Date: 20251215
Docket: CI19-01-22143
(Winnipeg Centre)
Indexed as: Nelson v. Canada (Attorney General)
Cited as: 2025 MBKB 155

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

ZONGIDAYA NELSON, ON HIS OWN BEHALF, ON BEHALF OF THE ROSEAU RIVER ANISHINAABE FIRST NATION, AND AS REPRESENTING A GROUP OF PERSONS WHO ARE ENTITLED TO RECEIVE AN ANNUITY PAYMENT FROM THE CROWN PURSUANT TO TREATY ONE,	)	Michael Rosenberg Jason Zushman Norman Rosenbaum for the plaintiff
plaintiff,	)	
- and -	)	
THE ATTORNEY GENERAL OF CANADA,	)	Scott Farlinger Neil Goodridge Christine Williams Sydney Ramsay for the defendant
defendant,	)	
- and -	)	
BROKENHEAD OJIBWAY FIRST NATION and SWAN LAKE FIRST NATION,	)	Brad Regher Ryan Lake Corinna Steffen Leticia Wabash for the moving parties
moving parties.	)	
	)	Judgment Delivered: December 15, 2025

GRAMMOND J.

INTRODUCTION

[1] The plaintiff seeks a variety of items of relief in this action relative to the payment of an annuity by the Crown pursuant to Treaty 1, signed in 1871.

[2] In February 2022, Edmond J. of this court (as he then was) granted a representation order in this matter (the "Representation Order" or the "Order") which included the following provisions:

> 1. THIS COURT ORDERS that a Representation Order is granted in favour of the Plaintiff, Zongidaya Nelson, to bring the claim forward on his own behalf and on behalf of the Roseau River Anishinabe First Nation, to represent a group of persons who are entitled to receive the annuity payment pursuant to Treaty 1 from the Crown.
>
> …
>
> 3. THIS COURT ORDERS that Zongidaya Nelson shall provide notice of the claim by providing a copy of the Re-Amended Statement of Claim, and a copy of this Order, to the Chief and Council of all First Nations which are members of Treaty 1, other than the Roseau River Anishinabe First Nation, by way of registered mail, and the Plaintiff will provide a report to the Honourable Court and to the Defendant upon such notice being effected.

[3] The parties agree that there are seven Treaty 1 First Nations, as follows:

a) Roseau River Anishinabe First Nation ("RRAFN");
b) Long Plain First Nation;
c) Sagkeeng Anicinabe Nation;
d) Sandy Bay Ojibway First Nation;
e) Pequis First Nation;
f) Swan Lake First Nation; and
g) Brokenhead Ojibway First Nation.

[4] The moving parties, Brokenhead Ojibway First Nation and Swan Lake First Nation (the "Moving Parties"), have requested an order varying the Representation Order to

exclude them and their respective memberships from the scope of the Representation Order, and for a declaration that any decision made after a trial in this matter is without prejudice to their respective rights and claims. These reasons reflect my decision on the motion.

BACKGROUND

[5] A timeline of relevant events in this matter includes the following:

a) **July 22, 2019**: the plaintiff filed the statement of claim;

b) **July 5, 2021**: RRAFN issued a Band Council Resolution ("BCR") providing its full authorization to the plaintiff to advance the claim in this matter;

c) **February 11, 2022**: Justice Edmond granted the Representation Order, on a consent basis;

d) **January 19, 2023**: the plaintiff and his counsel attended a meeting with the Treaty 1 First Nations, including the Moving Parties, to discuss this action, the Representation Order, and any questions;

e) **January 23, 2023**: the plaintiff served the Treaty 1 First Nations, including the Moving Parties, with the claim and the Representation Order by registered mail;

f) **November 20, 2023**: the plaintiff and his counsel met with leadership from each of the Treaty 1 First Nations, including the Chiefs of the Moving Parties, and gave a presentation on this action including the status of the case and next steps. The written presentation specified that the claim

was "on behalf of the group of people who receive an annuity under Treaty 1";

g) **February 20, 2024**: the plaintiff's counsel wrote to the Treaty 1 First Nations, including the Moving Parties, and repeated that all annuitants were included in the claim. Counsel also asked that the Treaty 1 First Nations attend an advisory circle to discuss the claim;

