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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MISSANABIE CREE FIRST NATION

Plaintiff/Moving Party

-and-

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

Defendants/Respondents

FACTUM OF THE RESPONDING PARTY, HIS MAJETY THE KING IN RIGHT OF ONTARIO

December 8, 2025

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PART I – OVERVIEW

1. This is a proposed class action brought by the Missanabie Cree First Nation on their own behalf and on behalf of all First Nation signatories and adherents to Treaty 9. The Plaintiff claims multiple breaches of Treaty 9, including a failure to increase the annuity payments to Treaty 9 First Nations, a failure to provide support for agriculture, a failure to provide ammunition and twine, and other alleged breaches of the rights of First Nations.

2. Treaties are foundational agreements between the Crown and First Nations. The First Nations' rights under these treaties are collectively held. Thus, the interpretation of Treaty 9 must be the same for each First Nation within the Treaty territory.

3. The class action regime in Ontario is an "opt out" regime, requiring those potential class members who do not wish to be bound by the result to opt out of the action. As such, the class action procedure is ill suited to the determination of collectively held rights. If a judicial interpretation of a treaty is to have effect on all parties bound by the treaty, there can be no opting out.

4. A representative action that requires each Treaty 9 First Nation to either consent to being represented by Missanabie Cree First Nation or be added themselves as a party (essentially, an "opt in" regime) assures that all parties have a say in the important determinations of these foundational rights.

PART II – FACTS

A. Treaty 9

5. The James Bay Treaty #9 ("Treaty 9") covers the west part of the James Bay and Hudson's Bay watershed. The Treaty 9 territory is to the immediate north of the land covered by the

Robinson Huron and Robinson Superior Treaties. Treaty 9 is approximately 90,000 square miles in area and covers almost two-thirds of Ontario's landmass[1].

6. In 1905, Treaty 9 was negotiated between the Crown and the Cree and Ojibwe peoples in the James Bay region.[2] Additional First Nations became parties to Treaty 9 through adhesions in 1906, 1929 and 1930.[3]

7. Treaty 9 provides for the surrender of Aboriginal title on the lands covered by the Treaty in exchange for certain promises made to the First Nation signatories, which were outlined in the articles of the Treaty. Treaty 9 says the relevant First Nation signatories and adherents would agree to "cede, release, surrender and yield up to the government of the Dominion of Canada, for His Majesty the King and His successors forever, all their rights titles and privileges whatsoever, to the lands" covered by the Treaty.[4] In exchange, Treaty 9 says the First Nation signatories would be entitled to the following:

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 of the reserves being arranged between the Crown and the relevant First Nations. The treaty also outlined that although the land would be administered by the Crown for the benefit of the First Nation Treaty members, that "such portions of the reserve and lands … may at anytime be required for the public works, buildings, railways, or roads" by the Crown and that compensation would be made to the relevant Treaty members upon such appropriation[5];

b) *Hunting, trapping and fishing rights* - the right to "pursue their usual vocations of hunting,

[1] 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, Plaintiff Amended Motion Record [PAMR] pg. 415.
[2] *Ibid* at para 10.
[3] *Ibid* at para 10.
[4] *Ibid* at pg. 3.
[5] *Ibid* at pg. 20 and pg. 140.

trapping and fishing throughout the tract surrendered … subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes"[6];

c) *Annuities* -

i. a one-time present or gratuity of $8.00 in cash to each member of Treaty 9[7]; and

ii. an annual payment of $4.00 to each member of Treaty 9, that would continue unless there be "some exceptional reason" for it not to[8]; and

d) Other minor provisions not relevant to this proposed class proceeding.[9]

B. The Proposed Class Action

8. The Plaintiff, Missanabie Cree First Nation, is a band under the *Indian Act*. It brings this action as a proposed class action on behalf of the thirty-seven First Nations that are recognized as being the First Nations and/or successors to the First Nations that signed or adhered to Treaty 9 (the "Treaty 9 First Nations").[10]

9. There are three main components to the Plaintiff's claim. All are based on rights arising from or alleged to arise from Treaty 9: (i) whether there was an express or implied term in Treaty 9 to increase the $4.00 per person annuity and whether the Crown was under an obligation to do so; (ii) whether there was an express or implied term in Treaty 9 to provide economic support for agricultural operations and whether the Crown was under an obligation to do so; (iii) whether there

