Court File No. CV-24-00000091-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

WABASEEMOONG INDEPENDENT NATIONS, on behalf of all TREATY 3 FIRST NATIONS and CHIEF WAYLON SCOTT, on his own behalf and on behalf of all members of the WABASEEMOONG INDEPENDENT NATIONS and all members of TREATY 3 FIRST NATIONS

Plaintiffs

- and -

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

Defendant

- and -

ANIMAKEE WA ZHING #37 FIRST NATION, COUCHICHING FIRST NATION, GAKIJIWANONG ANISHINAABE NATION, MITAANJIGAMIING FIRST NATION, NAICATCHEWENIN FIRST NATION, NAOTKAMEGWANNING FIRST NATION, NIGIGOONSIMINIKAANING FIRST NATION, RAINY RIVER FIRST NATIONS, SEINE RIVER FIRST NATION

Intervenors

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

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I. OVERVIEW

1. Nine Treaty 3 Communities (the "**Treaty 3 Intervenors**") are plaintiffs in a Treaty 3 annuities action (the "**annuities action**") proceeding in this Court, which has issues of fact and law in common with the proposed class action of Wabaseemoong Independent Nations ("**Wabaseemoong**").

2. The Treaty 3 Intervenors make submissions on *how* the proposed class action should be certified such that it is coordinated with their annuities action, if the Court decides to certify. The Treaty 3 Intervenors do not take a position on *whether* the Court should certify Wabaseemoong's proposed action as a class action.

3. If this Court decides to certify, the Court should exercise its discretion to grant relief and fashion a certification order that both allows the Treaty 3 annuities action to proceed and coordinates the annuities action with the class proceedings.

4. First, Wabaseemoong's proposed class action should be severed into three separate class proceedings—one for each Treaty 3 promise—ensuring that putative class members can freely decide how to participate in the class proceedings. Severing the proceeding ensures that putative class members are not constrained to a single opt-out procedure for the entirety of the claims being advanced by Wabaseemoong and would allow for different opt-out decisions for claims pertaining to the three distinct Treaty 3 promises being pled. The Court can and ought to formulate the proposed common issues as necessary to be heard in separate class proceedings.

5. Second, Wabaseemoong's sought after order staying all actions before the Ontario Superior Court of Justice based on the facts giving rise to the Wabaseemoong claim must be denied. Any order granted by the Court that stays

existing proceedings or bars any new proceedings based on the facts giving rise to Wabaseemoong's claim must expressly exempt proceedings brought by putative class members who choose to opt out of the class proceedings.

6. Third, any certification order should require the coordination of Wabaseemoong's class action on annuities with the Treaty 3 Intervenors' annuities action through appointing the same case management judge, who can make determinations on how to allow both actions to proceed in an orderly manner.

7. Finally, a six (6) month opt-out period following the Notice or Notices of Certification should be provided, in order that Treaty 3 Communities have sufficient opportunity to be adequately informed about the class proceedings and time to engage and receive direction from their members.

II. FACTS

Parties

8. The Treaty 3 Intervenors are comprised of the following nine Treaty 3 Communities:

(a) Animakee Wa Zhing #37 First Nation;

(b) Couchiching First Nation;

(c) Gakijiwanong Anishinaabe Nation;

(d) Mitaanjigamiing First Nation;

(e) Naicatchewenin First Nation;

(f) Naotkamegwanning First Nation;

(g) Nigigoonsiminikaaning First Nation;

(h) Rainy River First Nations; and

(i) Seine River First Nation.

9. The Treaty 3 Intervenors represent different Communities that are part of the Anishinaabe Nation in Treaty #3 in northwestern Ontario.[1]

10. The Treaty 3 Intervenors are all First Nation "bands" within the meaning of the *Indian Act*, RSC 1985, c 1-5, whose members are "Aboriginal peoples" within the meaning of section 35 of the *Constitution Act, 1982*.[2]

11. The Treaty 3 Intervenors are all successor collective rights holders of the Anishinaabeg of Rainy River and Lake of the Woods who entered Treaty 3.[3] The Treaty 3 Intervenors and their members are entitled to the benefits of Treaty 3, including annuity payments under Treaty 3.[4]

12. The Treaty 3 Intervenors are putative class members in this proceeding.

13. The Court granted the Treaty 3 Intervenors' intervention motion to be added parties to this proceeding for the certification motion. Pursuant to the Order of Justice W. Danial Newton, dated May 12, 2026, the Treaty 3 Intervenors may make submissions in relation to the form and scope of the relief to be granted in certifying the class action; the scope of the stay to be granted, if any, and its application to the annuities action; the process for opting-out; and the coordination of the annuities action with Wabaseemoong's proposed class action.[5]

14. Wabaseemoong, another Treaty 3 Community that is a part of the Anishinaabe Nation in Treaty #3, is the representative Plaintiff in this proceeding.

