

KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 147**

Date: **2025 09 16**
File No.: KBG-PA-00182-2023
Judicial Centre: Prince Albert

BETWEEN:

LAC LA RONGE INDIAN BAND and PETER
BALLANTYNE CREE NATION

PLAINTIFFS

- and -

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Counsel:

Adam Bordignon and Philip Fourie
Karen Jones, Cody Francon and
Gabriela Fuentealba

for the plaintiffs
for the defendant

JUDGMENT
September 16, 2025

POPESCU C.J.K.B.

I. INTRODUCTION

[1] This is an application pursuant to *The Class Actions Act*, SS 2001, c C-12.01 [Act], brought by the Lac La Ronge Indian Band and the Peter Ballantyne Cree Nation [Plaintiffs] seeking certification of this proceeding as a class action. The Plaintiffs further request that one of those Plaintiffs, the Lac La Ronge Indian Band, be appointed the representative plaintiff. The certification application is made on behalf of the successor First Nation Indian Bands to the signatories of Treaty 6. According to the

parties, this is the first time that a certification application has been brought by an Indian band seeking to be appointed as a representative plaintiff on behalf of other Indian bands.

[2] Treaty 6 is one of the numbered Treaties between the Crown (Canada) and various First Nations of the Plains and Wood Cree, Assiniboine and other Indigenous peoples. It was first signed in 1876 at Fort Carlton and Fort Pitt and later adhered to by other First Nations across what is now Alberta, Saskatchewan and Manitoba.

[3] The Treaty was intended to allow for peaceful settlement of the prairies by settlers, while providing Indigenous peoples with certain rights and protections.

[4] The statement of claim addresses the widespread issue commonly referred to as the opioid addiction epidemic. The claim is brought against the Attorney General of Canada [Canada] or [Defendant], who is designated to represent His Majesty in Right of Canada pursuant to s. 23 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50. The Plaintiffs allege that opioid addiction is pervasive throughout Treaty 6 Territory, resulting in increased crime, erosion of culture, language and traditions, breakdown of family support systems, elevated unemployment and significant emotional, mental, physical and spiritual harm—including malnutrition, overdoses and death.

[5] The Plaintiffs assert that they are entitled to enforce the rights negotiated and enshrined in Treaty 6. Specifically, they rely on two provisions: the “Pestilence” clause and the “Medicine Chest” clause. The Pestilence clause has been interpreted as imposing an obligation on the Crown to provide assistance to Treaty 6 members in times of calamity, such as disease outbreaks. The Medicine Chest clause pertains to the means through which the Crown would provide medical care for Treaty 6 members.

[6] The statement of claim alleges that Canada is obligated to provide medical care and other forms of aid to class members in response to the opioid epidemic. It further asserts that Canada must consult with class members to develop, fund and implement abatement and treatment programs. The Plaintiffs contend that Canada has failed to fulfil these obligations.

[7] Section 6(1) of the *Act* requires a court to certify a proceeding as a class action if five criteria are satisfied: first, the pleadings must disclose a cause of action; second, there must be an identifiable class; third, the claims of the class members must raise common issues; fourth, a class action would be the preferable procedure for resolving the common issues; and fifth, there must be a suitable representative plaintiff, who is willing to be appointed, who can fairly represent the group, has a workable method of advancing the action on behalf of the class and informing members, and does not have a conflict of interest with others in the group.

[8] The Plaintiffs assert that they have met all the necessary criteria for certification. Specifically, they contend that they have presented a viable cause of action, identified a clearly defined class, articulated appropriate common issues, and proposed a suitable representative plaintiff who has outlined a workable method for advancing the claim. Additionally, they assert that they have provided sufficient reasons supporting their position that a class action is the preferable procedure. Accordingly, the Plaintiffs seek an order granting certification.

[9] Canada opposes certification. While acknowledging its ongoing obligations to Indigenous peoples and its responsibility to address the opioid crisis, Canada maintains that the criteria for certification have not been satisfied. In particular, it argues that the factual foundation required to support a claim for breach of treaty rights is absent, that the Plaintiffs have failed to present a viable method for advancing the action, and that class actions are not appropriate vehicles for Indian bands to pursue

treaty rights claims. Therefore, Canada submits that certification is not the preferable procedure and that the application should be dismissed.

II. STATUTORY PROVISIONS

[10] The requirements for certification are set out in s. 6(1) of the *Act*:

6(1) Subject to subsections (2) and (3), the court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class;
- (c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
- (d) a class action would be the preferable procedure for the resolution of the common issues; and
- (e) there is a person willing to be appointed as a representative plaintiff who:
 - (i) would fairly and adequately represent the interests of the class;
 - (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[11] Section 2 of the *Act* defines “class” and “common issues” as follows:

“class” means two or more persons with common issues respecting a cause of action or a potential cause of action;

...

“common issues” means:

- (a) common but not necessarily identical issues of fact; or
- (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; ...

III. CLASS ACTIONS OBJECTIVES AND CERTIFICATION CRITERIA

[12] The overarching objectives of our legislation align closely with those of Ontario's *Class Proceedings Act, 1992*, SO 1992, c 6 [*Ontario Act*]. In the frequently cited decision of *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158 [*Hollick*], Chief Justice McLachlin, writing for the Court, articulated the goals of the *Ontario Act* as follows:

15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

This passage underscores that judicial economy, access to justice and behavioural modification of wrongdoers are foundational objectives of class action legislation. To these aims, the Supreme Court has directed that courts adopt a generous and purposive fulfil approach to interpreting class action statutes.

[13] In *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46,

[2001] 2 SCR 534 [*Western Canadian Shopping Centres*], Chief Justice McLachlin further emphasized the societal importance of class actions:

26 The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.

[14] In *Bisaillon v Concordia University*, 2006 SCC 19, [2006] 1 SCR 666, Justice LeBel, writing for the Court, reaffirmed the principle that class action legislation should be interpreted flexibly and generously. At para. 16, he stated:

16 The class action has a social dimension. Its purpose is to facilitate access to justice for citizens who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights (*Nadon v. Anjou (Ville d')*, [1994] R.J.Q. 1823 (C.A.), at p. 1827; *Comité d'environnement de La Baie inc. v. Société d'électrolyse et de chimie Alcan ltée*, [1990] R.J.Q. 655 (C.A.); *Syndicat national des employés de l'Hôpital St-Charles Borromée v. Lapointe*, [1980] C.A. 568). This Court has already noted that legislation on class actions should be construed flexibly and generously: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, at para. 14; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 51.

[15] Justice LeBel further clarified that class actions are procedural mechanisms and do not alter substantive rights. At para. 17, he wrote:

17 The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights (*Malhab v.*

Métromédia C.M.R. Montréal inc., [2003] R.J.Q. 1011 (C.A.), at paras. 57-58; *Tremaine v. A.H. Robins Canada Inc.*, [1990] R.D.J. 500 (C.A.), at p. 507; Y. Lauzon, *Le recours collectif* (2001), at pp. 5 and 9). It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so: D. Ferland and B. Emery, eds., *Précis de procédure civile du Québec* (4th ed. 2003), vol. 2, at pp. 876-77.

[16] As the Court of Appeal in *Pederson v Saskatchewan (Minister of Social Services)*, 2016 SKCA 142 at para 29, [2017] 5 WWR 669 [*Pederson*], emphasized, certification hearings in class actions must involve meaningful scrutiny of the evidence, though the focus remains procedural, not on the merits of the case. Courts should avoid superficial review but also not delve deeply into the complexities of the claim.

[17] Courts should interpret class action statutes liberally, to fulfil the purposes of judicial economy, access to justice and behaviour modification, and avoid filtering out legitimate claims through an overly restrictive approach. The objective of certification is to determine if, from a procedural perspective, the proposed action is best prosecuted as a class action; conversely, “... certification seeks to filter out manifestly unfounded and frivolous claims”: *Lin v Airbnb, Inc.*, 2019 FC 1563 at para 25 [*Lin*].

[18] A plaintiff who seeks certification of a class action must establish that each of the five statutory criteria has been met. This requirement is conjunctive, meaning that all five conditions must be satisfied before the court can certify the proceeding as a class action. This principle is affirmed in cases such as *Hoffman v Monsanto Canada Inc.*, 2007 SKCA 47 at paras 23 and 25, 283 DLR (4th) 190, and *G.C. v Merck Canada Inc.*, 2019 SKQB 42 at para 32. Further support can be found in *Brink v Canada*, 2024 FCA 43 at para 138, 490 DLR (4th) 552, and *Samson Cree Nation v Samson Cree Nation (Chief and Council)*, 2008 FC 1308 at para 35, [2009] 4 FCR 3, upheld in *Buffalo v Samson Cree Nation*, 2010 FCA 165 at para 3, 320 DLR (4th) 629.

[19] In *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at paras 63 and 99-104, [2013] 3 SCR 477 [*Pro-Sys Consultants*], the Court outlined the legal standards governing certification applications. In essence, two distinct standards apply to the five criteria in s. 6(1): one standard for the “cause of action” requirement under s. 6(1)(a), and another for the remaining four criteria in ss. 6(1)(b) to (e). The burden on the plaintiff is not unduly heavy.

[20] The first criterion -- s. 6(1)(a) -- which requires that pleadings disclose a cause of action -- is assessed using a standard similar to that applied in motions to strike or dismiss. Specifically, the court must determine whether it is plain and obvious that the claim does not disclose a reasonable cause of action and cannot succeed. If there is any reasonable prospect of success, the criterion is met. This approach is supported by decisions such as *Pro-Sys Consultants, Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 20, [2011] 2 SCR 261; and *Pederson* at para 65, among others.

[21] For the remaining four certification criteria -- ss. 6(1)(b) to (e) -- the plaintiff bears the burden of adducing evidence to establish “some basis in fact” that each criterion has been met. See in particular, *Hollick* at para 25; *Pro-Sys Consultants* at para 99; *Pederson* at paras 28-29; and *Kane v FCA US LLC*, 2022 SKQB 69 at paras 92-93, [2022] 9 WWR 680.

