Federal Court  Cour fédérale

Date: 20151015

Docket: T-1784-12

Citation: 2015 FC 1149

Ottawa, Ontario, October 15, 2015

PRESENT: The Honourable Mr. Justice Zinn

PROPOSED CLASS PROCEEDING

BETWEEN:

CHIEF EUGENE HORSEMAN
AND THE HORSE LAKE FIRST NATION

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

AMENDED ORDER AND REASONS

[1] The plaintiffs seek to certify this action as a class proceeding pursuant to Part 5.1 of the *Federal Courts Rules*, SOR/98-106. Rule 334.16 sets out several factors that must be met if an action is to be certified.

[2] For the reasons that follow, the plaintiffs have not satisfied the Court that they meet all of these mandatory factors, and accordingly, this action cannot be certified as a class action.

Background

[3] Between 1871 and 1921, Canada negotiated 11 separate treaties [the Numbered Treaties] with various First Nations. These treaties encompass all of Alberta, Saskatchewan and Manitoba, portions of British Columbia, Yukon, Northwest Territories, and Ontario. The treaties provided Canada with large tracts of land in exchange for promises Canada made to the First Nations. After the Numbered Treaties were entered into, other Bands adhered to them. The most recent adhesion was made by the McLeod Lake First Nation which adhered to Treaty 8 in 2000. Henceforth, I will refer to all of the First Nations signatories to the Numbered Treaties as the "Treaty Bands."

[4] In each of the Numbered Treaties, Canada agreed to pay an annual annuity to each member of the Treaty Band, and in many cases an additional or greater annuity to the Chiefs and Headsmen [the Annuity Payments]. Attached as Appendix A are the relevant provisions of the Numbered Treaties regarding these Annuity Payments.

[5] The amount of the Annuity Payments in Treaties 1 and 2 was increased in 1875 from $3 per person to $5, and an additional allowance was to be paid to the Chiefs and Headsmen. Other than these adjustments, the plaintiffs allege that Canada has never adjusted the amount of the Annuity Payments in any of the Numbered Treaties and, as a consequence, they say that "the Annuity Payments have been reduced in value to the point that they no longer contribute to the welfare of the individual recipients."

[6] The plaintiffs claim that the provisions in the Numbered Treaties that provide for the Annuity Payments entitle the recipient to an amount that is to be annually adjusted to reflect inflation and changes in purchasing power, in order to maintain a value equivalent to its buying power at the time the treaty was made. They claim that Canada is in breach of its obligations under the Numbered Treaties and its fiduciary duties and seek damages and "equitable compensation" for all members of the class "in an amount equal to the present value of losses sustained by the individual beneficiaries" as a result of Canada's failure to adjust the Annuity Payments over time.

[7] Although the claim made for each individual member of the proposed class may be a small amount, Canada filed an expert's report that estimates that, if the plaintiffs succeed in this class action, Canada's liability with respect to past Annuity Payments would be between one and two billion dollars. As was observed at the hearing, the amount of potential liability has no relevance to whether this action may be certified.

[8] The proposed representative plaintiffs are Chief Eugene Horseman [the Chief] and the Horse Lake First Nation [the HLFN]. The Chief is a member of the HLFN which is the successor of the Beaver Indians of Dunvegan, one of the signatories to Treaty 8. The Chief is entitled to receive an Annuity Payment under the terms of that treaty.

[9] The plaintiffs are proposing that the class be defined as: "All persons entitled to receive Annuity Payments under the terms of each of the Numbered Treaties."

[10] The plaintiffs propose the following as the common issues if this action is certified as a class proceeding:

> a. Does each of the Annuity Provisions under the Numbered Treaties, properly construed, provide for the right to receive an Annuity Payment that is adjusted annually to account for inflation and changes in purchasing power, in order to maintain a value equivalent to its buying power at the time each of the Numbered Treaties was made?
>
> b. Does Her Majesty the Queen in Right of Canada, by her agent the Minister of Aboriginal Affairs and Northern Development, owe a fiduciary duty to the Class in the administration of Annuity Payments under the Numbered Treaties to adjust the amount of Annuity Payments to account for changes in inflation and to preserve purchasing power, in order to maintain a value equivalent to the Annuity Payments' buying power at the time the Treaty was made?
>
> c. Is the Crown in an ongoing breach of its treaty obligations by providing Annuity Payments that are not adjusted for inflation and for changes in purchasing power?
>
> d. Should the Class be awarded damages and equitable compensation as a result of the Defendant's failure to adjust the Annuity Payments to account for changes in inflation and purchasing power and, if so, what is the methodology to be used to determine the amount?

[11] Prior to launching this action, the HLFN filed a claim with the Specific Claims Branch of the Department of Indian and Northern Affairs, asserting that the Annuity Payments owing pursuant to Treaty 8 had to be adjusted to reflect changes in purchasing power – the very claim advanced in this action. The Specific Claims Branch responded on December 7, 2011, saying that the claim could not be processed because it alleged a loss to individual members of the HLFN and not a loss to the HLFN itself:

> After careful review, it has been determined that the claim submission will not be further assessed under the Specific Claims

> Policy (the Policy), as set out in *The Specific Claims Policy and Process Guide*. Allegations pertaining to the failure of the Crown to provide treaty annuities to individuals, if proven, would give rise to a personal loss to those individuals. In order to be assessed under the Policy, a claim must be submitted by a First Nation suffering a loss from the alleged grievance. Consequently, your claim submission has not been filed with the Minister and will not proceed in the specific claims process…

[12] Subsequent to hearing the submissions of the parties on this motion for certification, the parties advised the Court of a recent decision of the Specific Claims Tribunal in *Beardy's & Okemasis Band #96 and 97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 [*Beardy's*]. The decision involved a claim arising out of Canada's non-payment of Treaty 6 annuity payments between 1885 and 1888, in the wake of the North-West Rebellion. Canada submitted that the tribunal had no jurisdiction over the claim because the annuity claims were individual in nature and not a right of the collective.