[6] *Ibid* at pg. 20, PAMR pg. 140.
[7] *Ibid* at pg. 20, PAMR pg. 140.
[8] Exhibit "E" to the Affidavit of Jason Gauthier sworn July 29, 2024, James Bay Treaty No. 9 at pg. 20, PAMR pg. 140.
[9] *Ibid* at pg. 20, PAMR pg. 140
[10] Notice of Motion of the Plaintiffs at para 7, PAMR pg. 11.

was an express or implied term in Treaty 9 to provide ammunition and twine and whether the Crown was under an obligation to do so; and (iv) whether the federal and provincial legislation, *An Act for the Settlement Of Certain Questions between the Governments of Canada and Ontario respecting Indian Reserve Lands,* enacted in 1924 that allegedly provides Ontario a one-half interest in mineral rights on Indian Reserves is contrary to Treaty 9.[11]

10. Part of the Plaintiff's proposed class action arises from the claim that there is "some basis in fact" that the Crown owed a duty to provide economic assistance for agriculture as well as an annual distribution of twine and ammunition to all class members.[12] The Plaintiff bases this claim not on the words of Treaty 9, but on the fact that all other previous numbered treaties provided for such provisions.[13]

11. To successfully have this action certified as a class proceeding the Plaintiff must meet the certification requirements outlined in section 5(1) of the *Class Proceedings Act, 1992* ("*CPA*").[14] Ontario contests certification on the grounds that (i) a class proceeding is not the preferable procedure and that instead this action should proceed as a representative action and (ii) the Plaintiff has not demonstrated some basis in fact that there was an express or implied term in Treaty 9 providing that the Crown provide economic assistance for agriculture or ammunition and twine.

PART III – ISSUES

12. The only issue in this motion is whether the Plaintiff has met its onus that this matter meets the certification criteria set out in section 5 of the *CPA*.

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[11] Moving Party Factum at paras 15-27.
[12] *Ibid* at para 21.
[13] *Ibid* at para 21; Exhibit "B" to the Affidavit of Jason Gauthier sworn July 29, 2024, Statement of Claim at para 53, PAMR pg. 140
[14] *Class Proceedings Act,* 1992 SO, 1992, s. 5(1).

PART IV – LAW AND ARGUMENT

13. For the Court to certify this matter as a class action, the Plaintiff has the onus of proving that the criteria set out in section 5 of the *CPA* have been met. Without prejudice to any defence Ontario has to this action and for the purposes of this motion, Ontario agrees that the pleadings disclose a cause of action and that there is an identifiable class. Ontario also does not object to the Missanabie Cree First Nation as a potential representative Plaintiff.

14. It is clear, however, that a class action is not the preferable procedure to determine the issues in this litigation. In the alternative, if this Court does determine that a class action should be certified, there is no basis in fact for proposed common issues 4 and 5 and the associated remedy in proposed common issue 6.

A. A Class Action is Not the Preferrable Procedure

15. Pursuant to paragraph 5(1)(d) of the *CPA*, a court cannot certify an action as a class proceeding unless it is satisfied that a class proceeding would be the preferable procedure for the resolution of the common issues. The preferability requirement captures two key concepts: first, the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim, and second, the question of whether a class proceeding would be preferable in the sense of preferable to other procedures such as joinder, test cases, consolidation, and so on."[15]

16. The preferability inquiry is conducted through the lens of the three principal goals of class actions: (i) judicial economy, (ii) access to justice, and (iii) behaviour modification. The ultimate

[15] *Class Proceedings Act,* 1992 SO, 1992, s. 5(1)(d); *Hollick v. Toronto (City),* 2001 SCC 68 (CanLII), at para 28.

question is whether other available means of resolving the claims are preferable, and not whether a class action would fully achieve those goals.[16]

17. Certifying a class action in this case would not achieve the goals of judicial economy. The ease with which class members can opt out raises the prospect of multiple proceedings and inconsistent interpretations of the same Treaty rights. By contrast, a representative action that requires either the consent of each Treaty 9 First Nation or their participation would be binding on all parties, would respect the interests of all Treaty 9 First Nations, and would ensure a consistent resolution of the issues in dispute.