[22] This evidentiary threshold is intentionally low, reflecting the court’s limited role at the certification stage, where it must avoid “finely calibrated assessments of evidentiary weight”: *AIC Limited v Fischer*, 2013 SCC 69 at para 40, [2013] 3 SCR 949 [*Fischer*]. The “some basis in fact” standard requires an evidentiary foundation for each of the last four certification criteria, but the use of the word “some” signals that the record need not be exhaustive. Courts must refrain from evaluating the sufficiency of the evidence or resolving evidentiary conflicts. See *Fischer* at para 41, citing

McCracken v Canadian National Railway Co., 2012 ONCA 445 at paras 75-76, 111 OR (3d) 745; and *Lin* at para 30.

[23] Finally, it is well established that the “some basis in fact” standard falls below the civil standard of proof -- namely, proof on a balance of probabilities. See *Pro-Sys Consultants* at para 105 and *Lin* at para 30. At the certification stage, the court does not undertake a robust analysis of the merits of the claims advanced. Accordingly, a successful certification order does not forecast the outcome of a subsequent common issues trial. See *Pro-Sys Consultants* at para 105 and *Lin* at para 31.

[24] Notably, s. 6(1) of the *Act* provides that the Court “shall” certify an action as a class proceeding if the statutory criteria are met. The jurisprudence encourages courts to seek ways to grant certification where appropriate, rather than to identify reasons to deny it.

[25] It is with these foundational principles in mind that the issues requiring resolution will be analyzed and determined.

IV. PRELIMINARY OBJECTIONS TO AFFIDAVITS

[26] Canada challenges the admissibility of certain materials submitted by the Plaintiffs. First, it objects to the inclusion of “news reports” attached as Exhibit “A” to the affidavit of Chief Tammy Cook-Searson, arguing that internet-sourced news articles are inadmissible and that Exhibit “A” should therefore be struck. Second, Canada contests the affidavit of Hester Cecilia Brittz [Ms. Brittz], which the Plaintiffs submitted to establish a factual basis for their claims—specifically, that an opioid addiction epidemic exists, that it is adversely affecting Treaty 6 members, and that there are viable methods for addressing these harms. Canada argues that Ms. Brittz, a speech pathologist and audiologist by training, lacks the necessary qualifications to provide the evidence contained in her affidavit.

(1) Exhibit “A” to the Affidavit of Chief Tammy Cook-Searson

[27] Exhibit “A” to the affidavit of Chief Tammy Cook-Searson is comprised of three internet-based articles [articles] downloaded from the website of the Canadian Broadcasting Corporation [CBC]:

- (i) January 15, 2019 – “FSIN says opioid crisis ‘an issue of justice and public safety’, calls for funding to help First Nations”;
- (ii) July 10, 2023 – “‘We need action’: Treaty 6 chiefs declare opioid crisis emergency”; and
- (iii) October 1, 2023 – “Red Pheasant Cree Nation declares state of emergency after 8 weekend overdoses”.

[28] The Plaintiffs submit that the purpose for tendering the articles is to establish, what *Hollick* describes as “some basis in fact”, for several class action criteria -- namely, identifiable class, common issues and preferable procedure.

[29] A certification application is procedural in nature and not determinative of the merits of the plaintiff’s claim. See *Hollick* at para 16. It is an interlocutory application.

[30] Generally speaking, affidavits must be confined to facts that are within the personal knowledge of the affiant. See Rule 13-30(1) of *The King’s Bench Rules*. However, Rules 13-30(2) and (3) provide that in interlocutory applications, “the Court may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person’s belief” provided that “the source of the information [is] disclosed in the affidavit”.

[31] The question that arises is whether internet-based hearsay evidence is admissible in an interlocutory application, such as the certification application before the Court.

[32] This Court has had the opportunity to consider this issue in *Thorpe v Honda Canada, Inc.*, 2010 SKQB 39, 352 Sask R 78 [*Thorpe*], where the following comments were made and conclusions reached:

21 The internet is an abundant source of information. Some of the information available is impeccably accurate, while other information is pure garbage. It does not make sense, on the one hand, to conclude that any and all information pulled from the world-wide web is inherently unreliable and ought to be given zero weight; on the other hand, it makes equally little sense to open the door to admitting into court absolutely anything placed on the internet by anybody.

22 ... internet information may be admissible in court proceedings depending upon a variety of circumstances relating to reliability which include, but are not limited to:

- *whether the information comes from an official website from a well known organization;
- *whether the information is capable of being verified;
- *whether the source is disclosed so that the objectivity of the person or organization posting the material can be assessed.

23 Where the threshold of “admissibility” is met, it is still up to the triers of fact to weigh and assess the information to determine what significance, if any, such information would have on the issues to be decided.

24 If the internet-based evidence tendered does not contain sufficient badges of reliability, it ought to be rejected as worthless and, hence, inadmissible.

[33] The reasoning in *Thorpe* has been subsequently relied upon on many occasions. See *Williams v Canon Canada Inc.*, 2011 ONSC 6571 at paras 65-67; *Wiegers v Apple, Inc.*, 2020 SKQB 24 at para 60; *Kish v Facebook Canada Ltd.*, 2021 SKQB 198; *Chow v Facebook, Inc.*, 2022 BCSC 137 at para 33, 80 CPC (8th) 396; *Beazley v Johnston*; 2022 ONSC 2747 at para 67; *Donegani v Facebook, Inc.*, 2024 ONSC 7153 at para 17; and *T.P. (Litigation guardian of) v Bytedance Ltd.*, 2025 SKKB 101 at paras 15-19.

[34] In *Thorpe*, the internet evidence sought to be introduced was made up of complaints about Honda automobiles posted to various web pages by unknown and anonymous persons. Who made the complaints, when they were made and the circumstances under which they were made was not disclosed. Further, the affiant in *Thorpe* did not disclose the basis for believing the information was true, accurate, reliable or unaltered.

[35] The circumstances here are different. The information comes from the CBC, a Crown corporation that serves as the national public broadcaster that offers a wide range of radio, television and digital services in both English and French. It was established in 1936. The articles come from the official website of this well-known organization.

[36] Further, the information contained in the articles is capable of being verified, the sources are disclosed and Chief Cook-Searson has sworn that she believes the content of the articles to be true.

[37] I find that the internet-based articles attached as Exhibit “A” are admissible. However, this is not to suggest that everything stated in the articles is accepted as fact. The articles themselves implicitly acknowledge that they consist partially of statements made by individuals expressing their concerns and observations. Merely asserting something does not render it factual. Nevertheless, these statements constitute admissible hearsay evidence and may be considered when evaluating whether there is a factual foundation for the relevant certification criteria within this certification application.

(2) Affidavit of Hester Cecilia Brittz

[38] The Plaintiffs tender the affidavit of Ms. Brittz to demonstrate some basis in fact to support the nature of the claims advanced—specifically, that an opioid

addiction epidemic exists, that it is causing harm to Treaty 6 First Nations people, and that there is a viable method for addressing those harms. The Plaintiffs submit that these purposes are relevant to the determination of the class definition, the identification of common issues and preferable procedure. The report attached to Ms. Brittz's affidavit includes content such as statistics related to the effects of opioids within Canada, as well as research on various methodologies referenced in the Plaintiffs' proposed plan to address the alleged opioid addiction epidemic. However, the Plaintiffs emphasize that the affidavit is not being offered as expert evidence.

[39] Canada contends that the affidavit should be struck on the grounds of inadmissibility. Specifically, Canada argues that Ms. Brittz is not qualified to offer the opinions she has proffered. Canada asserts that Ms. Brittz, a Tennessee-based speech pathologist and audiologist by training, lacks any post-secondary education in the field of opioid addiction. Canada highlights her insufficient educational and experiential qualifications and cites the well-established criteria for admitting expert opinion evidence set out in *R v Mohan*, [1994] 2 SCR 9 (QL) at paras 16-25, and *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182. Canada argues that these authorities form the basis for the Court to reject the affidavit. Additionally, Canada points to certain responses given by Ms. Brittz during questioning that suggest a limited understanding of Canada's geopolitical boundaries.

[40] On this issue, the parties have referred the Court to *Brooks v Canada (Attorney General)*, 2009 SKQB 509, [2010] 6 WWR 81 [*Brooks QB*], application for leave to appeal dismissed, albeit on unrelated grounds in *Brooks v Canada (Attorney General)*, 2010 SKCA 55, [2010] 6 WWR 149, a decision of Zarzeczny J. that is very much on point. In *Brooks QB*, the Court considered the admissibility of Dr. Margaret Sears' affidavit. While all respondents accepted her qualifications in chemical engineering, she lacked formal expertise in fields central to the case, such as epidemiology, toxicology or medicine. Much of her affidavit relied on studies and

opinions authored by others, which she was not qualified to adopt as expert evidence. Plaintiff's counsel in *Brooks QB* clarified that Dr. Sears' affidavit was not submitted as expert opinion but rather to demonstrate that credible scientific and medical literature exists supporting the plausibility of the claims. The Court accepted the affidavit for this limited use, noting it would be impractical and costly to require affidavits from every original author cited. Dr. Sears' role as a "bibliographer" was deemed necessary and her affidavit was admitted—not as expert opinion but to establish that some scientific basis exists for the proposed class action claims and issues.

[41] The salient paragraphs dealing with this issue in *Brooks QB* are found at paras. 52-62, where Zarzeczny J. provided this reasoning for admitting the affidavit of Dr. Sears:

52 The affidavit of Dr. Margaret Sears presents somewhat different challenges in relation to the objections raised by the respondents to its admissibility.

