

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

O*NTARIO*

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Moving Parties/Plaintiffs

- and -

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

Respondent/Defendant

- and –

ANIMAKEE WA ZHING #37 FIRST NATION, COUCHICHING FIRST NATION, GAKIJIWANONG ANISHNAABE NATION, MITAANJIGAMING 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)

REPLY FACTUM OF THE PLAINTIFF/MOVING PARTY, WABASEEMOONG INDPENDENT NATIONS

(Motion for Certification)

Dated: July 22, 2026

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I. OVERVIEW

1. Canada does not dispute that the Plaintiff meets the certification criteria under ss. 5(1)(a) and (c) of the Class Proceedings Act ("CPA")[1]: the action discloses tenable causes of action and that the Proposed Common Issues ("PCIs") are rationally connected to the class definition and predominate over any individual issue that exists or may later arise. Beyond minor objections to the definition of the class (s. 5(1)(b)) and the Plaintiff's litigation plan (s. 5(1)(e)), the Defendant does not contest that the Plaintiff has tendered evidence to establish some basis in fact that all criteria under s. 5(1) have been met.

2. The principal remaining issue on the motion is whether a class proceeding is the preferable procedure to advance the Plaintiff's claims on behalf of all Treaty 3 First Nations. The Plaintiff has adduced some basis in fact that a class proceeding is the preferable procedure. The Defendant has failed to show that their proposed alternative procedure, a representative action pursuant to Rule 12.08 of the Ontario *Rules of Civil Procedure* (the "*Rules*") is preferable to a class proceeding when considered through the lens of the objectives of the *CPA*.

3. The Defendant's submissions relating to the preferability of a Rule 12.08 representative action are flawed for **five** reasons.

4. **First**, Rule 12.08 is **only** available where the plaintiff seeks to bring an action on behalf of members of an "unincorporated association" or "trade union."[2] The putative class consisting of Treaty 3 First Nations is neither a "trade union" nor an "unincorporated association", which is a non-juridical entity "based on contract which binds their members together for declared common purposes and governs their relationship with each other."[3] While Rule 12.08 has been utilized as a procedural vehicle for advancing a treaty claim, in every instance where this has been the case an "unincorporated association" such as the Robinson Huron Treaty Litigation Fund (*Restoule*) or the Grand Council Treaty 3 (*Kelly*) has advanced the

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[1] *Class Proceedings Act, 1992*, S.O. 1992 c 6 [*CPA*] at s. 5(1)
[2] *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 [*Rules*] at r. 12.08.
[3] *Organization of Veterans of the Polish Second Corps of the Eighth Army v. Army, Navy & Air Force Veterans in Canada et al.*, 1978 CanLII 1606 (ONCA) [*Organization of Veterans*], cited in *Carcillo* at para. 25.

litigation on behalf of its members. In this case, Treaty 3 First Nations are the rights-holders with juridical personhood and legal standing to advance the herein claims for breach of treaty. They are not members of an unincorporated association with rights at issue in this litigation (*Kelly*) or with an underlying agreement in place to advance the litigation through the vehicle of a trust (*Restoule*). A representation order under Rule 12.08 is not available as an alternative to a class proceeding.

5. **Second**, in arguing that a representative action is preferable to a class proceeding, Canada relies on cases that have been decided in other jurisdictions where the rules governing representative actions are different than Rule 12.08. Indeed, there is no comparator to Rule 12.08 anywhere else in Canada; it is unique to Ontario. As such, and as recently held by this Court, cases from the Federal Court and from superior courts in British Columbia, Saskatchewan and Manitoba are unhelpful in determining whether a representative action is preferable in this case.[4] There are also fundamental differences between how the herein action has been structured (advanced by a First Nation on behalf of the rights-holding First Nations) and how actions in other jurisdictions were structured which drove the court's preferability analysis. Furthermore, preferability is premised on the **available** alternatives which vary across jurisdictions. In Ontario, a representative action under Rule 12.08 is not an available alternative which further underscores the preferability of a class proceeding.

6. **Third**, the Defendant's position on preferability overlooks the significant access to justice barriers and intentionally benefits from the frustration and obstructions enabled by a representative action. Specifically, *each* of the Treaty 3 First Nations excluding the Intervenors and Wabaseemoong who are already represented by counsel, would need to retain legal counsel and evaluate whether they consent to a Rule 12.08 representation order or wish to join the herein action as a party plaintiff or bring their own action. This will undoubtedly increase legal fees for class members and significantly delay the prosecution of this action.

[4] *Anishnabeg et al. v. AGC et al.*, 2026 ONSC 1139 [*Kitigan Zibi*] at para. 30

7. **Fourth**, representative actions under Rule 12.08 are not superior to class proceedings under the *CPA*. While Canada speculates that the Court **could** impose some of the same oversight mechanisms already available to litigants under the *CPA*, this only underscores the fact that class proceedings legislation offers a robust and protective procedural framework for the prosecution of group actions where the same wrong has been suffered by each member of the class. But for Canada's misplaced reliance on jurisprudence decided under different rules in different jurisdictions, Canada has failed to point to a decision of this Court which has found that a representative action is superior to a proceeding under the *CPA*. Indeed, most cases which have considered both options have landed on the side of the *CPA*.[5]

8. **Finally**, the Defendant's insistence that a treaty claim **can never** proceed as a class proceeding undermines the litigation autonomy of First Nations. The Defendant seeks to limit the options available to First Nations by insisting on an overly narrow view of the *CPA* and perversely, an overly broad view of Rule 12.08. This distortion of the litigation choices available to First Nations should not be countenanced by this Court. Especially in the context of a treaty dispute, where the Crown's honour is at stake, the Defendant should not be permitted to insist on unjustifiable procedural hurdles that First Nations must clear in order to resolve these historic and nation-building claims.

II. THE DEFENDANT FAILS TO APPLY THE REQUISITE S. 5(1)(D) ANALYSIS

9. Canada argues that a Rule 12.08 representative action is preferable to a class action but fails to conduct a comparative analysis of the advantages and disadvantages of class actions and representative actions through the lens of access to justice, behaviour modification, and judicial economy as required by the Supreme Court of Canada in *Fischer*[6]. This analysis is foundational to the preferability analysis under both the former and the amended *CPA*[7].

[5] *McGee v. London Life Insurance Co*, 2008 CanLII 20985 (ON SC) [*McGee*] at paras. 4, 29, 44 and 45.
[6] *AIC Limited v. Fisher,* 2013 SCC 69 [*Fisher*] at paras. 22-23.
[7] *Fischer* at para. 23. See also *Banman v. Ontario*, 2023 ONSC 6187 [*Banman*] at para. 320. "In addition to considering access to justice, judicial economy, and behaviour modification, the amended *Class Proceedings Act*, 1992, SO 1992, c 6 [*CPA*] requires the Court to consider… (iv) whether the proposed class action is superior (or "better") to the alternatives."

10. Canada's failure to engage with the applicable analytical framework under s. 5(1)(d) of the *CPA* and *Fischer* is telling: Canada cannot possibly rebut the Plaintiff's evidence that this class action is preferable to other procedures. Class proceedings legislation and jurisprudence are robust, providing important procedural protections for class members, including court-approved notices, suspended limitation periods, court supervision of administrative processes, settlements and counsel fees, and summary processes for an expeditious determination of legal issues through a common issues trial[8]. The class action's extensive notice requirements and opt-out procedures ensure that all Treaty 3 First Nations receive judicially-approved notice of the class action[9]. It thus preserves each Treaty 3 First Nation's litigation autonomy to be involved in this proceeding or pursue a remedy through a different procedure if desired[10]. While Canada speculates that the Court can impose notice requirements and supervise settlement and fees in the context of a representative action, Rule 12.08 provides no support for this.

11. Canada's submission that a Rule 12.08 order is preferable further calls into question the superiority and utility of a process that attempts to mimic the class action regime while failing to achieve its procedural and substantive benefits. As the Supreme Court noted in *Endean*, class action judges have "broad powers" and "the ability to take measures to ensure the fair and expeditious determination of issues arising in class proceedings, which furthers access to justice".[11] Section 12 of the *CPA* empowers the Court "to seek and impose creative solutions to the efficient determination of the issues"[12]. For example, in *Ukraine International Airlines JSC*, a class action and six individual and group actions were managed by a single case management judge and tried together[13].