h) **March 28, 2024**: counsel appeared at a case management conference before me, and trial dates were set for February 2026;

i) **January 20, 2025**: the Moving Parties (and two other plaintiffs) filed a claim in the Federal Court of Canada alleging breaches of Treaties 1 and 2 which they have proposed will proceed as a class action (the "Proposed Class Action");

j) **February 14, 2025**: the plaintiff's counsel wrote to the Treaty 1 First Nations, including the Moving Parties, and repeated that all annuitants were included in the claim. Counsel again asked that the Treaty 1 First Nations attend an advisory circle to discuss the claim;

k) **February 26, 2025**: the Moving Parties advised the plaintiff that they intended to bring a motion to be excluded from this action; and

l) **May 16, 2025**: the Moving Parties filed the motion.

[6] To be clear, the plaintiff's affidavit reflects additional points of contact with the Moving Parties that I have not listed above, though I accept the plaintiff's evidence with respect to those efforts.

EVIDENTIARY ISSUES

Affidavits of Chiefs Gordon Bluesky and Jason Daniels filed on behalf of the Moving Parties (the "Bluesky and Daniels Affidavits")

[7] Court of King's Bench Rule 39.01(4) provides that an affidavit for use on a motion may contain statements of the deponent's information and belief if the source of the information is specified in the affidavit.

[8] The defendant argued that both the Bluesky and the Daniels Affidavits reflect multiple assertions of fact preceded by the phrase "I am told and do verily believe …" or similar language, without identification of the source of the information, such that the evidence is not properly before the court. The defendant also submitted that the Bluesky and Daniels Affidavits reflect many statements that constitute argument relative to the merits of the issues before the court and are not proper evidence.

[9] The Moving Parties pointed to ***Mitchell v. M.N.R.***, 2001 SCC 33, where the court commented upon the unique and inherent evidentiary difficulties often encountered in Indigenous rights claims, and the flexible approach to Indigenous evidence that must be accommodated. In addition, the Moving Parties noted that in ***Winnipeg (City) v. Caspian Projects Inc. et al.***, 2020 MBQB 120, the court stated that although identification of source information is generally a precondition to admissibility, that approach should not be applied in "an overly rigid fashion", and that evidence may be sufficient if the source of the information and belief is obvious, if the affidavit was read generously.

[10] I note that some of the impugned evidence relates to events or circumstances that preceded, surrounded, or followed the signing of Treaty 1 in 1871. I agree with the defendant that the source of the deponents' information and belief is not apparent on the face of the affidavits, but I recognize that this type of information would have been passed down over a lengthy period of time, presumably by various sources, such that strict compliance with Rule 39.01(4) in 2025 would be difficult. Certainly, given the nature of the historical evidence, I am prepared to apply the rules flexibly.

[11] Having said that, I am also mindful of the comments in ***Interlake Reserves Tribal Council Inc. et al. v. Manitoba***, 2022 MBQB 131, that in these circumstances the court must inquire into whether a witness represents a reasonably reliable source of history, and should seek to discern what evidence has been provided based upon reliable Indigenous traditional knowledge versus that which is unreliable speculation, opinion, and argument. In this case, the Bluesky and Daniels Affidavits do not reflect any details of historical sources or traditional knowledge, which makes it difficult to determine the reliability of the historical evidence.

[12] In addition, while historical evidence regarding the interpretation of Treaty 1 has been advanced as context and will be highly relevant to the merits of the claim at trial, it is not particularly relevant to the motion before me. In other words, the evidence does not help me decide how the Representation Order ought to be interpreted, and whether it should be varied.

[13] For all of these reasons, I have attached little weight to the historical evidence in the Bluesky and Daniels Affidavits for the purposes of this motion.

[14] In addition, I agree with the defendant that portions of the Bluesky and Daniels Affidavits reflect argument, some of which are characterized as the deponents' "beliefs" on, *inter alia*, why the interests of the Treaty 1 First Nations would be better served by proceeding with the Proposed Class Action instead of this action, and why First Nations governments, and not the plaintiff, ought to prosecute a claim relative to annuity payments under Treaty 1. These statements are in the vein of submissions, are not proper evidence, and I will not consider them on the motion[1].