53 All respondents acknowledge Dr. Sears' qualifications as the holder of a doctoral degree in chemical engineering and her claimed long-standing involvement in and experience with conducting research related to some of the issues fundamental to this proposed class action. In her affidavit she refers to and relies upon numerous studies, publications and sources dealing with the nature of chemicals used at CFB Gagetown relied upon in the claim as the source of damage and injury to the proposed plaintiff class members and the issues of their causation.

54 I am satisfied, from the whole of the information provided to me upon this certification application, including the extensive expert opinion affidavits filed on behalf of the respondents, that the merits of this case will necessarily involve expert opinion evidence of many and multiple disciplines including, at a minimum, persons with expertise and qualifications in the fields of epidemiology, toxicology, immunology and endocrinology as well as, potentially, chemical engineering.

55 Dr. Sears, except for the latter qualification, does not have any academic qualifications or degrees in these various fields nor a general or specialist degree in medicine.

56 Nevertheless, as the materials demonstrate, she has spent a

good portion of her career researching issues in respect to areas where a broad range of scientific and medical expertise has been applied to generate experiments, studies, papers and publications of all sorts, many of which are, arguably, relevant to the issues raised in this case.

57 As one of the respondents observed, Dr. Sears' affidavit, although it reflects a noble effort at objectivity, nevertheless frequently reflects opinions, if not of Dr. Sears herself, those of others who have authored these studies, etc. Although some of these might well be qualified as experts to provide opinion evidence as expressed in the reports, studies and papers which they have authored or in which they have participated as referred to by Dr. Sears, -- Dr. Sears cannot be so qualified. I agree.

58 The issue of the admissibility of her affidavit also arose and was dealt with by McNally J. in the *Bryson, supra*, certification judgment. He concluded, at para. 17, in part, as follows:

17 ... Upon review of the materials filed in this motion, neither Dr. Sears nor the plaintiffs have established that she possesses the requisite knowledge or qualifications to adopt or comment on the views expressed in the articles and publications of the other researchers or authors that she has attached to her affidavits. In such circumstances, her affidavits and opinions do not meet the test of admissibility for expert opinion evidence. Accordingly, they are not admissible in these proceedings and are struck from the record.

59 Counsel for the plaintiff, in his oral argument, took the position that Dr. Sears' affidavit was not being advanced as an expert opinion, nor could or should she be qualified by this Court, upon this certification application, to provide the opinions or conclusions which she brings forward in her affidavit. Rather, and this was also the position which he took during the hearing of the respondents' application to cross-examine Dr. Sears upon her affidavit (an application which I heard and granted) her affidavit was being proffered primarily for the purpose of demonstrating that at least some significant scientific and medical body of opinion exists to support, in general terms, the claim advanced by the plaintiff on behalf of the members of the proposed class in this case. Further that there is some scientific or medical basis for concluding that the proposed plaintiff class could be affected by or exposed to risk of injury or "adverse health effects" from contact with alleged contaminants at CFB

Gagetown. These, plaintiff's counsel argues, are issues relevant to the determination of the definition of the class and the common issues raised in this amended certification application.

60 If not proffered as an expert opinion, the affidavit of Dr. Sears may well be admitted for the limited purpose argued for by counsel for the plaintiff. Taking a principled approach -- namely applying the necessity and reliability criteria to the admissibility of her affidavit, its admissibility is further supported. To suggest that individual affidavits could be filed on behalf of each or even a representative number of the report and study authors referred to in Dr. Sears' affidavit would be a monumental and financially prohibitive exercise. That is especially so if it were solely to establish that some basis exists in medicine or science to support the nature of the claims being advanced, the commonality of the issues proposed or the appropriateness of the proposed membership of the class in these certification proceedings. A bibliographer, such as Dr. Sears appears in part to be, may well represent a necessary approach to address the otherwise practical unavailability of this kind of evidence in this kind of proceeding.

61 I have also concluded that there is a threshold degree of reliability to support the conclusion that the studies and publications referred to by Dr. Sears in her affidavit actually do relate to the subject matter which she deposes they do and perhaps, although this is not as obvious, they support some of the conclusions which Dr. Sears deposes she understands the reports and publications have the potential to stand for or support.

62 For this stated limited purpose, and for these principled based reasons, I am prepared to admit Dr. Sears' affidavit, not as an expert opinion, but rather to identify some of the information that "is out there" to assist the plaintiff in its future attempts to convince the court that the class and its membership as well as the common issues proposed has some arguable foundation in science and medicine.

[Emphasis added]

[42] There are significant parallels between *Brooks QB* and the case before this Court with respect to the admissibility of this type of affidavit evidence. In particular, the affidavit was intended to establish some basis in fact; the deponent has devoted considerable time to researching issues related to opioid abuse; and the

affidavit was not tendered as expert opinion. Rather, it was presented in the capacity of a bibliographer, so to speak.

[43] I adopt the rationale of Zarzeczny J. in *Brooks QB* and find that the affidavit is admissible. As was the case in *Brooks QB*, it is admitted, not as expert opinion evidence but as evidence with respect to establishing some basis in fact respecting the proposed class action claims and certification criteria.

V. CERTIFICATION CRITERIA

[44] As outlined above, the test for certification requires the Plaintiffs to show “some basis in fact” for each of the certification requirements, except the cause of action requirement, for which the “plain and obvious” test applies. It is necessary to address each criterion individually.

(1) Do the pleadings disclose a reasonable cause of action (s. 6(1)(a))?

(a) Test

[45] Whether a pleading discloses a reasonable cause of action is evaluated under Rule 7-9(2)(a) of *The King’s Bench Rules*, using the standard for motions to strike: assuming all pleaded facts are true, the claim must clearly have no reasonable chance of success. Material facts are accepted as true unless they are absurd or unverifiable. Courts interpret pleadings generously, but mere assertions or speculative legal conclusions are not considered material facts and are not assumed to be true. See *Pro-Sys Consultants* at para 63; and *Das v George Weston Ltd.*, 2018 ONCA 1053 at para 74, 43 ETR (4th) 173.

[46] It is with this test in mind that the “reasonable cause of action” criterion will be analyzed.

(b) Breach of Treaty rights

[47] The Plaintiffs allege that Canada has unjustifiably breached, and continues to breach, its obligations under Treaty 6 by failing to provide necessary and sufficient assistance to band members affected by opioid addiction. In support of their claim, the Plaintiffs purport to rely on two specific provisions within Treaty 6: the “Pestilence” clause and the “Medicine Chest” clause. These provisions are part of the treaty signed in 1876 at Fort Carlton and Fort Pitt.

[48] The “Pestilence” clause represents a promise by the Crown to provide aid in the event of famine or widespread disease, suggesting a duty to alleviate suffering through appropriate assistance. The “Medicine Chest” clause obligates the Crown to maintain a medicine chest at the residence of the Indian agent, accessible for use by Indigenous peoples covered by the Treaty.

[49] Specifically, these clauses read as follows:

The Pestilence clause

That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.

The Medicine Chest clause

That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.

[50] The Plaintiffs argue that, when read in the context of treaty rights jurisprudence, these two provisions establish a clear and actionable obligation on the part of the Crown to consult with Treaty 6 bands and to develop and implement an

effective abatement program to address the opioid crisis.

[51] Although the Plaintiffs' claim refers to both the "Pestilence" clause and the "Medicine Chest" clause, the certification application is silent with respect to the latter and it is only the Pestilence clause that is advanced as the basis for a common issue. The Plaintiffs acknowledge this and rely only on the "Pestilence" clause to found their claim; however they contend that the "Medicine Chest" clause should be considered on the basis that it "informs" the way in which the "Pestilence" clause should be interpreted.

[52] Canadian courts have recognized that treaty clauses such as the "Pestilence" clause and the "Medicine Chest" clause should be given an ongoing and modern application. For example, in *R v Marshall*, [1999] 3 SCR 456 (QL) at para 78, the Court set forth the following:

78 This Court has set out the principles governing treaty interpretation on many occasions. They include the following.

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R v Sundown*, [1999] 1 SCR 393 at para 24; *R v Badger*, [1996] 1 SCR 771 at para 78; *R v Sioui*, [1990] 1 SCR 1025 at 1043; *Simon v The Queen*, [1985] 2 SCR 387 at 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting Sui Generis Treaties" (1997), 36 Alta L Rev.46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, [page512] and the Sparrow Justificatory Test" (1997), 36 Alta L Rev 149.
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: *Simon* at 402; *Sioui* at 1035; and *Badger* at para 52.
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sioui* at 1068-69.
4. In searching for the common intention of the parties, the

integrity and honour of the Crown is presumed: *Badger* at para 41.

5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger* at paras 52-54; *R v Horseman*, [1990] 1 SCR 901 at 907.
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger* at paras. 53 et seq.; *Nowegijick v The Queen*, [1983] 1 SCR 29 at 36.
7. A technical or contractual interpretation of treaty wording should be avoided: *Badger*; *Horseman*; and *Nowegijick*.
8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: *Badger* at para 76; *Sioui* at 1069; and *Horseman* at 908.
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: *Sundown* at para 32; and *Simon* at 402.

[53] Canada argues that the Plaintiffs' claim fails to provide a factual foundation to support the specific issues allegedly experienced by any of the Treaty 6 bands as a result of the purported lack of programs, supports or funding. Furthermore, Canada contends that the allegation of a breach of Treaty 6 lacks particulars as to how the Treaty was breached. Canada submits that the Plaintiffs are seeking a "free-ranging general inquiry" and are asking the Court to determine the alleged breach "in a vacuum". According to Canada, the Plaintiffs' failure to plead material facts renders the statement of claim deficient and incapable of disclosing a reasonable cause of action. Additionally, Canada argues that the Plaintiffs have provided no basis upon which to assess what relief or damages, if any, may be appropriate or required for each class member.

