consisting of all Treaty 9 Nations, providing certainty and finality. Finally, a class proceeding preserves the autonomy of each First Nations to remove itself from the action while eliminating economic, social and psychological barriers to participation which have prevented First Nations from accessing legal redress in the past.[79]

iii) A class action is superior to any alternatives

62. In *Banman*, this Court found that a class proceeding was superior to alternative procedures because, among other things, it:

a) automatically assembled all class members who may benefit from a common issues trial;

b) provided class members with legal representation that may otherwise be unavailable; and

c) achieved economies of scale for the whole group.

63. These factors are also satisfied in the present case. A class proceeding is superior to any other alternatives available to Treaty 9 First Nations. Further, it is the only procedure that will promote access to justice, judicial economy, and behavioural modification.

64. First Nations are historically disenfranchised groups that have faced significant access to justice barriers.[80] A class proceeding is an accessible vehicle for Treaty 9 First Nations to collectively advance their claims. It also provides legal representation and recourse for Class Members who may

[79] *JoyceSC* at para. 176.
[80] *JoyceSC* at para. 176.

not otherwise be able to afford counsel to prosecute their individual treaty claims.

65. The court-approved notice process will also ensure that Class Members receive adequate notice of the proceeding, have the opportunity to opt-out if they desire, and receive timely notice of developments in this litigation.

66. A class proceeding also facilitates judicial economy by preventing the litigation of multiple overlapping claims in different forums. This will conserve judicial resources and ensure that the parties do not incur unnecessary legal expense and delay. Finally, the availability of aggregate damages achieves the goal of access to justice; as Belobaba J. observed and the Court of Appeal affirmed in *Ramdath*, without aggregate damages "the potential of the class action for enhancing access to justice will not be realized".[81]

iv) No reasonable alternatives to a class proceeding

67. Breach of treaty obligations, breach of fiduciary cases, and Indigenous rights cases are amenable to certification and have been certified by Canadian Courts (outside of Ontario) in the past.[82] The potential alternatives to a class proceeding are: a representative action under Rule 10 or 12.08 of the *Rules of Civil Procedure*; individual actions; a joinder action; or 37 different claims through the Specific Claims Tribunal. As explained below, none of these options are viable alternatives.

v) Representative action under Rule 12.08 is not preferable

68. Rule 12.08 of the *Rules of Civil Procedure* authorizes unincorporated associations or trade unions to bring proceedings on behalf of groups or collectives. Rule 12.08 is wholly distinct from Rule 114 of the *Federal Court Rules*, which is occasionally used to authorize representative actions

[81] *Ramdath v. George Brown College*, 2014 ONSC 3066 at paras. 1, 42, var'd in part, 2015 ONCA 921 at paras. 75-78; *Spina v. Shoppers Drug Mart Inc.*, 2024 ONCA 642 at paras. 196-201.
[82] *AndersonCA*; *JoyceCA*.

on behalf of First Nations in the Federal Court.

69. Here, the Plaintiff and Class Members are "juridical persons" with the capacity to commence litigation in their own name. They are not Aboriginal collectives (such as unincorporated political associations) who have no legal standing to commence proceedings and must rely on a Rule 12.08 representative proceeding to enforce their rights. Accordingly, a Rule 12.08 representation order is not available in this case.

70. While the Federal Court recently authorized a treaty annuity indexing claim in Treaty 4 to proceed by way of representative action in *Chief Nepinak and Chief Acoose v Canada* ("*Nepinak-Acoose*"),[83] this case is distinguishable for the following reasons:

a) **First**, *Nepinak-Acoose* was not the only treaty annuities indexing claim that had been initiated in Treaty 4. The Court found that at least eleven Specific Claims had been commenced in addition to a competing, parallel class proceeding in the Saskatchewan Court of King's Bench.[84] Certifying the Federal Court class proceeding would have resulted in numerous opt-outs and fragmentation of the claim across various courts and jurisdictions, giving rise to potentially inconsistent interpretations of treaty. Here, there is no evidence that any Treaty 9 First Nation has commenced or intends to commence a parallel proceeding.

b) **Second**, the plaintiffs in *Nepinak-Acoose* were two individuals who brought the action on behalf of the individual members of the Treaty 4 First Nations. Because the rights to receive an annuity under treaty is a collective right, the proper representative plaintiffs were not before the Court.[85] This action, on the other hand, is framed correctly in recognition of the juridical status of the rights-holding bands (being First Nations) and the

[83] *Nepinak and Acoose*.
[84] *Nepinak and Acoose* at para. 9.
[85] *Nepinak and Acoose* at para. 50.

proper parties are before the Court.

c) **Third**, Ontario lacks an equivalent to Rule 114 of the *Federal Court Rules* in the *Rules of Civil Procedure*, which pre-dates Ontario's class proceeding legislation and was historically used to resolve Aboriginal and treaty rights cases involving communal rights.[86] Rule 114 is not analogous to Rule 12.08 and is no assistance in the present case. The flexible procedural tools and judicial oversight provided through the *CPA* are unavailable under Rule 12.08.

a. Individual actions or a joinder action are not reasonable alternatives

71. There is "some basis in fact" that this proceeding is superior to 37 individual actions. There is no evidence that the Plaintiff or any of Treaty 9 Nations are willing to commence individual actions, which would inevitably result in a multiplicity of proceedings (which shall be avoided pursuant to s. 138 of the *Courts of Justice Act*), and the risk of inconsistent results.

b. The Specific Claims Tribunal is not preferable

72. There is no basis in fact that the Specific Claims Tribunal (the "Tribunal") process is superior to a class proceeding in addressing the psychological, social, and economic barriers to access to justice faced by the Class.[87]

73. The Tribunal process is lengthy and protracted and fails to protect the full scope of rights sought to be advanced through this proceeding. Claims before the Tribunal are limited to $150,000,000 and limited to recent conduct that transpired no more than 15 years before the date on which the Claim is filed.[88] The Tribunal also lacks jurisdiction to award general and punitive damages or grant declaratory relief.[89] Accordingly, the Tribunal cannot consider historic losses or order a

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[86] *Nepinak and Acoose* at para. 36.
[87] *AIC Limited* at para. 27.
[88] *Specific Claims Tribunal Act*, S.C. 2008, c.22 [*SCTA*] at s. 15(1)(a).
[89] *SCTA* at s. 20(1)(b).

remedy addressing the future or go-forward implementation of treaty promises. As the Supreme Court underscored in *Fischer*, access to justice has both substantive and procedural components.[90] The Tribunal offers, at best, *partial* substantive justice, leaving wrongs committed over 100 years unaddressed.