[13] The tribunal held at paras 314-317 that it did have jurisdiction because the failure to pay the annuity was a loss to the collective:

> Treaty 6 provides for annual payments to all future generations of members of the collective. This could not be a promise to the unborn. They do not exist, at least in the corporeal sense. It is a promise to the collective comprised of the members, collectively, as it is constituted at every moment in time
>
> The entitlement to the payment ceases when a member of the collective is removed from the band list. While an individual who is no longer on the band list may remain a de facto member of the community, he or she would no longer be recognized by the government as a member of the band constituted under the Indian Act, 1880. Under the system of administration and governance imposed on indigenous peoples by the Indian Act, 1880, the entitlement of the individual to the annual payment is lost, as it is not owed to the individual but to the collective as then constituted.

> The annual payment sustains the collective by providing cash, meagre as it is, to each member. This is the intent of the provision for the annual payment required by Treaty 6 as partial consideration for the cession of a collective interest in the land. The failure to pay the required money to an entitled individual is a loss to the collective.
>
> The Claimant, a band under the *Indian Act*, 1880, and a First Nation within the definition of the term in the *SCTA*, is the present incarnation of the collective that suffered the loss between 1885 and 1889. The loss between 1885 and 1889 is "its" loss within the meaning of the *SCTA*, section 14(1).

[14] The parties provided written submissions on the impact, if any, of *Beardy's* on this motion. They addressed whether, in light of *Beardy's*, the specific claims process would be a preferable procedure for adjudicating the claims herein advanced and also whether *Beardy's* provides guidance on the issue of standing.

[15] *Beardy's* is not binding on this Court and it is noted that even the tribunal saw the Annuity Payments issue to have both an individual and a collective aspect. For these reasons, I find that *Beardy's* is unhelpful when considering the issue of standing. It may, however, be relevant to the question of the preferred procedure for advancing this claim.

[16] The five requirements for certification of an action as a class proceeding are set out in Rule 334.16, reproduced in Appendix B. Those requirements are as follow:

1. The pleading must disclose a reasonable cause of action;
2. There must be an identifiable class of two or more persons;
3. The claims of the class must raise common questions of law or fact;

4. A class proceeding must be the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

5. There must be a representative plaintiff who

   i. would fairly and adequately represent the interests of the class;

   ii. has prepared a plan for the proceeding that sets out a workable method of advancing the action and notifying the members of its progress;

   iii. does not have an interest in conflict with the other class members regarding the common questions of law and fact; and

   iv. has provided a summary of the agreement with legal counsel respecting fees and disbursements.

[17] Canada submits that the motion for certification fails to meet all of these requirements except the second: Canada agrees that there is an identifiable class.

Analysis

A. *Do the pleadings disclose a reasonable cause of action?*

[18] The plaintiffs plead two causes of action: Canada's alleged breach of treaty obligations and its alleged breach of fiduciary duty.

[19] Canada submits that there are three reasons why the pleading does not disclose a reasonable cause of action.

[20] First, Canada submits that the claims advanced by the plaintiffs are based on collective and not individual rights. It says that a representative action is used where there are common or collective rights at issue; whereas a class proceeding is used where there are individual rights at issue. There being no individual rights at issue, it says that the claim cannot succeed as drafted. Canada argued this as a preliminary issue of standing; however, for the reasons that follow, this submission is more appropriately considered when examining whether the claim advances a reasonable cause of action.

[21] Second, Canada submits that the plaintiffs' claims are bound to fail "because there is no air of reality to the causes of action alleged."

[22] Third, Canada submits that "the Statement of Claim does not disclose a cause of action for breach of fiduciary duty or a sustainable claim for ongoing breach of treaty obligations."

[23] The plaintiffs note that there is a very low threshold they must meet to satisfy the Court that their pleading discloses a reasonable cause of action. In *Le Corre v Canada (Attorney General)*, 2004 FC 155 paras 21-23, aff'd 2005 FCA 127, this Court held that the test to be met is the same as that applied to striking a pleading: Is it plain and obvious that the plaintiff cannot succeed and that the action is doomed to failure? The jurisprudence tells us that the plaintiffs need not pass a preliminary merits test requiring an examination of the evidence. However, the Supreme Court in *Pro-Sys Consultants Ltd v Microsoft Corp*, [2013] 3 SCR 477 at para 63, said that the test will not be met if, "assuming all the facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed." Therefore, while the Court can examine the facts as

pled, it cannot go outside the four corners of the Statement of Claim in determining if the test has been satisfied.

(1) Can this action be brought as a class proceeding?

[24] Class proceedings provisions provide a procedural mechanism for the consolidation of similar claims. It follows that the viability of a class action is contingent on the viability of the individual claims that comprise it. If the individual members of a class do not have standing to make the claims that are asserted, then the class action will necessarily fail.

[25] This point was recognized by the Manitoba Court of Appeal in *Soldier v Canada (Attorney General)*, 2009 MBCA 12 at para 30 [*Soldier CA*], where the Court of Appeal held that "[t]he plaintiffs who bring the certification action must have standing to sue as if it were an individual action." Similarly, in *Bisaillon v Concordia University*, 2006 SCC 19 at para 17, the majority of the Supreme Court of Canada held that "[t]he class action is…a procedural vehicle whose use neither modifies nor creates substantive rights…It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so." Class action legislation does not create any new cause of action; rather, it is procedural.

[26] Because a class action cannot succeed unless the individual class members have standing, the issue of standing should be considered as part of the analysis of whether the pleadings disclose a reasonable cause of action under Rule 334.16(a). This was the approach taken by the Manitoba Court of Queen's Bench in *Soldier v Canada (Attorney General)*, 2006 MBQB 50 [*Soldier QB*], at para 26:

> I am persuaded that the issue of standing is a matter to be considered at this stage, in determining whether there is a cause of action and whether s. 4(a) of the Act is met. There can be no cause of action if there is no standing.

[27] This approach was upheld in *Soldier CA*, where the Court of Appeal at para 37 wrote that "the certification judge did not err in principle or commit palpable and overriding error when she considered standing as part of the question as to whether the plaintiffs had a cause of action."

[28] To say that the issue of standing is, as a matter of logic, part of the certification analysis is not to say that, as a matter of procedure, they must always be addressed at the same time. As the Court of Appeal emphasized in *Soldier CA* at para 34, "the question of when to consider the issue of standing is discretionary and may vary depending on the facts of each case and the nature of the evidence presented." It observed that, depending on the material that is before the Court, it may be appropriate to consider the issue of standing earlier, as part of a precertification motion to strike or for summary judgment, or later, as was done in this case, as part of the certification hearing.