18. The onus remains on the Plaintiff to establish there is some basis in fact that a class action is the preferrable procedure. Under the *CPA,* a class action is the preferrable procedure if, and only if, it is superior to all reasonably available means.[17]

19. Class actions by their nature are structured around individual causes of action aggregated into a common proceeding. A key feature of class actions is that regardless of the common issues that may bind them, individual claimants still retain the right to opt out of any class proceeding and pursue their own individual remedy.[18] Claimants who opt out of a class proceeding are not bound by the judgment or settlement.[19]

20. The idea that a treaty right would apply only to those First Nations that participated in the litigation, rather than universally, "is intrinsically at odds with the spirit and purpose of treaty rights enforcement".[20] As the Federal Court opined in *Gill v Canada*, a case which considered whether a class action was preferrable to a representative action*:* "a declaration as to aboriginal rights and

[16] *Hollick*, at paras 27, 31; *AIC v Fischer*, 2013 SCC 69 at paras 16, 22.
[17] *CPA,* Section 5 (1.1).
[18] CPA, Section 9.
[19] CPA, Section 27(2), 27.1 (4).
[20] *La Lac Ronge Indian Band v Canada (Attorney General),* 2025 SKKB 147 (CanLII) at para 108.

treaty benefits is not a remedy of an individual nature, accruing to only those individuals who participate in the litigation, but a collective right, not amenable to opting out, the result binding each and every member of the entity".[21]

21. Allowing some Treaty 9 First Nations to opt out of the litigation introduces a level of uncertainty regarding the application of the outcome of the class action. If the decision in the class action will be binding on all Treaty 9 First Nations, then the right to opt out of the class action is illusory, contrary to what the *CPA* provides. If the decision is not binding on all Treaty 9 First Nations, then there is a chance that different courts will find different interpretations of Treaty 9, leading to confusion and further litigation.

22. A representative action would eliminate any such uncertainty as the judgment and settlement would be binding on all represented parties.[22] The Federal Court succinctly summarized the differences between the two procedures:

> The practical distinction lies in the source of commonality. A representative proceeding is suitable where claimants assert the same *collective* right because the right is inherently *communal*. It requires "common issues of law or fact" asserted by and affecting the persons represented by the representative plaintiff or issues that "relate to a collective interest shared by those persons." Conversely, a class proceeding is suitable where distinct individuals advance *personal* claims that happen to raise *common issues*. It requires that the claims of the class members "raise common questions of law or fact." The Aboriginal bar, in the Reference Letter, writes that representative proceedings are maintained by persons who have the "same interest" in the proceedings; whereas class proceedings are maintained by persons where there is a "common issue of law or fact" at stake. Hence, "[e]ssentially, the difference between the two actions is whether the commonality is derived from the nature of the parties or the nature of the issues" [emphasis in original].[23]

23. The Plaintiff cites two cases, *Anderson v. Manitoba* and *Nova Scotia (Attorney General) v. Joyce*, for the proposition that cases that address the breach of treaty rights are amenable to

[21] *Gill v. Canada,* 2005 FC 192 (CanLII), at para 13.
[22] *Kelly v Canada (Attorney General),* 2013 ONSC 1220 (CanLII) at para 91.
[23] Chief Derek Nepinak and Chief Bonny Lynn, *Acoose v. Canada*, 2025 FC 925 (CanLII) at para 41 ["Nepinak"].

certification. Both cases are distinguishable from the present case. *Anderson* was a property damage claim. The claimants alleged the government's operation of water control structures caused flooding on their reserve lands. The common issues were rooted in nuisance and negligence.[24] Any discussion of treaty rights was at best incidental.

24. *Joyce* was brought on behalf of individual Mi'kmaq persons, asserting their right to hunt. The claimants in *Joyce* were not members of any First Nations bands, but were individuals claiming Mi'kmaq ancestry. The issues in *Joyce* related to the decision to no longer recognize these individual's asserted rights under s. 35, and whether that decision breached duty to consult or infringed their section 35 rights.[25] It is not a case regarding the interpretation of any particular treaty.