12. A class action is most appropriate because of the nature of the common issues and the identical, yet *sui generis*, nature of the causes of action but it is also preferable because it will likely result in a common framework, important for treaty implementation in the context

[8] *CPA* at ss. 17-20, 25-28, and 32.
[9] *Western Canadian Shopping Centres Inc v. Dutton*, 2001 SCC 46 at para. 49
[10] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279 at para. 42.
[11] *Endean v. British Columbia*, 2016 SCC 42 [*Endean*] at para. 32.
[12] *Endean* at para. 38.
[13] *S. v. Ukraine International Airlines JSC*, 2024 ONSC 3303 [*Ukraine*] at para.3.

of the specific annuities promise, and compensation that could easily be applied to determine damages for all of the class members.

13. All class members have the same rights under, and the same interests in the interpretation, implementation and enforcement of Treaty 3, which contains a single set of promises that the Crown extended to each and every signatory without variation. The PCIs concern three specific breaches of treaty obligations and fiduciary duty: the failure to maintain the real value of the Annuity Payment, the failure to maintain the real value of the Ammunition and Twine Payment and the failure to provide the promised Agricultural Benefits to Treaty 3 First Nations. Although the relationship between the Crown and each Treaty 3 First Nation is independent and distinct, making it mandatory that any treaty implementation occur with the free and informed consent of each Treaty 3 First Nation, the determination of the PCIs apply equally to all Treaty 3 First Nations.

14. In *Johnson*, the Court observed that the right to opt-out of a class proceeding recognizes the "significant" rights to "initiate and participate in litigation", "appoint counsel of one's choice", "participate meaningfully in the development of litigation strategy" and "settlement negotiations", and "settle an action."[14] Further, this Court remarked in *McSherry* that "[a]n opt-out regime maximizes class member participation in a class action….[and] **directly and indirectly facilitate access to justice**"[15]. The same principles apply to a procedural vehicle by which common or collective claims may be advanced.

15. The Defendant cannot and should not be permitted to dictate the procedural vehicle through which the Plaintiff or any other Treaty 3 First Nation pursues a remedy. Nor should the Defendants be able to force the Plaintiff or any other Treaty 3 First Nations to proceed by way of a Rule 12.08 order. There is no basis in law, equity, or otherwise to strip away Treaty 3 First Nations' right to choose the procedure through which they litigate their claims. Depriving First Nations of the right to proceed by way of the *CPA* undermines the legislative intention of the act, deprives them of recourse that other Canadians enjoy equally, and

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[14] *Johnson v. Ontario,* 2021 ONCA 650 [*Johnson*] at para. 16.
[15] *McSherry v. Zimmer GMBH,* 2012 ONSC 4113 [*McSherry*] at para. 118 (**emphasis added**).

emboldens the indifference and ferocity of the Crown's behaviour and efforts to fetter treaty implementation of the Treaty 3 Annuities Promise.

III. RULE 12.08 IS NOT AN AVAILABLE ALTERNATIVE TO A CLASS PROCEEDING

16. Rule 12.08 is unequivocal: a representation order is **only** available for members of an unincorporated association or a trade union. The Ontario Court of Appeal held, "(u)nincorporated associations are based on contract which binds their members together for declared common purposes and governs their relationship with each other."[16] Similarly, in *Gammie*, this Court held that "(a)n unincorporated association is, essentially, an agreement among a number of persons which articulates their common purpose, establishes an organization to achieve that common purpose and sets out how that organization is to be operated to achieve that purpose. **The relationship among the persons is contractual in nature**".[17] While Rule 12.08 does not define an "unincorporated association", the Supreme Court of Canada has held that common law terms are presumed to retain their meaning when used in legislation.[18] *Carcillo* is the most recent appellate authority defining "unincorporated association", building on a body of appellate case law dating back to at least 1978 and pre-dating the *Rules of Civil Procedure*, RRO 1990, Reg 194[19].

17. The purpose of Rule 12.08 is inconsistent with the Defendant's position that it is superior to a class proceeding. As this Court held in *McGee*, Rule 12.08 "was enacted to accommodate the enactment of the *Class Proceedings Act*, *1992*" recognizing that "(t)he procedure of the *CPA* was too elaborate and complex (and unnecessary) for some claims by trade unions and unincorporated associations." Its application is intended to be limited as "(t)he representation of groups is by and large addressed by the *CPA*."[20]

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[16] *Organization of Veterans*, cited in *Carcillo v Ontario Major Junior Hockey League*, 2025 ONCA 652 [*Carcillo*] at para. 25.
[17] *Gammie v Jordan,* 2017 ONSC 124, [*Gammie*] at para. 39.
[18] See *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44, at para. 30; *R. v. Jarvis*, 2019 SCC 10, at para. 56.
[19] *Carcillo* at para. 25, citing to *Organization of Veterans*.
[20] *McGee v. London Life Insurance Co.*, 2008 CanLII 20985 [*McGee*]at para. 36.

18. Recently, this Court affirmed that Rule 12.08 exists to provide an "unincorporated association" with standing to sue.[21] The class in this matter, consisting of Treaty 3 First Nations, is not an "unincorporated association" which precludes the Plaintiff from seeking a representation order pursuant to the three-part test set out in *OPA*.[22] Any such attempt fails at the first step of the test, which requires that: i) there must be numerous persons **who are members of a trade union or unincorporated association**; ii) the numerous persons must assert a claim that would be unduly expensive or inconvenient to pursue under the *CPA*; and iii) the claim must be on behalf of or for the benefit of all of persons on whose behalf the representative order is made.

19. The Defendant relies on what they say are two recent examples of a treaty annuities indexing action proceeding as a representation action in support of their argument that Rule 12.08 is available as an alternative procedure to a class proceeding: *Restoule* and *Red Rock* and *Whitesand v. Canada*[23]. Of the two cases, only *Restoule* proceeded as a representative action pursuant to Rule 12.08. However, in *Restoule,* the Robinson Huron Treaty Nations formed the Robinson Huron Treaty Litigation Fund (the "RHTLF") an "unincorporated association", for the purpose of advancing a treaty annuities indexing action on behalf of the underlying Nations.[24] The formation of the RHTLF was a necessary pre-requisite to a Rule 12.08 Order, as this Court has recently found.[25] *Red Rock* and *Whitesand v. Canada* proceeded on the basis of a **consent** order under Rule 10 of the *Rules of Civil Procedure.*[26] Rule 10 is not available in this case as a procedural alternative. It is only available where the represented group consists of persons who are unborn or unascertained or who have present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.[27] Treaty 3 First Nations do not meet this definition.

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[21] *Atikameksheng Anishnawbek v. Canada*, 2026 ONSC 3878, [*Atikameksheng*] at para. 75 - 77.
[22] *OPA v. Ottawa Police Services Board,* 2014 ONSC 1584 at paras. 10 and 31.
[23] Attorney General of Canada's Factum on the Motion for Certification, dated July 15, 2026 [Respondent's Factum] at para. 35
[24] *Nootchtai v. Nahwegahbow Corbiere Genoodmagejig Barristers and Solicitors,* 2025 ONSC 6071 *[Nootchai 2025]* at para. 47 – 51.

[25] *Atikameksheng*, para. 69 - 77
[26] *Red Rock First Nation v. Canada (AG)*, 2022 ONSC 2309 [*Red Rock*] at para. 11.
[27] See Appendix "A"

They are sovereign, independent entities, juridical persons, represented by their Chief and Council.