[29] In this case, Canada submits that the individual members of the plaintiff class lack standing to enforce the right to annuities under the Numbered Treaties. Canada claims that the right to annuities under a treaty is a collective right held by the Treaty Bands. It can therefore only be enforced on behalf of the Bands as a whole, by way of a representative action.

[30] In order to understand why Canada says that representative actions are uniquely well suited to the enforcement of collective rights, it is useful to understand the history of that form of

action and, in particular, its history in the federal courts. The development of multiparty actions is described in some detail by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paras 19 - 29. Unlike the law courts which judged individual questions between the plaintiff and the defendant, courts of equity developed a rule of compulsory joinder that required that all those interested in the subject matter of the litigation be made and named as parties. The advantage of this development was that it "allowed the Court to examine every facet of the dispute and thereby ensure that no one was adversely affected by its decision without first having had an opportunity to be heard" and it "possessed the additional advantage of preventing a multiplicity of duplicative proceedings."

[31] The compulsory joinder rule became inadequate when the interested parties to the conflict became too numerous to be joined. The court of equity relaxed the rule and created the representative action. In *Chance v May* (1722), Prec Ch 592, 24 ER 265, members of a partnership were allowed to sue on their own behalf and on behalf of some 800 other partners for the misapplication and embezzlement of funds by the partnership's former treasurer and manager. As the Supreme Court indicates: "The court allowed the action because 'it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, and so all of the rest were in effect parties,' and because 'it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be made parties'." The representative action thus became available where there were numerous parties who had the same interest in an action – one or more persons could represent all interested persons and the decision was binding on all of them.

[32] Prior to 2002, the requirement that the persons have the same interest was reflected in Rule 114(1) of the *Federal Courts Rules* which provided: "Where two or more persons have the same interest in a proceeding, the proceeding may be brought by or against any one or more of them as representing some or all of them."

[33] Rule 114 was repealed in 2002 when the class action regime was brought into effect. However, The Hon. Allan Lutfy and Emily McCarthy in *Rule-Making in a Mixed Jurisdiction: The Federal Court (Canada)* (2010), 49 SCLR (2d) 313 indicate that Rule 114 was reinstated in an amended format in 2007, at the request of the Aboriginal litigation bar. They observe at page 324 that a subcommittee of the Rules Committee found that treaty rights are generally not individual rights and that the availability of opt out in class aboriginal proceedings is problematic:

> A review of the nature of Aboriginal and treaty rights in Canada demonstrates that they are, for the most part, *sui generis* rights that are held communally and that arise, at times, from an agreement that was entered into by a band or a nation with the Crown in right of Canada. These rights are transmitted to individuals because of their membership in a particular band or nation, but are not held by these individuals in an individual capacity. Thus membership in the group is the *sine qua non* of exercising or enforcing the right.
>
> Governance of a band or a nation is regulated by either customary law or the Indian Act. Thus members of First Nations communities belong to a (generally) identifiable group, they are seeking to enforce a communal right, and the capacity to opt out from the litigation – due to the nature of the right at issue – is problematic at best.

[34] As a result, Rule 114 was reinstated. A representative action may be brought by a person acting as a representative of one or more other persons on condition that "the issues asserted by … the representative and the represented persons (i) are common issues of law and fact and there

are no issues affecting only some of those persons, or (ii) relate to a collective interest shared by those persons."

[35] The plaintiffs acknowledged that treaty rights are generally collective in nature, "belonging" to the signatory First Nations. However, they submit that, in appropriate circumstances, treaty rights claims can be pursued on an individual basis. In *Soldier CA*, the Court of Appeal concluded that it was not plain and obvious that individual members of the plaintiff First Nations lacked standing to seek adjusted annuity payments by way of class action. The plaintiffs also refer to *Behn v Moulton Contracting Ltd.*, 2013 SCC 20 [*Behn*] where the Supreme Court of Canada confirmed that treaty rights are collective, but went on to note at para 33 that this does not completely preclude individual members from asserting treaty rights because there may be individual aspects to those rights:

> The Crown argues that claims in relation to treaty rights must be brought by, or on behalf of, the Aboriginal community. This general proposition is too narrow. It is true that Aboriginal and treaty rights are collective in nature. However, certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights, as some of the interveners have proposed. [authorities omitted]

In *Behn* the Supreme Court of Canada chose not to determine whether there were some treaty rights that could be enforced by individuals by way of a class proceeding as it was unnecessary "at this stage of the development of the law" and in light of the basis on which the decision was made.

[36] In support of its position that the Annuity Payments are individual rights, the plaintiffs point to the 2011 letter from the Specific Claims Branch which sets out its view that the right to collect an annuity payment is an individual right. Canada submits that this evidence is not persuasive.

[37] The plaintiffs also note that Canada distributes the Annuity Payments directly to individual band members, and therefore they say that it is properly construed as an individual right. Aboriginal Affairs and Northern Development Canada's [AANDC] Manual for the Administration of Payments Pursuant to Treaty [the AANDC Manual] states that treaty annuities are "payable to an individual" and that the individual must acknowledge receipt by signing the treaty pay list, which "acts as evidence of the Crown's fulfillment of its treaty obligation to pay annuity to an individual." Further, the administrative processes in place at AANDC recognizes that the entitlement of certain individuals survives even where their First Nation no longer exists or is no longer recognized as a First Nation by the Crown.

[38] Canada may ultimately succeed in establishing that the right to receive an Annuity Payment is collective in nature because the Numbered Treaties address the cessation of collectively-held land and were entered into by Treaty Bands and First Nations. Canada's position that it is an individual's connection with a Treaty Band or First Nation that creates his or her entitlement to receive an annuity payment and the fact that this right may be exercised or asserted individually does not change the nature of the underlying right. However, the question the Court must address at this stage is whether it is plain and obvious that the plaintiffs' claim cannot succeed.