[54] In my view, Canada's position that the claim does not disclose a reasonable cause of action is without merit. The claim does plead material facts which, if accepted as true, provide a sufficient basis for the action. It cannot fairly be said that the claim has no reasonable prospect of success. It is well established that breach of treaty rights is an identifiable cause of action. Treaty rights, as illustrated by the above referred to principles, are a unique type of agreement that attract special principles of interpretation and ought not be interpreted in a static or ridged way. While it is far from certain that the Plaintiffs will succeed in prosecuting their claim, it easily satisfies the relatively low bar of establishing a reasonable cause of action. Whether a treaty right as alleged exists, and whether there is an unjustified infringement of the right, are questions to be determined at another time.

[55] I find that the requirements of s. 6(1)(a) of the *Act* have been met.

(2) Is there an identifiable class (s. 6(1)(b))?

(a) Test

[56] Section 6(1)(b) of the *Act* states that a party seeking to have an action certified must satisfy the court that there is an identifiable class. In *Western Canadian Shopping Centres* at para 38, the Supreme Court of Canada described the requirement and the rationale for the requirement as follows:

38 ... First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to

membership in the class be determinable by stated, objective criteria [cites omitted].

Principles that can be extracted from this passage and other jurisprudence in the country are as follows:

- (i) the class should be clearly defined;
- (ii) the class definition shall state objective criteria by which members of the class can be identified (see *Western Canadian Shopping Centres* at para 38);
- (iii) the class definition should be rationally connected to the common issues (see *Western Canadian Shopping Centres* at para 38);
- (iv) the class should be defined without elements that require a determination of the merits of the claim (see *Western Canadian Shopping Centres* at para 38);
- (v) there must be a rational connection between the proposed class definition, the proposed causes of action and the proposed common issue (see *Hoffman v Monsanto Canada Inc.*, 2005 SKQB 225 at para 202, [2005] 7 WWR 665 [*Hoffman*]);
- (vi) the class must not be unnecessarily broad (see *Hollick* at para 21);
- (vii) it is not required that the class be defined such that it would be necessary that every class member would, by definition, be entitled to damages should the common issues be resolved against the defendant (see *Western Canadian Shopping Centres* at para 39; and *Sorotski v CNH Global N.V.*, 2007 SKCA 104 at para 44, [2008] 1 WWR 386 [*Sorotski*]);
- (viii) the class should not be arbitrarily under-inclusive or over-inclusive (see *Paramount Pictures (Canada) Inc. v Dillon* (2006), 29 CPC (6th) 13 (Ont Sup Ct); and *Hoffman*);

- (ix) on a motion to certify or on an appeal, the court may modify the definition of the class or the common issues if the court is of the view that such modification is required to accord with the *Act* (see *Williams v Mutual Life Assurance Co. of Canada* (2000), 51 OR (3d) 54 (Ont Sup Ct); *Zicherman v Equitable Life Insurance Co. of Canada* (2003), 226 DLR (4th) 112 (Ont CA); and *Wilkins v Rogers Communications Inc.* (2008), 66 CPC (6th) 251 (Ont Sup Ct)); and
- (x) a solution to the dilemma that a class definition must not be overly broad, yet not restricted by an impermissible reference to merit, is the use of the “claims made” limiter (see *Merck Frosst Canada Ltd. v Wuttunee*, 2009 SKCA 43, [2009] 5 WWR 228).

(b) *Identifiable class analysis*

[57] Canada’s concern regarding the difficulty in determining which Indian bands are entitled to the benefits flowing from Treaty 6 is not without foundation. The historical and legal complexities surrounding treaty adherence make the identification of beneficiary bands a nuanced exercise. One cannot simply rely on the list of original signatories to Treaty 6. The Treaty-making process extended beyond the initial signing, with several bands adhering to Treaty 6 at later dates. These subsequent adhesions carry legal weight and must be considered in any determination of which bands are potential class members.

[58] This point is underscored in the affidavit of Peter Havlik, filed by the Plaintiffs, in which he outlines some of the challenges involved in confirming which bands fall under Treaty 6. In the report attached to his affidavit, he explains that determining which bands fall within the scope of Treaty 6 is not necessarily straightforward:

It is not uncommon for Bands within a Treaty area to have

amalgamated (either by choice or by force) or to have been split into two or more successor Bands. Understanding these changes impacts not only who is deemed to be a signatory to Treaty No. 6, but also impacts access to and release of information related to any singular Band.

The first, and most readily accessible, resource to begin tracing successor Bands is a finding aid developed by Library and Archives Canada (LAC) in 1994, entitled “FA 10-12: Guide to Indian Bands and Agencies in Western Canada, 1871-1959”. HCG acquired, and now holds, this finding aid from the Pacific Federal Record Centre, the Vancouver branch of LAC, on 20 July 2015. The HCG team then used Adobe Acrobat’s integrated “optical character recognition” or “OCR” feature to make the document keyword searchable.

Using Adobe’s integrated keyword search function, “Treaty 6” yields 99 potential results which will require more thorough review within this finding aid. Additional analysis of this document in full will also be required to ensure that reliance on OCR does not lead to the misidentification of other possible Band splits or amalgamations within Treaty No. 6. ...

[59] Recognizing this complexity, the Plaintiffs have deliberately framed their class definition as “successor bands to the signatories of Treaty 6”. This formulation acknowledges that treaty rights and obligations may extend beyond the original signatory bands to those that have, through historical continuity or formal adhesion, become successors in interest. This approach reflects the evolving nature of treaty relationships and the importance of continuity in Indigenous governance and identity.

[60] Unlike commercial contracts, where the parties are clearly and definitively identified at the time of execution, treaties involving Indigenous peoples often involve fluid and evolving relationships. The scope of a treaty is not always immediately apparent, and determining who falls within its ambit requires careful historical, legal and anthropological analysis.

[61] This issue of “what is an Indian Band” was squarely addressed in *Papaschase Indian Band No. 136 v Canada (Attorney General)*, 2004 ABQB 655, 43

Alta LR (4th) 41 [*Papaschase*]. In that case, Justice Slatter (as he then was) grappled with the question of whether the Papaschase Indian Band had ceased to exist. At paras. 165 through 192 of his decision, Slatter J. provides a detailed analysis of the historical record, band membership and governmental recognition, ultimately concluding that the Papaschase Band “does not exist”.

[62] Importantly, the decision illustrates that, while the inquiry may be challenging, there are objective criteria by which the existence of a band can be determined. These criteria include historical documentation, continuity of governance, recognition by other Indigenous groups and the Crown and evidence of community cohesion. The case underscores the necessity of a rigorous and evidence-based approach when assessing the status and rights of Indigenous bands in the context of treaty entitlements.

[63] In the present case, the parties have reached agreement on the precise identity of the 47 bands currently recognized as falling within the scope of Treaty 6. Each proposed class member is identified by name, and the list of bands covered by Treaty 6 is publicly available on official government websites.

[64] Canada has rightly noted that, upon further and careful review, it may be that not all bands currently listed are, in fact, successor bands to the original signatories of Treaty 6. Conversely, there may be additional bands that ought to be included. These are legitimate concerns. However, such determinations are not within the purview of the Court at the certification stage. The question at this juncture is not whether the list is exhaustive or perfectly accurate but whether the proposed class is objectively identifiable.

[65] I have little difficulty concluding that the proposed class meets this requirement. The 47 bands have been clearly identified and mutually agreed upon by the parties as those currently covered by Treaty 6. Whether that list should be broadened

or narrowed following further historical or legal analysis is a matter that can be addressed at a later stage. What matters for present purposes is that the class is defined with sufficient precision to permit objective identification of its members.

[66] Moreover, the class definition satisfies the other criteria for certification. In particular, it is rationally connected to the causes of action and the common issues and is not unnecessarily broad.

[67] Accordingly, for the reasons outlined above, I find that the identifiability requirement is met and the proposed class definition satisfies the requirements of s. 6(1)(b) of the *Act*.

(3) Do the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members (s. 6(1)(c))?

(a) *Test*

[68] Section 6(1)(c) of the *Act* requires, as a condition for certification, that the claims of the class members “raise common issues, whether or not the common issues predominate over other issues affecting individual members”. McLachlin C.J. in *Western Canadian Shopping Centres* explained the scope of this criterion as follows:

39 ... [T]here must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be “common” only where its resolution is necessary to the resolution of each class member’s claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member’s claim. However, the class members’ claims must share a substantial common ingredient to

justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

40 ... [W]ith regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

[69] In *Sorotski*, the Saskatchewan Court of Appeal considered *Hollick*, and offered the following observations, which are helpful in resolving the issue at hand in this case:

53 The facts in *Hollick* reveal a good deal about the manner in which the commonality requirement is to be applied. The proposed class action in that case was on behalf of some 30,000 people living in the vicinity of a landfill site which was alleged to have caused harm through noise and physical pollution. The Supreme Court found the commonality requirement to be satisfied because, for any putative class member to prevail individually, he or she would have to show, among other things, that the defendant emitted pollutants. The Court reached this conclusion notwithstanding that the common issue was merely one feature of the liability equation. In so doing, the Court necessarily accepted that many aspects of liability, as well as the question of damages, would have to be determined on an individual basis after the common issues trial. Nonetheless, it concluded the commonality requirement to have been satisfied.

54 The reasoning of the certification judge in this case with respect to commonality does not comply with the notion that common issues need not predominate over individual issues and it does not follow the approach reflected in *Hollick*. The judge focused on the various matters that might have to be considered in order to finally resolve questions of liability and damages as they relate to each member of the proposed class. He did not give adequate consideration to the issues common to each member of the class. This was an error of legal principle.

[70] The following core principles emerge from the above referred to statements:

- (i) In order to be considered a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary for the resolution of each class member's claim.
- (ii) It is not required that all, or even a majority, of the issues of law or fact of the class members be identical, similar or related; the question is whether the members' claims raise some questions of law or fact that are sufficiently similar or sufficiently related to justify a class action.
- (iii) An issue can be a common issue if it is an issue of fact or law that is common to all claims and its resolution would advance the litigation for (or against) a class.
- (iv) It is not necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the court will examine the significance of common issues in relation to individual issues.

