

CITATION: Anishinabeg et al. v. AGC et al., 2026 ONSC 1139
COURT FILE NO.: CV-16-70862
DATE: 2026/03/05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kitigan Zibi Anishinabeg and Jean-Guy Whiteduck, on their own behalf and on behalf of all other members of the Algonquin Anishinaabe Nation, Plaintiffs

-and-

Attorney General of Canada and National Capital Commission, Defendants

BEFORE: The Honourable Justice Flaherty

COUNSEL: Eamon Murphy and Julian Riddell, counsel for the Plaintiffs

Zoe Oxaal, Kelly Keenan, and Amanda McGarry, counsel for the Defendants

HEARD: February 13, 2026

REASONS FOR DECISION

[1] This motion raises the following issue: are the plaintiffs required to bring a motion under r. 12.08 of the *Rules of Procedure*, R.R.O. 1990, Reg. 194 (“Rules”) to obtain the court’s authorization to continue this representative proceeding?

[2] The plaintiffs, Kitigan Zibi Anishinabeg and Jean-Guy Whiteduck, commenced this action on their own behalf and on behalf of all other members of the Algonquin Anishinaabe Nation (“AAN”). Among other things, they seek a declaration that the AAN has Aboriginal title to certain federally-held lands along the Ottawa River, within the meaning of s. 35(1) of the *Constitution Act, 1982*. These lands, referred to as the Kichi Sipi Claim, include Parliament Hill, the Supreme Court, LeBreton Flats, and portions of three islands in the Ottawa River.

[3] This motion is brought by the defendants. They submit that a r. 12.08 motion is mandatory under the Rules, including in matters involving s. 35 claims. Moreover, ongoing negotiations with the Algonquins of Ontario (“AOO”) and the AOO’s potentially overlapping land claim underscore the importance of addressing representation issues at the outset of this litigation.

[4] The plaintiffs submit that a r. 12.08 motion is not required in the circumstances of this case. They state that the AOO negotiations do not, in fact, overlap with the Kichi Sibi Claim. Requiring a representation motion in this Aboriginal title case would be inconsistent with the principles of reconciliation and access to justice. In any event, nothing further would be gained by a representation motion: all represented parties have received notice and none have objected to being represented. The plaintiffs' alternative argument is that any representation issues in this case are best determined at the outset of the trial.

[5] For the reasons that follow, I find that the plaintiffs must bring a r. 12.08 motion before trial. The court's authorization is required to bring this representative action.

OVERVIEW

[6] The statement of claim was filed in December 2016, but placed in abeyance until approximately 2023. The pleadings remain open, and the finalization of a discovery plan is on hold pending the resolution of this motion. The timetable agreed to by the parties contemplates the action being set down for trial before March of 2028.

The Claim

[7] The plaintiffs bring this action on behalf of the AAN, which is defined in the statement of claim as comprised of 11 *Indian Act* bands in Ontario and Quebec, including Kitigan Zibi Anishinabeg (located in Quebec) and Pikwakanagan (located in Ontario.)¹

[8] The plaintiffs last amended their statement of claim on February 10, 2025. It seeks the following relief:

[a] A declaration that the AAN has Aboriginal title to the Kichi Sibi Land Claim, within the meaning of s. 35(1) of the *Constitution Act, 1982*;

¹ The terms "band" appears in the *Indian Act*, R.S.C., 1985, c. I-5 to describe the elected governing body of a First Nation. This term is not the contemporary terminology. However, where these reasons reference the terms in the legislation, I use the terminology from the statute.

[b] A declaration that the Treaty of Swegatchy is a binding treaty of peace and friendship between Canada and the AAN, which requires Canada to protect the AAN's Aboriginal title lands and hunting grounds, including the Kichi Sibi Land Claim;

[c] A declaration that Canada and the National Capital Commission ("NCC") have infringed the AAN's Aboriginal title and have not justified the infringements;

[d] A declaration that Canada has breached its duty to consult and accommodate the AAN's Aboriginal title interests and has failed to uphold the honour of the Crown; and

[e] A declaration that Canada dishonourably breached certain Crown promises.

Negotiations

[9] Before filing the claim, Kitigan Zibi attempted to engage in negotiations with Canada over the Kichi Sibi Claim. In 1989, it submitted a comprehensive land claim to the federal government on behalf of Kitigan Zibi and four other AAN bands. In 1994, Kitigan Zibi submitted a second comprehensive claim, this time solely in its own name. Both claims included the Kichi Sibi Claim.