Affidavit of Dr. Victor P. Lytwyn filed by the Moving Parties

[15] The Moving Parties filed an affidavit affirmed by Dr. Victor Lytwyn (the "Lytwyn Affidavit"), who holds a Ph.D. in historical geography, and who deposed that he is an expert in treaty and Aboriginal rights. In addition to his *curriculum vitae*, attached to his affidavit are two documents that he described as "expert opinion reports", one of which pertains to the signing of Treaty 1, and the other of which pertains to additional promises outside of Treaty 1.

[16] The plaintiff submitted that the Lytwyn Affidavit is inadmissible because:

a) the notice of motion did not reflect that the Moving Parties intended to rely upon expert evidence, and the parties were not given notice of that intention until the Lytwyn Affidavit was served on June 17, 2025;

b) given that the motion was scheduled to proceed on a tight timeline, the plaintiff had no opportunity to respond to the affidavit in kind;

[1] The specific paragraph references within the affidavits to which the defendant objected on both issues are listed in Exhibit "O" to the affidavit of Samantha Novak affirmed July 14, 2025.

c) the plaintiff requested from counsel disclosure of the letter of instruction to Dr. Lytwyn and directed Chief Bluesky to bring it to his cross-examination, but the letter was not provided. At Chief Bluesky's cross-examination, counsel for the Moving Parties objected to questions posed about Dr. Lytwyn's retainer and instructions;

d) Dr. Lytwyn's *curriculum vitae* does not reflect expertise on Treaty 1;

e) the two "reports" attached to the affidavit do not reflect the questions that Dr. Lytwyn was asked to answer, the materials that he reviewed, a statement of his independence, or an acknowledgement of his duty to the court;

f) the report at Exhibit "B" appears to summarize a historical document but does not reflect the source of its contents, and the report at Exhibit "C" reproduces the text of historical documents that are not in evidence; and

g) the reports do not reflect opinion evidence and do not assist the court.

[17] The Moving Parties argued that the Lytwyn Affidavit was provided as "further and other materials" as reflected in their notice of motion, and that it provides uncontroversial and important historical context including the nation-to-nation relationship between the Treaty 1 First Nations and the defendant, and the outside promises unique to Treaties 1 and 2. Moreover, the Moving Parties noted that Dr. Lytwyn was not cross-examined, and that the documents underlying the reports were not requested.

[18] Having considered the submissions, I have concluded that there are multiple problems with the admissibility of the Lytwyn Affidavit.

[19] First, although the affiant deposed that he prepared two "expert opinion" reports, the Lytwyn Affidavit does not reflect the affiant's opinion or analysis on any issue before the court. Rather, both Exhibits "B" and "C" reflect summaries of historical information, the sources of which are not cited, and the relevance of which to this motion is unclear. Second, the Lytwyn Affidavit does not reflect a statement of the affiant's independence or duty to the court. Third, the Moving Parties refused to disclose the instructions that they gave to Dr. Lytwyn.

[20] I am not satisfied, therefore, that the requirements set out in ***R. v. Mohan***, 1994 SCC 80 or ***White Burgess Langille Inman v. Abbott and Haliburton Co.***, 2015 SCC 23 have been met, and the Lytwyn Affidavit will be struck from the court record.

Affidavit of the Plaintiff

[21] The plaintiff's affidavit, at paragraphs 68 through 75, contains evidence regarding a variety of claims and matters in which the Moving Parties' counsel of record, Maurice Law, is or has been involved.

[22] The Moving Parties submitted that these excerpts of the affidavit are scandalous, frivolous, and vexatious and should be struck pursuant to Court of King's Bench Rule 25.11. Alternatively, they argued that this evidence should be given no weight.

[23] In my view, at best, these paragraphs reflect an attempt by the plaintiff to explain why he has concerns about Maurice Law acting as class counsel in the Proposed

Class Action, which is not relevant to the motion. At worst, however, the plaintiff advanced this evidence to attempt to embarrass Maurice Law by drawing the court's attention to situations in which it encountered or could have encountered negative or adverse outcomes.

[24] In my view, these paragraphs of the plaintiff's affidavit are irrelevant to the issues before me and should not have been included in the affidavit. They will be struck from the court record together with the exhibits referenced in those paragraphs.