74. The Tribunal process is also slow. To start a claim, a First Nation must file a claim with the Minister of Crown-Indigenous Relations (the "Minister"), who then has **three years** from this date to decide whether to negotiate the Claim, or allow the claim to proceed in the Tribunal. The First Nation cannot start a claim before the Tribunal until the Minister authorizes it do so, or the three-year period passes.[91]

75. As this Court found in *The Chippewas of Sarnia Band*, the more comprehensive regime for the resolution of the plaintiffs' claims is the preferable option.[92] As such, proceeding through the Tribunal is not preferable to a class proceeding.

vi) The common issues predominate over the individual issues

76. The current design of the class proceeding does not contemplate any individual issues. As a result, the common issues clearly predominate over any potential individual issues.[93]

E. MISSANABIE IS A SUITABLE REPRESENTATIVE PLAINTIFF

77. A suitable representative plaintiff under section 5(1)(e) must: (i) adequately and fairly represent the interests of the Class; (ii) prepare a workable litigation plan; and (iii) have no conflict of interest with the Class on the PCIs.[94] There is ample evidence, far exceeding the "some basis in fact" standard, that Missanabie meets all of these criteria.

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[90] *AIC Limited* at para. 24.
[91] *SCTA* at s. 16(1).
[92] *Chippewas of Sarnia Band v. Canada (Attorney General)*, 1996 CanLII 8015 (ONSC).
[93] *Banman* at para. 322.
[94] *Daniells v. McLellan*, 2017 ONSC 3466 [*Daniells*] at para. 79.

78. Missanabie has played an active role in developing the proposed class proceeding. It has actively outreached to all Treaty 9 First Nations to advise them of the proposed class proceeding. Missanabie is well-situated to adequately and fairly represent the interests of the Class.[95]

79. Missanabie's proposed Litigation Plan sets out a comprehensive and workable framework for advancing the action and for notifying Class members and keeping them and their members apprised of significant developments in the litigation. For example, Class Counsel will create a system to communication updates with Treaty 9 First Nations in their language of choice and send regular litigation updates to Class Members.[96]

80. Further, Missanabie has no conflict of interest with any Class members with respect to the PCIs. As a party to Treaty 9, Missanabie, like all other Treaty 9 First Nations, has suffered the same harm as a result of the Crown's alleged breaches of Treaty 9, breach of fiduciary duty and breach of the honour of the Crown.

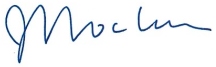
F. CONCLUSION

81. In the circumstances, the requirements for certification have been satisfied. This class proceeding best achieves the three goals of class proceedings: behaviour modification, judicial economy, access to justice.

V. RELIEF REQUESTED

82. Missanabie respectfully requests an Order: (i) certifying this action as a class proceeding; (ii) appointing Missanabie as the representative plaintiff for the Class; and (iii) awarding Missanabie costs of the certification motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of October, 2025.



Counsel for the Plaintiff

[95] Chief Gauthier Aff at para. 30.
[96] Amended Litigation Plan dated July 31, 2025 at paras. 46-47, MRP 470.

Appendix "A" – Plaintiff's List of Revised Proposed Common Issues ("PCIs")

1. Does Treaty 9 contain an implied term requiring the Crown to increase the annual payment of $4.00 per member of Treaty 9 First Nations (the "Annuity Payment") to offset the impacts of inflation, maintain the real value thereof and/or share in the value of the economic benefits derived by the Crown from the territory covered by Treaty 9?

2. If the answer to (1) is yes, by failing to increase the Annuity Payment since Treaty 9 was entered into in 1905, did the Crown fail to act in accordance with:
    a. its obligations to the Class under Treaty 9?;
    b. its fiduciary obligations owing to Class Members?;
    c. the honour of the Crown; and/or
    d. any other equitable duties?

3. If the answer to (3)(A), (B), (C) or (D) is yes, is the Crown liable to pay damages and/or equitable compensation to the Class, and if so, in what amount?

4. Does Treaty 9 contain an express or implied term requiring the Crown to provide economic assistance in agriculture, stock-raising to the members of Treaty 9 First Nations?

5. Does Treaty 9 contain an express or term requiring the Crown to provide an annual distribution of twine and ammunition to the members of Treaty 9 First Nations?

6. If the answer to (4) and/or (5) is yes, by failing to make provision in Treaty 9 for economic assistance in agriculture, stock-raising or other work and an annual distribution of ammunition and twine, did the Crown fail to act in accordance with:
    a. its obligations to the Class under Treaty 9;
    b. is fiduciary obligations owing to the Class Members;
    c. the Honour of the Crown; and/or
    d. any other equitable duties?

7. Is the *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, contrary to Treaty #9 insofar as it purports to grant the Government of the Province of Ontario a one-half interest in all mineral rights in Indian Reserves within the Province of Ontario that were set apart under Treaty 9?

8. If the answer to (6)(A),(B),(C) or (D) or (7)(A), (B), (C) or (D) is yes, is the Crown liable to pay damages and/or equitable compensation to the Class and if so, in what amount?

9. In the alternative, if the answer to (1) is no, did the Crown breach the Class Members' rights with respect to the negotiation and implementation of Treaty 9 by failing to include an express requirement to increase the Annuity Payment (an "Escalator Clause") in the text of Treaty 9, specifically did the Crown:

    a. fail to act in good faith;
    b. breach its fiduciary obligations owing to the Class;
    c. fail to act in accordance with the Honour of the Crown; and/or
    d. any other equitable duties?