20. Nor does this Court's recent decision in *Kitigan Zibi* support Canada's contention that a Rule 12.08 representation order is available as an alternative to a class proceeding. The issue in *Kitigan Zibi* was whether a Rule 12.08 order was **required** in order for an Aboriginal Title claim to be advanced as a representative action.[28] The Plaintiff had sought to bring an Aboriginal Title claim on behalf of a group of First Nations without first seeking a Rule 12.08 order. It was undisputed that the plaintiff had elected to bring their action as a representative action.[29] The Court agreed with Canada that a Rule 12.08 order was required before the claim could be advanced.[30] Notably, the Court **did not decide** that the group that the Plaintiff sought to represent was an "unincorporated association" and that a Rule 12.08 was in fact available in the circumstances. Rather, the Court found that it was not in a position to determine whether the test for a Rule 12.08 order had been met.[31]

21. Further, on this record, Wabaseemoong has established that a class proceeding under the *CPA* would facilitate access to justice and judicial economy by providing costs-savings to class members and streamlining class members' claims through a single proceeding. As such, proceeding by way of a representative action does not satisfy the second element of the *OPA* test.

22. Decisions considering Rule 12.08 relate to actions brought by individuals belonging to unincorporated associations or trade unions (such as a group of police officers, members of a charitable unincorporated association, or members of a union local before the local had

[28] *Kitigan Zibi* at para. 4 - 5.
[29] *Kitigan Zibi* at paras. 23 and 49.
[30] *Kitigan Zibi* at para. 40.
[31] *Kitigan Zibi* at para. 46

legal standing).[32] In most of these cases, this Court has held that a class action – not a representative action – is the appropriate procedure to advance collective claims.[33]

IV. CANADA'S RELIANCE ON DECISIONS FROM OTHER JURISDICITONS IS MISPLACED

23. Canada relies on decisions of the Federal Court (*Gill, Horseman, Nepinak*), the Court of King's Bench for Saskatchewan (*Lac La Ronge*), Manitoba (*Soldier*) and the Supreme Court of British Columbia (*Kwicksutaineuk*) in support of its argument that a representative action is preferable to a class proceeding **in this case**. What Canada overlooks is that the rules governing representative actions in other jurisdictions are **fundamentally different and incompatible** with Rule 12.08 which is unique in that it is limited to circumstances where the represented plaintiffs are members of an unincorporated association or a trade union. Appendix "A" which sets out the rules governing representative actions in different jurisdictions, including Ontario, demonstrates their significant differences. As this Court recently held in *Kitigan Zibi*, "given the fundamentally different approaches these rules take to representative proceedings, the jurisprudence from British Columbia offers little guidance on the question of whether a representative order is required in Ontario."[34] The same can be said for the jurisprudence from the Federal Court, Saskatchewan and Manitoba that the Defendant relies upon.

24. Beyond the differences between the applicable rules in each jurisdiction, the cases that have been previously decided in other Courts were flawed structurally:
    i. *Gill* involved litigation brought by individuals not First Nations. The Court's comments about preferability were *obiter* but in any event must be understood in their proper context: individuals cannot opt-out of treaty interpretation because the rights at issue are collectively held;[35]

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[32] See *Ginter v. Gardon*, [2001] OJ No 1148 (ON SC); *Synod of the Diocese of Huron v. Delicata*, 2011 ONSC 4403 at paras. 9-10; *Alliance of the Polish Eastern Provinces, Toronto (Trustee of) v. Dziemianczuk*, 2009 CanLII 22580 (ON SC) at paras. 11, 15-16; *Brown v. Hanley*, 2018 ONSC 1112 at paras. 52-53.
[33] *McGee* at paras. 4, 29, 44 and 45.
[34] *Kitigan Zibi* at para. 30.
[35] *Gill v. Canada*, 2005 FC 192 [*Gill*] at paras. 1, 13

ii. *Horseman* was a treaty annuities indexing case brought by individuals on behalf of a class which spanned all of the Numbered Treaties. The Court found that the historical differences between the negotiation of each Numbered Treaty precluded certification;[36]

iii. *Nepinak and Acoose* was a treaty annuities indexing claim brought by individuals. Due to the collective nature of the treaty right at issue, the Court found that a claim brought by individuals could not meet the preferability requirement;[37]

iv. *Soldier* was also a treaty annuities indexing claim brought by individuals on behalf of individuals. This structure precluded certification as the rights at issue were collective in nature and therefore there was no cause of action where those right are asserted by individuals nor is the common issue criteria satisfied;[38]

v. *Kwicksutaineuk* concerned a different issue entirely, that is whether aboriginal collectives which are not juridical persons in law may bring a class proceeding under British Columbia's *Class Proceedings Act* and is therefore of no assistance;[39]

vi. *Lac La Ronge* concerned different treaty promises, namely the medicine chest and pestilence clauses under Treaty 6 and the Court dismissed the motion for certification because the resolution of common issue would not get the plaintiffs very far as individual issues would remain to be resolved. Preferability could not be established where the individual issues were "inextricably bound up with the interpretation of the treaty rights determination question."[40]

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36 *Horseman v. Canada*, 2015 FC 1149 [*Horseman*] at paras. 9, 59-61 and 67
37 *Nepinak and Acoose v. Canada*, 2025 FC 925 [*Nepinak and Acoose*] at paras. 6, 42 and 51
38 *Soldier v. Canada,* 2006 MBQB 50 [*Soldier*] at paras. 5, 43, 55 and 62
39 *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193 [*Kwicksutaineuk*] at para. 11-12
40 *Lac La Ronge Indian Band v. Canada (Attorney General)*, 2025 SKKB 147 [*Lac La Ronge*] at paras.47, 89 – 95 and 116

25. Unlike the above cases, the herein Action is brought by the right party (a First Nation) on behalf of the right class (Treaty 3 First Nations). The class is constrained to Treaty 3 First Nations and there are no individual issues that could undermine the preferability of a class proceeding. Further, there is no question that the Plaintiff and the class members are juridical persons, being *Indian Act* bands who are "persons" for the purposes of the *CPA*. Finally, the structure of the herein Action recognizes the collective nature of the rights at issue and avoids the problem inherent in *Gill, Soldier, Nepinak and Acoose* and *Horseman* of individuals opting out of the interpretation of a collective right. These reasons are sufficient to find this case is uniquely poised to satisfy the *CPA* criteria for certification especially where there is no superior alternative to a class proceeding available to Treaty 3 First Nations.

26. Indeed, Canada cannot point to a single decision of this Court where a Rule 12.08 order has been granted in a treaty interpretation case in the absence of an "unincorporated association". As already discussed, in *Restoule*, the First Nations formed the RHTLF as the vehicle for prosecuting the claim through a Rule 12.08 representative action. In *Kelly*, the plaintiffs framed their action as a representative action under Rule 12.08 because the rights holder was the Grand Council of Treaty 3, an "unincorporated association".[41] Canada disputed that the Grand Council was the rights-holder and argued that it was the *Indian Act* bands that adhered to treaty who held the rights at issue. To solve this dilemma, Justice Perell ordered the Grand Council to obtain authorization from the Treaty 3 bands to represent their interests failing which the bands could elect to join the action as a party plaintiff or be added as a defendant.[42] *Kelly* must be confined to its unique facts. In this case, there is no dispute between the parties that the *Indian Act* bands are the rights-holders and there is no "unincorporated association" to ground a Rule 12.08 order.

27. *Restoule* further highlights the pitfalls of Rule 12.08 actions which lack the procedural safeguards of a class action under the *CPA*. Following the Supreme Cout's decision, some of the signatories to the Robinson Treaties challenged the legal fees sought by plaintiffs' counsel and Canada's conduct during settlement negotiations.[43] Following the settlement of the

[41] *Kelly v. Canada (Attorney General)*, 2013 ONSC 1220 [*Kelly*].
[42] *Kelly* ONSC at para. 28-29; 41-46; 111-121; *Kitigan Zibi* at paras. 35 - 39.
[43] *Nootchai* 2025.