[39] The present action is quite similar to that in *Soldier QB*. That claim related to the Annuity Payments under Treaty 1 and Treaty 2. The certification judge described the claim to be essentially "that the Crown was under a continuing obligation to pay to each Indian cash in an amount sufficient to purchase the basket of goods [being as many blankets, clothing, prints, twine or traps, that $15.00 would have purchased at the 1871 cost price in Montreal] at the current cost price." The judge rejected the certification motion, holding at para 43 that "the right to the annuity itself and any interpretation of the treaty right necessary to determine that right are collective." Although the Court of Appeal dismissed the appeal, it found that the certification judge erred in holding that the plaintiffs had no standing because the Annuity Payments were a collective and not an individual right. The Court of Appeal states, at para 59:

> …the answer to whether this is a matter of collective rights to be litigated by way of a representative action or a matter of common rights to be litigated by way of class proceedings is not so clear a matter of law that it can be said that it is plain and obvious that the plaintiffs have no standing and therefore no cause of action.

[40] My view of the jurisprudence, given the facts as pled, parallels that of the Court of Appeal. It is not plain and obvious that the plaintiffs have no standing such that this claim cannot succeed as a class action.

(2) Breach of Treaty Obligations

[41] Canada submits that the plaintiffs' claim that it breached its treaty obligations and fiduciary duty is "entirely based on an unfounded assertion that the parties to each of the Numbered Treaties intended and understood at the time each Numbered Treaty was signed that the amount of the annuities would increase annually to account for the effects of inflation."

Canada points out that at para 43 of their memorandum the plaintiffs admit that "the assembly and review of historical evidence … did not uncover any evidence that the parties negotiating the Numbered Treaties considered the potential for inflation." Accordingly, Canada submits that there is no air of reality to the plaintiffs' claims and the plaintiffs cannot show that the pleading discloses a reasonable cause of action.

[42] The plaintiffs plead that it was the "common intention and understanding of the parties at the time each of the Numbered Treaties was signed was that the Annuity Payments would continue to provide a significant contribution to the welfare of the individual beneficiaries." The plaintiffs indicate that they will rely, in part, on evidence that at the time the first treaties were negotiated in 1871, a skilled farm labourer and a female domestic earned only $156 and $60 annually. Treaty 1 provided an aboriginal family of 5 an annual sum of $25 which was described in the Commissioner's report at the time as being "usually sufficient to procure many comforts for the family."

[43] The plaintiffs argue that neither party contemplated that the purchasing power of the annuity would be dissipated over time. Rather, they say that the mutual assumption was that the annuity would provide the Indians with a level of "comfort" based on the purchasing power of the amount agreed upon at the time. The plaintiffs will be asking the Court to imply a contractual term on the basis of that understanding in order to assure and provide efficacy to their mutual agreement – namely, to imply a term that the annuity is to be adjusted to maintain its purchasing power. This submission is based on the approach the Supreme Court of Canada expressed at para 43 of *R v Marshall*, [1999] 3 SCR 456:

> The law has long recognized that parties make assumptions when they enter into agreements about certain things that give their arrangements efficacy. Courts will imply a contractual term on the basis of presumed intentions of the parties where it is necessary to assure the efficacy of the contract, e.g., where it meets the "officious bystander test": *M.J.B. Enterprises Ltd. v. Defence Construction* (1951) Ltd., [1999] 1 S.C.R. 619, at para. 30. (See also: *The "Moorcock"* (1889), 14 P.D. 64; *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; and see generally: Waddams, *supra*, at para. 490; Treitel, *supra*, at pp. 190-94.) Here, if the ubiquitous officious bystander had said, 'This talk about truckhouses is all very well, but if the Mi'kmaq are to make these promises, will they have the right to hunt and fish to catch something to trade at the truckhouses?", the answer would have to be, having regard to the honour of the Crown, "of course". If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations. The honour of the Crown was, in fact, specifically invoked by courts in the early 17th century to ensure that a Crown grant was effective to accomplish its intended purpose: *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, at p. 67b and p. 1026, and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555, at p. 56b and pp. 557-58.
>
> [emphasis added]

[44] In my view, it cannot be said that it is plain and obvious that the pleading as framed does not disclose a reasonable cause of action for breach of treaty if, as is pled, it was the intention and understanding of the parties at the time the treaty was signed that the annuity would provide a certain level of comfort to the Indians. No adjustment clause was negotiated because, as the plaintiffs submit and Canada appears to agree, neither party considered then that the purchasing power of the annuity might be substantially eroded. Those alleged facts, together with the application of the “officious bystander test,” provide a reasonable cause of action for breach of treaty.

(3) Breach of Fiduciary Duty

[45] Canada submits that the plaintiffs have failed to plead the material facts necessary to meet either of the two tests for establishing a fiduciary duty. Relying on *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, it submits that the first situation where a fiduciary duty may arise is "where there is a specific or cognizable communal Aboriginal interest and a Crown undertaking of discretionary control over the specific Aboriginal interest in a way that invokes responsibility in the nature of a private law duty." The second situation is where "there is an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries, a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries), and a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control."

[46] With respect to the first situation, the plaintiffs submit that the Annuity Provisions are a specific and cognizable Aboriginal interest. They further submit that Canada assumed control over that interest. I accept that the Annuity Provisions are arguably a specific Aboriginal interest. It is pled that "the Minister is responsible for setting the amount of the Annual Payments and for distributing Annuity Payments" and that in doing so he is "under an obligation to adjust the amount of the Annuity Payments to account for changes in inflation and to preserve purchasing power." In my view, this is a sufficient basis to find that there is a reasonable cause of action pled that Canada breached its fiduciary duty to the beneficiaries of the treaty Annuity Payments.

[47] On this basis, it cannot be said that it is plain and obvious that the facts as pled fail to disclose a reasonable cause of action of breach of fiduciary duty.

[48] The plaintiffs have met the first part of the test for certification.

B. *Identifiable Class of Two or More Persons*

[49] As noted above, Canada accepts that this requirement has been met if the class is defined as "all persons entitled to receive Annuity Payments under the terms of the Numbered Treaties in accordance with chapter 4 of the March 2002 AANDC Manual for the Administration of Payments Pursuant to Treaty."

C. *Common Questions of Law or Fact*

[50] The law on what constitutes common questions of law or fact for certification purposes is well settled.

[51] The claims of the proposed class must raise questions of law or fact that are common to all class members, regardless of whether or not those common questions predominate over questions only affecting individual class members: Rule 334.16(1)(c).