25. Provincial and federal courts have consistently found that the proper procedure for the adjudication of collectively held treaty rights is a representative action, not a class action. As noted in *Acoose v. Canada*, decades of provincial and federal jurisprudence stress the need for consistent adjudication of treaty rights.[26]

26. In *Horseman v. Canada,* a proposed class action related to the increase in annuity payments, the court stated:

> The opt out provision in class actions appropriately recognizes that an individual with a cause of action may choose to pursue his or her own recourse and should not automatically be bound by a court's decision in a class action. For that reason, a decision in a class action is not binding on an individual claimant who opts out, or on the defendant in respect of that individual's claim.
>
> This reality brings into sharp focus why class actions are not generally appropriate when the fundamental issue to be determined is the proper interpretation of a treaty provision.

[24] *Anderson et al v. Maintoba,* 2017 MBCA 14 (CanLII) at para 48.
[25] *Nova Scotia (Attorney General) v. Joyce,* 2024 NSCA 9 (CanLII) at para 65.
[26] *Nepinak* at para 67.

> The Court cannot accept that different courts or judges may reach differing interpretations of a treaty (a result that is possible in a class action proceeding that is followed by other representative or individual actions). This alone is reason to find that where, as here, the claim rests upon the interpretation of a treaty, the claim will be better advanced by way of representative action, where opting out is not an option.[27]

27. In *Soldier v. Canada*,[28] a claim for treaty annuity increases, the Manitoba Court of Appeal upheld the trial judge's dismissal of certification, finding that a representative action was the preferable procedure:

> …Individuals who opt out may properly take the position they are not bound by the court's decision, and bring another action against the Crown seeking different relief, and upon different evidence. […] There is the potential for a multiplicity of proceedings and conflicting decisions in respect of a single document […] As the certification judge noted, there should not be more than one interpretation of the treaty depending upon whether individuals opt out of the class. Such a result would not lead to judicial economy.[29]

28. Two recent decisions this year, from the Federal Court and the Court of King's Bench in Saskatchewan, follow the established jurisprudence and reiterate that class actions are not the preferrable procedure to adjudicate treaty rights.

29. In *Nepinak,* the Federal Court denied certification of the proposed class action and ordered that the action proceed as a representative action. The proposed common issues in that case are substantially similar to the issues in this case. The Plaintiffs proposed common issues concerned the interpretation of Treaty 4 and specifically whether class members were entitled to receive increased annuity payments. The Court found: "the risk of opt-outs leading to parallel proceedings, and therefore conflicting treaty interpretations, has been recognized by courts across different jurisdictions as a concrete and unacceptable threat to judicial economy, as established

[27] *Horseman v. Canada*, 2015 FC 1149.
[28] *Soldier v Canada; Bone v Canada*, 2006 MBQB 50, aff'd 2009 MBCA 12.
[29] *Soldier v Canada; Bone v Canada*, 2009 MBCA 12 at para 78.

in *Gill*, *Soldier*, *Kelly Trial*, and *Horseman"*.[30]

30. In *Lac La Ronge,* the Court of King's Bench in Saskatchewan rejected certification of a proposed class proceeding regarding the interpretation of Treaty 6 on the grounds of preferrable procedure. The court found that the opt-out mechanism in class actions risked inconsistent treaty interpretations, undermining judicial economy and fairness.[31] A representative action or conventional lawsuit was deemed more appropriate for resolving collective treaty rights claims.

31. The Plaintiff specifically relies on the availability of aggregate damages under the *CPA* to bolster their claim that a class action is the preferrable procedure. Aggregate damages are appropriate in cases where the individual damages are small, or it would be too costly to precisely calculate. If the Plaintiff is successful in it's claim for damages, aggregate damages would not be necessary as the methodology for calculating any compensable harm is a straightforward calculation, as explained by the Plaintiff's own expert.[32] The Federal Court in *Nepinak* agreed, finding that the calculation of individual entitlements in a treaty indexing case did not justify invoking additional procedural mechanisms.[33]