Robinson-Huron plaintiffs' claim for historical damages, **two** Chiefs on behalf of their respective First Nations (**not all 21 Robinson-Huron First Nations**, despite the representation order in place), brought an application to review their counsel's legal fees. Ultimately, Justice Myers reduced counsel's contingency-based legal fees from the $510 million originally sought to $40 million.[44] In order to achieve this result, these two applicant Chiefs were required to retain counsel, bring an application for leave to assess fees, and advance the application for assessment. There was also an interim motion challenging the admissibility of the respondent lawyers' affidavit evidence.[45] This multi-step process would not be required in a class action context, where legal fees must always be approved by the Court. Beyond this, Justice Myers, citing the Court of Appeal in Fresco, warned that court review of counsel fees in "mega-fund settlements" (such as *Restoule*) is important to protect the integrity of the legal profession.[46]

28. Further, the non-settling Robinson-Superior plaintiffs brought a separate constitutional application alleging the Crown improperly leveraged its settlement with the Robinson-Huron plaintiffs to negotiate a *lesser* and *unfair* settlement with the Robinson-Superior plaintiffs. Of note, the Robinson-Superior plaintiffs objected to Robinson-Huron's settlement with the Crown.[47] A class proceeding would largely have avoided these challenges given the Court's ongoing supervisory role and discretion to direct the proceedings.

V. DEFENDANT MISCHARACTERIZES THE EFFICACY OF REPRESENTATIVE ACTIONS IN ONTARIO

29. A Rule 12.08 representative action has numerous significant shortcomings relative to a class proceeding. First, the outcome of a representative action will not automatically bind all Treaty 3 Nations, nor prevent a multiplicity of proceedings. For instance, a representative action will not bind Treaty 3 First Nations who do not consent to a representative order.

[44] *Nootchai 2025* at paras. 23 and 269.
[45] *Nootchtai 2025* at para. 1.
[46] *Nootchai 2025* at para. 21, citing to *Fresco v. CIBC*, 2024 ONCA 628.
[47] *Red Rock et al v. Canada et al*. (Court File No. 2001 – 0673), Notice of Review for Constitutional Compliance

30. Second, the framework for a representative action under Rule 12.08 is materially different from the procedure established by Rule 114 within the unique context of the *Federal Rules*. In contrast to Rule 114 of the *Federal Rules*, which was first repealed then reintroduced in recognition that some forms of First Nations claims could proceed by way of representative action,[48] Rule 12.08 was enacted for the express purpose of allowing members of trade unions and unincorporated associations to advance group claims where a class proceeding was too elaborate, complex, and unnecessary to advance collective claims. As this Court noted in *McGee*, the enactment of the *CPA* limited the role and utility of representative actions under Rule 12.08.[49]

31. The claims advanced in this proceeding are substantial – in the nature of nation defining claims – and the judicial tools provided under the *CPA* are necessary and available to be deployed to ensure the timely and efficient resolution of class members' claims.

32. Further, unlike Rule 114 of the *Federal Rules*, Rule 12.08 lacks many important safeguards and does not provide for court approval of notice, court supervision and approval of settlement agreements, or the substitution of a representative plaintiff who is no longer able to fairly and adequately represent the interests of the group. The Defendant's attempt to superimpose these protections onto their proposed representative action underscores the superiority of class actions. As Justice Perell held in *Banman*, superiority requires that the proposed class action be better than or superlative to the proposed alternative procedures for resolving the dispute (i.e., Rule 12.08).[50] That assessment requires a comparative analysis of the two procedures, grounded in the evidence, not speculation and conjecture.[51]

33. The effect of a representation order, here, would be to narrow the scope of the claims and the Defendants' exposure (given that some Treaty 3 First Nations may not have the resources to retain counsel and accept exposure to adverse costs), and to seriously delay the resolution of

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[48] *Rules Amending Certain Rules Governing Practice and Procedure Applicable to the Federal Courts (Representative Proceedings, Class Proceedings and Other Amendments)*, SOR/2007-301, s. 4 at p. 2762.
[49] *McGee* at para. 36.
[50] *Banman* at paras. 317 and 320.
[51] *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2016 ONCA 916 at para. 47.

these claims, given the time required for each Treaty 3 First Nation to retain counsel and join the proceeding. Notably, the indemnification of plaintiffs against adverse costs is a significant benefit of class proceedings.[52] There is no evidence that Treaty 3 First Nations would be indemnified in the context of a representative order. These hurdles undermine the objectives of class proceedings and are fatal to the Defendant's position that a representative action is preferable to this class action.

a) The Prospect of Multiplicity of Proceedings and Inconsistent Decisions is Speculative

34. Beyond the procedures available to ensure coordination of trials involving the same subject matter, discussed above, the Defendant ignores the application of horizontal *stare decisis*, which reduces the likelihood of inconsistent decisions[53] – a risk that is already remote on the record before this court. In *Lac La Ronge*, the Court found that the principle of *stare decisis* would mitigate any inconsistent treaty interpretations, as these would eventually be resolved by an appellate court.[54]

35. In this case, the Plaintiff in this action has worked collaboratively with the Intervenors to advance the two actions in a coordinated fashion. Both the Plaintiff and the Intervenors are in agreement that the two actions should be case managed together and be heard by the same judge which would address any concerns regarding inconsistent treaty interpretation. There are no other actions in any other court concerning the interpretation of the Treaty 3 provisions at issue and therefore the risk of inconsistent decisions is entirely speculative.

36. Furthermore, the Specific Claims Tribunal has no pending litigation before it that overlaps with the herein claim that could give rise to an inconsistent decision. While a total of two First Nations (not including the Plaintiff) have submitted claims to the Specific Claims Branch, only one of these claims has been filed. Furthermore, the Specific Claims Branch is not a court or tribunal but a department within CIRNAC which assesses whether claims

[52] *Price v. Smith & Wesson Corp.*, 2024 ONSC 1368 at para. 227.
[53] *R. v. Sullivan*, 2022 SCC 19 at paras. 65-66, 73-86.
[54] *Lac La Ronge* at para. 131.

should be accepted for negotiation.[55] This process does not produce "decisions" that could conflict with findings made by this Court. Should this matter be certified as a class proceeding, there will be no risk of an inconsistent decision on the same issues that this claim raises.

b) The only opt-outs are the Intervenors and they do not oppose Certification

37. Canada raises the possibility of opt-outs as a reason for denying certification on the basis of preferability. Because there are at least nine (9) First Nations who have expressed an intent to opt-out of the proposed class action, Canada argues that this undercuts the goals of a class proceeding because there will be no judicial economy and no access to justice. This may be true where multiple lawsuits have been commenced in relation to the same cause of action, however, the **only** evidence before this Court is that there are currently two actions that address the Crown's failure to increase the annuity payment under Treaty 3: the herein proceeding and the action brought by the Intervenors who account for the nine (9) First Nations who have expressed an intent to opt-out. Furthermore, the Intervenors have notified all Treaty 3 First Nations about their action and **none have opted to join as plaintiffs**. Accordingly, contrary to what Canada asserts, there is no serious risk of opt-outs as it would appear that **only** the Intervenors have expressed a concrete intention to bring their own claim and have, in fact, brought their own claim.

38. The Intervenors do not oppose certification of the herein action and are in agreement with the Plaintiff that the two actions can be case managed together to ensure consistency and coordination. Such a situation is not unheard of.[56] Furthermore, complexity is greatly reduced in this matter by the fact that there are only two law firms that are involved and the Plaintiff and the Intervenors enjoy a good working relationship as evidenced by the consent order granting the Intervenors party status. Contrary to Canada's suggestion that a class proceeding will undermine access to justice, certifying the herein action and case managing

[55] Affidavit of Stefan Matiation affirmed on October 23, 2025, Respondent's Motion Record, Tab 2, Exhibit A: The Specific Claims Policy and Process Guide
[56] *Ukraine* at para. 3.

the two parallel proceedings will ensure that **all** Treaty 3 First Nations benefit from a judicial determination of their rights. Indeed, there is no evidence before this Court that a class proceeding **is opposed** by any Treaty 3 First Nation. Rather, Treaty 3 First Nations have been notified by the Intervenors of the option of a joinder action and this option has been rejected by all but the Intervenor First Nations. A class proceeding will provide those Treaty 3 First Nations who lack the capacity or interest in advancing their own claim to participate in any award or settlement. Furthermore, certification will ensure that a single, consistent interpretation of the treaty provision at issue will bind all Treaty 3 First Nations.