10. If the answer to (8) is yes, did the Governor-in-Council approve and consent to Treaty 9 on terms which were unconscionable, foolish, improvident or otherwise amounted to exploitation of the

Class?

11. If the answer to (8) is yes, did the Crown commit further breaches of its equitable, fiduciary and honourable obligations owing to the Class Members by failing to correct its error at any time since the signing of Treaty 9?

12. If the answer to (8)(A), (B), (C), or (D), and/or (9), and/or (10) is yes, is the Crown liable to pay damages and/or equitable compensation to the Class and if so, in what amount?

13. By failing to comply with an implied or express obligation to increase the Annuity Payment, or alternatively, by failing to uphold its equitable, fiduciary and honourable obligations in the negotiation and implementation of Treaty 9, was the Crown unjustly enriched and did the Class suffer a corresponding deprivation without juristic reason?

14. If the answer to (12) is yes, is the Crown liable to pay damages and/or restitution to the Class and if so, in what amount?

15. Can damages or some portion thereof, be determined on an aggregate basis?

16. Do the actions of the Crown give rise to punitive, exemplary, or aggravated damages? If so, in what amount?

17. Should the Crown pay pre-and post-judgment interest pursuant to the *Courts of Justice Act* to the class? If so, in what amount?

SCHEDULE A - LIST OF AUTHORITIES

Jurisprudence

1. *Shot Both Sides v. Canada*, 2024 SCC 12
2. *Ontario (Attorney General) v. Restoule*, 2024 SCC 27
3. *Joyce v. Nova Scotia (Attorney General)*, 2022 NSSC 22
4. *Nasogaluak v. Canada (Attorney General)*, 2021 FC 656
5. *Ewert v. Canada*, 2018 SCC 30
6. *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15
7. *Atlantic Lottery Corp. Inc v. Babstock*, 2020 SCC 19
8. *AIC Limited v. Fischer*, 2013 SCC 69
9. *Daniells v. McLellan*, 2017 ONSC 3466
10. *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14
11. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73
12. *Chief Derek Nepinak and Chief Bonny Lynn Acoose v. Canada,* 2025 FC 925
13. *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General)*, 2023 ONCA 565
14. *Joyce v. Nova Scotia (Attorney General)*, 2024 NSCA 9
15. *Anderson et al v. Manitoba et al,* 2017 MBCA 14
16. *R v. Marshall*, 2005 SCC 43
17. *Carcillo v. Ontario Major Junior Hockey League,* 2025 ONCA 652
18. *Grant v. Canada (Attorney General)*, 2009 CanLII 68179 (ONSC)
19. *R. v. Imperial Tobacco Canada Ltd*, 2011 SCC 42
20. *Whiteduck v. Ontario*, 2023 ONCA 543
21. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44
22. *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4
23. *Hollick v. Toronto (City),* 2001 SCC 68
24. *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58

25. *Price v. Smith & Wesson Corporation*, 2025 ONCA 452

26. *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718

27. *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46

28. *Grossman v. Nissan Canada*, 2019 ONSC 6180

29. *Banman v. Ontario*, 2023 ONSC 6187

30. *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (ONCA)

31. *Cavanaugh et al. v. Grenville Christian College et al.*, 2020 ONSC 1133

32. *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444

33. *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57

34. *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443

35. *Omarali v Just Energy,* 2016 ONSC 4094

36. *Baroch v. Canada Cartage Diversified GP Inc.*, 2015 ONSC 40

37. *Hodge v. Neinstein*, 2017 ONCA 494

38. *Good v. Toronto Police Services Board*, 2016 ONCA 250

39. *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423

40. *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53

41. *Banerjee v. Shire Biochem Inc. et al.,* 2010 ONSC 889

42. *Lockhart v. Attorney General of Canada*, 2024 ONSC 6573

43. *Richard v. The Attorney General of Canada*, 2024 ONSC 3800

44. *Fantl v. Transamerica Life Canada*, 2016 ONCA 633

45. *Ramdath v. George Brown College*, 2014 ONSC 3066

46. *Ramdath v. George Brown College*, 2015 ONCA 921

47. *Spina v. Shoppers Drug Mart Inc.*, 2015 ONCA 921

48. *Chippewas of Sarnia Band v. Canada (Attorney General)*, 1996 CanLII 8015 (ONSC).

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

Date: **October 1, 2025**

Joel P. Rochon

SCHEDULE B – LIST OF STATUTES

***Canadian Charter of Rights and Freedoms*, Rights of the Aboriginal Peoples of Canada, Part 2 of The *Constitution Act*, 1982**

Recognition of existing aboriginal and treaty rights

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of *aboriginal peoples of Canada*

(2) In this Act, ***aboriginal peoples of Canada*** includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) ***treaty rights*** includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands, S.C. 1924, c. 48

1 All Indian Reserves in the Province of Ontario heretofore or hereafter set aside, shall be administered by the Dominion of Canada for the benefit of the band or bands of Indians to which each may have been or may be allotted; portions thereof may, upon their surrender for the purpose by the said band or bands, be sold, leased or otherwise disposed of by letters patent under the Great Seal of Canada, or otherwise under the direction of the Government of Canada, and the proceeds of such sale, lease or other disposition applied for the benefit of such band or bands, provided, however, that in the event of the band or bands to which any such Reserve has been allotted becoming extinct, or if, for any other reason, such Reserve, or any portion thereof is declared by the Superintendent General of Indian Affairs to be no longer required for the benefit of the said band or bands, the same shall thereafter be administered by, and for the benefit of, the Province of Ontario, and any balance of the proceeds of the sale or other disposition of any portion thereof then remaining under the control of the Dominion of Canada shall, so far as the same is not still required to be applied for the benefit of the said band or bands of Indians, be paid to the Province of Ontario, together with accrued unexpended simple interest thereon.

2 Any sale, lease or other disposition made pursuant to the provisions of the last preceding paragraph may include or may be limited to the minerals (including the precious metals) contained in or under the lands sold, leased or otherwise disposed of, but every grant shall be subject to the provisions of the statute of the Province of Ontario entitled "*The Bed of Navigable Waters Act*", Revised Statutes of Ontario, 1914, chapter thirty-one.