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[1] Affidavit of Chief McVicar, affirmed May 1, 2026, Motion Record of the Intervenor [**Intervenor MR**], Tab 2, at p. 6, para. 7 [**McVicar Affidavit**].
[2] McVicar Affidavit, Intervenor MR, Tab 2, at p. 6, para. 9.
[3] McVicar Affidavit, Intervenor MR, Tab 2, at p. 6, para. 8.
[4] McVicar Affidavit, Intervenor MR, Tab 2, at p. 6, para. 9.
[5] Order of Justice W. Danial Newton, May 12, 2026, Intervenor MR, Tab 1, at pp. 1-3.

15. His Majesty the King in Right of Canada, as represented by the Attorney General of Canada, is the Defendant in this proceeding. This same Defendant is named in the annuities action of the Treaty 3 Intervenors.[6]

Treaty 3 Annuities Action

16. In November 2025, the Treaty 3 Intervenors commenced their annuities action, Ontario Superior Court File No. CV-25-00000087-0000.[7]

17. The annuities action was brought by the Treaty 3 Intervenors on their own behalf in their capacity as First Nation “bands” and successors to the signatories of Treaty 3. The Treaty 3 Intervenors chose to advance their claim as an action and have standing to bring the action regarding collective Treaty 3 rights that belong to Treaty 3 Communities.[8]

18. The annuities action pleads breaches of the Crown’s duties to negotiate Treaty 3 in good faith and to implement the Treaty 3 annuities promise diligently and honourably.

19. First, the annuities action alleges that during negotiations of Treaty 3, the Crown, as represented by Treaty Commissioners, breached its duty to negotiate honestly and in good faith by:

(a) failing to disclose the effect of inflation on the value and/or purchasing power of annuity payments;

(b) failing to disclose the possibility of including a provision for the augmentation of the annuity payments if the Anishinaabeg territory in Rainy River and Lake of the Woods became more productive; and

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[6] McVicar Affidavit, Intervenor MR, Tab 2, Exhibit 1, at p. 5, para. 6.
[7] McVicar Affidavit, Exhibit 1, Intervenor MR, Tab 2A, at p. 16, paras. 5-6.
[8] See e.g. *R. v. Sundown*, 1999 CanLII 673 (SCC), [1999] 1 SCR 393 at para. 36; *Gill v. Canada*, 2005 FC 192 at para. 12 [***Gill***]; *Behn v. Moulton Contracting Ltd,* 2013 SCC 26 at para. 33; Chief *Derek Nepinak and Chief Bonny Lynn Acoose v. Canada*, 2025 FC 925 at para. 50 [***Chief Derek***].

(c) actively misrepresenting the amount that Treaty Commissioners were able to offer for annuity provisions pursuant to their mandate from the Crown.[9]

20. Second, the annuities action alleges that annuity provisions in Treaty 3 are intended to provide members of the Anishinaabe Nation in Treaty #3 with annual annuity payments equivalent to the real value and/or purchasing power of the nominal dollar figures agreed to in 1873. Consequently, by failing to adjust the nominal dollar figures of the annuity payments since 1873 to account for changes in value and/or purchasing power, the Crown has breached the Treaty and its duty of diligent implementation, has frustrated the purpose of the Treaty, and has failed to act honourably.[10]

21. Animakee Wa Zhing #37 and other Treaty 3 Intervenors intend to opt-out of Wabaseemoong's proposed class action, if certified, to pursue their annuities action.[11]

Comparison of Annuities Action and Wabaseemoong's Proposed Class Action

22. There are issues of fact and law in common in the annuities action and Wabaseemoong's proposed class action relating to the negotiation of the annuity provisions in Treaty 3 and the implementation of the annuity promise by the Crown.