VI. THE ORDERS SOUGHT TO STAY PARALLEL ACTIONS RELATE ONLY TO CLASS ACTIONS

39. At paragraph 50 of their factum, Canada argues that the following orders sought by the Plaintiff "could significantly impact the rights of Treaty 3 First Nations": i) a stay of "any other proceeding before the Superior Court of Justice based on the facts giving rise to this proposed class proceeding"; and ii) a declaration that "no other proceeding based upon the facts giving rise to this proceeding may be commenced."

40. The Defendant's criticism is misplaced. The orders sought by the Plaintiff are routine orders that relate to parallel class proceedings. They are intended to prevent the commencement of overlapping class actions in the event this action is certified without leave of the court. They are not intended to undermine the right to opt-out or to commence or pursue parallel individual claims.

VII. THE PLAINTIFF AGREES WITH THE DEFENDANT THAT THE CLAIM SHOULD NOT BE SEVERED

41. The Intervenors' proposal that the Court sever the claims and deal with each separately ought to be rejected. Neither the Defendant nor the Intervenors dispute that the pleadings disclose a reasonable cause of action with respect to each claim (s. 5(1)(a)) or that the claims raise common issues (s. 5(1)(c)). Furthermore, the Court retains discretion to certify some common issues and not others should the Court find that only certain issues are amenable to a class proceeding. It will then fall to the Plaintiff to elect whether to abandon the uncertified

claims or to seek severance of those claims through an amendment to the Statement of Claim. Addressing severance in the context of a Certification Motion is neither necessary nor advisable given the focus of the Court's inquiry on whether the *CPA* criteria have been satisfied. Given that the Intervenors do not oppose certification *of any of the claims*, there is no basis upon which to order severance in the within motion.

VIII. THERE IS AN IDENTIFIABLE CLASS DESPITE BAND 826

42. Canada argues the inclusion of "Band 826" in the list of class members precludes Certification on the basis that "Band 826" is not a band under the *Indian Act* and is therefore outside of the definition of the "class" as put forth by the Plaintiff. Canada relies on the existence of "Band 826" as proof that class definition is unworkable and therefore cannot satisfy s. 5(1)(b) of the *CPA*.

43. Canada estimates that 26,319 individuals registered under the *Indian Act* are members of, or affiliated with Treaty 3 First Nations.[57] Of that total number, two (2) individuals are listed as members of "Band 826".[58] Canada's position is that, notwithstanding that a class proceeding is the superior proceeding, two (2) individuals should dictate the outcome for 26,317 people. This is neither fair nor justifiable in law.

44. In order to satisfy section 5(1)(b), the plaintiff must establish "some basis in fact" that there are two or more persons who could prove that they suffered individual harm.[59] Canada does not dispute that the proposed class is rationally connected to the common issues, is constrained by objective criteria and is not overly broad. Rather, Canada's argument is that because "Band 826" is not a "legal entity" and therefore not a juridical person, certification cannot be granted.

45. Canada bases its argument on the *Kwicksutaineuk* decision from British Columbia. which is factually distinguishable. In that case, the **entire class** consisted of non-juridical entities that

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[57] Respondent's Factum at para. 10
[58] Respondent's Factum at para. 11
[59] *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 at para 72.

were not legal "persons" for the purpose of the *Class Proceedings Act*. It was on that basis that the Court found the action could not be certified. [60] In this case, all but two (2) individuals are captured by the class definition which Canada does not otherwise take issue with. It bears re-stating that Canada's concern applies to two (2) out of 26,319 individuals or 0.007% of the class's underlying population.

46. There is a simple solution to address the supposed unworkability of a class definition that includes two (2) individuals who are not affiliated to any Treaty 3 First Nation. The Court should amend the class definition to exclude "Band 826" and order that the two (2) individuals be provided with notice of the action and given the option of joining as party plaintiffs or intervenors. There is a precedent for such an order in *Kelly* which was concerned with ensuring that all affected individuals were before the Court.[61] Given that the affected individuals in this case consist of two (2) individuals, their addition to the litigation as either parties or intervenors will not make the proceeding unwieldy or increase the cost for the parties or the Court. It is far more costly for the Court to insist that every Treaty 3 First Nation bring its own separate action to enforce its treaty rights than to provide notice to Band 826's two members.

IX. DEFICIENCIES IN THE LITIGATION PLAN DO NOT PRECLUDE CERTIFICATION

47. The Defendant relies on *Carcillo* for the proposition that alleged deficiencies in the Plaintiff's litigation plan preclude certification.[62] *Carcillo* and the herein action are not even comparable in terms of scale and complexity. As the Motions Judge in *Carcillo* found, the proceeding involved "individual defences of 78 defendants spread across 13 jurisdictions; hundreds of likely third-party claim; highly diverse allegations of abuse, encompassing many different torts; events spanning a 50-year period; complex conflicts-law issues involving common law, civil law, and potentially U.S. law; and numerous limitation period defences."[63] The Court of Appeal agreed that the proposed class action "is of an

[60] *Kwicksutaineuk* at para. 11-12
[61] *Kelly* at para. 121
[62] Respondent's Factum at para. 67 - 68
[63] *Carcillo* para. 57.

unprecedented scale and complexity, far greater than that of other systemic negligence class actions previously recognized. This reality made it essential for counsel to present a litigation plan capable of meeting these challenges."[64]

48. In *Price*, a decision rendered just three months **before** *Carcillo*, the Court of Appeal agreed with the Motions Judge that the plaintiffs' failure to produce a workable litigation plan was not a bar to certification. Significantly the Motions Judge found, and the Court of Appeal agreed, that "the litigation plan's deficiencies could be resolved 'as late as after the common issues trial'" and that the plaintiffs had satisfied the representative plaintiff criteria set out at s. 5(1)(e) of the *CPA*. Treating a litigation plan as a "work in progress" is consistent with guidance from the Court of Appeal as it is expected that the plan will evolve as the case proceeds.[65]

49. In this case, the Defendant takes issue with the fact that the Plaintiff's litigation plan fails to address the Intervenors' action and potential conflicts that the Defendant says arise out of the evidence of Chief McVicar given on cross-examination. What the Defendant overlooks is that the Plaintiff filed its litigation plan with its Certification Motion Record in June of last year. Indeed the Litigation Plan is dated June 25, 2025.[66] The Intervenors commenced their action on November 18, 2025, nearly five months **after** the Litigation Plan was filed.[67] Furthermore, the Intervenors served (but did not file) their motion to intervene on March 27, 2026. This led to discussions between the Intervenors and the Plaintiff resulting in a consent order and an agreement that the two proceedings ought to be case managed together. Chief McVicar was cross-examined on May 20, 2026.

50. Accordingly, in light of the recency of the events and their evolving nature, the Plaintiff has not yet had an opportunity to address how the class proceeding and the Intervenors' action will be case managed in its litigation plan which continues to be a "work in progress." Should

[64] *Caricillo* para. 4.
[65] *Price v. Smith & Wesson Corporation*, 2025 ONCA 452, at para. 136.
[66] Affidavit of Chief Waylon Scott sworn June 25, 2025 [Scott Affidavit], Certification Motion Record of Plaintiff, Tab 3E
[67] Affidavit of Chief Linda McVicar affirmed May 1, 2026 [Filed McVicar Affidavit], Intervenor Motion Record, Exhibit 1.

the Court find that the Plaintiff's action ought to be certified, the issues that the Defendant raises can be addressed through case management and amendments to the litigation plan.