3 Any person authorized under the laws of the Province of Ontario to enter upon land for the purpose of prospecting for minerals thereupon shall be permitted to prospect for minerals in any Indian Reserve upon obtaining permission so to do from the Indian Agent for such Reserve and upon complying with such conditions as may be attached to such permission, and may stake out a mining claim or claims on such Reserve.

4 No person not so authorized under the laws of the Province of Ontario shall be given permission to prospect for minerals upon any Indian Reserve.

5 The rules governing the mode of staking and the size and number of mining claims in force from time to time in the Province of Ontario or in the part thereof within which any Indian Reserve lies shall apply to the staking of mining claims on any such Reserve, but the staking of a mining claim upon any Indian Reserve shall confer no rights upon the person by whom such claim is staked except such as may be attached to such staking by the *Indian Act* or other law relating to the disposition of Indian Lands.

6 Except as provided in the next following paragraph, one-half of the consideration payable, whether by way of purchase money, rent, royalty or otherwise, in respect of any sale, lease or other disposition of a mining claim staked as aforesaid, and, if in any other sale, lease or other disposition hereafter made of Indian Reserve lands in the Province of Ontario, any minerals are included, and the consideration for such sale, lease or other disposition was to the knowledge of the Department of Indian Affairs affected by the existence or supposed existence in the said lands of such minerals, one-half of the consideration payable in respect of any such other sale, lease or other disposition, shall forthwith upon its receipt from time to time, be paid to the Province of Ontario; the other half only shall be dealt with by the Dominion of Canada as provided in the paragraph of this agreement numbered 1.

7 The last preceding paragraph shall not apply to the sale, lease or other disposition of any mining claim or minerals on or in any of the lands set apart as Indian Reserves pursuant to the hereinbefore recited treaty made in 1873, and nothing in this agreement shall be deemed to detract from the rights of the Dominion of

Canada touching any lands or minerals granted or conveyed by His Majesty for the use and benefit of Indians by letters patent under the Great Seal of the Province of Upper Canada, of the Province of Canada or of the Province of Ontario, or in any minerals vested for such use and benefit by the operation upon any such letters patent of any statute of the Province of Ontario.

8 No water-power included in any Indian Reserve, which in its natural condition at the average low stage of water has a greater capacity than five hundred horsepower, shall be disposed of by the Dominion of Canada except with the consent of the Government of the Province of Ontario and in accordance with such special agreement, if any, as may be made with regard thereto and to the division of the purchase money, rental or other consideration given therefor.

9 Every sale, lease or other disposition heretofore made under the Great Seal of Canada or otherwise under the direction of the Government of Canada of lands which were at the time of such sale, lease or other disposition included in any Indian Reserve in the Province of Ontario, is hereby confirmed, whether or not such sale, lease or other disposition included the precious metals, but subject to the provisions of the aforesaid statute of the Province of Ontario entitled "*The Bed of Navigable Waters Act*", and the consideration received in respect of any such sale lease or other disposition shall be and continue to be dealt with by the Dominion of Canada in accordance with the provisions of the paragraph of this agreement numbered 1, and the consideration received in respect of any sale, lease or other disposition heretofore made under the Great Seal of the Province of Ontario, or under the direction of the Government of the said Province, of any lands which at any time formed part of any Indian Reserve, shall remain under the exclusive control and at the disposition of the Province of Ontario.

10 Nothing herein contained, except the provision for the application of "*The Bed of Navigable Waters Act*" aforesaid, shall affect the interpretation which would, apart from this agreement, be put upon the words of any letters patent heretofore or hereafter issued under the Great Seal of Canada or the Great Seal of the Province of Ontario, or of any lease or other conveyance, or of any contract heretofore or hereafter made under the direction of the Government of Canada or of the Province of Ontario.

Class Proceedings Act, 1992, S.O. 1992, c. 6

Certification

5. (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced 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 of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1); 2020, c. 11, Sched. 4, s. 7 (1).

Same

(1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,

(a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and

(b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members. 2020, c. 11, Sched. 4, s. 7 (2).

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

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

(b) has produced 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 of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2); 2020, c. 11, Sched. 4, s. 7 (3).

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5); 2020, c. 11, Sched. 4, s. 7 (4).

Existence of other class proceeding

(6) If a class proceeding or proposed class proceeding, including a multi-jurisdictional class proceeding or proposed multi-jurisdictional class proceeding, has been commenced in a Canadian jurisdiction other than Ontario involving the same or similar subject matter and some or all of the same class members as in a proceeding under this Act, the court shall determine whether it would be preferable for some or all of the claims of some or all of the class members, or some or all of the common issues raised by those claims, to be resolved in the proceeding commenced in the other jurisdiction instead of in the proceeding under this Act. 2020, c. 11, Sched. 4, s. 7 (2).

Same, considerations

(7) In making a determination under subsection (6), the court shall,

(a) be guided by the following objectives:

(i) ensuring that the interests of all parties in each of the applicable jurisdictions are given due consideration,

(ii) ensuring that the ends of justice are served,

(iii) avoiding irreconcilable judgments where possible,

(iv) promoting judicial economy; and

(b) consider all relevant factors, including,

(i) the alleged basis of liability in each of the proceedings, and any differences in the laws of each applicable jurisdiction respecting such liability and any available relief,

(ii) the stage each proceeding has reached,

(iii) the plan required to be produced for the purposes of each proceeding, including the viability of the plan and the available capacity and resources for advancing the proceeding on behalf of the class,

(iv) the location of class members and representative plaintiffs in each proceeding, including the ability of a representative plaintiff to participate in a proceeding and to represent the interests of class members,

(v) the location of evidence and witnesses, and

(vi) the ease of enforceability in each applicable jurisdiction. 2020, c. 11, Sched. 4, s. 7 (2).

Motion for determination under subs. (6)

(8) The court, on the motion of a party or class member made before the hearing of the motion for certification, may make a determination under subsection (6) with respect to a proceeding under this Act, and, in doing so, may make any orders it considers appropriate respecting the proceeding, including,

(a) staying the proceeding; and

(b) imposing such terms on the parties as the court considers appropriate. 2020, c. 11, Sched. 4, s. 7 (2).