23. For example, both proceedings:

(a) acknowledge Treaty rights are collective rights, and that Treaty 3 Communities, as represented by their Chiefs and Councils, are the proper entities to bring a claim alleging breaches of Treaty;[12]

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[9] McVicar Affidavit, Exhibit 1, Intervenor MR, Tab 2A, at p. 15, paras. 3-4.
[10] McVicar Affidavit, Exhibit 1, Intervenor MR, Tab 2A, at p. 16, paras. 5-7.
[11] McVicar Affidavit, Intervenor MR, Tab 2, at p. 19, para. 23.
[12] Notice of Motion, Motion Record of the Plaintiff [**Plaintiff MR**], Tab 1, at para. 8; Amended Statement of Claim, Plaintiff MR, Tab 1A, at para. 11.

(b) plead that there is a Treaty 3 right to an annual payment to each individual Treaty 3 beneficiary (the $5 nominal amount);[13]

(c) seek adjustment to the nominal payment amount to maintain the real value and/or purchasing power of the promised annuity payment;[14] and

(d) plead that the Crown breached its duty to negotiate in good faith by failing to disclose the effect of inflation on the value and/or purchasing power of annuity payments, although Wabaseemoong advances this as a pleading in the alternative.[15]

24. The annuities action includes related, yet distinct pleadings from Wabaseemoong's proposed class action. For example:

(a) along with the $5 annuity payment, the Treaty 3 Intervenors' annuity action also pleads the other promised annuity payments of $25 to Chiefs and $15 to Councillors;[16]

(b) the annuities action pleads a breach of the duty to negotiate in good faith by the Crown for failing to disclose the possibility of including a provision for the augmentation of the annuity payments based on increased value of the lands;[17] and

(c) the annuities action pleads that the Crown breached its duty to negotiate in good faith when Treaty Commissioners misled the Anishinaabeg

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[13] Amended Statement of Claim, Plaintiff MR, Tab 1A, at para. 1; McVicar Affidavit, Exhibit 1, Intervenor MR, Tab 2A, at pp. 23-24, paras. 44 & 47.
[14] McVicar Affidavit, Exhibit 1, Intervenor MR, Tab 2A, at pp. 25-26, paras. 57-61; Amended Statement of Claim, Plaintiff MR, Tab 1A, at para. 49; Memorandum of Fact and Law of the Plaintiff [**Plaintiff Factum**], Appendix "A", at p. 36.
[15] McVicar Affidavit, Exhibit 1, Intervenor MR, Tab 2A, at p. 20, para. 30; Amended Statement of Claim, Plaintiff MR, Tab 1A, at para. 50.
[16] McVicar Affidavit, Exhibit 1, Intervenor MR, Tab 2A, at p. 23, para. 44;
[17] McVicar Affidavit, Exhibit 1, Intervenor MR, Tab 2A, at pp. 20-21, para. 31.

concerning the scope of their negotiation mandate regarding annuity payments.[18]

26. Similarly, Wabaseemoong has distinct claims in its pleadings. For example:

(a) Wabaseemoong's proposed class action pleads an adjustment to annuities to reflect a share in the value of the accumulation of wealth derived by the Crown from territory within Treaty 3;[19]

(b) the proposed class action pleads that the Crown's failure to disclose the effect of inflation is a breach of a fiduciary duty owed by the Crown;[20]

(c) the proposed class action pleads, in the alternative, that the Crown breached its fiduciary duties and acted in bad faith by failing to negotiate and implement Treaty 3 provisions that were uniform and equitable in comparison to the Robinson Huron and Robinson Superior Treaties of 1850;[21] and

(d) the proposed class action pleads causes of action with respect to Crown failures in the negotiation and implementation of distinct Treaty 3 promises on agricultural benefits and ammunition and twine payments.[22]

Other Similar Claims Proceeding

27. Various Treaty 3 Communities are currently advancing claims on the same causes of action advanced in the Wabaseemoong proposed class action. Apart from the annuities action, there are currently Specific Claims filed by Shoal Lake #40 First Nation for agricultural benefits, by Wabaseemoong for Treaty 3

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[18] McVicar Affidavit, Exhibit 1, Intervenor MR, Tab 2A, at pp. 21-22, paras. 34-39.
[19] Amended Statement of Claim, Plaintiff MR, Tab 1A, at para. 49.
[20] Amended Statement of Claim, Plaintiff MR, Tab 1A, at para. 50; Plaintiff Factum, at p. 20, para. 34.
[21] Amended Statement of Claim, Plaintiff MR, Tab 1A, at para. 50.
[22] Amended Statement of Claim, Plaintiff MR, Tab 1A, at paras. 43-48.