[10] The federal government did not accept either claim for negotiation, the reasons it provided were that: (a) the government's policy was not to negotiate on an individual band basis; and (b) members of other Algonquin First Nations may have equally valid rights in the land claimed.

[11] In 1983, the Algonquins of Pikwakanagan submitted a petition on behalf of the Algonquin Nation to Canada and Ontario, claiming the lands of the Ottawa River watershed, including the Kichi Sibi Claim. Canada accepted Pikwakanagan's claim for negotiation, and as of at least 2000, these negotiations expanded to include the Algonquins of Ontario ("AOO"). The AOO is comprised of one *Indian Act* band (Pikwakanagan) and nine non-*Indian Act* band communities.

[12] In 2016, Canada, Ontario, and the AOO reached a non-binding agreement in principle, which forms the basis for negotiating a final treaty. Among other things, the parties agreed that a final treaty would constitute a full and final settlement of Aboriginal title of the AOO in Canada (other than in Quebec). Through these negotiations, proposed settlement lands have been

identified, although not finally agreed to by the AOO, Canada, and Ontario. Notably, the proposed settlement lands do not include the Kichi Sibi Claim.

[13] The parties to this action disagree about the status of the AOO negotiations. Canada's chief negotiator affirmed that discussions are ongoing. Although the plaintiffs are not party to the AOO negotiations, they obtained information from websites and through an access to information request, which identifies challenges the AOO is experiencing with its governance, membership, and structure. The plaintiffs believe that Canada's negotiations with the AOO have been on hold for two years.

[14] The parties disagree about other aspects of the AOO negotiations, including whether they are relevant to the need for a representation motion. For example, the defendants question whether Pikwakanagan's interests are aligned with those of the rest of the group the plaintiffs seek to represent. They also raise concerns that the AOO includes nine non-*Indian Act* band communities who claim an interest in the Kichi Sibi Claim, but who are not part of the group the plaintiffs seek to represent.

[15] According to the plaintiffs, the exclusion of non-*Indian Act* communities has no bearing on a pre-trial motion or whether a representative action should proceed. The plaintiffs have also raised a number of concerns about the AOO negotiations. Kitigan Zibi and other communities of the AAN with reserves in Quebec are not included, although their territory includes land in Ontario. The plaintiffs also expressed concern about how the AOO has determined its membership, which includes groups the plaintiffs do not recognize as title-holding Algonquin Anishinaabe communities.

[16] As I discuss in more detail later in these reasons, these issues cannot and need not be resolved in the context of this pre-trial motion.

Notice

[17] In June 2024, Kitigan Zibi sent letters to the represented AAN communities (including Pikwakanagan), providing them with notice of the Kichi Sibi Claim and explaining that these communities are represented in the claim. Kitigan Zibi invited the AAN communities to provide

them with band council resolutions authorizing the plaintiffs to bring this action and to include them in the represented group. Five of these ten communities provided band council resolutions. None of the other communities have objected to being represented by the plaintiffs in this proceeding.

[18] The AOO and Pikwakanagan have received copies of the plaintiffs' amended claim. In response to correspondence from Canada, both the AOO and Pikwakanagan indicated they have no instructions regarding the representation issues in this action.

ANALYSIS

[19] Should the court direct the plaintiffs to bring a motion under r. 12.08 for an order authorizing this action as a representative action?

[20] Rule 12.08 states:

Where numerous persons are members of an unincorporated association or trade union and a proceeding under the [*Class Proceedings Act*, 1992] would be an unduly expensive or inconvenient means for determining their claims, one or more of them may be authorized by the court to bring a proceeding on behalf of or for the benefit of all.

[21] Broadly speaking, the purpose of r. 12.08 is to ensure that the plaintiffs are an appropriate collective to bring a representative action, in the sense that there are issues of law and fact common among the members of the collective, and that success of the claim would mean success for the whole collective. Rule 12.08 also ensures that the interests of the represented groups are adequately represented by the plaintiffs. This mechanism is important, as all members of the represented groups will be bound by the outcome of the proceeding, whether or not they participate in the litigation: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 40.