[52] In order to assess whether there are such common questions, the Court undertakes a purposive inquiry – the question to be addressed is whether allowing the claim to proceed will "avoid duplication of fact-finding or legal analysis:" *Western Canada Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 39, [2001] 2 SCR 534 [*Dutton*], *Rumley v British Columbia*, 2001

SCC 69 at para 29, [2001] 3 SCR 184 [*Rumley*], *Vivendi Canada Inc. v Dell'Aniello*, 2014 SCC 1 at para 44, [2014] 1 SCR 3 [*Vivendi*]. The answer to a common question can be nuanced to reflect individual claims: *Rumley* at para 32.

[53] It is not essential that all class members be identically situated vis-à-vis the opposing party and even a significant level of difference among the class members does not preclude a finding of commonality: *Dutton* at para 39, *Pro-Sys* at paras 108 and 112. To establish commonality, evidence that the acts alleged actually occurred is not required; rather, the evidence must demonstrate that the questions are common to all class members: *Pro-Sys* at para 110.

[54] In *Dutton* and *Pro-Sys* the Supreme Court held that an issue will only be "common" when its resolution is necessary for each member's claim to be resolved. *Dutton* held that success for one member must mean success for all. However, the Supreme Court in *Vivendi* at paras 45 - 46 relaxed that strict requirement somewhat such that the question now is, "does success for one member result in failure for another?":

> Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in Dutton must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.
>
> *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the

> members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.
>
> [emphasis added.]

[55] As noted earlier, the plaintiffs submit that there are four common issues of law or fact requiring determination in this litigation: Interpretation of the Numbered Treaties, whether Canada owes the class members a fiduciary duty, whether there is an ongoing breach of Canada's treaty obligations, and the method of calculating compensation for the lost annuity payments.

(1) Treaty Interpretation

[56] The plaintiffs submit that the interpretation of the Annuity Provisions in the Numbered Treaties is a common issue because resolution of this issue would substantially advance the claims of all the proposed class members.

[57] They argue that the wording of the Annuity Provisions is substantially the same in each Numbered Treaty and that each subsequent treaty was built on those preceding it. The plaintiffs refer to the evidence of Ms. Holmes, a witness for Canada, who stated that the Numbered Treaties cannot be properly considered in isolation and that researching all of the Numbered Treaties individually would be "very inefficient" because of the "tremendous amount of overlap." The plaintiffs submit that resolving this as a common issue would avoid considerable duplication of fact-finding and analysis.

[58] Moreover, they submit that if the evidence indicates that the Numbered Treaties must be interpreted differently, then all that is required is a nuanced answer to the common question, which approach does not mean the question is not common, as was endorsed in *Vivendi*.

[59] Canada correctly points out at paras 16-17 of its memorandum that the eleven treaties differ in wording and scope:

> 16. By express language in each treaty, not only does the amount of the annual treaty payment differ, but significantly, so does the mode or "currency" of payment. For example:
>
> a) Treaties 1 and 2 provide for payment: "…to each Indian family of five persons the sum of fifteen dollars Canadian currency, or in like proportion for a larger or smaller family, such payment to be made in articles as the Indians shall require of blankets, clothing, prints (assorted colours), twine or traps, at the current cost price in Montreal, or otherwise, if her Majesty shall deem the same desireable in the interests of Her Indian people, in cash".
>
> b) On April 30, 1875, the Privy Council issued an Order in Council increasing the amount of "the annual payment to each Indian under Treaties Nos. 1 and 2, from $3 to $5 per annum …" on the condition that anyone receiving the increased payment would abandon their claim to the so-called "outside promises", which refers to certain items orally promised by the Treaty Commissioners, which were not included in the text of the treaties.
>
> c) Treaties 3 through 8, 10 and 11 provide for the annual treaty payment of $5 in cash to each Indian. Treaties 4, 7, 8, and 11 stipulate that the payment is to be "paid only to the heads of families"
>
> d) Treaty 9 provides for the annual payment of $4 in cash for each Indian, to be "paid only to the heads of families".
>
> 17. The Numbered Treaties, with the exception of Treaties 1, 2 and 9, also contain provisions for an annual treaty payment (sometimes referred to as a "salary") for the chief and councillors. The amount of the payment and the number of councillors eligible

to receive this payment varies from treaty to treaty, and in some cases, by Treaty Band:

a) Although Treaties 1 and 2 do not provide for any supplemental annual treaty payment for chiefs and councillors, the 1875 Order in Council approved the "payment over and above such sum of $5, of $20 each and every year to each chief". Since 1875, Canada has also paid $15 per year to councillors of Treaties 1 and 2 Bands.

b) Treaties 3, 5, and 6 provide for an aggregate payment of $30 per chief and $20 per eligible councillor because in addition to the $5 annual treaty payment to each Indian person, "it is further agreed" that each chief is to be paid $25 per annum and each councillor is to be paid $15 per annum. The number of councillors who may receive the additional payment varies: not exceeding 3 (Treaties 3 and 5) or up to 4 councillors (Treaty 6).

c) Treaties 4, 7, 8, 10 and 11 provide for an annual treaty payment of $25 to each chief and $15 to each councillor. Unlike Treaties 1, 2, 3 5, and 6, Treaties 4, 7, 8, 10 and 11 do not provide that the annual treaty payment to the chief and councillors is in addition to the $5 annual treaty payment for each Indian person. The number of councillors who may receive payment varies by treaty: not to exceed 4 per Band (Treaty 4), unlimited (Treaty 10). Others vary based on the size of the Band: not to exceed 4 to a large Band and 2 to a small Band (Treaty 8), at least 30 members for the chief to receive payment, and 2 councillors for every 200 members will receive payment (Treaty 11). Treaty 7 itemizes how many councillors are entitled to receive payment by Treaty Band group: not exceeding 15 (Blackfeet and Blood Indians); 4 (Piegan and Sarcee Bands), and 5 (Stoney Indian Bands).

d) Treaty 9 contains no provisions whatsoever for any supplemental annual treaty payment for chiefs and councillors.

[60] I agree with Canada that treaty interpretation is fact-driven and must be done on a treaty-by-treaty basis. I do not accept Canada's submission that the plaintiffs are asking the Court to interpret the Annuity Provisions of all the Numbered Treaties *en masse*; they recognize that there

may be different interpretations given to the eleven treaties. However, I do not agree with the plaintiffs that this would be no more than a "nuanced" approach of the sort described in *Vivendi*.