annuities indexing, and by Grassy Narrows First Nation for Treaty 3 annuities indexing, agricultural benefits, and ammunition and twine indexing.[23]

III. ISSUES

28. The Treaty 3 Intervenors make submissions on the following issues:

(a) the severance of the class action into separate proceedings to ensure the fair exercise of opt-out rights and the reformulation of proposed common issues to facilitate this;

(b) limiting the application of the stay of proceedings to any Treaty 3 proceedings on annuities, agricultural benefits, and/or ammunition and twine advanced by putative class members that do not opt out of the relevant class proceedings;

(c) the coordination of the proposed class proceeding with the Treaty 3 Intervenors' annuities action; and

(d) a six-month opt-out period.

IV. ARGUMENT

Issue 1: The Annuities Claims Should be Severed into a Separate Class Action, as Should the Ammunition and Twine and Agricultural Benefits Claims, with Proposed Common Issues Reformulated as Necessary

Severance of Distinct Treaty 3 Claims into Separate Class Actions

29. The Court should require the Plaintiff to bring its claims with respect to three distinct categories of Treaty 3 issues—the obligation to adjust the annuities, the agricultural benefits promises, and the ammunition and twine promise—[24] in separate proceedings. This would allow putative class members to freely decide

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[23] Affidavit of Stefan Matiation, affirmed October 23, 2025, Exhibit B [**Matiation Affidavit**], Respondent's Motion Record [**Respondent MR**], Tab 2B, at p. 50.
[24] Notice of Motion, Plaintiff MR, Tab 1, at para. 3; Amended Statement of Claim, Plaintiff MR, Tab 1A, at para. 1.

whether and how to participate in the class proceedings without being prejudiced by the opt-out procedure.

30. The issues raised in respect of the obligation to adjust the annuities is qualitatively different than the issues raised regarding agricultural benefits: for annuities, there is an issue with respect to the existence, nature, and scope of the Treaty obligation to adjust the annuities; in contrast, there is no dispute that an agricultural benefits right *exists* but the question arises as to whether or not it was performed. Further the issues raised in respect of the obligation to adjust the annuities is quantitatively different than the issues raised regarding the adjustment of the ammunition and twine payment promise: the analysis of the adjustment for inflation of the cost of ammunition and twine underlying that payment promise is quantitatively different than the analysis of the adjustment for inflation of a nominal annuities payment in dollar figures.

31. The category of issues related to annuities is also distinct for the purpose of this motion in that the annuities action only overlaps with the annuities common issues and not the other two categories, aside from the general history of the negotiation of Treaty 3. This creates a dilemma with respect to the right to opt-out.

32. The *Class Proceedings Act*[25] provides that class members have a *right* to opt out of a *proceeding* but does *not* provide for the right to opt out of the determination of an issue or a class of issues.[26] That is, it is an all or nothing right. Thus, parties who opt out to pursue their own claim against Canada in respect of the failure to adjust the annuities cannot remain in the class action in respect of the agricultural benefits issues or ammunition and twine issues. Instead, they are pushed to either remain in the claim for all three categories of Treaty 3 claims or pursue separate actions for all three categories of claims. This

[25] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, at s. 9 [***CPA***].
[26] See e.g. *Nutech Brands Inc v. Air Canada*, 2008 CanLII 11643 (ONSC), at para. 18; *3113736 Canada Ltd. v. Cozy Corner Bedding Inc.*, 2019 ONSC 2249, at para. 67.

is clearly prejudicial to both the class members and the interest of the court to discourage an unnecessary multiplicity of proceedings.[27]

33. This prejudice arises from the joinder of these three distinct classes of Treaty 3 claims into one class action. While the joinder of multiple claims is permitted under Rule 5.01,[28] the court may order that these claims be asserted in another proceeding if the "the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party[.]"[29] Making an order that the existing single proceeding be divided into separate class proceedings is available to the court,[30] and would cure this prejudice by allowing each class member to make a choice as to which issues they wish to pursue in their own action(s) upon opting out of each respective class proceeding, and which issues they would prefer to advance in the context of a class.