Courts of Justice Act, R.S.O. 1990, c. C.43

Prejudgment and postjudgment interest rates

Definitions

127 (1) In this section and in sections 128 and 129,

"bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to banks listed in Schedule I to the *Bank Act* (Canada); ("taux d'escompte")

"date of the order" means the date the order is made, even if the order is not entered or enforceable on that date, or the order is varied on appeal, and in the case of an order directing a reference, the date the report on the reference is confirmed; ("date de l'ordonnance")

"postjudgment interest rate" means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the date of the order falls, rounded to the next higher whole number where the bank rate includes a fraction, plus 1 per cent; ("taux d'intérêt postérieur au jugement")

"prejudgment interest rate" means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the nearest tenth of a percentage point; ("taux d'intérêt antérieur au jugement")

"quarter" means the three-month period ending with the 31st day of March, 30th day of June, 30th day of September or 31st day of December. ("trimestre") R.S.O. 1990, c. C.43, s. 127 (1).

Calculation and publication of interest rates

(2) After the first day of the last month of each quarter, a person designated by the Deputy Attorney General shall forthwith,

(a) determine the prejudgment and postjudgment interest rate for the next quarter; and

(b) publish in the prescribed manner a table showing the rate determined under clause (a) for the next quarter and the rates determined under clause (a) or under a predecessor of that clause for all the previous quarters during the preceding 10 years. 2006, c. 21, Sched. A, s. 18.

Regulations

(3) The Attorney General may, by regulation, prescribe the manner in which the table described in clause (2) (b) is to be published. 2006, c. 21, Sched. A, s. 18.

Prejudgment interest

128 (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order. R.S.O. 1990, c. C.43, s. 128 (1).

Exception for non-pecuniary loss on personal injury

(2) Despite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court made under clause 66 (2) (w). R.S.O. 1990, c. C.43, s. 128 (2); 1994, c. 12, s. 44.

Special damages

(3) If the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order.

Exclusion

(4) Interest shall not be awarded under subsection (1),

(a) on exemplary or punitive damages;

(b) on interest accruing under this section;

(c) on an award of costs in the proceeding;

(d) on that part of the order that represents pecuniary loss arising after the date of the order and that is identified by a finding of the court;

(e) with respect to the amount of any advance payment that has been made towards settlement of the claim, for the period after the advance payment has been made;

(f) where the order is made on consent, except by consent of the debtor; or

(g) where interest is payable by a right other than under this section. R.S.O. 1990, c. C.43, s. 128 (3, 4).

Postjudgment interest

129 (1) Money owing under an order, including costs to be assessed or costs fixed by the court, bears interest at the postjudgment interest rate, calculated from the date of the order.

Multiplicity of proceedings

138 As far as possible, multiplicity of legal proceedings shall be avoided. R.S.O. 1990, c. C.43, s. 138.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Interpretation

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

Representation of an Interested Person Who Cannot Be Ascertained

Proceedings in which Order may be Made

10.01 (1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(b) the determination of a question arising in the administration of an estate or trust;

(c) the approval of a sale, purchase, settlement or other transaction;

(d) the approval of an arrangement under the *Variation of Trusts Act*;

(e) the administration of the estate of a deceased person; or

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. R.R.O. 1990, Reg. 194, r. 10.01 (1).

Order Binds Represented Persons

(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (2).

Settlement Affecting Persons who are not Parties

(3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,

(a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or

(b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons. R.R.O. 1990, Reg. 194, r. 10.01 (3).

(4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (4).

Representation of a Deceased Person

10.02 Where it appears to a judge that the estate of a deceased person has an interest in a matter in question in the proceeding and there is no executor or administrator of the estate, the judge may order that the proceeding continue in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent the estate for the purposes of the proceeding, and an order in the proceeding binds the estate of the deceased person, subject to rule 10.03, as if the executor or administrator of the estate of that person had been a party to the proceeding. R.R.O. 1990, Reg. 194, r. 10.02.

Relief from Binding Effect of Order

10.03 Where a person or an estate is bound by reason of a representation order made under subrule 10.01 (1) or rule 10.02, an approval under subrule 10.01 (3) or an order that the proceeding continue made under rule 10.02, a judge may order in the same or a subsequent proceeding that the person or estate not be bound where the judge is satisfied that,

(a) the order or approval was obtained by fraud or non-disclosure of material facts;

(b) the interests of the person or estate were different from those represented at the hearing; or

(c) for some other sufficient reason the order or approval should be set aside. R.R.O. 1990, Reg. 194, r. 10.03; O. Reg. 259/14, s. 3.

Proceeding by Unincorporated Association or Trade Union

12.08 Where numerous persons are members of an unincorporated association or trade union and a proceeding under the Act would be an unduly expensive or inconvenient means for determining their claims, one or more of them may be authorized by the court to bring a proceeding on behalf of or for the benefit of all. O. Reg. 288/99, s. 9; O. Reg. 496/20, s. 5.

RULE 37 MOTIONS — JURISDICTION AND PROCEDURE

Notice of Motion

37.01 A motion shall be made by a notice of motion (Form 37A) unless the nature of the motion or the circumstances make a notice of motion unnecessary or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 37.01; O. Reg. 322/24, s. 4.

Jurisdiction to Hear a Motion

Jurisdiction of Judge

37.02 (1) A judge has jurisdiction to hear any motion in a proceeding. R.R.O. 1990, Reg. 194, r. 37.02 (1).