[61] The approach described in *Vivendi* focuses on the effect of the answer to the question on each class member. In that context the common question, in my view, is with respect to each separate treaty. The interpretation of each individual treaty may be a common question for each individual entitled to an annuity under that treaty; however, there is no obvious commonality among those class members and the individuals entitled to an annuity under another treaty.

[62] To suggest, as the plaintiffs do, that the common issue is one of treaty interpretation is to state the common issue far too broadly and in far too general a manner. The Supreme Court cautioned against such an approach in *Rumley* at para 29:

> It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings.

[63] Even if the plaintiffs establish that each subsequent treaty was negotiated with an eye to those that had preceded it, that does not entail that the interpretation of the predecessor treaties will provide much probative evidence as to the proper interpretation of a later treaty. As the Supreme Court said in *R v Marshall,* [1999] 3 SCR 456 at para 80: "Each treaty must be considered in its unique historical and cultural context."

[64] The evidence in the record, as summarized in Canada's memorandum at paras 130-146, reveals the unique historical and cultural context of each of the treaties, including the following:

(i) the 50 year gap between the negotiation of Treaty 1 and Treaty 11, (ii) the different Treaty Bands negotiating each treaty and the lack of uniformity in the persons who negotiated for Canada, (iii) the inclusion of a third party, Ontario, when negotiating Treaty 9, (iv) the different geographic regions covered by each treaty, (v) the changing and different motivations that each Treaty Band and Canada had in finalizing the treaty, (vi) the different cultural interests that each Treaty Band was anxious to preserve, and (vii) the different land areas ceded by the Treaty Bands.

[65] I agree with Canada that an individual analysis of the treaty text, the mutual intention of the parties, and the original purposes for which the various parties entered into the treaty must be done for each of the Numbered Treaties: See *Badger* at paras 51-52, *Marshall* at para 80, *Sundown* at para 25. Moreover, some of the individual annuitants are recent additions to a treaty as a result of adhesions to an existing treaty. What was the Band's motivation, interest and intention in adhering to the treaty, and was it the same as the original signatories?

[66] The need to consider each treaty in its unique historical and cultural context is incompatible with a class proceeding of the scope proposed by the plaintiffs. In *R v Goodstriker*, 2012 ABPC 319 the Alberta Provincial Court emphasized that a treaty cannot be considered based on what the parties of another Aboriginal community agreed to in another treaty involving different peoples.

[67] All of these differences and individual circumstances lead me to the conclusion that there is no common issue among the members of the proposed class relating to the interpretation of eleven different treaties.

(2) Fiduciary Duty

[68] For many of the same reasons outlined above, I find there is no common issue as to whether Canada owed each annuitant a fiduciary duty. Whether Canada made an undertaking in the ratification of each of the Numbered Treaties to maintain the purchasing power of the annuity and whether that created a fiduciary duty to the annuitants requires an analysis of the circumstances of each separate treaty at the time of ratification or adhesion. Any decision regarding whether a fiduciary duty arose from the ratification of or adhesion to a particular treaty would only resolve the question for that particular treaty.

(3) Ongoing Breach

[69] Likewise, whether there is an ongoing breach of the Numbered Treaties or fiduciary duty can only be a common issue if there is a common interpretation of all the Numbered Treaties, or a common finding of fiduciary duty. Without a finding that there is a common obligation there can be no corresponding common breach of that obligation.

(4) Calculation of Damages

[70] Unless a common interpretation of all the Numbered Treaties is possible, the issue of methodology to calculate damages cannot be common among the class members. If the

plaintiffs were to succeed in establishing that the Annuity Payments in one or more of the Numbered Treaties must be adjusted, then a full analysis will be required for each such treaty to determine the appropriate methodology for determining the value of the annuity payments. Moreover, the commencement date of that adjustment will also need to be determined for each treaty and there may be variations between annuitants from original Treaty Bands and annuitants from Bands that adhered to the treaty much later.

[71] For these reasons, I find that there are no common issues or facts that arise relating to all individual members of the proposed class. The plaintiffs have failed to satisfy the third requirement necessary to certify this action.

D. *Preferable Procedure*

[72] In assessing whether a class proceeding is the preferable procedure for the just and efficient resolution of the common issues, the Court must first assess whether such a proceeding would be a fair, efficient and manageable method of advancing the claim and, secondly, whether it would be preferable to other procedures: *Rumley* at para 35.

[73] In assessing preferability, the common issues must be considered in the context of the action as a whole and the Court must take into account the "importance of the common issues in relation to the claims as a whole:" *AIC Limited v Fisher*, 2013 SCC 69 at para 21 [*AIC*], citing *Hollick* at para 30. In *Hollick*, the Supreme Court accepted that the Court should adopt a "practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court." This requires that the Court look

at all reasonably available means of resolving the claims, not just having the matter proceed as individual claims.

[74] In *AIC* it was held that the preferability analysis is a comparative exercise where the Court is asked to consider the extent to which the proposed class action may achieve the goals of judicial economy, behaviour modification, and access to justice. The real question is whether "other available means of resolving the claim are preferable."

[75] The plaintiffs submit that individual actions and representative proceedings are the only two reasonable alternatives, but that both would be impractical and comparatively inefficient when compared to a class proceeding.

[76] Canada agrees with the plaintiffs that individual actions would not be appropriate, but does so on the basis that no individual right exists. Canada submits that the claims of these plaintiffs are more appropriately advanced as a representative proceeding brought on behalf of the HLFN that is limited in scope to the interpretation of the Annuity Provision in Treaty 8. It says that a representative action with respect to all the Numbered Treaties is not an appropriate means of resolving these claims because the scope is too large and because it is inconsistent with the principles of treaty interpretation.

[77] Both parties agree that recourse to the specific claims tribunal is not the appropriate avenue to address these claims.

[78] Having found that the action cannot be certified because the claims of the class do not raise common questions of fact or law, it is not necessary that this element of the test be examined too closely. Perhaps, it is better that less is said. However, for the benefit of the parties and purely as obiter so as not to bind a judge in any future claim, let me offer these observations.

[79] I concur with the parties that commencing numerous individual actions is not an appropriate manner of proceeding for the obvious reasons stated by all counsel. On the other hand, one proceeding covering all annuitants under eleven different treaties negotiated at different times and under different conditions over-reaches. Either a class action or a representative action restricted to the members of the signatory Treaty Bands subject to one of the numbered treaties seems a credible and arguably appropriate procedure.