ISSUES

[25] The Moving Parties raised the following issues on the motion:

a) Does the Representation Order apply to the Moving Parties and their respective memberships;

b) If so, should the Representation Order be varied to exclude the Moving Parties and their respective memberships; and

c) If the Representation Order is varied, should the court declare that any decision made after a trial in this matter is without prejudice to the Moving Parties' respective rights and claims?

DOES THE REPRESENTATION ORDER APPLY TO THE MOVING PARTIES AND THEIR RESPECTIVE MEMBERSHIPS?

[26] The Moving Parties did not raise this issue in their notice of motion, but they did raise it in their motion brief and in oral submissions. The plaintiff argued that this approach was fundamentally unfair, but nevertheless, I exercised my discretion and agreed to consider this issue.

[27] King's Bench Rule 10.01(1) provides that a representative may be appointed for a person or class of persons who have an interest in or may be affected by a proceeding. It is clear that the Treaty 1 First Nations, including the Moving Parties, have an interest in or may be affected by this proceeding given that their respective memberships are entitled to annuity payments pursuant to Treaty 1.

[28] As referenced above, the Representation Order provides that the plaintiff will advance the claim to represent "a group of persons who are entitled to receive the annuity payment pursuant to Treaty 1 from the Crown". This language mirrors that which is found in other documents on the court pocket, but the word "group" is not defined in the Order.

[29] The Moving Parties have taken the position that their respective memberships do not form part of the "group" referenced in the Representation Order. Since the Order was granted on a consent basis and no reasons were given, to determine this question I have reviewed the contents of the record that was before Justice Edmond when he granted the Order.

[30] First, I considered the statement of claim. Paragraph 5 reflects that "the plaintiff is a representative plaintiff … for a class of persons … more particularly described as … [a]ll persons … who are Indians of the Treaty 1 First Nations and who are entitled to receive payments pursuant to Treaty 1 from Canada". Paragraph 10 of the claim reflects that seven First Nations (including the Moving Parties) are successors to the original First Nations signatories of Treaty 1, and that the members of those First Nations are beneficiaries to Treaty 1 and are entitled to receive annuity payments

pursuant to the Crown's obligations thereunder. Although the statement of claim in this matter has been amended on multiple occasions, the substance of paragraphs 5 and 10 has remained consistent.

[31] In addition, in March 2021, the claim was amended to include as an item of alternative relief at paragraph 1(p) an order that the plaintiff "represent all individual members of Treaty 1 First Nations in relation to their interests in this proceeding". This amendment was made in the context of converting the claim from a proposed class action, as it was filed originally, to a representative action.

[32] It is clear that each of paragraphs 1(p), 5, and 10 were before Justice Edmond when he considered and granted the Representation Order.

[33] Second, I note that in June 2021, the plaintiff and defendant submitted a brief to Justice Edmond reflecting the points to which they had agreed. The brief reflects that the plaintiff would "represent a group of persons who are Indians of the Treaty 1 First Nations and who are entitled to receive payments pursuant to Treaty 1 from Canada", and that language is mirrored in the case management conference memorandum issued by Justice Edmond on June 15, 2021. The brief also provided that the action will have precedential value for all Treaty 1 First Nations and all individual annuity recipients beyond those from RRAFN.

[34] In my view, the "group" referenced in the Representation Order is defined by the foregoing context, and most specifically, the language found at paragraph 5 of the statement of claim. Certainly, the language included in paragraph 1 the Representation Order is not as specific at it could have been, but I am satisfied that its scope includes

the Moving Parties and their respective memberships. If only the membership of RRAFN was to be included in the claim, the language of paragraph 1 the Representation Order need not have included any reference to a "group" of annuitants.

[35] I note also that Justice Edmond ordered service of the Representation Order and the claim upon the Treaty 1 First Nations, including the Moving Parties. If the Moving Parties' respective memberships were not included in the Representation Order, the provision of notice would have been unnecessary.

[36] On the basis of all of the foregoing, I have concluded that the "group" referenced in paragraph 1 of the Representation Order includes the respective memberships of the seven Treaty 1 First Nations, two of which are the Moving Parties.