34. This, of course, is particularly important in respect of the Treaty 3 Intervenors, who are collectively advancing the annuities action and have chosen not to also pursue claims in respect of ammunition and twine and agricultural benefits within the same action. The Court should not prejudice putative class members who wish to pursue their own claims regarding annuities, agricultural benefits, or ammunition and twine, because of the joinder of a diversity of distinct Treaty 3 claims in one class action.

Annuities Common Issues Should Be Segregated from Other Issues

35. The Court should formulate common issues for annuities, agricultural benefits, and ammunition and twine that are fully discrete to allow for the distinct

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[27] *Courts of Justice Act,* RSO 1990, c C.43, Part -1, at s. 138.
[28] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, at r. 5.01 [***Rules***].
[29] *Rules*, at r. 5.05.
[30] See e.g. *Good v. Toronto Police Services Board*, 2014 ONSC 4583, aff'd 2016 ONCA 250, leave to appeal to SCC refused 2016 CanLII 76801; *Guenette v. Canada (Attorney General)*, 2004 CanLII 18911 (ONSC); *Bagaco v. Union Energy Limited Partnership*, 2009 CanLII 6830 (ONSC).

Treaty 3 claims to advance in separate class proceedings. Given the formulation of the common issues that Wabaseemoong has proposed, the Court can achieve this end while exercising its authority to redefine the proposed common issues cautiously and with restraint.[31]

36. Wabaseemoong has proposed common issues under separate headings for annuities, agricultural benefits, and ammunition and twine.[32] This readily facilitates the severance of the proposed class action into three separate class proceedings.

37. Despite the initial separation of common issues, the Plaintiff proposes "In the Alternative" common issues which combine annuities and ammunition and twine. Common issues regarding damages are also proposed that incorporate damages from each cause of action.[33]

38. To allow for separate class proceedings—or, in the alternative, for the annuities issues to be tried separately—the Court should reformulate the Plaintiff's "In the Alternative" common issues and damages common issues so that they are presented distinctly for annuities, agricultural benefits, and ammunition and twine. This proposed reformulation aligns with Common Issues 1 to 9 as proposed by the Plaintiff and represents a minor and suitable exercise of discretion by this Court.

Issue 2: The Stay Sought by the Proposed Class Representative is Overly Broad

39. The proposed representative Plaintiff has sought an overly broad stay of proceedings that should be denied; any order granted should be limited to

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[31] Plaintiff Factum, Appendix "A", at pp 36-39; *McCracken v. Canadian National Railway Company*, 2012 ONCA 445 at para. 144; *Chief Heidi Cook et al v. The Government of Manitoba et al*, 2026 MBKB 65 at para. 282.
[32] Plaintiff Factum, Appendix "A", at pp 36-39.
[33] Plaintiff Factum, Appendix "A", at pp 36-39.

staying proceedings brought by class members who do not opt out of the class proceedings.

40. In the Notice of Motion for Certification, Wabaseemoong requests a wide reaching stay of existing proceedings and a bar on future proceedings, asking for (1) an order staying "any other proceeding before the Ontario Superior Court of Justice" based on the same issues of fact and law within the proposed class action; and (2) a declaration that no other proceeding on the same issues of fact and law may be commenced.[34]

41. This relief must be denied. Section 9 of the *Class Proceedings Act* and the jurisprudence of this Court make it clear that class members have a *right* to opt out and exercise their autonomy to pursue their own actions in respect of the same subject matter.[35] The *Class Proceedings Act* clearly contemplates the potential for a multiplicity of proceedings in parallel to a class action, provided that the plaintiffs in these actions have opted out of the class proceeding.[36] The proposed stay, however, would frustrate this as it would have the effect of staying the Treaty 3 Intervenors' annuities action and any other existing or future Ontario court proceeding on Treaty 3 annuities, ammunition and twine payments, and agricultural benefits irrespective of whether the plaintiffs in such proceedings opted out of the class action(s).

42. The overly broad nature of this requested order can be addressed by (1) limiting the stay of proceedings to members of the class who have *not* opted out within the opt-out period provided in any certification order, and (2) explicitly excluding the annuities action from the scope of the stay.