Jurisdiction of an Associate Judge

(2) An associate judge has jurisdiction to hear any motion in a proceeding, and has all the jurisdiction of a judge in respect of a motion, except a motion,

(a) where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;

(b) to set aside, vary or amend an order of a judge;

(c) to abridge or extend a time prescribed by an order that an associate judge could not have made;

(d) for judgment on consent in favour of or against a party under disability;

(e) relating to the liberty of the subject;

(f) under section 4 or 5 of the *Judicial Review Procedure Act*; or

(g) in an appeal. R.R.O. 1990, Reg. 194, r. 37.02 (2); O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Jurisdiction of Registrar

(3) The registrar shall make an order granting the relief sought on a motion for an order on consent, if,

(a) the consent of all parties (including the consent of any party to be added, deleted or substituted) is filed;

(b) the consent states that no party affected by the order is under disability; and

(c) the order sought is for,

(i) amendment of a pleading, notice of application or notice of motion,

(ii) addition, deletion or substitution of a party,

(iii) removal of a lawyer as lawyer of record;

(iv) setting aside the noting of a party in default,

(v) setting aside a default judgment,

(vi) discharge of a certificate of pending litigation,

(vii) security for costs in a specified amount,

(viii) re-attendance of a witness to answer questions on an examination,

(ix) fulfilment of undertakings given on an examination, or

(x) dismissal of a proceeding, with or without costs. O. Reg. 19/03, s. 8; O. Reg. 575/07, s. 21.

Where Motions to be Brought

37.03 Unless the court orders otherwise, all motions shall be brought in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02 and, if a motion is to be heard in person, it shall be heard in that county. O. Reg. 689/20, s. 22.

Motions — To Whom to be Made

37.04 A motion shall be made to the court if it is within the jurisdiction of an associate judge or registrar and otherwise shall be made to a judge. R.R.O. 1990, Reg. 194, r. 37.04; O. Reg. 19/03, s. 9; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Hearing Date for Motions

Where no practice direction

37.05 (1) At any place where no practice direction concerning the scheduling of motions is in effect, a motion may be set down for hearing on any day on which a judge or associate judge is scheduled to hear motions. O. Reg. 770/92, s. 10; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Exception, lengthy hearing

(2) If a lawyer estimates that the hearing of the motion will be more than two hours long, a hearing date shall be obtained from the registrar before the notice of motion is served. O. Reg. 770/92, s. 10; O. Reg. 575/07, s. 3.

Urgent motion

(3) An urgent motion may be set down for hearing on any day on which a judge or associate judge is scheduled to hear motions, even if a lawyer estimates that the hearing is likely to be more than two hours long. O. Reg. 770/92, s. 10; O. Reg. 575/07, s. 3; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Content of Notice

37.06 Every notice of motion (Form 37A) shall,

(a) state the precise relief sought;

(b) state the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and

(c) list the documentary evidence to be used at the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.06.

Service of Notice

Required as General Rule

37.07 (1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 37.07 (1); O. Reg. 260/05, s. 9 (1).

Where Not Required

(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice. R.R.O. 1990, Reg. 194, r. 37.07 (2).

(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice. R.R.O. 1990, Reg. 194, r. 37.07 (3).

(4) Unless the court orders or these rules provide otherwise, an order made without notice to a party or other person affected by the order shall be served on the party or other person, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion. O. Reg. 219/91, s. 3; O. Reg. 260/05, s. 9 (2).

Where Notice Ought to Have Been Served

(5) Where it appears to the court that the notice of motion ought to have been served on a person who has not been served, the court may,

(a) dismiss the motion or dismiss it only against the person who was not served;

(b) adjourn the motion and direct that the notice of motion be served on the person; or

(c) direct that any order made on the motion be served on the person. R.R.O. 1990, Reg. 194, r. 37.07 (5).

Minimum Notice Period

(6) Where a motion is made on notice, the notice of motion shall be served at least seven days before the date on which the motion is to be heard. R.R.O. 1990, Reg. 194, r. 37.07 (6); O. Reg. 171/98, s. 12; O. Reg. 438/08, s. 33.

Filing of Notice of Motion

37.08 (1) Where a motion is made on notice, the notice of motion shall be filed with proof of service at least seven days before the hearing date in the court office where the motion is to be heard. R.R.O. 1990, Reg. 194, r. 37.08 (1); O. Reg. 171/98, s. 13; O. Reg. 438/08, s. 34.

(2) Where service of the notice of motion is not required, it shall be filed at or before the hearing. R.R.O. 1990, Reg. 194, r. 37.08 (2).

Abandoned Motions

37.09 (1) A party who makes a motion may abandon it by delivering a notice of abandonment. R.R.O. 1990, Reg. 194, r. 37.09 (1).

(2) A party who serves a notice of motion and does not file it or appear at the hearing shall be deemed to have abandoned the motion unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 37.09 (2).

(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 37.09 (3).

Material for Use on Motions

Where Motion Record Required

37.10 (1) Where a motion is made on notice, the moving party shall, unless the court orders otherwise before or at the hearing of the motion, serve a motion record on every other party to the motion and file it, with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, and the court file shall not be placed before the judge or associate judge hearing the motion unless he or she requests it or a party requisitions it. R.R.O. 1990, Reg. 194, r. 37.10 (1); O. Reg. 171/98, s. 14 (1); O. Reg. 438/08, s. 35 (1); O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Contents of Motion Record

(2) The motion record shall contain, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the notice of motion;

(c) a copy of all affidavits and other material served by any party for use on the motion;

(d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and

(e) a copy of any other material in the court file that is necessary for the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.10 (2).

Responding Party's Motion Record

(3) Where a motion record is served a responding party who is of the opinion that it is incomplete may serve on every other party, and file, with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a responding party's motion record containing, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and

(b) a copy of any material to be used by the responding party on the motion and not included in the motion record. R.R.O. 1990, Reg. 194, r. 37.10 (3); O. Reg. 171/98, s. 14 (2); O. Reg. 438/08, s. 35 (2).

Material may be Filed as Part of Record

(4) A notice of motion and any other material served by a party for use on a motion may be filed, together with proof of service, as part of the party's motion record and need not be filed separately. R.R.O. 1990, Reg. 194, r. 37.10 (4).

Transcript of Evidence

(5) A party who intends to refer to a transcript of evidence at the hearing of a motion shall file a copy of the transcript as provided by rule 34.18. R.R.O. 1990, Reg. 194, r. 37.10 (5).

Factum

(6) A party may serve on every other party a factum that meets the requirements of rule 4.06.1. O. Reg. 14/04, s. 18; O. Reg. 300/24, s. 8.