[37] I will add that I reject the Moving Parties' submissions that the claim as amended in November 2022 expanded upon the scope of the "group" referenced in the Representation Order, and that the claim being brought by the plaintiff on his own behalf and on behalf of RRAFN derogates from the scope of the "group" as referenced above. The plaintiff is clearly a member of RRAFN, and RRAFN is clearly one of the Treaty 1 First Nations. It is entirely appropriate, therefore, that the plaintiff has brought the claim on behalf of RRAFN as set out in the style of cause.

SHOULD THE REPRESENTATION ORDER BE VARIED TO EXCLUDE THE MOVING PARTIES AND THEIR RESPECTIVE MEMBERSHIPS?

[38] Having confirmed that the Representation Order applies to the Moving Parties and their respective memberships, I have considered whether it ought to be varied as requested by the Moving Parties.

POSITIONS OF THE PARTIES

[39] The Moving Parties argued, *inter alia*, that:

a) the promise to provide treaty annuities was made to the "bands" as a collective right, and was recognized and affirmed by s. 35(1) of the ***Constitution Act***, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the "***Constitution Act***");

b) only First Nations have standing to challenge the interpretation of collectively held treaty rights or to assert breaches thereof, whereas individual First Nations members do not have standing to do so;

c) permitting individuals to assert treaty rights separate and apart from First Nations would permit the defendant to take advantage of the power imbalance between the defendant and the Treaty 1 First Nations, and would dilute the defendant's treaty obligations;

d) the Moving Parties were not consulted and did not authorize the plaintiff to represent them in this action;

e) the Moving Parties are not bound by the BCR issued by RRAFN, because it did not have the authority to bind them, and their collective rights are vested independently by treaty and by the ***Constitution Act***;

f) the interests of the plaintiff and of the Moving Parties are in conflict in this action;

g) at the trial of this matter, evidence from First Nations with respect to the interpretation of Treaty 1 will be necessary to complete the record;

h) a representative action does not require the participation of its members and the notifications are minimal, such that a claim relative to annuitants' treaty rights should proceed as a class action, with an option that class members may opt out;

i) this motion is not a collateral attack upon the Representation Order because King's Bench Rule 10.03 contemplates that relief from the binding effect of the order can be granted; and

j) there is no evidence that granting the motion would derail the trial scheduled to commence in February 2026.

[40] The plaintiff argued, *inter alia*, that:

a) his interests are aligned with the Moving Parties' interests;

b) the Moving Parties were given the opportunity to participate in this action;

c) the motion is a collateral attack on the Representation Order, from which no appeal was taken;

d) the Moving Parties have not met the requirements of King's Bench Rule 10.03, such that they cannot be relieved from the binding effect of the Representation Order; and

e) the upcoming trial scheduled for February 2026 ought not to be derailed, and although the Moving Parties submitted that the trial should proceed

without them, they have challenged the legitimacy of the action, questioned the plaintiff's standing to pursue it, and sought to diminish its scope.

[41] The defendant's submissions mirrored those of the plaintiff, in the main.

[42] In summary, the parties' submissions are centered around two main questions:

a) whether the plaintiff (an individual) can prosecute the claim in this matter; and

b) whether a claim to enforce treaty rights can be pursued in the context of a class action.

THE LAW

[43] The Representation Order was made under Court of King's Bench Rule 10.01(1), which permits a judge to appoint a person to represent any class of persons who have an interest in or may be affected by a proceeding. The rule does not require authorization or consent from the members of the class.

[44] Rule 10.01(2) provides that a representation order is binding upon a person or class so represented, subject to Rule 10.03.

[45] Rule 10.03 provides that where a person is bound by an order under Rule 10, a judge may order that they will not be so bound where the judge is satisfied that:

a) the order was obtained by fraud or non-disclosure of material facts;

b) the interests of the person were different from those represented at the hearing; or

c) for some other sufficient reason the order should be set aside.

[46] The Moving Parties advised in oral submissions that they were not relying upon Rule 10.03(a), although they advised previously, at Chief Bluesky's cross-examination, that they were so relying.