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[34] Notice of Motion, Plaintiff MR, Tab 1, at paras (j) and (k).
[35] *CPA*, s. 9; *Vaeth v. North American Palladium Ltd,* 2016 ONSC 5015 at paras. 44-45; *Durling v. Sunrise Propane Energy Group Inc,* 2011 ONSC 266 at para. 19 [***Durling***]; *Johnson v. Ontario,* 2022 ONCA 725 at paras. 2-3; *Herold v. Wasserman*, 2022 SKCA 103 at para. 37.
[36] *Durling* at para. 20, citing *Abdulrahim v. Air France*, 2010 ONSC 5542 at para. 66.

Issue 3: If Certified, the Certification Order Must Provide for Coordination of Annuities Action and Class Proceedings

43. The Treaty 3 Intervenors propose that if the class action is certified (whether as one proceeding or several), the annuities action and the class action on annuities be managed together by the same case management judge. While class actions are exempt from Rule 77.05(3) of the *Rules of Civil Procedure* regarding the joint case management of multiple proceedings,[37] case management by the same judge of class actions and individual actions based on the same issues of fact and law is nonetheless available to the court and ought to be granted.[38]

42. The interpretation of Treaty rights is a matter of public law importance that requires consistent adjudication and thus, necessitates that any certified class proceeding on annuities be coordinated with the annuities action.[39] Given the right of putative Treaty 3 Community class members to opt out of the class action, if certified, and advance their own litigation, there is potential that the court will face a multiplicity of proceedings on issues of collective Treaty 3 rights. The advancement of parallel actions, fully independently of one another, would be antithetical to judicial economy and the jurisprudence on how to litigate collective rights.[40] Thus, effective case management to coordinate the class action(s) with the annuities action of the Treaty 3 Intervenors is necessary if certification is granted.

43. The appointment of the same case management judge to both proceedings would allow for the case management judge to safeguard judicial

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[37] *Rules,* at r. 77.02(3) & 77.05(3).
[38] See e.g. *Workman Optometry v. Aviva Insurance,* 2021 ONSC 3843.
[39] *Ontario (Attorney General) v. Restoule,* 2024 SCC 27 at paras. 103-107 & 210; *Chief Derek* at para. 67.
[40] *Kelly v. Canada (Attorney General),* 2013 ONSC 1220 at paras. 106 & 109-110 [***Kelly***]; *Gill* at paras. 12-13; *Soldier v. Canada (Attorney General),* 2009 MBCA 12 at para. 78 [***Soldier***]; *Horseman v. Canada,* 2015 FC 1149 at paras. 78-82.

economy by making procedural orders intending to avoid the duplication of pre-trial steps, such as the production of historic documents.

44. The case management judge could also ensure that the trial of the annuities issues in both actions proceeds and is determined in an orderly way. While the manner of coordination of the hearing of the annuities issues in multiple actions need not be defined at this stage of the proceeding, coordination could be achieved in several different ways, including:

(b) severing the annuities common issues into a separate common issues trial (if the class action itself is not severed into separate proceedings);[41]

(c) determining how and in what order the various issues will be tried; and

(d) the hearing of the common issues on annuities together with the annuities action either at the same time, or with one hearing immediately after the other.[42]

Issue 4: Six-Month Opt-Out Period Warranted

45. The certification order should provide a six-month opt-out period following the giving of notice to each of the Treaty 3 Communities that the class proceeding or proceedings have been certified. This is a complex action with important constitutional, financial, and cultural implications for the Treaty 3 Communities. This complexity is heightened by the fact that there are three very distinct categories of claims being made in this proposed class action.

46. Further, the proposed class members are collective rights holders who are governed for the purpose of making litigation decisions by Chiefs and Councils.[43] Given the significance of the claims being advanced in Wabaseemoong's proposed class action, proposed class members must have adequate notice,

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[41] *Rules*, at r. 6.1.01.
[42] *Rules*, at r. 6.01.
[43] Amended Statement of Claim, Plaintiff MR, Tab 1A, at para. 11.

time, and information to understand the ramifications of being part of the class proceeding (or proceedings).[44] As fiduciaries to their members, Chiefs and Councils will require adequate time to engage their members and receive direction on whether remaining in or opting out of one or more of each of the class proceedings, if certified, is in their best interest.