32. The Plaintiff further argues that a representation order under Rule 12.08 is not available because Treaty 9 First Nations are not unincorporated associations or trade unions as referred to in the *Rule*. Notably in their original motion record, the Plaintiff had proposed this as alternative order to certification. As the Plaintiff points out, each Treaty 9 First Nation has legal standing to commence litigation. Representative actions for claims, specifically seeking increased annuity payments have been litigated in Ontario.[34] The Court retains the inherent jurisdiction to interpret

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[30] *Nepinak* at para 86.
[31] *La Lac Ronge Indian Band v Canada (Attorney General),* 2025 SKKB 147 at para 111.
[32] Plaintiff Amended Motion Record dated July 31, 2015, Affidavit of David J. Hutchings, Expert Report para 15, page 416.
[33] *Nepinak* at para 84.
[34] See: *Red Rock First Nation v. Canada (Attorney General),* 2005 CanLII 19780 (ONSC)*; Restoule v. Attorney General of Canada,* 2024 ONSC 1127 (CanLII) at para 4.

the *Rules* liberally to make any order necessary to ensure that the action proceeds in the most expeditious and least expensive manner.[35]

33. A representative action would facilitate access to justice for all Treaty 9 First Nations by ensuring they consent to participate in the action. The Plaintiff has not shown that a class action would provide any greater access to justice for the proposed class. The Plaintiff claims ten billion dollars in damages, unspecified punitive damages, or in the alternative a declaration that the Treaty 9 land surrender be set aside as amounting to exploitation. Given the breadth of the claim it is imperative any judgment reached in this case is uniform and applicable to all Treaty 9 First Nations. If, for example, a Court were to order a reversal of land surrender, it would not make sense that this judgment would only be applicable to those Treaty 9 First Nations that did not opt out to the proposed class action.

34. A representative action promotes judicial economy as it would consolidate the claims of all Treaty 9 First Nations, while minimizing the risk of multiple proceedings. The opt out mechanism of class actions, which could lead to contradictory interpretations of Treaty 9, is completely at odds with the goal of judicial economy.

35. Both a class action and representative action can meet the goal of behaviour modification, as such this factor is neutral in the analysis of which procedure is preferrable.

B. There is no basis in fact for Proposed Common Issues 4 and 5

36. In the alternative, if this Court determines that a class action is the preferable procedure, the Plaintiff has not shown some basis in fact for the existence of proposed common issues 4 and

[35] Rules of Civil Procedure, Rule 1.04.

5, and the associated remedy in proposed common issue 6.

37. The Plaintiff must demonstrate some basis in fact for the conclusion that there are common issues that, once resolved, would actually advance the adjudication of each individual claim.[36] The Court of Appeal has confirmed that the Plaintiff must demonstrate that there is some basis in fact for the existence of the common issue as well as its commonality.[37]

38. Proposed common issue 4 states: "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?" Proposed common issue 5 is similarly worded, except it regards the annual distribution of twine and ammunition rather than agricultural supports.

39. The evidence put forward by the Plaintiff directly undermines the argument that Treaty 9 contains an express term for the provision of either of these benefits. In fact, the evidence of the Plaintiff's expert, Dr. Miller, is that the text of Treaty 9 is silent on the topic of agricultural assistance and on support for hunting, trapping and fishing (the reason for the provision of twine and ammunition).[38] Dr. Miller goes on to explain:

> The reason for the omission of agricultural assistance from Treaty 9 appears to be that the treaty commissioners believed that the region covered by Treaty 9 was unsuitable for agriculture and that Treaty 9 bands would continue to sustain themselves economically principally by hunting, gathering and trading furs for goods.[39]

40. Accordingly, in Dr. Miller's opinion supports for agriculture were deliberately left out of Treaty 9. Dr. Miller further confirms the kinds of agricultural supports that were provided to other First Nations pursuant to other treaties were not provided to Treaty 9 First Nations. There is no

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[36] *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 paras 39-40.
[37] *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606 (CanLII) at para 71-72.
[38] Exhibit "B" to the Affidavit of J. R. Miller sworn July 24, 2024, Expert Report of J. R. Miller dated November 13, 2023 [Miller Report], PAMR Tab 5, at pages 391-394.
[39] Miller Report, supra, at page 391.

basis in fact, either in the text of Treaty 9 or the conduct of the parties to it, that there is either an express or implied term for the provision of agricultural support. The facts all support the conclusion that no such supports were intended to be provided pursuant to Treaty 9.