[47] In my view, the following decisions are of particular relevance to the motion:

a) ***Gill v. Canada***, 2005 FC 192, where the court was asked to clarify whether a claim should proceed as a representative action or a class action. The court stated:

> [12] The case law points to two options, either that of letting the present action proceed as a class action, or exercising discretion … to allow the action to proceed as if it were still a representative action. Here Crown counsel point out that 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 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. Sparrow* 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075 at pages 1111 and 1112; *R. v. Van der Peet* 1996 CanLII 216 (SCC), [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 CanLII 666 (SCC), [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 CanLII 673 (SCC), [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. …
>
> [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.

b) ***Soldier v. Canada (Attorney General)***, 2009 MBCA 12, where the plaintiffs sought to certify as a class action a claim that related to annuity payments under Treaties 1 and 2. In other words, the substance of the claim was very similar to the claim in this matter. The certification motion was denied because the motion judge concluded, *inter alia*, that treaty rights are collective rights which belong to bands and not to individuals, such that the plaintiffs had no standing to bring individual claims. The Manitoba Court of Appeal determined that:

i. it was not "plain and obvious that the plaintiffs have no standing", such that the certification motion should not have been denied on this point;

ii. the motion judge did not err by finding that a representative action under Rule 10 was a preferable procedure to a class action;

iii. the opt-out provision found in s. 26(1) of ***The Class Proceedings Act***, C.C.S.M. c. C130, is a problem for treaty interpretation, because all individuals must be bound by the outcome of a collective right; and

iv. a representative action can be brought on behalf of a band;

c) ***Kelly v. Canada (Attorney General)***, 2013 ONSC 1220 (reversed in part at 2014 ONCA 92), where the court concluded that collective rights should be enforced by First Nations, but that individuals should be joined as parties, and that

class proceedings were inappropriate for treaty rights claims because individual class members could opt out;

d) ***Behn v. Moulton Contracting Ltd.***, 2013 SCC 26, where the court stated that the assertion that treaty rights claims must be brought by the community is too narrow as a general proposition. Aboriginal and treaty rights are collective in nature but are exercised by individual members. As such, rights can have both collective and individual aspects, and individuals may assert certain Aboriginal or treaty rights. At paragraph 35 the court stated:

> … despite the critical importance of the collective aspect of Aboriginal and treaty rights, rights may sometimes be assigned to or exercised by individual members of Aboriginal communities, and entitlements may sometimes be created in their favour. In a broad sense, it could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature. …;

e) ***Horseman v. Canada***, 2015 FC 1149 (upheld at 2016 FCA 238), where a group sought to certify a class action regarding the annuities to be paid under eleven treaties in Canada, including Treaty 1. At the trial level, the court stated in *obiter* that:

> [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.

The Court of Appeal did not comment upon these *obiter* statements made by the trial court;

f) ***Ontario (Attorney General) v. Restoule***, 2024 SCC 27, where the court considered whether the payments under an Ontario treaty entered into in 1875 should be augmented. The claim was pursued by six individuals as a representative action, and the court noted that although treaties are nation-to-nation agreements, the annuities were to be delivered to the "Chiefs and their Tribes" and were in fact paid to each individual beneficiary in cash. The court also considered the importance of treaty interpretation into the future, and stated that "a court's interpretation of these treaty rights will be binding in perpetuity";

g) ***Chief Derek Nepinak and Chief Bonny Lynn Acoose v. Canada***, 2025 FC 925[2], where the court considered a claim relative to annuity payments pursuant to two treaties in Ontario. The court stated at paragraph 50 that: "In my view, the right to receive an annual treaty payment is a collective right that is exercised individually. The fact that an individual may exercise a treaty right or be able to assert a treaty right does not change the nature of the underlying right." The court also stated that:

> [73] … a well-established body of Supreme Court jurisprudence confirms that treaty rights are inherently collective in a legal sense: …. By focusing and relying on how members of First Nations individually exercise their collective rights in *Restoule*, the Plaintiffs overlook the fundamental legal requirement that interpretation of such collective rights must yield one single, binding resolution applicable to the entire signatory group, not fragmented outcomes for different subgroups. This requirement is precisely why courts have recognized that treaty interpretation disputes are incompatible with class actions.
>
> [citations omitted]

[2] This decision is currently under appeal.