47. The issue of notice and an opportunity for each of the Treaty 3 Communities to properly consider their position concerning this proceeding is heightened for annuities, which are collective rights held by the Treaty 3 Communities and not individual rights.[45] While this supports the view that a class of Treaty 3 Communities is appropriate in these circumstances, the Court of Appeal in the *Kelly* case—which concerned the bringing of a representative action on behalf of the whole Treaty 3 collective—held that it is appropriate that each Treaty 3 Community have some form of say in authorizing a proceeding potentially affecting their claims.[46] In that case, the court directed that the Treaty 3 Communities either indicate consent to the proceedings or be added to the proceeding as a party.[47] In this case, it would be most appropriate that Treaty 3 Communities be given proper notice of the certification order and a reasonable time to consider whether they would prefer to opt out.

48. These concerns are further heightened given that it is not at all clear if the Treaty 3 Communities have had an opportunity to consider their position. While Chiefs and proxies of some of the Treaty 3 Intervenors heard a presentation by Wabaseemoong at the Grand Council Treaty #3 Chiefs-in-Assembly meeting on October 3, 2024, the Treaty 3 Intervenors did not understand from the presentation that Wabaseemoong intended to proceed with a class action that would include all Treaty 3 Communities as class members, nor did the Treaty 3

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[44] See e.g. *Arsalani v. Islamic Republic of Iran*, 2021 ONSC 1334 at paras. 43-45.
[45] *Beardy's & Okemasis Band #96 and #97 v. Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 (CanLII), at paras. 301-317; *Chief Derek* at paras. 47-50.
[46] *Kelly* at paras. 17-21.
[47] *Kelly* at para. 21.

Intervenors receive confirmation in writing or written materials from Wabaseemoong regarding the proposed class action. Early notice, in writing, of the actual claim would have unequivocally alerted all the Treaty 3 Communities to the fact that a class action was being brought and given them time to consult their membership and consider their position.

49. All of this militates in favour of a longer opt-out period than what is contemplated by the Plaintiff.[48] The Treaty 3 Intervenors are of the view that a six (6) month opt-out period is a reasonable timeframe within the range of opt-out periods previously ordered by the court, and would allow Treaty 3 Communities to choose whether to opt out and, if so, provide a Band Council Resolution to confirm their opt-out decision.[49]

V. ORDER SOUGHT

50. The Treaty 3 Intervenors:

(a) take no position with respect to whether this proceeding should be certified as a class action;

(b) ask that pursuant to Rule 5.05(b),[50] the Court order that the proposed class action be brought as three separate class proceedings;

(c) ask that the proposed stay and bar on further proceedings be limited to proceedings brought by those members of the class that do not opt out within the designated opt-out period;

(d) ask that the Court order that the class action or actions and the annuities action be managed by the same case management judge;

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[48] Affidavit of Chief Waylon Scott Sworn June 25, 2025, Exhibit "E", Plaintiff MR, Tab 3A.
[49] See e.g. *Smith v. National Money Mart Company*, 2007 CanLII 13369 at para. 46; *Bendall v. McGhan Medical Corp*, 1993 CanLII 5550 (ON CTGD).
[50] *Rules*, at r. 5.05(b).

(e) ask that the Plaintiff be required to give notice to each Treaty 3 Community of the certification order and the litigation plan within thirty (30) days of the making of any certification order; and

(f) ask that there be a time of at least six (6) months from the expiry of the thirty-day notice period for the Treaty 3 Communities to decide whether to opt out.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of May 2026.

per

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SCHEDULE "A"

LIST OF AUTHORITIES

No.	Reference
1.	*Abdulrahim v. Air France*, 2010 ONSC 5542
2.	*Bagaco v. Union Energy Limited Partnership*, 2009 CanLII 6830 (ONSC)
3.	*Behn v. Moulton Contracting Ltd.*, 2013 SCC 26
4.	*Bendall v. McGhan Medical Corp*, 1993 CanLII 5550 (ON CTGD)
5.	*Chief Derek Nepinak and Chief Bonny Lynn Acoose v. Canada*, 2025 FC 925
6.	*Chief Heidi Cook et al v. Government of Manitoba et al*, 2026 MBKB 65
7.	*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266
8.	*Gill v. Canada*, 2005 FC 192
9.	*Sherry Good v. Toronto Police Services Board*, 2014 ONSC 4583
10.	*Guenette v. Canada (Attorney General)*, 2004 CanLII 18911 (ONSC)
11.	*Herold v. Wasserman*, 2022 SKCA 103
12.	*Horseman v. Canada,* 2015 FC 1149
13.	*Johnson v. Ontario*, 2022 ONCA 725
14.	*Kelly v. Canada (Attorney General)*, 2013 ONSC 1220
15.	*McCracken v. Canadian National Railway Company*, 2012 ONCA 445
16.	*Nutech Brands Inc v. Air Canada*, 2008 CanLII 11643 (ONSC)
17.	*Ontario (Attorney General) v. Restoule*, 2024 SCC 27
18.	*R v. Sundown*, 1999 CanLII 673 (SCC), [1999] 1 SCR 393
19.	*Smith v. National Money Mart Company*, 2007 CanLII 13369 (ONSC)