(7) The moving party's factum, if any, shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 15 (1).

(8) The responding party's factum, if any, shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 15 (2).

(9) Revoked: O. Reg. 394/09, s. 15 (3).

Refusals and Undertakings Chart

(10) On a motion to compel answers or to have undertakings given on an examination or cross-examination satisfied,

(a) the moving party shall serve on every other party to the motion and file with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, a refusals and undertakings chart (Form 37C) that sets out,

(i) the issue that is the subject of the refusal or undertaking and its connection to the pleadings or affidavit,

(ii) the question number and a reference to the page of the transcript where the question appears, and

(iii) the exact words of the question; and

(b) the responding party shall serve on the moving party and every other party to the motion and file with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a copy of the undertakings and refusals chart that was served by the moving party completed so as to show,

(i) the answer provided, or

(ii) the basis for the refusal to answer the question or satisfy the undertaking. O. Reg. 132/04, s. 8; O. Reg. 438/08, s. 35 (5, 6).

Confirmation of Motion

37.10.1 (1) A party who makes a motion on notice to another party shall confer or attempt to confer with the other party and shall, not later than 2 p.m. five days before the hearing date,

(a) give the registrar a confirmation of motion (Form 37B) by,

(i) sending it by e-mail to the court office, or

(ii) leaving it at the court office; and

(b) send a copy of the confirmation of motion to the other party by e-mail. O. Reg. 537/18, s. 7 (1); O. Reg. 689/20, s. 23 (1); O. Reg. 383/21, s. 4; O. Reg. 224/22, s. 2 (1, 3).

Failure to Send Copy of Confirmation

(2) If a party fails to send a copy of the confirmation of motion to a responding party in accordance with clause (1) (b), the responding party may, not later than 10 a.m. four days before the hearing date,

(a) give the registrar a confirmation of motion (Form 37B) by,

(i) sending it by e-mail to the court office, or

(ii) leaving it at the court office; and

(b) send a copy of the confirmation of motion to the moving party by e-mail. O. Reg. 537/18, s. 7 (1); O. Reg. 689/20, s. 23 (2); O. Reg. 383/21, s. 4; O. Reg. 224/22, s. 2 (2, 3).

Duty to Update

(3) A party who has given a confirmation of motion and later determines that the confirmation is no longer correct shall immediately,

(a) give the registrar a corrected confirmation of motion (Form 37B) by,

(i) sending it by e-mail to the court office, or

(ii) leaving it at the court office; and

(b) send a copy of the corrected confirmation of motion to the other party by e-mail. O. Reg. 14/04, s. 19; O. Reg. 689/20, s. 23 (3); O. Reg. 383/21, s. 4; O. Reg. 224/22, s. 2 (3).

Effect of Failure to Confirm

(4) If no confirmation is given under subrule (1), the motion shall not be heard and is deemed to have been abandoned, unless the court orders otherwise. O. Reg. 537/18, s. 7 (2).

Costs

(5) If a motion is deemed to have been abandoned under subrule (4) and the responding party gave a confirmation of motion in accordance with subrule (2), the responding party may be heard on the costs of the abandoned motion on the hearing date scheduled for the abandoned motion. O. Reg. 537/18, s. 7 (2).

Hearing in Absence of Public

37.11 (1) A motion may be heard in the absence of the public where,

(a) the motion is to be heard and determined without oral argument;

(b) because of urgency, it is impractical to have the motion heard in public;

(c) the motion is to be heard by telephone conference or video conference;

(d) the motion is made in the course of a pre-trial conference or case conference; or

(e) the motion is before a single judge of an appellate court. R.R.O. 1990, Reg. 194, r. 37.11 (1); O. Reg. 465/93, s. 4 (1); O. Reg. 24/00, s. 7; O. Reg. 170/14, s. 9.

(2) The hearing of all other motions shall be open to the public, except as provided in section 135 of the *Courts of Justice Act*, in which case the presiding judge, associate judge or officer shall endorse,

(a) on the notice of motion leave for a hearing in the absence of the public; or

(b) on a separate document in accordance with subrule 59.02 (2), with necessary modifications. O. Reg. 689/20, s. 24; O. Reg. 383/21, s. 15.

37.12 Revoked: O. Reg. 288/99, s. 15.

Hearing without Oral Argument

Consent motions, unopposed motions and motions without notice

37.12.1 (1) Where a motion is on consent, unopposed or without notice under subrule 37.07 (2), the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 465/93, s. 4 (2).

(2) Where the motion is on consent, the consent and a draft order shall be filed with the notice of motion. O. Reg. 766/93, s. 1 (1).

(2.1) In the case of a motion on consent in the Court of Appeal, an affidavit or other document setting out the reasons why it is appropriate to make the order sought on the motion shall also be filed with the notice of motion. O. Reg. 82/17, s. 3.

(3) Where the motion is unopposed, a notice from the responding party stating that the party does not oppose the motion and a draft order shall be filed with the notice of motion. O. Reg. 766/93, s. 1 (1).

Opposed Motions in Writing

(4) The moving party may propose in the notice of motion that the motion be heard in writing without the attendance of the parties, in which case,

(a) the motion shall be made on at least fourteen days notice;

(b) the moving party shall serve with the notice of motion and immediately file, with proof of service in the court office where the motion is to be heard, a motion record, a draft order and a factum entitled factum for a motion in writing, setting out the moving party's argument;

(c) the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 465/93, s. 4 (2); O. Reg. 766/93, s. 1 (2); O. Reg. 689/20, s. 25.

(5) Within ten days after being served with the moving party's material, the responding party shall serve and file, with proof of service, in the court office where the motion is to be heard,

(a) a consent to the motion;

(b) a notice that the responding party does not oppose the motion;

(c) a motion record, a notice that the responding party agrees to have the motion heard and determined in writing under this rule and a factum entitled factum for a motion in writing, setting out the party's argument; or

(d) a notice that the responding party intends to make oral argument, along with any material intended to be relied upon by the party. O. Reg. 465/93, s. 4 (2).