The court concluded that the claim should proceed as a representative action and not as a class action. It is important to note that the Federal Court Rules which govern representative actions differ from King's Bench Rule 10 significantly; and

h) ***Anderson v His Majesty the King in the Right of Alberta***, 2025 ABKB 167, where the court stated that treaty rights do not fall squarely within either class action or representative action proceedings, because as held in ***Behn***, they are collective rights held by First Nations that are exercised individually. In addition, while individuals might have an interest in seeking redress for alleged rights infringements, the rights remain collective in nature.

ANALYSIS

[48] I note that pursuant to Rule 10.01(2), the Representation Order is binding upon the class of persons represented, subject to Rule 10.03. I have considered whether the Moving Parties ought to be relieved from the binding effect of the Representation Order pursuant to Rule 10.03.

[49] Since the Moving Parties did not rely upon Rule 10.03(a) at the hearing, I have not considered whether the Representation Order was obtained by fraud or the non-disclosure of material facts. Having said that, I note that there is no evidence of either fraud or non-disclosure on the record before me.

[50] I have considered whether, for the purposes of Rule 10.03(b), the interests of the Moving Parties are different from the interests of the plaintiff and RRAFN as those interests were represented at the hearing before Justice Edmond. More particularly, I have reviewed the relief sought by the plaintiff in the claim in this matter and by the

Moving Parties in the Proposed Class Action. I note that the crux of the relief sought in both claims is:

a) a declaration that the defendant is required to index or augment the annuities paid under Treaty 1;

b) a declaration that the defendant breached its obligations by failing to index or augment the annuities paid under Treaty 1;

c) an order that quantifies the annuities after indexation or augmentation; and

d) an order for payment of indexed or augmented amounts from and after 1872.

[51] In other words, the relief sought in each of the claims is very similar, which the Moving Parties did not dispute in any material way.

[52] On the foregoing basis, and for the purposes of Rule 10.03(b), I am not satisfied that the interests of the Moving Parties are different from the interests of the plaintiff and RRAFN.

[53] I have also considered whether, for the purposes of Rule 10.03(c), there is some other sufficient reason that the Representation Order should be set aside relative to the Moving Parties.

[54] I will note at the outset that the plaintiff, the defendant, and the Moving Parties agree that Treaty 1 annuity payments have always been made directly to individual annuitants, and not to the Treaty 1 First Nations. This reality is important to my analysis regarding whether the plaintiff can prosecute the claim in this matter.

[55] In this context, the Moving Parties argued that it is an "extraordinary step" to bind a party that is not before the court, and in particular a First Nation that is protected by the ***Constitution Act***. They argued that the plaintiff was required to consult with them and receive their consent by way of BCR, which should have been considered when the Representation Order was granted.

[56] I note also that when asked on cross-examination why this action falls short of representing the interests of the Brokenhead Ojibway First Nation, Chief Bluesky stated, "the leadership's not involved". Having said that, RRAFN leadership is involved in this action, and three of the other Treaty 1 First Nations have expressly supported the plaintiff's claim.

[57] I accept that all of the Treaty 1 First Nations, including the Moving Parties, were kept informed of the status of the claim and were given multiple opportunities to become involved in the prosecution of this action together with the plaintiff in different ways, including consultation and a proposed advisory circle as referenced at paragraph 5 above. The Moving Parties chose not to do so. I accept the plaintiff's submission, therefore, that Chief Bluesky's statement relates to the fact that this action is not being prosecuted by the Moving Parties' leadership.

[58] The Moving Parties pointed to ***Kelly*** and ***Yahaan v. Canada***, 2018 FCA 41, in support of their submissions, but in my view both of those cases are distinguishable for the following reasons.

[59] In ***Kelly***, the proposed representative action related to the enforcement of a treaty right to "maintain schools" and the court stated that if the representative action

was approved, the court would have required that all 28 First Nations rights holders either provide BCRs authorizing the plaintiff to bring the claim or be named as parties. I note, however, that the right to maintain schools is a collective right that, by its nature, does not include direct payments to individual beneficiaries as does the collective right in this action.