20. *Soldier v. Canada (Attorney General)*, 2009 MBCA 12

22. *Vaeth v. North American Palladium Ltd.*, 2016 ONSC 5015

23. *Workman Optometry v. Aviva Insurance*, 2021 ONSC 3843.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Class Proceedings Act, 1992*, S.O. 1992, c 6, s. 9

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.

2. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 35

35 Recognition of existing aboriginal and treaty rights

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

Definition of "aboriginal peoples of Canada"

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

Land claims agreements

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

Aboriginal and treaty rights are guaranteed equally to both sexes

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

3. *Courts of Justice Act*, RSO 1990, c C.43, s. 138

Multiplicity of proceedings

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

4. *Indian Act*, RSC 1985, c 1-5

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

Joinder of Claims

5.01 (1) A plaintiff or applicant may in the same proceeding join any claims the plaintiff or applicant has against an opposite party. R.R.O. 1990, Reg. 194, r. 5.01 (1).

(2) A plaintiff or applicant may sue in different capacities and a defendant or respondent may be sued in different capacities in the same proceeding. R.R.O. 1990, Reg. 194, r. 5.01 (2).

(3) Where there is more than one defendant or respondent, it is not necessary for each to have an interest in all the relief claimed or in each claim included in the proceeding. R.R.O. 1990, Reg. 194, r. 5.01 (3).

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Relief against Joinder

5.05 Where it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may,

(a) order separate hearings;

(b) require one or more of the claims to be asserted, if at all, in another proceeding;

(c) order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest;

(d) stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or

(e) make such other order as is just. R.R.O. 1990, Reg. 194, r. 5.05.

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Where Order May Be Made

6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,

(a) they have a question of law or fact in common;

(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under this rule,

the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them. R.R.O. 1990, Reg. 194, r. 6.01 (1).

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list. R.R.O. 1990, Reg. 194, r. 6.01 (2).

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Separate Hearings

6.1.01 (1) The court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages,

(a) on a party's motion, with or without the consent of the other parties; or

(b) at a conference under Rule 50, with the consent of the parties. O. Reg. 175/24, s. 1.

(2) In determining whether to order a separate hearing, the court shall consider,

(a) whether ordering a separate hearing will dispose of some or all of the issues, shorten or simplify the rest of the proceeding or result in a substantial saving of costs;

(b) whether the issues are clearly severable and can be heard separately without unduly repeating evidence or risking inconsistent findings of fact;

(c) whether ordering a separate hearing would unduly prejudice or advantage a party, including the impact on any counterclaim, crossclaim or third or subsequent party claim or, in cases where a jury notice has been delivered, on a party's election to have the action heard by a jury;

(d) the impact of ordering a separate hearing at the applicable stage in the proceeding; and

(e) any other relevant matter. O. Reg. 175/24, s. 1.

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Exceptions, Class Proceedings Act, 1992

77.02 (3) Despite subrule (1), this Rule,

(a) applies to an action or application commenced under the Class Proceedings Act, 1992 only if certification as a class proceeding has been denied; and

(b) does not apply to actions or applications certified as class proceedings under the Class Proceedings Act, 1992. O. Reg. 438/08, s. 64.

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Assignment for Case Management

Multiple Proceedings

77.05 (3) Two or more proceedings may be assigned under subrule (1) or (2) for case management together. O. Reg. 438/08, s. 64.

WABASEEMOONG INDEPENDENT NATIONS et al. Plaintiffs	- and -	**HIS MAJESTY THE KING IN RIGHT OF CANADA** Defendant	- and -	**ANIMAKEE WA ZHING #37 FIRST NATION, et al.** Intervenor

Court File No. CV-24-00000091-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Kenora

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