Also, certification should be refused where numerous individual issues overwhelm common issues and where the issues are intrinsically individualistic. See *Kenney v Canada (Attorney General)*, 2016 FC 367 at para 37.

[71] These principles will guide the analysis that follows.

(b) Proposed common issues

[72] The common issues proposed by the Plaintiffs are as follows:

- (a) Is an opioid crisis a "pestilence" or "calamity" within the meaning of Treaty 6?

- (b) If so, is the Defendant obliged to provide “necessary and sufficient” assistance to relieve the opioid crisis on Treaty 6 reserves?
- (c) If yes, what form of abatement, damages or other relief should such “necessary and sufficient” assistance take?

[73] It should be noted that the Plaintiffs abandoned their claim for punitive damages that was initially pleaded in the statement of claim.

(c) Positions of the parties on “common issues”

[74] The Plaintiffs submit that the common issues they have identified indeed raise matters of shared concern. Proposed common issues (a) and (b) relate to the interpretation of Treaty 6. The Plaintiffs argue that the resolution of these issues will affect all class members equally and will determine whether Canada is obligated to provide assistance to the class members to mitigate the opioid addiction epidemic among class members.

[75] The Plaintiffs suggest that if these issues are resolved in the negative, it will be dispositive of each class member’s claim and will effectively conclude the action. Conversely, if the issues are resolved in the affirmative, Canada would be found to have breached its treaty obligations, thereby significantly advancing each class member’s claim.

[76] With respect to proposed common issue (c), the Plaintiffs assert that it also satisfies the criteria for a common issue. Given that treaties represent a solemn exchange of promises, the most appropriate relief is that which gives effect to the commitments made by the parties. The Plaintiffs seek two forms of relief—damages and abatement—either collectively or individually. They argue that damages are a recognized remedy for treaty breaches, and that an abatement program, which could be

implemented over a 10-year period, is laid out in the report attached to the affidavit of Ms. Brittz.

[77] The Plaintiffs contend that, regardless of which form of relief is ultimately deemed most appropriate at the common issues trial, the question of what relief is suitable under the terms of the Treaty is itself a critical and common issue for all class members.

[78] Canada takes issue with the position advanced by the Plaintiffs regarding the proposed common issues. It argues that these issues bypass several threshold questions that must first be addressed. Specifically, Canada asserts that it is necessary to determine:

- What additional resources may be required;
- What resources are sufficient;
- An assessment of the resources Canada has provided and continues to provide; and
- An evaluation of the resources available from the provinces.

[79] Canada submits that only after these preliminary considerations are resolved would it be appropriate to assess whether any outstanding requirements fall within either the “Medicine Chest” or “Pestilence” clauses of Treaty 6.

[80] Additionally, Canada argues that alleged failures cannot be determined on a class-wide basis as the opioid crisis involves complex issues that must be assessed on a First Nation-by-First Nation basis.

[81] Canada also contends that proposed common issue (c), which relates to damages and abatement, is incapable of resolution on a class-wide basis. This is because the Plaintiffs have not presented a credible or plausible methodology for assessing damages or for implementing a meaningful abatement program.

[82] In summary, Canada maintains that the Plaintiffs have failed to meet the “some basis in fact” threshold required to certify the proposed common issues.

(d) Common issues analysis

[83] I conclude that common issues (a) and (b) fall within the parameters of s. 6(1)(c) of the *Act* and are properly constituted common issues. It is evident that all class member bands ultimately determined to fall within the scope of Treaty 6 are entitled to its associated benefits. Moreover, it is reasonable to infer that evidence presented at a common issues trial is capable of demonstrating that many Indigenous persons within those bands have been adversely affected by opioid use in a manner comparable to, or more severe than, other Canadians.

[84] Common issue (a) asks whether the opioid crisis constitutes a pestilence or calamity within the meaning of the Treaty. The answer to this question is a substantial ingredient of each class member’s claim and its resolution is necessary for the resolution of each class member’s claim. Similarly, with respect to common issue (b), if the opioid crisis is found to constitute a pestilence or calamity, it is open to the Court to conclude that Canada bears a corresponding obligation to provide appropriate assistance to enable members of Treaty 6 to cope with its effects. This, too, is an issue that raises questions of fact or law that are common to all claims.

[85] Accordingly, the questions of whether the opioid crisis constitutes a pestilence or calamity within the meaning of Treaty 6 and whether Canada is obliged to provide necessary and sufficient assistance to relieve the opioid crisis on Treaty 6 reserves are clearly common issues. Success for one class member necessarily means success for all. The resolution of these questions would either advance or dispose of the claims of all class members.

[86] To satisfy the commonality requirement, there must be a rational

connection between the class and the common issues, and the determination of each common issue must contribute meaningfully to advancing the litigation. See *Lin* at para 29. This is the case here.

[87] The Pestilence clause of Treaty 6 provides that if a First Nation is overtaken by pestilence or general famine, the Crown will provide relief. Clauses of this nature have been interpreted liberally by the courts, extending far beyond their literal wording. For example, the Medicine Chest clause, which originally required a medicine chest to be kept at the house of the Indian agent for the use of First Nations, has since been interpreted as a promise of ongoing access to health care.

[88] Whether the Pestilence clause will receive a similarly expansive interpretation in the context of the opioid crisis remains uncertain and is a live issue to be determined through litigation.

[89] Although common issues (a) and (b) may be suitable for resolution through a common issues trial, the same cannot be said for common issue (c). Common issue (c) presupposes affirmative findings on issues (a) and (b), and concerns the nature and scope of the relief that Canada should provide if a breach of treaty rights is established. The proposed class is purportedly comprised, more or less, of 47 bands located across Alberta, Saskatchewan and Manitoba. While it is reasonable to assume that many members of these bands have been adversely affected by the opioid crisis, much like the broader Canadian population, the evidence does not sufficiently establish what assistance these bands have already received – or are receiving – by way of aid or assistance from Canada to address the opioid crisis. Nor have the Plaintiffs provided any indication of how one might determine the extent to which each band has been negatively impacted by opioid abuse. The bands vary significantly in size and population and are spread throughout three prairie provinces. Some may have received more support than others. Some may have been impacted more than others or more than

the general population. While the Plaintiffs have set forth some evidence that the Indigenous population, generally, is more susceptible to the negative effects of opioid addiction and abuse, the evidence falls short of establishing the mechanism by which it can be determined how each band has been impacted and why the resources provided by Canada are insufficient. Before any assessment of damages or abatement can be undertaken, a comprehensive evaluation is required to determine what resources are available to each band and its members and what support has already been provided. Only then could it be determined whether Canada has fallen short of its obligations.

[90] If, at trial, it were determined that the opioid crisis constitutes a pestilence within the meaning of Treaty 6, thereby obligating Canada to provide necessary and sufficient assistance, the critical question that follows is whether Canada failed to fulfil that obligation.

[91] While the resolution of common issues (a) and (b) would modestly contribute to the progress of the litigation, the magnitude, complexity and inherently individualized character of common issue (c) render its resolution pivotal; absent such resolution, the majority of substantive issues would remain unresolved.

[92] Although the Plaintiffs have attempted to present evidence regarding a method for assessing damages and/or implementing an abatement program for class members, the evidence is largely unsupported and relies heavily on the opioid class action cases in the United States.

[93] Moreover, and significantly, common issue (c) is overly vague. It asks the Court, if common issues (a) and (b) are found in the Plaintiffs' favour, to grant broad, undefined and non-specific remedies in the form of abatement, damages or other relief. A question of this nature, given the complex and individualistic circumstances of each potential class member, is virtually impossible to answer and lacks

commonality. Any attempt to provide relief would inevitably devolve into an unwieldy maze of individualized claims.

[94] In my view, the Plaintiffs have not established a sufficient basis in fact to support common issue (c) as a common issue suitable for certification.

[95] Accordingly, I find that common issues (a) and (b) raise common issues; however, common issue (c) does not.

(4) Would a class action be the preferable procedure for the resolution of the common issues (s. 6(1)(d))?

(a) Test

[96] One of the criteria that a proposed representative plaintiff must meet for an action to be certified as a class proceeding is that a class action must be the preferable procedure for resolving the common issues.

[97] In *Hollick*, McLachlin C.J. provided a helpful framework for approaching this inquiry:

27 ... The parties agree that, in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions - judicial economy, access to justice, and behaviour modification: see also *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.)

28 The report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": Report of the Attorney General's Advisory Committee on Class Action Reform, *supra*, at p. 32. In my view, it would be impossible to determine

whether the class action is preferable in the sense of being a “fair, efficient and manageable method of advancing the claim” without looking at the common issues in their context.

...

30 The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues “predominate” over the individual issues: see *Federal Rules of Civil Procedure*, Rule 23(b)(3) (stating that class action maintainable only if “questions of law or fact common to the members of the class predominate over any questions affecting only individual members”); see also *British Columbia Class Proceedings Act*, s. 4(2)(a) (stating that, in determining whether a class action is the preferable procedures, the court must consider “whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members”). I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General’s Advisory Committee put it, the preferability requirement asks that the class representative “demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings” (emphasis added): M. G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act*, 1992 (1993), at p. 27.

[98] In *Schroeder v DJO Canada Inc.*, 2010 SKQB 125 at para 133, [2010] 10 WWR 324, aff’d in *DJO Canada, Inc. v Schroeder*, 2011 SKCA 106, [2012] 1 WWR 485, I summarized several key principles derived from *Hollick* and other decisions:

133 ...