[80] While the choice of these alternatives remains with the plaintiff(s), I think there is merit to the position of Canada that a representative action may be more appropriate.

[81] If the claims of the annuitants under a treaty were to proceed as a class action, then each annuitant would be permitted the choice of opting out of the action. The record reveals that, as of June 2014, one individual action and fifteen representative actions have been commenced on behalf of different treaty bands in this Court or in a superior court. Pursuant to Rule 334.21(2) the persons covered by those actions will be automatically excluded from this action unless they discontinue those actions. For limitation reasons, the Court has been advised that discontinuance is unlikely.

[82] 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. 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.

E. *Appropriateness of the Representative Plaintiff*

[83] The plaintiffs submit that the Chief is entitled to receive annuity payments pursuant to Treaty 8 and is therefore a member of the Proposed Class. He is the elected chief of the HLFN.

[84] The plaintiffs argue that a representative plaintiff is not required to have a detailed knowledge of the legal issues involved in the action or the civil litigation process to fairly and adequately represent a class: See *Maxwell v MLG Ventures Ltd.*, [1995] OJ No 1163 at para 10 (On Ct J, Gen Div), *Momi* at para 75. The plaintiffs submit that the Chief has demonstrated an understanding of the basic claims in this action and the ability to instruct counsel. He appreciates that he would be representing all members of the Proposed Class. Moreover, they say that he does not have a conflicting interest on any of the common issues and has summarized

the agreements regarding fees and disbursements between him and class counsel which provide that counsel may be paid up to one-third of any amounts recovered or benefits obtained from the class action. In short, they submit that all the requirements of Rule 334.16(1)(e) have been satisfied.

[85] If the Court certifies the proposed class for all *Indian Act* bands, the plaintiffs submit in the alternative that the HLFN, represented by the Chief, is an appropriate representative plaintiff. The HLFN's registered members are entitled to receive annuity payments under Treaty 8 and the Chief is its elected chief.

[86] The plaintiffs submit that their litigation plan demonstrates their ability to rigorously prosecute this claim on behalf of the class. They point out that a litigation plan is "not to be scrutinized in great detail at the certification stage," but it must show that the plaintiff and counsel have "thought the process through and that they grasp its complexities:" *Buffalo FC* at para 148.

[87] Canada submits, citing passages from the examination of the Chief, that neither he nor the HLFN is an appropriate representative plaintiff for the proposed class.

[88] I agree with Canada that in order to vigorously and capably prosecute a class proceeding, the representative plaintiff must have at least a basic understanding of the case to be advanced and his or her role in the proceeding: *Sullivan v Golden Intercapital (GIC) Investments Corp.*, 2014 ABQB 212 at paras 54-57. Canada has persuaded me that the examination of the Chief

demonstrates that he lacks sufficient knowledge of the facts and issues that are raised by the claim and does not understand his responsibilities as a representative plaintiff. He has only a rudimentary knowledge of the facts and issues raised by the claim he is asserting, he is not familiar with the terms of any of the Numbered Treaties, or how entitlement to Annuity Payments is determined. He appears to be little more than a bystander in the litigation in that he has not played an active role in the decisions relating to the litigation. He was not involved in identifying or determining the Proposed Class and was not aware of whether any other Treaty Bands or band members had authorized him or the HLFN to represent them in this class proceeding. Although Canada is correct in pointing out that he has taken no steps to identify witnesses or collect relevant documents, this is largely irrelevant as it is early in the litigation to take these steps. However, it is troubling that he appears to have little or no independent knowledge of the pleadings, litigation plan or the notice plan in this action. Canada has established through its examination of the Chief that he has no understanding of class proceedings or his role as representative plaintiff.

[89] While the plaintiffs contend that neither the Chief nor the HLFN have interests that conflict with those of other members of the Proposed Class, I must agree with Canada that neither plaintiff has actually considered whether conflicts might exist. The pleadings in other ongoing cases involving Annuity Payments show that a conflict may exist among individuals with regard to who is or ought to be considered entitled to Annuity Payments and the method for determining adjustments to the amount.

[90] For these reasons, I find that neither plaintiff is an appropriate representative plaintiff in the proposed class proceeding.

Conclusion

[91] For these reasons the motion to certify this action as a class proceeding must be dismissed. In keeping with Rule 334.39, each party shall bear its own costs.

ORDER

THIS COURT ORDERS that the motion to certify this action as a class proceeding is dismissed, without costs.

"Russel W. Zinn"

Judge

Appendix A – Numbered Treaties Annuity Provisions

Treaty 1 (August 3, 1871)

"Her Majesty's Commissioner shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the district above described, distributing them in families, and shall in every year ensuing the date hereof, at some period during the month of July in each year, to be duly notified to the Indians and at or near their respective reserves, pay to each Indian family of five persons the sum of fifteen dollars Canadian currency, or in like proportion for a larger or smaller family, such payment to be made in such articles as the Indians shall require of blankets, clothing, prints (assorted colours), twine or traps, at the current cost price in Montreal, or otherwise, if Her Majesty shall deem the same desirable in the interests of Her Indian people, in cash."

Order in Council (April 30, 1875)

"[A]s there seems to have been some misunderstanding between the Indian Commissioner and the Indians in the matter of Treaties Nos. 1 and 2, the Government, out of good feeling to the Indians and as a matter of benevolence, is willing to raise the annual payment to each Indian under Treaties Nos. 1 and 2, from $3 to $5 per annum, and make payment over and above such sum of $5, of $20 each and every year to each Chief, and a suit of clothing every three years to each Chief and each Headman, allowing two Headmen to each band, on the express understanding, however, that each Chief or other Indian who shall receive such increased annuity or annual payment shall be held to abandon all claim whatever against the Government in connection with the so-called "outside promises," other than those contained in the memorandum attached to the treaty."

Treaty 2 (August 21, 1871)

"And further, that Her Majesty's Commissioner shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall in every year ensuing the date hereof, at some period during the month of August in each year to be duly notified to the Indians, and at or near their respective reserves, pay to each Indian family of five persons the sum of fifteen dollars, Canadian currency, or in like proportion for a larger or smaller family, such payment to be made in such articles as the Indians shall require of blankets, clothing, prints (assorted colours), twine or traps, at the current cash price in Montreal, or otherwise, if Her Majesty shall deem the same desirable in the interest of Her Indian people, in cash."