X. CHIEF MCVICAR'S EVIDENCE IS INADMISSIBLE HEARSAY

51. On May 20, 2026, the Defendant cross-examined Linda McVicar, Chief of Animakee Wa Zhing #37 First Nation, on an **unfiled** Affidavit that was not properly before the Court. During the course of that cross-examination, the Defendant elicited inadmissible hearsay evidence regarding the understanding of certain Chiefs who had been at the meeting of Grand Council Treaty 3 on October 3, 2024 and who have not tendered affidavit evidence in these proceedings and been subject to cross-examination.[68]

52. An unfiled affidavit constitutes an out of Court statement that is inadmissible for the truth of its contents. The proper procedure for the admissibility of a prior statement of a witness is to hold a *voir dire* to determine whether "the statement was made in circumstances that do not negate its reliability."[69] However, even where a prior statement of a witness is found to be admissible under the principled approach to hearsay, any hearsay evidence contained in the prior statement does not become admissible for the truth of its contents. Likewise, hearsay evidence elicited on cross-examination is inadmissible.[70]

53. Canada relies on Chief McVicar's cross-examination testimony as evidence that "the amended wording of the resolution **reflected an understanding from all Chiefs present** that Wabaseemong would be free to pursue its own lawsuit, while preserving the ability of other Treaty 3 First Nations to pursue their own existing or future claims without being bound by, or required to participate in Wabaseemoong's proposed proceeding."[71] Neither Canada nor the Intervenors tendered evidence from any of the Chiefs who were at the meeting **except**

[68] Certified Transcription of the Cross-examination on Affidavit of Linda McVicar, via Veritext Legal Solution's virtual Zoom platform, with all participants attending virtually, on May 20, 2026, Respondent's Supplemental Motion Record, Tab 1 at pp. 48-50, 51-52, Q# 143-148, 150-155.
[69] *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 ["*B.(K.G.)*"] at pg. 783.
[70] *B.(K.G.)* at pg. 784.
[71] Respondent's Factum at para. 22.

Chief McVicar. As such, the only evidence before the Court that is admissible is **her understanding** and no one else's.

54. This is significant because Canada seeks to use the evidence of Chief McVicar to bootstrap its argument that there is no support for the herein Action among Treaty 3 First Nations. This argument is contradicted by evidence that is in the record and that is admissible. The Intervenors do not oppose Certification and are in agreement that their action and the herein action can be case managed to mitigate the risk of inconsistent verdicts.[72] Of the fifteen Chiefs present, eleven voted in favour of the October 3, 2024 Resolution supporting Wabaseemoong's action. Canada never sought to cross-examine former Chief Waylon Scott and so his evidence that the Chiefs discussed the class action and the specific details about the contents of the claim is unchallenged.[73] The understanding of the eleven Chiefs who voted in favour of the Resolution cannot be elicited through Chief McVicar and therefore, the evidence on its face demonstrates that the majority of Chiefs who were present at the October 3, 2024 meeting are in favour of the herein action.

55. Regardless, the Plaintiff is not required to demonstrate that there is one hundred percent buy-in for its class proceeding as a pre-requisite to certification. The **only admissible** evidence before the Court is that the nine (9) First Nation Intervenors intend to opt-out of the herein action however the effect of the Intervenors opting-out is not a factor that weighs against preferability. The Intervenors are working with the Plaintiff to advance their actions in a coordinated fashion and the combination of the two actions ensures that all Treaty 3 First Nations will receive a single binding decision in regard to the interpretation of the treaty rights at issue in this claim.

XI. CONCLUSION

56. There is no issue that the Plaintiff has pleaded tenable causes of action and that the common issues are rationally connected to the class definition and predominate over individual issues (of which there are none). Canada's concerns regarding the inclusion of "Band 826" are

[72] Filed McVicar Affidavit at para. 24
[73] Scott Affidavit at para. 47

easily addressed through the addition of the two individuals who are members of this non-entity as parties and any deficiencies in the Litigation Plan can and should be addressed post-certification.

57. The only criteria which Canada seriously disputes on this motion is preferability. However, the only option Canada has advanced as an alternative to a class proceeding is a Rule 12.08 representative action which is limited to claims brought on behalf of members of unincorporated associations and trade unions. Treaty 3 First Nations, as a group, are neither. Furthermore, a Rule 12.08 procedure lacks the robust procedural safeguards of a class proceeding as provided for by the CPA. Canada's reliance on jurisprudence from other jurisdictions is telling. There has been no case in which this Court has found that a Rule 12.08 representative action is preferable to a class proceeding. Accordingly, this honourable Court should certify the herein action under the CPA and order that this case and the Intervenors' action be managed together.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of July, 2026.

Counsel for the Plaintiff

SCHEDULE A – LIST OF AUTHORITIES

Jurisprudence

1. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279
2. *AIC Limited v. Fischer*, 2013 SCC 69
3. *Alliance of the Polish Eastern Provinces, Toronto (Trustee of) v. Dziemianczuk*, 2009 CanLII 22580
4. *Anishinabeg et al. v. AGC et al.*, 2026 ONSC 1139
5. *Atikameksheng Anishnawbek v. Canada*, 2026 ONSC 3878
6. *Banman v. Ontario*, 2023 ONSC 6187
7. *Brown v. Hanley*, 2018 ONSC 1112
8. *Carcillo v. Ontario Major Junior Hockey League*, 2025 ONCA 652
9. *Endean v. British Columbia*, 2016 SCC 42
10. *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2016 ONCA 916
11. *Fresco v. Canadian Imperial Bank of Commerce*, 2024 ONCA 628
12. *Gammie v Jordan*, 2017 ONSC 124
13. *Gill v. Canada*, 2005 FC 192
14. *Ginter v. Gardon*, [2001] OJ No 1148
15. *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44
16. *Horseman v. Canada*, 2015 FC 1149
17. *Johnson v. Ontario*, 2021 ONCA 650
18. *Kelly v. Canada (AG)*, 2013 ONSC 1220

19. *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193

20. *Lac La Ronge Indian Band v Canada (Attorney General)*, 2025 SKKB 147

21. *McGee v. London Life Insurance Co*, 2008 CanLII 20985

22. *McSherry v. Zimmer GMBH*, 2012 ONSC 4113

23. *Nepinak and Acoose v. Canada,* 2025 FC 925

24. *Nootchtai v. Nahwegahbow Corbiere Genoodmagejig Barristers and Solicitors*, 2025 ONSC 5540

25. *Nootchtai v. Nahwegahbow Corbiere Genoodmagejig Barristers and Solicitors*, 2025 ONSC 6071

26. *Nootchtai v. Nahwegahbow Corbiere Genoodmagejig*, 2024 ONSC 6088

27. *OPA v. Ottawa Police Services Board,* 2014 ONSC 1584

28. *Organization of Veterans of the Polish Second Corps of the Eighth Army v. Army, Navy & Air Force Veterans in Canada et al.,* 1978 CanLII 1606 (ONCA)

29. *Price v. Smith & Wesson Corp.,* 2024 ONSC 1368

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

31. *R. v. B. (K.G.),* [1993] 1 S.C.R. 740

32. *R. v. Jarvis,* 2019 SCC 10

33. *R. v. Sullivan*, 2022 SCC 19

34. *Red Rock First Nation v. Canada (AG)*, 2022 ONSC 2309

35. *S. v. Ukraine International Airlines JSC*, 2024 ONSC 3303

36. *Soldier v. Canada*, 2006 MBQB 50

37. *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58

38. *Synod of the Diocese of Huron v. Delicata*, 2011 ONSC 4403

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

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

Date: **July 22, 2026**

Counsel for the Plaintiff

SCHEDULE B – LIST OF STATUTES

Class Proceedings Act, 1992,

S.O. 1992, c. 6 Certification

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

(a) the pleadings or the notice of application discloses a cause of action;
(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
(c) the claims or defences of the class members raise common issues;
(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
(e) there is a representative plaintiff or defendant who,
  (i) would fairly and adequately represent the interests of the class,
  (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1); 2020, c. 11, Sched. 4, s. 7(1).

Same
(1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,
(a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and
(b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members. 2020, c. 11, Sched. 4, s. 7 (2).

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

proceeding unless there is a representative plaintiff or defendant who,
(a) would fairly and adequately represent the interests of the subclass;
(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and
(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2); 2020, c. 11, Sched. 4, s. 7 (3).