41. The same is true for the provision of twine and ammunition. Dr. Miller reviews the terms of treaties 1 through 8 regarding the provision of twine and ammunition, and the specific amounts the signatories to those treaties would receive. He also confirms that uniquely, Treaty 9 contains no such provisions and the signatories to Treaty 9 did not receive such supports.[40] There is no basis in fact for the notion that Treaty 9 contained an implied term for the provision of these specific benefits.

42. Therefore, the Plaintiff has not met their onus of showing some basis in fact for the existence of proposed common issues 4 and 5 and they should not be certified, along with the remedial proposed common issue 6.

C. Proposed Litigation Plan

43. The Plaintiff's amended litigation plan is unworkable. The Plaintiff's estimated timeframes for disclosure, examinations for discovery and trial of this action post-certification are unrealistic. The Plaintiff's proposal that the parties exchange affidavit of documents within 30 days of some unspecified notice date fails to give real consideration to the scope of the case. Likewise, the proposal that the examinations for discovery be conducted within 90 days of the notice date, which is the deadline for the opt-out period, is also not realistic.

44. The amended litigation plan contemplates the appointment of a Class Action Administrator

[40] Miller Report, *supra,* at p. 393-401.

that would determine how compensation would be distributed to the Treaty 9 First Nations and individuals. These determinations may be better left to the First Nations themselves rather than an administrator. Furthermore, if this matter proceeds as a representative action, the Treaty 9 First Nations that consent to joining the action, and their counsel, will likely want to contribute to the development of the litigation plan. Ontario submits that the parties should work together to cooperatively develop a litigation plan, after the motion for certification.

PART V – ORDER REQUESTED

45. Ontario asks that this motion for certification be dismissed, with costs on a partial indemnity basis.

December 8, 2025

Jonathan Sydor/Teresa-Anne Martin/Jack Douketis
Counsel for the Responding Party
His Majesty the King in Right of Ontario

SCHEDULE "A"

1. *Acoose v. Canada*, 2025 FC 925
2. *AIC v. Fischer*, 2013 SCC 69
3. *Anderson et al v. Maintoba,* 2017 MBCA 14
4. *Gill v. Canada,* 2005 FC 192
5. *Hollick v. Toronto (City),* 2001 SCC 68
6. *Horseman v. Canada,* 2015 FC 1149
7. *Kelly v. Canada (Attorney General),* 2013 ONSC 1220
8. *La Lac Ronge Indian Band v. Canada (Attorney General),* 2025 SKKB
9. *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606
10. *Nova Scotia (Attorney General) v. Joyce,* 2024 NSCA 9
11. *Red Rock First Nation v. Canada (Attorney General)*, 2005 CanLII 19780 (ONSC)
12. *Restoule v. Attorney General of Canada,* 2024 ONSC 1127
13. *Soldier v. Canada; Bone v Canada*, 2006 MBQB 50
14. *Soldier v. Canada; Bone v Canada*, 2009 MBCA 12
15. *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46

SCHEDULE "B"

***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)

Opting out

9 Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order. 1992, c. 6, s. 9; 2020, c. 11, Sched. 4, s. 12.

Effect of judgment on common issues

27 (2) A judgment on common issues of a class or subclass does not bind,

(a) a person who has opted out of the class proceeding; or

(b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a). 1992, c. 6, s. 27 (2).

Effect of settlement

27.1 (4) If a proceeding is certified as a class proceeding, a settlement under this section that is approved by the court binds every member of the class or subclass, as the case may be, who has not opted out of the class proceeding, unless the court orders otherwise. 2020, c. 11, Sched. 4, s. 25.

***Rules of Civil Procedure*, RRO 1990, Reg 194**

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).

Court File: CV-23-00029205-00CP

MISSANABIE CREE FIRST NATION	**- and -**	**ATTORNEY GENERAL OF CANADA ET AL.**
Plaintiff/Moving Party		Defendants/Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at SAULT STE. MARIE

FACTUM OF HIS MAJESTY THE KING IN RIGHT OF ONTARIO
(Motion for Certification)

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