Order in Council (April 30, 1875)

"[A]s there seems to have been some misunderstanding between the Indian Commissioner and the Indians in the matter of Treaties Nos. 1 and 2, the Government, out of good feeling to the Indians and as a matter of benevolence, is willing to raise the annual payment to each Indian under Treaties Nos. 1 and 2, from $3 to $5 per annum, and make payment over and above such sum of $5, of $20 each and every year to each Chief, and a suit of clothing every three years to each Chief and each Headman, allowing two Headmen to each band, on the express understanding, however, that each Chief or other Indian who shall receive such increased annuity

or annual payment shall be held to abandon all claim whatever against the Government in connection with the so-called "outside promises," other than those contained in the memorandum attached to the treaty."

Treaty 3 (October 3, 1873)

"And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall in every year ensuing the date hereof, at some period in each year to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of five dollars per head yearly."

…

"It is further agreed between Her Majesty and the said Indians that each Chief duly recognized as such shall receive an annual salary of twenty-five dollars per annum, and each subordinate officer, not exceeding three for each band, shall receive fifteen dollars per annum;"

Treaty 4 (September 15, 1874)

"As soon as possible after the execution of this treaty Her Majesty shall cause a census to be taken of all the Indians inhabiting the tract hereinbefore described, and shall, next year, and annually afterwards for ever, cause to be paid in cash at some suitable season to be duly notified to the Indians, and at a place or places to be appointed for that purpose, within the territory ceded, each Chief twenty-five dollars; each Headman not exceeding four to a band, fifteen dollars; and to every other Indian man, woman and child, five dollars per head; such payment to be made to the heads of families for those belonging thereto, unless for some special reason it be found objectionable."

Treaty 5 (September 20 & 24, 1875)

"And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall in every year ensuing the date hereof, at some period in each year to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of five dollars per head yearly."

…

"It is further agreed between Her Majesty and the said Indians that each Chief duly recognized as such shall receive an annual salary of twenty-five dollars per annum, and each subordinate officer, not exceeding three for each band, shall receive fifteen dollars per annum;"

Treaty 6 (August 23 & 28 and September 9, 1876)

"And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of

this treaty, cause to be taken an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall, in every year ensuing the date hereof, at some period in each year, to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of $5 per head yearly."

…

"It is further agreed between Her Majesty and the said Indians, that each Chief, duly recognized as such, shall receive an annual salary of twenty-five dollars per annum; and each subordinate officer, not exceeding three for each band, shall receive fifteen dollars per annum;"

Treaty 7 (September 22, 1877)

"Her Majesty also agrees that next year, and annually afterwards forever, she 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, to each Chief, twenty-five dollars, each minor Chief or Councillor (not exceeding fifteen minor Chiefs to the Blackfeet and Blood Indians, and four to the Piegan and Sarcee Bands, and five Councillors to the Stony Indian Bands), fifteen dollars, and to every other Indian of whatever age, five dollars; the same, unless there be some exceptional reason, to be paid to the heads of families for those belonging thereto."

Treaty 8 (June 21, 1899)

"Her Majesty also agrees that next year, and annually afterwards for ever, She 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, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto."

Treaty 9 (November 6, 1905)

"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 for those belonging thereto."

Treaty 10 (August 28, 1906)

"His Majesty also agrees that next year and annually thereafter for ever He will cause to be paid to the Indians in cash, at suitable places and dates of which the said Indians shall be duly notified, to each chief twenty-five (25) dollars, each headman fifteen (15) dollars and to every other Indian of whatever age five (5) dollars."

Treaty 11 (June 27, 1921)

"HIS MAJESTY, also agrees that during the coming year, and annually thereafter, 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, to each Chief twenty-five dollars, to each Headman fifteen dollars, and to every other Indian of whatever age five dollars, to be paid only to heads of families for the members thereof, it being provided for the purposes of this Treaty that each band having at least thirty members may have a Chief, and that in addition to a Chief, each band may have Councillors or Headmen in the proportion of two to each two hundred members of the band."

Appendix B – *Federal Courts Rules* Class Proceeding Certification

334.16(1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	334.16(1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies:
(a) the pleadings disclose a reasonable cause of action;	a) les actes de procédure révèlent une cause d'action valable;
(b) there is an identifiable class of two or more persons;	b) il existe un groupe identifiable formé d'au moins deux personnes;
(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
(e) there is a representative plaintiff or applicant who	e) il existe un représentant demandeur qui:
(i) would fairly and adequately represent the interests of the class,	(i) représenterait de façon équitable et adéquate les intérêts du groupe,
(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,	(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,
(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and	(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,
(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.	(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.
(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common	(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en

questions of law or fact, including whether

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

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

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

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

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

compte, notamment les suivants:

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;

d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

(3) Si le juge constate qu'il existe au sein du groupe un sous-groupe de membres dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe de sorte que la protection des intérêts des membres du sous-groupe exige qu'ils aient un représentant distinct, il n'autorise l'instance comme recours collectif que s'il existe un représentant demandeur qui:

a) représenterait de façon équitable et adéquate les intérêts du sous-groupe;

b) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du sous-groupe et tenir les membres de celui-ci informés de son déroulement;

c) n'a pas de conflit d'intérêts avec d'autres membres du sous-groupe en ce qui concerne les points de droit ou de fait communs;

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

d) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1784-12
STYLE OF CAUSE:	CHIEF EUGENE HORSEMAN ET AL v HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 9, 2015
ORDER AND REASONS:	ZINN J.
DATED:	OCTOBER 7, 2015
AMENDED:	OCTOBER 15, 2015

APPEARANCES:

Paul R. Bennett Mark W. Mounteer	FOR THE PLAINTIFFS
Kathy Ring, Shelan Miller, Lisa Laird, Brett Nash	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Hordo Bennett Mounteer LLP Barristers and Solicitors Vancouver, British Columbia Donovan & Company Vancouver, British Columbia	FOR THE PLAINTIFFS
William F. Pentney Deputy Attorney General of Canada Department of Justice Aboriginal Law Section Vancouver, British Columbia	FOR THE DEFENDANT