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

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

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

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

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

- (a) be guided by the following objectives:
  - (i) ensuring that the interests of all parties in each of the applicable jurisdictions are given due consideration,
  - (ii) ensuring that the ends of justice are served,
  - (iii) avoiding irreconcilable judgments where possible,
  - (iv) promoting judicial economy; and
- (b) consider all relevant factors, including,
  - (i) the alleged basis of liability in each of the proceedings, and any differences in the laws of each applicable jurisdiction respecting such liability and any available relief,
  - (ii) the stage each proceeding has reached,
  - (iii) the plan required to be produced for the purposes of each proceeding,

including the viability of the plan and the available capacity and resources for advancing the proceeding on behalf of the class,

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

(v) the location of evidence and witnesses, and

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

Motion for determination under subs. (6)

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

(a) staying the proceeding; and

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

Notice of certification

17(1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section. 1992, c. 6, s. 17 (1); 2020, c. 11, Sched. 4, s.(1).

Court may dispense with notice

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so. 1992, c. 6, s. 17 (2); 2020, c. 11, Sched. 4, s. 18 (2).

Order respecting notice

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

(a) the cost of giving notice;
(b) the nature of the relief sought;
(c) the size of the individual claims of the class members;
(d) the number of class members;
(e) the places of residence of class members; and
(f) any other relevant matter. 1992, c. 6, s. 17 (3); 2020, c. 11, Sched. 4, s. 18 (2).

Means of giving notice

(4) The court may, for the purposes of subsection (3), order that notice be given by any of the following means or combination of the following means, and may order that notice be given to different class members by different means:

1. Personally or by mail.
2. By posting, advertising, publishing or leafleting.
3. By individual notice to a sample group within the class.
4. By any electronic means the court considers appropriate.

5. By any means that may be prescribed.
6. By any other means the court considers appropriate. 2020, c. 11, Sched. 4, s. 18 (3).

Contents of notice

(5) Unless the court orders otherwise, notice under this section shall,

(a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;
(b) state the manner by which and time within which class members may opt out of the proceeding;
(c) describe the possible financial consequences of the proceeding to class members;
(d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;
(e) indicate whether there is a third-party funding agreement as defined in section 33.1 between the representative plaintiff and a funder and, if so, provide a description of the payment to which the funder is entitled under the agreement;
(f) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;
(g) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;
(h) describe the right of any class member to participate in the proceeding;
(i) provide contact information for a person or entity to whom class members may direct inquiries about the proceeding;
(j) include the prescribed information; and
(k) include any other information the court considers appropriate. 2020, c. 11, Sched. 4, s. 18 (3).

Court to consider circumstances

(6) The court shall make such orders under subsections (3), (4) and (5) as are necessary to ensure that the notice given is the best notice that is practicable in the circumstances. 2020, c. 11, Sched. 4, s. 18 (3).

Solicitations of contributions

(7) With leave of the court, notice under this section may include a solicitation of contributions
from class members to assist in paying solicitor's fees and disbursements. 1992, c. 6, s. 17 (7).

Public Guardian and Trustee

(8) Notice ordered to be given under this section shall be served on the Public Guardian and Trustee if there is a reasonable possibility that the Public Guardian and Trustee is authorized to act on behalf of one or more class members. 2020, c. 11, Sched. 4, s. 18 (4).

Notice where individual participation is required
18 (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section. 1992,
c. 6, s. 18 (1).

Order respecting notice
The court shall make an order setting out when and by what means notice shall be given under this section, and in so doing shall have regard to the factors set out in subsection 17 (3). 2020, c. 11, Sched. 4, s. 19.

Means of giving notice
(3) The court may, for the purposes of subsection (2), order that notice be given by any of the following means or combination of the following means, and may order that notice be given to different class members by different means:

1. By any means referred to in paragraphs 1 to 4 of subsection 17 (4).
2. By any means that may be prescribed.
3. By any other means the court considers appropriate. 2020, c. 11, Sched. 4, s. 19.

Contents of notice
(4) Unless the court orders otherwise, notice under this section shall,

(a) state that common issues have been determined in favour of the class;
(b) state that class members may be entitled to individual relief;
(c) describe the steps to be taken to establish an individual claim;
(d) state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;
(e) provide contact information for a person or entity to whom class members may direct inquiries about the proceeding;
(f) include the prescribed information; and
(g) include any other information the court considers appropriate. 2020, c. 11, Sched. 4,
(h) s. 19.

Court to consider circumstances
(5) The court shall make such orders under subsections (2), (3) and (4) as are necessary to ensure that the notice given is the best notice that is practicable in the circumstances. 2020, c. 11, Sched. 4, s. 19.

Notice to protect interests of affected persons
19 (1) At any time in a proceeding under this Act, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party, or to ensure the fair conduct of the proceeding. 2020, c. 11, Sched. 4, s. 20.

Order respecting notice
(2) The court shall make an order setting out when and by what means notice shall be given under this section, and in so doing shall have regard to the factors set out in subsection 17 (3). 2020, c. 11, Sched. 4, s. 20.

Means of giving notice
(3) The court may, for the purposes of subsection (2), order that notice be given by any of the following means or combination of the following means, and may order that notice be given to different class members by different means:

1. By any means referred to in paragraphs 1 to 4 of subsection 17 (4).
2. By any means that may be prescribed.
3. By any other means the court considers appropriate. 2020, c. 11, Sched. 4, s. 20.

Court to consider circumstances
(4) The court shall make such orders under subsections (2) and (3) as are necessary to ensure that the notice given is the best notice that is practicable in the circumstances. 2020, c. 11, Sched. 4, s. 20.

Notices, general requirements

Plain language

20 (1) A notice under section 17, 18 or 19 shall be written in a plain language manner. 2020, c. 11, Sched. 4, s. 21.

Bilingual
(2) A notice under section 17, 18 or 19 shall be written in English and in French, unless the court orders otherwise. 2020, c. 11, Sched. 4, s. 21.

Court approval
(3) A notice under section 17, 18 or 19 shall be approved by the court before it is given. 2020, c. 11, Sched. 4, s. 21.

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

Interpretation

General Principle

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

Representation of an Interested Person Who Cannot Be Ascertained

Proceedings in which Order may be Made

10.01 (1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
(b) the determination of a question arising in the administration of an estate or trust;
(c) the approval of a sale, purchase, settlement or other transaction;
(d) the approval of an arrangement under the Variation of Trusts Act;
(e) the administration of the estate of a deceased person; or
(f) any other matter where it appears necessary or desirable to make an order under this subrule,

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

Order Binds Represented Persons

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

Settlement Affecting Persons who are not Parties

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

(a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or
(b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

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

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

Representation of a Deceased Person

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

Relief from Binding Effect of Order

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

(a) the order or approval was obtained by fraud or non-disclosure of material facts;
(b) the interests of the person or estate were different from those represented at the hearing; or
(c) for some other sufficient reason the order or approval should be set aside. R.R.O. 1990, Reg. 194, r. 10.03; O. Reg. 259/14, s. 3.

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

Federal Court Rules, (SOR/98-106)
Representative proceedings

- 114 (1) Despite rule 302, a proceeding, other than a proceeding referred to in section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that

    (a) the issues asserted by or against 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;

    (b) the representative is authorized to act on behalf of the represented persons;

    (c) the representative can fairly and adequately represent the interests of the represented persons; and

    (d) the use of a representative proceeding is the just, most efficient and least costly manner of proceeding.

Powers of the Court
(2) At any time, the Court may

(a) determine whether the conditions set out in subsection (1) are being satisfied;

(b) require that notice be given, in a form and manner directed by it, to the represented persons;

(c) impose any conditions on the settlement process of a representative proceeding that the Court considers appropriate; and

(d) provide for the replacement of the representative if that person is unable to represent the interests of the represented persons fairly and adequately.

Orders in representative proceeding
(3) An order in a representative proceeding is binding on the represented persons unless otherwise ordered by the Court.

Approval of discontinuance or settlement
(4) The discontinuance or settlement of a representative proceeding is not effective unless it is approved by the Court.

Style of cause
(5) Every document in a proceeding commenced under subsection (1) shall be prefaced by the heading "Representative Proceeding".