(6) Where the responding party delivers a notice under subrule (5) that the party intends to make oral argument, the moving party may either attend the hearing and make oral argument or not attend and rely on the party's motion record and factum. O. Reg. 465/93, s. 4 (2).

Disposition of Motion

37.13 (1) On the hearing of a motion, the presiding judge or officer may grant the relief sought or dismiss or adjourn the motion, in whole or in part and with or without terms, and may,

(a) where the proceeding is an action, order that it be placed forthwith, or within a specified time, on a list of cases requiring speedy trial; or

(b) where the proceeding is an application, order that it be heard at such time and place as are just. R.R.O. 1990, Reg. 194, r. 37.13 (1).

(2) A judge who hears a motion may,

(a) in proper case, order that the motion be converted into a motion for judgment; or

(b) order the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by the trial judge. R.R.O. 1990, Reg. 194, r. 37.13 (2).

(3) Where on a motion a judge directs the trial of an issue, subrules 38.10 (2) and (3) (issue treated as action) apply with necessary modifications. R.R.O. 1990, Reg. 194, r. 37.13 (3).

Exception, motions in estate matters

(4) Clause (2) (b) and subrule (3) do not apply to a motion under Rule 74, 74.1 or 75. O. Reg. 484/94, s. 7; O. Reg. 111/21, s. 4.

Setting Aside, Varying or Amending Orders

Motion to Set Aside or Vary

37.14 (1) A party or other person who,

(a) is affected by an order obtained on motion without notice;

(b) fails to appear on a motion through accident, mistake or insufficient notice; or

(c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 37.14 (1); O. Reg. 132/04, s. 9.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just. R.R.O. 1990, Reg. 194, r. 37.14 (2).

Order Made by Registrar

(3) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a registrar may be made to a judge or associate judge, at a place determined in accordance with rule 37.03 (where motions to be brought). R.R.O. 1990, Reg. 194, r. 37.14 (3); O. Reg. 689/20, s. 26; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15

Order Made by Judge

(4) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a judge may be made,

(a) to the judge who made it, at any place; or

(b) to any other judge, at a place determined in accordance with rule 37.03 (where motions to be brought). R.R.O. 1990, Reg. 194, r. 37.14 (4); O. Reg. 689/20, s. 26.

Order Made by Associate Judge

(5) A motion under subrule (1) or any other rule to set aside, vary or amend an order of an associate judge may be made,

(a) to the associate judge who made it, at any place; or

(b) to any other associate judge or to a judge, at a place determined in accordance with rule 37.03 (where motions to be brought). R.R.O. 1990, Reg. 194, r. 37.14 (5); O. Reg. 689/20, s. 26; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Order Made in Court of Appeal or Divisional Court

(6) A motion under subrule (1) or any other rule to set aside, vary or amend an order made by a judge or panel of the Court of Appeal or Divisional Court may be made,

(a) where the order was made by a judge, to the judge who made it or any other judge of the court; or

(b) where the order was made by a panel of the court, to the panel that made it or any other panel of the court. R.R.O. 1990, Reg. 194, r. 37.14 (6); O. Reg. 82/17, s. 4, 17.

Motions in a Complicated Proceeding or Series of Proceedings

37.15 (1) Where a proceeding involves complicated issues or where there are two or more proceedings that involve similar issues, the Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice or a judge designated by any of them may direct that all motions in the proceeding or proceedings be heard by a particular judge, and rule 37.03 (where motions to be brought) does not apply to those motions. R.R.O. 1990, Reg. 194, r. 37.15 (1); O. Reg. 292/99, ss. 2 (3), 4; O. Reg. 689/20, s. 27.

(1.1) A judge who is directed to hear all motions under subrule (1) may refer to an associate judge any motion within the jurisdiction of an associate judge under subrule 37.02 (2) unless the judge who made the direction under subrule (1) directs otherwise. O. Reg. 348/97, s. 2; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

(1.2) A judge who is directed to hear all motions under subrule (1) and an associate judge to whom a motion is referred under subrule (1.1) may give such directions and make such procedural orders as are necessary to promote the most expeditious and least expensive determination of the proceeding. O. Reg. 438/08, s. 37 (1); O. Reg. 394/09, s. 16; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

(2) A judge who hears motions pursuant to a direction under subrule (1) shall not preside at the trial of the actions or the hearing of the applications except with the written consent of all parties. R.R.O. 1990, Reg. 194, r. 37.15 (2); O. Reg. 438/08, s. 37 (2).

Prohibiting Motions without Leave

37.16 On motion by any party, a judge or associate judge may by order prohibit another party from making further motions in the proceeding without leave, where the judge or associate judge on the hearing of the motion is satisfied that the other party is attempting to delay or add to the costs of the proceeding or otherwise abuse the process of the court by a multiplicity of frivolous or vexatious motions. R.R.O. 1990, Reg. 194, r. 37.16; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Motion before Commencement of Proceeding

37.17 In an urgent case, a motion may be made before the commencement of a proceeding on the moving party's undertaking to commence the proceeding forthwith. R.R.O. 1990, Reg. 194, r. 37.17.

Specific Claims Tribunal Act, S.C. 2008, c. 22

Exceptions

15 (1) A First Nation may not file with the Tribunal a claim that

(a) is based on events that occurred within the 15 years immediately preceding the date on which the claim was filed with the Minister;

(b) is based on a land claims agreement entered into after December 31, 1973, or any related agreement or Act of Parliament;

Filing a specific claim

16 (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

(a) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part;

(b) three years have elapsed after the day on which the claim was filed with the Minister and the Minister has not notified the First Nation in writing of his or her decision on whether to negotiate the claim;

(c) in the course of negotiating the claim, the Minister consents in writing to the filing of the claim with the Tribunal; or

(d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

Basis and limitations for decision on compensation

20 (1) The Tribunal, in making a decision on the issue of compensation for a specific claim,

(a) shall award monetary compensation only;

(b) shall not, despite any other provision in this subsection, award total compensation in excess of $150 million;

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

MISSANABIE CREE FIRST NATION -and- **ATTORNEY GENERAL OF CANADA ET AL.**
Plaintiff Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding Commenced at Sault Ste. Marie

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