- The class action must represent a fair, efficient and manageable procedure that is preferable to any other alternative method of resolving the claim, such as joinder, test case or consolidation of actions. All alternate forms of proceedings put forth by the parties ought to be considered by the court. See *Cloud v. Canada (Attorney General)*

(2004), 73 O.R. (3d) 401 at paras. 73-75 (C.A.); *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 23 (Ont. S.C.J.); *Knight v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 235, 267 D.L.R. (4th) 579 at para. 24; *Lavier v. MyTravel Canada Holidays Inc.* (2009), 248 O.A.C. 378 (Div. Ct.), rev'g (2008), 59 C.P.C. (6th) 57 (Ont. S.C.J.); *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 at para. 50 (S.C.J.), aff'd (2001), 17 C.P.C. (5th) 103 (Ont. Div. Ct.), aff'd (2003), 226 D.L.R. (4th) 112 (Ont. C.A.) and (2003), 226 D.L.R. (4th) 131 (Ont. C.A.); and *Brimner v. Via Rail Canada Inc.* (2000), 47 O.R. (3rd) 793 at para. 7 (Div. Ct.), rev'g (1999), 47 O.R. (3d) 798 (S.C.J.).

- The determination of the common issues in a class action should advance the proceeding in accordance with the policy objectives of the Act, namely:
 - access to justice;
 - judicial economy; and
 - modification of the behaviour of the wrongdoer.

See *Schweyer v. Laidlaw Carriers Inc.* (2000), 44 C.P.C. (4th) 236 (Ont. S.C.J.); and *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 at paras. 119-121 (S.C.J.), leave to appeal refused, (2000), 52 O.R. (3d) 20 (S.C.J.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 88 (QL).

- The court, in reaching its decision on preferable procedure, should consider all of the common and individual factors as part of a factual matrix. See *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 at para. 25 (Ont. Ct. Gen. Div.); *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.); and *Gregg v. Freightliner Ltd. (c.o.b. Western Star Trucks)*, 2003 BCSC 241, 35 C.C.P.B. 31 at para. 81. This would include a consideration of the nature of the proposed common issues, the individual issues which would remain after determination of the common issues, the factors listed in the Act, the complexity and management of the proposed **action** as a whole, and the general rights of the plaintiffs and the defendants. See *Chadha v. Bayer Inc.* (2001), 54 O.R. (3rd) 520 at para. 16 (Div. Ct.), rev'g (1999), 45 O.R. (3d) 29 (S.C.J.), aff'd (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 106 (QL);

and *Price v. Panasonic Canada Inc.* (2002), 22 C.P.C. (5th) 382 at para. 43 (Ont. S.C.J.).

- A class action is not a preferable procedure where, even after a determination of the common issues, the action would then break down into substantial individual trials because, in such a case, the advantages of a class proceeding would be lost. See *Western Canadian Shopping Centres, supra*, at para. 39; and *Heward v. Eli Lilly & Co.* (2007), 39 C.P.C. (6th) 153 at para. 104 (Ont. S.C.J.), leave to appeal to Divisional Court granted, (2007), 45 C.P.C. (6th) 309 (Ont. S.C.J.), appeal dismissed, (2008), 295 D.L.R. (4th) 175 (Ont. Div. Ct.).
- The more the individual issues will predominate, the less efficient the class action becomes. However, the preferability requirement will still be met even though, after the resolution of the common issues, substantial individual issues remain to be resolved. In that sense, the common issues need not predominate over individual issues. See *Cloud v. Canada (Attorney General), supra*, at paras. 73-75; *Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 42 O.R. (3d) 776 (Gen. Div.), rev'd on other grounds, [2001] O.J. No. 5368 (Div. Ct.) (QL), and *Lavier v. MyTravel Canada Holidays Inc., supra*.
- The preferability analysis cannot take place in a vacuum. The plaintiffs must establish that a class action is preferable to the use of individual proceedings to resolve the outstanding claims. See *Hollick v. Toronto (City), supra*, at para. 30; and Michael G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992*, (Aurora, Ont.: Canada Law Book, 1993) at 27.
- While the issue of whether individual issues predominate over common issues is not to be taken into account in the common issues analysis, it is an important factor to be considered in the preferable proceeding assessment because, in order to assess class action preferability, regard must be had to the option of using individual proceedings. The preferability requirement will not be satisfied if the common issues are overwhelmed by the individual issues that remain, such that the resolution of the common issues will essentially just mark the beginning of the process leading to the final disposition of the class members claims. See *Heward v. Eli Lilly & Co., supra*, at para. 104.

[99] Recently, the Saskatchewan Court of Appeal provided important guidance on the “preferable procedure” requirement in *Evans v General Motors of Canada Company*, 2024 SKCA 87, [2025] 2 WWR 575 [*Evans*]. In this decision, the Court reaffirmed the analytical framework for assessing preferability in certification applications. First, the court must determine whether a class proceeding offers a fair, efficient and manageable method for advancing the claim. Second, it must conduct a comparative analysis, weighing the relative advantages of a class action against all other reasonably available means of resolving the class members’ claims, including non-judicial avenues. The Court emphasized that the ultimate question is whether these alternative methods are preferable, not whether the class action would fully achieve the goals of fairness, efficiency and manageability, adding that the onus is on the plaintiff to show some basis in fact for the court to be able to conclude that a class proceeding is preferable to other options.

[100] It is with these basic principles in mind that I will analyze the “preferable procedure” criteria.

(b) Position of the parties

[101] The Plaintiffs submit that a class action is the preferable procedure as it would facilitate access to justice. They argue that litigating treaty rights cases is inherently challenging, complex and notoriously expensive. Pursuing remedies through a class action, they contend, would be more efficient, as the costs and efforts would be distributed among all class members. Moreover, the Plaintiffs assert that no other procedure can provide a remedy as just or effective as a class action. The resolution of the proposed common issues will determine Canada’s obligations under the Treaty and, consequently, its liability to all class members. This means that, for most class members, Canada’s liability will have been established before they are required to take

any active role in the proceedings, which is something that would not be possible under any other procedure.

[102] The Plaintiffs also contend that a class action would promote judicial economy. They argue that resolving the common issues would significantly advance the claim and avoid unnecessary duplication in fact-finding and legal analysis. They submit that the individual issues will be minimal. Once Canada's obligations are determined at the common issues trial, the only remaining question will be how relief is to be distributed.

[103] Additionally, the Plaintiffs argue that a class action would support the goal of behaviour modification. The resolution of the issues would provide Canada with clear guidance regarding its obligations under the Treaty moving forward.

[104] Canada, on the other hand, disputes the Plaintiffs' assertion that a class action is the preferable procedure, maintaining instead that the claim is more appropriately advanced through a representative proceeding. Canada contends that a class proceeding would not be fair, efficient or manageable, particularly given the possibility that class members could opt out and initiate separate actions covering substantially the same issues. Such a scenario is problematic as those who opt out would not be bound by the outcome of the class action, thereby undermining finality and consistency. Moreover, a fragmented litigation strategy, characterized by multiple parallel proceedings with potentially divergent outcomes, poses significant challenges in light of the collective nature of treaty rights. Canada therefore argues that a representative action is a more suitable mechanism for resolving the issues, as it binds all parties represented in the litigation and promotes coherence and judicial economy.

(c) *Preferability procedure analysis*

(i) *is a class action a fair, efficient or manageable method of advancing the claim?*

[105] The onus is on the plaintiff to establish some basis in fact for the court to be able to conclude that a class action is the preferable procedure: *Evans* at para 69.

[106] In my view, a class action is not a fair mechanism for advancing the Plaintiffs' claim. It fails to serve the interests of Indigenous peoples and Canada alike. This conclusion is based, in part, on the ease with which putative class members may opt out, thereby avoiding the binding effect of the ultimate determination in the action.

[107] As discussed above, the claim concerns an alleged breach of treaty rights. Treaty rights are a form of collective right, recognized through agreements between Indigenous First Nations and the Crown. These rights are primarily experienced and exercised by the collective group. A key feature of *The Class Actions Act* is that members of the proposed class can choose to opt out and pursue separate claims, regardless of whether the class action is ultimately successful. See s. 18 of the *Act*. This presents a challenge in the context of treaty rights, as a resolution of the class action would not resolve the claims of bands that choose to opt out.

[108] The idea that a treaty right would apply only to those bands that participated in the litigation—rather than universally—is intrinsically at odds with the spirit and purpose of treaty rights enforcement.

[109] This fundamental problem was acknowledged and discussed in *Gill v Canada*, 2005 FC 192 at paras 12-14, 271 FTR 139:

12 . . . some aboriginal claims, brought under former Rule 114, do not fit conveniently within the new Class Action Rules, particularly when the claim seeks a determination of collective rights as is the case here, where the Plaintiffs claim aboriginal and treaty rights and declaratory relief to that effect. The Supreme Court of Canada has on a number of occasions pointed

out that aboriginal right [*sic*] are collective rights, belonging to collective entities and this is particularly so when the rights are derived from treaty and thus are collective rights belonging to the band as a whole: for example see *R. v. Sparrow* [1990] 1 S.C.R. 1075 at pages 1111 and 1112; *R. v. Van der Peet* [1996] 2 S.C.R. 507, in which the Court looked upon the right claimed as a right, if it had existed, of the Sto:lo Indian Nation; *R. v. Marshall* [1999] 3 S.C.R. 533 at 546-547 where the individual on trial, claiming an aboriginal right, was required to demonstrate membership in an aboriginal community; and *R. v. Sundown* [1999] 1 S.C.R. 393 at paragraph 36 where Mr. Justice Cory, in writing the decision of the Court, observed that:

Any interest in the hunting cabin is a collective right that is derived from the treaty and the traditionary method of hunting. It belongs to the Band as a whole and not to Mr. Sundown or an individual member of the Joseph Bighead First Nation. It would not be possible, for example, for Mr. Sundown to exclude other members of this First Nation who have the same treaty right to hunt in Meadow Lake Provincial Park.

13 Given the collective nature of aboriginal rights and claims under treaty, they are difficult to reconcile with class action procedure. By way of example, Crown counsel point to Rule 299.23, which allows an individual to opt out of a class proceeding. This observation is pertinent because a declaration as to aboriginal rights and treaty benefits is not a remedy of an individual nature, accruing to only those individuals who participate in the litigation, but a collective right, not amenable to opting out, the result binding each and every member of the entity, here the descendants of a specific group of people.