[60] Although the outcome in ***Kelly*** is distinguishable on its facts, the decision reflects useful commentary regarding the comparison and contrast of the processes in representative actions and class actions. The court stated, quoting ***Berry v. Pulley***, 2011 ONSC 1378, that:

> 55. … In both class proceedings and also in proceedings under Rule 10, the court's order on the merits will bind the class members represented. In class proceedings, but not proceedings under rule 10.01, a putative class member has an opportunity to opt-out. ...
>
> 56. The utility of this comparison is that it reveals that representative proceedings in general involve a class member being bound to the outcome notwithstanding that he or she does not fully participate as a party. The comparison also reveals that in representative proceedings under the *Act*, the Legislature intended that class members would not have the right to be relieved of the binding effect of a settlement approved by the court. …
>
> [emphasis added]

[61] It is important to note that the Ontario rule governing representative actions mirrors King's Bench Rule 10, and as such, the court's comments are particularly instructive in the case at bar. The very nature of a representative action contemplates that not all class members will participate fully as parties, which makes sense given the scope and breadth of beneficiaries under Treaty 1. In my view, these principles apply equally to the Moving Parties as they do to the individual beneficiaries under Treaty 1.

If consents were required in the absence of the option to opt out, it would be unlikely that any representative action could ever proceed.

[62] ***Yahaan*** is distinguishable because the Federal Court Rules applied in that action govern representative actions differently than King's Bench Rule 10. More particularly, Federal Court Rule 114 requires that members of the class authorize a representative action, and no such provision exists within Rule 10.

[63] On the foregoing basis, and given the case authorities referenced above, including ***Behn*** and ***Restoule*** which are binding upon me, as well as ***Nepinak***, I accept that the right to an annuity under Treaty 1 is a collective right that may be asserted by an individual beneficiary. The context of annuity payments made directly to individuals is distinct from cases involving collective rights that do not involve individual beneficiaries, and I reject the submission that BCRs were required from each of the Treaty 1 First Nations to proceed with this action. I have concluded that the plaintiff as a member of one of the Treaty 1 First Nations can bring this claim on behalf of the group of annuitants.

[64] I will add that I am not satisfied that the plaintiff is an inappropriate representative of the group because he "lacks the ability to vigorously prosecute" the claim as alleged by the Moving Parties. In my view, the plaintiff has demonstrated a sufficient understanding of the basis for his claim, and he has steered the action to trial, no doubt under the guidance of his counsel which is entirely appropriate in the circumstances. To the extent that the plaintiff was unclear on certain facts related to the claim on cross-examination as alleged by the Moving Parties, it is my view that

many non-lawyer litigants may not understand or appreciate every nuance of their claim as their lawyer does, and that stands to reason given the complexity of the issues before the court.

[65] In addition, the law is clear that treaties were meant to impose obligations into the distant future and that court decisions interpreting those treaties are binding upon all Canadians, without exemption. Moreover, the interpretation of treaties must give rise to one binding outcome and there can be no second chance for a different interpretation of the same treaty. As set out in multiple decisions as referenced above, these factors lend themselves to the context of a representative action because the opt-out provisions in class proceedings would give rise to a multiplicity of proceedings, interpretations, and outcomes, such that the pursuit of a class action in a treaty interpretation case is simply not appropriate.

[66] Accordingly, and although the Moving Parties wish to pursue the Proposed Class Action, it is difficult to see how it could be certified, particularly given the decision in ***Nepinak***. Moreover, the certification motion has not yet been heard, and to my knowledge, no hearing date has been set, whereas the trial in this action is scheduled to take place in February 2026.

[67] For all of the foregoing reasons, I am not satisfied that there is a sufficient reason to set aside the Representation Order relative to the Moving Parties for the purposes of Rule 10.03(c).

[68] Given my conclusions, the Moving Parties' request for a declaration that any decision made after a trial in this matter would be without prejudice to their respective rights and claims must also be denied.

CONCLUSION

[69] I have attached little weight to or not considered significant portions of the Bluesky and Daniels Affidavits for the purposes of this motion.

[70] The Lytwyn Affidavit is struck from the court record.

[71] Paragraphs 68 through 75 of the plaintiff's affidavit and the corresponding exhibits are struck from the court record.

[72] The Representation Order applies to the Moving Parties and their respective memberships.

[73] The Representation Order should not be varied to exclude the Moving Parties and their respective memberships, and there will be no declaration that a decision made after a trial in this matter would be without prejudice to the Moving Parties' respective rights and claims.

[74] The motion is dismissed.

[75] Neither the plaintiff nor the defendant sought costs of the motion, and as such I make no order as to costs.

_____

J.