[22] While they disagree about the need for a r. 12.08 motion, the parties agree that the following criteria apply in determining whether the court should exercise its discretion and allow representative claims under s. 35 to proceed:

[a] is the collective of rights-bearers on behalf of whom the plaintiffs purport to act capable of clear definition?

[b] are there issues of law or fact common to all members of the collective so defined?

[c] would success on the petition mean success for the whole collective so defined?

[d] would the proposed representatives adequately represent the interests of the collective?

See *Hwlitsum First Nation v. Canada (Attorney General)*, 2018 BCCA 276 at para. 8.

Does Rule 12.08 Apply to the Kichi Sibi Claim?

[23] There is no dispute that this is a representative action, which the plaintiffs seek to advance on behalf of a group. The defendants submit that a r. 12.08 motion is required and must be brought at the start of a proposed action. In this respect, the defendants rely on *United Food and Commercial Workers Canada, Local 175, Region 6 v. Quality Meat Packers Holdings Limited*, 2018 ONCA 671, leave to appeal to SCC dismissed, [2018] S.C.C.A. No. 396 (*Caetano*), where the Court of Appeal held that no representative proceeding may be brought in Ontario until and unless court authorization is granted pursuant to r. 12.08: at para. 33.

[24] The plaintiffs submit that r. 12.08 does not apply to s. 35 proceedings, and to title proceedings in particular. They say r. 12.08 should not gatekeep Indigenous peoples' ability to advance constitutional claims. Because Indigenous claimants often have no independent capacity to sue and be sued, s. 35 title claims must generally be brought as representative actions.

[25] In this case, the plaintiffs only choice was to bring a representative action. They submit that requiring court approval for representative claims for Aboriginal title would be unjust, contrary to the objectives of reconciliation and access to justice, and may prevent Indigenous peoples from having their rights determined on their merits in Ontario.

[26] The plaintiffs rely on *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4, at para. 62, where the Supreme Court stated:

[T]he unique context of litigation to vindicate Aboriginal rights must always be borne in mind, both as to whether an abuse of process exists and, if so, what follows from that — i.e., what order would be appropriate. Court procedures should facilitate, not impede, the just resolution of Aboriginal claims. As this Court stated in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, “[t]he fundamental objective of the modern law of [A]boriginal and treaty rights is the reconciliation of [A]boriginal peoples and non-[A]boriginal peoples and their respective claims, interests and ambitions” (para. 1).

[27] Significantly, Ontario courts have applied r. 12.08 in matters involving s. 35 claims: see *Keewatin v. Ontario (Minister of Natural Resources)*, 2006 CanLII 35625 (Ont. S.C.) (*Keewatin*); *Mike Restoule v. Attorney General of Canada*, 2024 ONSC 1127 (*Restoule*); *Kelly v. Canada (Attorney General)*, 2013 ONSC 1220, rev’d in part, 2014 ONCA 92 (*Kelly*); and in an order rendered on consent in *Grand Chief Mathew Coon Come v. Attorney General of Canada* (20 March 2025), Toronto, CV-16-552834 (Ont. S.C.) (*Coon Come*).

[28] The plaintiffs submit that these cases are not determinative for two reasons: first, with the exception of the *Coon Come* matter, this jurisprudence concerns Aboriginal treaty claims, not the title claims that are the subject of this action; and second, although courts have applied r. 12.08, they have not specifically considered whether such orders are *required* in s. 35 title claims.

[29] I was provided with no Ontario cases in which a court has dispensed with a r. 12.08 motion in a s. 35 claim, including a title claim. In *Coon Come*, the court deferred the representation issue to trial but did not dispense with the requirement for a r. 12.08 motion.

[30] Importantly, Ontario’s r. 12.08 differs from the rule in British Columbia dealing with representative proceedings. In British Columbia, under Rule 20-3(1), a representative proceeding may be commenced by or against a represented group unless the court orders otherwise. In Ontario, r. 12.08 requires court authorization in order to bring a representative action. There is no dispute that the same test for standing applies under r. 12.08 and the equivalent rules in British Columbia and elsewhere. However, given the fundamentally different approaches these rules take to representative proceedings, the jurisprudence from British Columbia offers little guidance on the question of whether a representative order is required in Ontario.

[31] I begin by considering the Ontario cases in which r. 12.08 has been applied in the context of s. 35 claims. In three of these cases — *Keewatin*, *Restoule*, and *Coon Come* — the court granted representation motions with little discussion of the underlying rationale and without addressing whether such a motion was required.