Rules Amending Certain Rules Governing Practice and Procedure Applicable to the Federal Courts (Representative Proceedings, Class Proceedings and Other Amendments), SOR/2007-301

4. The Rules are amended by adding the following after rule 113:

114. (1) Despite rule 302, a proceeding, other than a proceeding referred to in section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that:

(a) the issues asserted by or against 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;

(b) the representative is authorized to act on behalf of the represented persons;

(c) the representative can fairly and adequately represent the interests of the represented persons; and

(d) the use of a representative proceeding is the just, most efficient and least costly manner of proceeding.

Powers of the Court

(2) At any time, the Court may

(a) determine whether the conditions set out in subsection (1) are being satisfied;

(b) require that notice be given, in a form and manner directed by it, to the represented persons;

(c) impose any conditions on the settlement process of a representative proceeding that the Court considers appropriate; and

(d) provide for the replacement of the representative if that person is unable to represent the interests of the represented persons fairly and adequately.

Orders in representative proceeding

(3) An order in a representative proceeding is binding on the represented persons unless otherwise ordered by the Court.

Approval of discontinuance or settlement

(4) The discontinuance or settlement of a representative proceeding is not effective unless it is approved by the Court.

(5) Every document in a proceeding commenced under subsection (1) shall be prefaced by the heading “Representative Proceeding”.

APPENDIX "A"

Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194	*Federal Court Rules*, SOR/98-106	*Manitoba Court of Kings Bench Rules*, M.R. 553/88	*Saskatchewan Court of Kings Bench Rules*, Sask. K.B. Rules 2013	*Supreme Court Civil Rules*, B.C. Reg. 95/2011
Representation of an Interested Person Who Cannot Be Ascertained **Proceedings in which Order may be Made** **10.01 (1) In a proceeding concerning,** **(a)** the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution; **(b)** the determination of a question arising in the administration of an estate or trust; **(c)** the approval of a sale, purchase, settlement or other transaction; **(d)** the approval of an arrangement under the Variation of Trusts Act; **(e)** the administration of the estate of a deceased person; or	**Representative proceedings** **114 (1)** Despite rule 302, a proceeding, other than a proceeding referred to in section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that **(a)** the issues asserted by or against 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; **(b)** the representative is authorized to act on behalf of the represented persons; **(c)** the representative can fairly and adequately represent the interests of the represented persons; and	**Proceedings in which order may be made** **10.01(1)** In a proceeding concerning, **(a)** the interpretation of a deed, will, agreement, contract or other instrument, or the interpretation of a statute, order in council, order, rule, regulation, by-law or resolution; **(b)** the determination of a question arising in the administration of an estate or trust; **(c)** the approval of a sale, purchase, settlement or other transaction; **(d)** the approval of an arrangement under section 59 of *The Trustee Act*; **(e)** the administration of the estate of a deceased person; or **(f)** any other matter where it appears necessary or desirable; a judge may by order appoint one or more persons to represent any person or class of persons, including;	**Representative actions** **2-10 (1)** If numerous persons have a common interest in the subject of an intended claim, one or more of those persons may make or be the subject of a claim or may be authorized by the Court to defend on behalf of or for the benefit of all. **(2)** If a certification order is obtained pursuant to *The Class Actions Act*, an action referred to in subrule (1) may be continued pursuant to that *Act*. **Representation order** **2-11(1)** In this rule: "absent person" means a person for whom a representative is or may be appointed pursuant to this rule and includes an unborn person, an unascertained person, or a person or member of a class of persons who cannot readily be ascertained, found or served, who has a present, future, contingent or	**Representative proceeding** **(1)** If numerous persons have the same interest in a proceeding, other than a proceeding referred to in subrule (10), the proceeding may be started and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them. **Court may appoint representative** **(2)** At any stage of a proceeding referred to in subrule (1), the court, on the application of a party, may appoint one or more of the defendants or respondents or another person to represent one or more of the persons having the same interest in the proceeding, and if the court appoints a person not named as a defendant or a respondent, the court must make an order under Rule 6-2 adding that person as a defendant or respondent.

(f) any other matter where it appears necessary or desirable to make an order under this subrule, a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. **Order Binds Represented Persons** **(2)** Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03. … **Relief from Binding Effect of Order** **10.03** Where a person or an estate is bound by reason of a representation order made under subrule 10.01 (1) or rule 10.02, an approval under subrule 10.01	**(d)** the use of a representative proceeding is the just, most efficient and least costly manner of proceeding. **Powers of the Court** **(2)** At any time, the Court may **(a)** determine whether the conditions set out in subsection (1) are being satisfied; **(b)** require that notice be given, in a form and manner directed by it, to the represented persons; **(c)** impose any conditions on the settlement process of a representative proceeding that the Court considers appropriate; and **(d)** provide for the replacement of the representative if that person is unable to represent the interests of the represented persons fairly and adequately. **Orders in representative proceeding** **(3)** An order in a representative proceeding is binding on the represented persons unless	**(g)** unborn persons; or **(h)** persons who cannot readily be ascertained, found or served; who have a present, future, contingent or unascertained interest in, or may be affected by, the proceeding. **Order binds represented persons** **10.01(2)** Where an appointment is made under subrule (1), an order in the proceeding is binding upon a person or class so represented, subject to rule 10.03 [Settlement affecting persons who are not parties]. …	unascertained interest in, or may be affected by, a proceeding; "proceeding" means a proceeding concerning: **(a)** the interpretation of: **(i)** a deed, will, contract or other instrument; or **(ii)** an enactment, order in council or municipal bylaw or resolution; **(b)** the determination of a question arising in the administration of an estate or trust; **(c)** the approval of a sale, purchase, compromise or other transaction; **(d)** the approval of an arrangement pursuant to *The Trustee Act*, 2009; **(e)** the administration of the estate of a deceased person; or **(f)** any other matter if the Court considers it necessary or desirable. **(2)** In a proceeding, the Court may appoint one or more persons to represent an absent person. **(3)** If an appointment is made pursuant to this rule, a judgment in the proceeding is binding on an	**Enforcement of order made in representative proceeding** **(3)** An order made in a proceeding referred to in subrule (1) of this rule is binding on all the persons represented in the proceeding as parties, but must not be enforced against a person not a party to the proceeding except with leave of the court. **Application for leave** **(4)** An application for leave under subrule (3) must be served on the person against whom the applicant seeks to enforce the order, and the person served with the application for leave may dispute liability to have the order enforced against the person. **Court order** **(5)** On an application for leave under subrule (3), the court may order that the question of whether the order is enforceable against the person served with the application for leave be determined in the manner the court considers will further the

(3) or an order that the proceeding continue made under rule 10.02, a judge may order in the same or a subsequent proceeding that the person or estate not be bound where the judge is satisfied that, **(a)** the order or approval was obtained by fraud or non-disclosure of material facts; **(b)** the interests of the person or estate were different from those represented at the hearing; or **(c)** for some other sufficient reason the order or approval should be set aside. **Proceeding by Unincorporated Association or Trade Union** **12.08** Where numerous persons are members of an unincorporated association or trade union and a proceeding under the Act would be an unduly expensive or inconvenient means for determining their claims, one or more of them may be authorized by the court to bring a proceeding on behalf of or for the benefit of all.	otherwise ordered by the Court. …		absent person represented pursuant to subrule (2), unless the Court, in the same or a subsequent proceeding, orders otherwise. …	object of these Supreme Court Civil Rules. **Representation of interested person who cannot be ascertained** **(6)** In a proceeding concerning **(a)** the administration of the estate of a deceased person, **(b)** property subject to a trust, or **(c)** the construction of a written instrument, including an enactment, the court may appoint one or more persons to represent a person, including **(d)** an unborn or unascertained person, or **(e)** the members of a class of persons who have a present, future, contingent or unascertained interest in, or who may be affected by, the proceeding, and who, or some of whom, cannot readily be ascertained or found. **Appointment order binding** **(7)** If an appointment of a representative is made under subrule (6), an order in the

				proceeding is binding on a person or class so represented. …

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

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

Plaintiff(s)

- and -

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

ANIMAKEE WA ZHING #37 FIRST NATION, et al.
(Intervenors)

Defendant

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

REPLY FACTUM OF THE PLAINTIFF
(Motion for Certification)

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