14 Certainly there may be some elements of the Class Action Rules that might benefit this proceeding, for example the requirement as to a precise definition of the parties and the reporting requirements, to the group as a whole, pursuant to Rules 299.34 and 299.18(1)(e)(ii). However, all else being equal, these are provisions which can be dealt with as case management matters.

[Emphasis added]

[110] A process that could require a defendant, in this case, Canada, to defend multiple proceedings on different fronts, each stemming from the same alleged

violation of treaty rights, is also inherently unfair.

[111] Further, a process that gives rise to multiple proceedings is neither efficient nor conducive to judicial economy. This, too, is a factor in play when assessing the preferable procedure criteria. Since the potential band members may opt out there is the possibility that there could be multiple proceedings leading to conflicting decisions based on claims for different relief grounded on a different evidentiary base. This, as recognized by the Manitoba Court of Appeal in *Soldier v Canada (Attorney General)*, 2009 MBCA 12, 236 Man R (2d) 107 [*Soldier*], does not promote judicial economy:

78 ... the CPA [*Class Proceedings Act*] provides that a judgment binds those members of the class who do not opt out. Consistent with this, s. 26(2) provides that a defendant to a class proceeding is not bound by a judgment on common issues in any subsequent proceeding between the defendant and the persons who opted out. Individuals who opt out may properly take the position that they are not bound by the court's decision, and bring another action against the Crown seeking different relief, and upon different evidence. More will be said on the issue of evidence under the next section. See also s. 16 of the CPA. There is the potential for a multiplicity of proceedings and conflicting decisions in respect of a single document. Accordingly, the opting out provision becomes an issue. As the certification judge noted, there should not be more than one interpretation of the treaty depending upon whether individuals opt out of the class. Such a result would not lead to judicial economy.

[Emphasis added]

[112] It is acknowledged that in *Soldier*, the focus was on individual members being able to easily opt out, whereas here the issue concerns bands opting out individually. While the contexts differ, the underlying principle remains the same.

[113] In addition, it is untenable to have a situation where different courts or different judges could arrive at different interpretations of treaty rights. This was

recognized as problematic in *Horse Lake First Nation v Canada*, 2015 FC 1149 [*Horse Lake*]:

82 The opt out provision in class actions appropriately recognizes that an individual with a cause of action may choose to pursue his or her own recourse and should not automatically be bound by a court's decision in a class action. For that reason, a decision in a class action is not binding on an individual claimant who opts out, or on the defendant in respect of that individual's claim. This reality brings into sharp focus why class actions are not generally appropriate when the fundamental issue to be determined is the proper interpretation of a treaty provision. The Court cannot accept that different courts or judges may reach differing interpretations of a treaty (a result that is possible in a class action proceeding that is followed by other representative or individual actions). This alone is reason to find that where, as here, the claim rests upon the interpretation of a treaty, the claim will be better advanced by way of representative action, where opting out is not an option.

[Emphasis added]

[114] This same point was recently reiterated in *Nepinak v Canada*, 2025 FC 925 [*Nepinak*], where Zinn J. made the following observation:

66 Having weighed the submissions, I conclude that judicial economy favours a representative proceeding. Treaty interpretation demands consistency and uniformity. In the context of Treaty 4, the same provisions on Annuity Payments must yield the same outcome for all annuitants rather than different results for various subgroups. Because class proceedings permit members to "opt-out" with relative ease, it risks spawning parallel litigations in which identical treaty obligations may be interpreted differently. Such fragmentation undermines judicial economy for this group litigation, even if, in the long run, appeals and the principle of *stare decisis* will eventually result in the unification of differing interpretations. It is a risk that, in my view, a representative action would better minimize.

67 Decades of provincial and federal jurisprudence stress the need for consistent adjudication of treaty rights: *Kelly Trial* [2013 ONSC 1220] at paras 106 and 109-110; *Gill* [2005 FC 192] at paras 12-13; *Soldier* at para 78; *Horseman* at paras

78-82. At paragraph 82 of *Horseman*, I made this observation in *obiter*:

... class actions are not generally appropriate when the fundamental issue to be determined is the proper interpretation of a treaty provision. The Court cannot accept that different courts or judges may reach differing interpretations of a treaty (a result that is possible in a class action proceeding that is followed by other representative or individual actions).

I stand by this position. The reasoning is not that class actions lack utility in general, but rather that, once an individual or subgroup “opts out,” subsequent or parallel litigation can yield an entirely different ruling. In the context of this specific action, the resulting multiplicity of rulings stands in direct opposition to the objective of achieving a unified and consistent resolution of a treaty interpretation dispute through a collective proceeding.

[Emphasis added]

[115] The concept that the treaty interpretation is important and requires a unified and consistent application was recently underscored by the Supreme Court of Canada in *Ontario (Attorney General) v Restoule*, 2024 SCC 27, 494 DLR (4th) 383, where the following important comments were made by the Court:

113 Yet the future-oriented significance of historic treaties is only one element of their precedential character. Historic Crown-Indigenous treaties are binding not only on their direct signatories; they are binding upon *all Canadians* who, because of the Crown’s assertion of sovereignty, are also effectively implicated in these founding agreements. A treaty is a compact “not only among the provinces or ‘founding peoples’, but also ‘between the non-Aboriginal population and Aboriginal peoples’” ... Seen from this perspective, a court’s interpretation of an historic treaty has extensive normative reach. This further supports correctness review in historic treaty interpretation. A deferential standard of review ultimately “allows for the possibility of errors that will remain uncorrected in the interest of finality” Such a possibility is in tension with the precedential significance of historic treaty interpretation, not only for their immediate signatories, but for all Canadians, now and in the future.

[Emphasis in original]

[116] Judicial economy is assessed from the standpoint of whether the class action effectively consolidates the common issues, thereby avoiding duplicative fact-finding and fragmented legal proceedings. See *Rumley v British Columbia*, 2001 SCC 69, [2001] 3 SCR 184. When overlapping actions or segmented lawsuits are minimized, judicial economy weighs in favour of certification. However, where, as in this case, individual issues will continue to predominate following the common trial, such that the conclusion of the class action merely marks the beginning of the broader litigation process, this weighs against certification. When looking at the action brought by the Plaintiffs objectively and on a high-level basis, it becomes obvious that the claim is highly individualized such that the resolution of the individual issues for each band would be inextricably bound up with the interpretation of the treaty rights determination questions.

[117] Comparatively speaking, the resolution of common issue (a) and common issue (b) in favour of the Plaintiffs would not, in my view, appreciably advance the overall claims of the potential class members because each one is so highly individualized. The proposed litigation plan submitted by the Plaintiffs is vague and does not sufficiently address how damages and/or abatement could be efficiently resolved should the common issues be determined in favour of the Plaintiffs. The litigation plan is summarized and contained within the affidavit of Ms. Brittz. The report attached to the affidavit reveals that the majority of cost estimates for the litigation plan allotments are directed toward Ms. Brittz or entities managed or owned by Ms. Brittz.

[118] Further, the proposed litigation plan appears to disregard the autonomy and governance structure of the proposed First Nations class members and presents a problematic picture as to who would control the funds and to what extent each of the First Nations class members would receive them. According to the litigation plan, band class members would not be able to apply for any funds received as a result of a

successful action, but rather funding would be allocated automatically pursuant to various indexes and assessments for which Ms. Brittz cites no apparent supporting authorities.

[119] In addition, as argued by Canada, the Plaintiffs' litigation plan as set forth by Ms. Brittz, is deficient in that it does not consider or acknowledge the many relevant programs, services and funding already being provided by Canada, including:

- The Mental Wellness Program to support First Nations and Inuit access to mental wellness services;
- \$196.1 billion over 10 years in health care transfer payments to Canadian provinces/territories, including \$25 billion over 10 years to provinces and territories for bilateral agreements to address unique needs in four shared health priorities, including access to quality mental health and substance use services;
- \$2 billion over 10 years to address unique challenges Indigenous peoples face when it comes to fair and equitable access to quality and culturally safe health care services; and
- Grant and contribution funding through the Substance Use and Addictions Program, for harm reduction, treatment and recovery projects that focus on at risk and disproportionately impacted populations, including Indigenous peoples.

[120] Accordingly, I find that a class action would not constitute a fair, efficient or manageable method of advancing the claim. At best, it might address some preliminary issues but would leave the majority of substantive matters unresolved, with no practical means for resolution.

(ii) *comparative analysis respecting the relative advantage of a class action over other reasonably available means of resolving the claim*

[121] It is common ground that a band is a legal and political entity capable of suing and being sued. Accordingly, it would be possible for either or both of the Plaintiffs to bring an action in their own names to enforce treaty rights. The parties have provided historical context indicating that this now uncontroverted principle was not always the case. It is evident that this legal recognition has evolved over time. See *Samson Indian First Nation v Canada*, 2023 FC 1299.

[122] Historically, it was standard practice for a band to initiate legal proceedings through its Chief and Council in a representative capacity, acting on behalf of the band's members as a collective. See *Papaschase* at para 166 (reversed in part on other grounds, 2006 ABCA 392, 66 Alta LR (4th) 243, and restored 2008 SCC 14, [2008] 1 SCR 372).

[123] It is now settled law that an Indian band may sue or be sued directly and need not frame an action to enforce its rights and interests as a representative proceeding. See *Key First Nation v Lavallee*, 2021 FCA 123 at para 47. A conventional lawsuit is therefore a viable option.

[124] A conventional lawsuit brought by one or several bands is, in my respectful view, a viable option that could advance the Plaintiffs' claim without much of the complexity that is associated with class actions. There are many processes offered within *The King's Bench Rules* which, if managed effectively, could serve to streamline the process rather than cause it to become bogged down. For instance, Rule 7-1 of *The King's Bench Rules* provides for a summary determination of a "question or issue". A resolution of preliminary issues, such as those raised as common issues (a) and (b) might be able to move the claim forward in a relatively expeditiously manner. Given the relatively small number of potential Plaintiffs and the substantial damages being

sought, this approach offers another reasonable means of resolving the claim.

[125] In the present case, however, Canada submits that the most appropriate procedural vehicle to resolve the issues raised in the Plaintiffs' claim is a representative action, not because such a form is required, as it may have been in the past, but because it is the preferable approach. I agree.

[126] Representative actions are expressly contemplated and permitted under Rules 2-10 and 2-11 of *The King's Bench Rules*. While similar to class actions in many respects, representative proceedings differ in one critical way: they bind all individuals represented in the action, with no option to opt out.

[127] A properly framed representative action would include a mechanism for providing notice to affected parties, which, in this case, would be the other 45 bands who are part of Treaty 6. These bands would then have the opportunity to participate in the proceeding. Should they choose not to participate, they would assume the risk that any subsequent claim could be barred on the basis of abuse of process, thereby reducing the likelihood of inconsistent decisions.

[128] Representative actions have increasingly been recognized by Canadian courts as a more suitable procedural vehicle for advancing claims involving treaty rights. This preference is notably illustrated in cases such as *Soldier, Horse Lake* and *Nepinak*. In *Horse Lake*, the Court observed—albeit in *obiter dictum*—that the risk of inconsistent judicial interpretations of treaties, particularly in class actions where individual bands may opt out, supports the conclusion that representative actions are more appropriate for such claims. See *Horse Lake* at para 82.

[129] Further insight into the procedural evolution of representative actions in the Federal Court is provided in *Canada (Royal Mounted Police) v Canada (Attorney General)*, 2015 FC 1372 [RCMP]. In that case, the Court examined the historical

development of representative actions within the Federal Court Rules. It was revealed that these Rules were amended in response to advocacy from the Indigenous legal community, who sought a mechanism to facilitate collective claims without the procedural complexities inherent in class actions. This reform was intended to better accommodate Indigenous litigants seeking remedies for collective harms, particularly in the context of treaty and Aboriginal rights:

62 The defendant’s argument in favour of a representative action is that it is intended for use in cases of collective claims. This includes, but is not limited to, First Nations’ claims. Section 114 of the *Rules* concerning representative actions was repealed in 2002 and then later reinstated. Former Chief Justice Allan Lutfy and Ms. Emily McCarthy provided a history of this repeal and reinstatement in their article entitled “Rule-Making in a Mixed Jurisdiction: The Federal Court (Canada)” (2010), 49 SCLR (2d) 313. Though the reinstatement of section 114 was at the urging of members of the Aboriginal litigation bar (to facilitate collective claims without the need for some of the unnecessary complexities of a class action), it was recognized that other groups might also benefit from a simpler procedure for asserting collective claims. Labour litigation was cited as one area where this could be of assistance. Accordingly, it was decided that the reinstated Rule permitting representative actions would not be limited to the context of Aboriginal litigation.

[Emphasis added]

[130] In *RCMP*, the Court found that although the claim was not brought by Indigenous parties, it was nonetheless based on collective rights and therefore more appropriately addressed through a representative action.

[131] The Plaintiffs argue that the “opt-out” concern associated with class actions also applies to representative actions as a band could choose not to join the representative action—effectively opting out. While this observation is accurate on one level, it overlooks a critical distinction. In a class action, the opt-out mechanism is straightforward and preserves the right of the party who opts out to pursue separate

litigation, expressly allowing for the possibility of inconsistent outcomes or multiple trials. In contrast, in a representative action, an interested party must actively join and agree to be bound by the final determination of the court. That determination would be binding on both Canada and the participants in the representative action. The doctrines of *stare decisis*, judicial comity and abuse of process could operate to preclude Canada and those that choose not to participate in the representative action from relitigating the interpretation of Treaty 6.

[132] Unlike many consumer claims, which may involve dozens, hundreds or even thousands of potential class members with relatively minor individual claims—making individual proceedings or representational actions impractical—this case involves a defined group of approximately 47 potential members, each with potentially substantial claims. I find that the size and nature of the group render it well-suited for resolution through a representative proceeding.

[133] In my respectful view, the preferable procedure would be a conventional lawsuit or a representative action. A class action is not the preferable procedure for the claim as currently framed.

[134] Accordingly, I find that the Plaintiffs have failed to establish some basis in fact that a class action would be the preferable procedure to resolve the common issues pursuant to s. 6(1)(d) of the *Act*.

(5) An appropriate representative plaintiff (s. 6(1)(e)(i)-(iii))

(a) Would fairly and adequately represent the interests of the class

[135] Another prerequisite for certification is the presence of an individual willing to be appointed as a representative plaintiff who can fairly and adequately represent the interests of the class. There is no issue with respect to the ability of an Indian band to sue. Although not an incorporated body, Indian bands are statutory

bodies with a variety of powers, and they are legal entities separate from their members with the status to sue or to be sued: *King v Gull Bay Indian Band* (1983), 38 CPC 1 (Ont Dist Ct); *Bannon v Pervais* (1989), 68 OR (2d) 276 (Ont Dist Ct); *Clow Darling Ltd. v Big Trout Lake Band* (1989), 70 OR (2d) 56 (Ont Dist Ct); *Commandant v Wahta Mohawks* (2006), 48 CCEL (3d) 29 (Ont Sup Ct); and *West Moberley First Nations v British Columbia*, 2007 BCSC 1324, [2008] 5 WWR 746.

[136] A band council may sue or be sued in its own name: *Kucey v Peter Ballantyne Band Council*, [1987] 3 WWR 438 (Sask CA); *Whitebear Band Council v Carpenters Provincial Council Saskatchewan* (1982), 135 DLR (3d) 128 (Sask CA). In *Western Canadian Shopping Centres*, McLachlin C.J. described this requirement at para. 41 as follows:

41 ... the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class

[137] The Plaintiffs propose that the Lac La Ronge Indian Band be appointed as the representative plaintiff. The Band is a signatory to Treaty 6. In her affidavit, Chief Cook-Searson affirms her understanding of the responsibilities associated with acting as a representative plaintiff, including receiving information from and providing instructions to counsel. She further deposes that she is committed to advancing the best interests of the class. Chief Cook-Searson has indicated that her Band is willing to assume the role of representative plaintiff and that she has the time necessary to dedicate to the proceeding. Her affidavit demonstrates both her knowledge of the matter and her

commitment to the class action.

[138] Accordingly, I find that the proposed plaintiff is willing and prepared to be appointed as the representative plaintiff and that she would fairly and adequately represent the interests of the class.

(b) Has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action

[139] As outlined above, I am not satisfied that the Plaintiffs have presented a plan for the class action that sets out a workable method for advancing the claim on behalf of the class. As previously noted, even if common issues (a) and (b) were resolved in favour of the Plaintiffs, the subsequent course of the litigation remains uncertain. The Plaintiffs have set out in their materials what they characterize as a workable method of advancing the action. The Plaintiffs contend that the plan presented is not “the plan” but merely an illustration of “a plan”. It is replete with vague assertions and placeholders that extend well beyond the notion of mere approximations. Ms. Brittz’s report, albeit well intentioned and not intended to be implemented in its current form, is, at best, aspirational. One section of the document, described as an “estimates based on the fees currently paid to prospective team members for similar services”, contains the total of \$14,367,600.00. Although the total represents a compilation of various figures, it is comprised of soft and unsubstantiated entries so vague and unsupported that the resulting number is essentially meaningless, appearing to be plucked out of thin air. The report also lists numerous prospective team members who hail from all over the world, including West Virginia, Tennessee and South Africa. While their credentials are undoubtedly impressive, the report does not clearly explain how these individuals would be involved in any abatement program.

[140] With respect, the workable method of advancing the action, presumably

through some form of abatement, is so detached from the reality of the acute circumstances facing Treaty 6 members so as to make it of little practical value.

[141] Further, the plan lacks any substantive detail regarding how the individual claims, which are both complex and significant, could even begin to be resolved.

[142] If this were the sole deficiency in the Plaintiffs' case, it might have been appropriate for the Court to grant leave to file additional documentation demonstrating a clearer and more practical method of proceeding. However, given my conclusion that the Plaintiffs have failed to establish that a class action is the preferable procedure, the absence of a workable method to advance the claim is ultimately academic.

(c) Does not have, on the common issues, an interest that is in conflict with the interests of other class members

[143] There is no evidence to suggest that the proposed representative plaintiff is in a conflict with the other potential class members. Accordingly, I find that Lac La Ronge Indian Band is not in conflict and that it would be a suitable and appropriate representative plaintiff, had the class action been certified.

VI. CONCLUSION

[144] The Lac La Ronge Indian Band and the Peter Ballantyne First Nations have applied to this Court for an order that the within action be certified as a class action. Section 6(1) of *The Class Actions Act* requires that the court certify an action as a class action on application if the court is satisfied that the criteria set forth in that section have been met. For the reasons cited above, I conclude that not all of the certification criteria have been met.

[145] Although the pleadings disclose a cause of action (s. 6(1)(a)), there is an identifiable class (s. 6(1)(b)), two of the three proposed common issues do raise

common issues (s. 6(1)(c)) and the Lac La Ronge Indian Band is a suitable representative plaintiff (s. 6(1)(e)), I find that the Plaintiffs have failed to establish that a class action is the preferable procedure (s. 6(1)(d)). They have also failed to demonstrate a workable method for advancing the action on behalf of the class. While the latter deficiency was considered in the context of the preferable procedure analysis, it was not determinative; had it been the only shortcoming, it might have been addressed by permitting the Plaintiffs to file an amended plan.

[146] Accordingly, the application to certify the action as a class action is denied.

C.J.K.B.
M.D. POPESCU