[32] In *Keewatin*, the plaintiffs were Anishnaabe members who obtained an order under r.12.08 to bring their treaty rights infringement action on behalf of all members of Grassy Narrows First Nation. The r. 12.08 motion was not opposed.

[33] In *Restoule*, the plaintiffs obtained an order to bring their action claiming Crown failure to fulfill treaty annuity obligations on behalf of all members of the Ojibewa (Anishinaabe) Nation who are beneficiaries of the *Robinson Huron Treaty* of 1850. From the court's brief reasons, it is not clear that the plaintiffs' motion was opposed.

[34] In *Coon Come*, the court's order was based on a settlement reached by the parties. The representation issue under r. 12.08 was deferred to trial. As no reasons were provided, there is no discussion of the court's rationale for deferring the representation issues.

[35] The issue was explored in more depth in *Kelly*, a case about an alleged breach of a communal fiduciary duty owed to the beneficiaries of Treaty 3, between the Crown and those who were at one time known as the Saulteaux Tribe of the Ojibway Indians at the Northwest Angle on the Lake of the Woods. The case involved a proposed representation action to enforce a Treaty provision related to maintaining schools. Under r. 12.08, the plaintiffs sought an order authorizing a representative action on behalf of all beneficiaries of Treaty 3. The Crown opposed the motion.

[36] The issue in *Kelly* was somewhat complicated by the parties' disagreement over the proper rights holder. While the plaintiffs viewed the proper rights holders as the unincorporated association comprised of the beneficiaries of Treaty 3, led by a Grand Council, the Crown took the position that the proper rights holders were *Indian Act* bands, statutory bodies with the status to sue or be sued. The court held that the proper rights holder was a matter to be decided at trial.

[37] In terms of the representation motion under r. 12.08, however, this created something of a circular problem: the nature of the proposed rights holder had an important bearing on whether a

representation order would be necessary. The court held that if the rights holder of the Treaty 3 rights were the 28 Indian bands, then a representation order would not be necessary because the bands have the right to sue and be sued. However, all 28 bands would be necessary parties to the action. Conversely, if the rights holder of the Treaty 3 were an unincorporated association comprised of the beneficiaries of the Treaty that does not have the right to sue, a representation order would be necessary.

[38] Perell J. wrote:

[121] The dilemma, however, is more apparent than real. The fixes to the procedural problems of ensuring that the proper and necessary parties are before the court remain available. If Grand Chief White's breach of treaty claim is justiciable, a matter which I discuss next, he is able to bring an representative action on behalf of the beneficiaries of Treaty 3 provided that: (1) he was authorized to do so by all of the 28 reserve bands (by band council resolutions); or (2) if he joins as party defendants those bands that do not authorize his representation action.

[39] Ultimately, Perell J. dismissed the claim as non-justiciable. On appeal, the court held that certain aspects of the claim were justiciable. However, it did not interfere with Perell J.'s directions on the representation issue, describing them as a practical solution. Although the Court of Appeal in *Kelly* does not explicitly set out how standing in Indigenous claims ought to be decided, it did not take issue with the underlying premise behind Perell J.'s directions – namely that court authorization is required to bring a representative action.

[40] In sum, Ontario courts have consistently applied r. 12.08 in s. 35 claims. Taking this a step further, I have considered whether a r. 12.08 motion is *required* or whether the objectives of reconciliation and access to justice militate in favour of dispensing with the need for r. 12.08 motion in this action. I find that they do not. In this respect, I agree with the British Columbia Court of Appeal's reasoning in *Hwlitsum First Nation v. Canada (Attorney General)*, at paras. 17 and 18. The court concluded that the functional, purposeful, flexible and generous approach referred to in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 apply to the substantive resolution of claims to Aboriginal rights and title, not to the preliminary issue of who has the legal capacity to advance the claim. In my view, the same reasoning applies to the procedural steps for establishing legal capacity to advance the claim:

procedural criteria are applied by taking into account the nature of Aboriginal rights and title, but they must still be met.

[41] I would add that I do not view r. 12.08 as inconsistent with the objectives of reconciliation and access to justice. While a representation motion adds a step to the litigation, it embeds important access to justice and reconciliation considerations, including ensuring that all represented Indigenous parties are adequately represented by the plaintiffs: see, e.g., *Kanyen'ke:haka Nation v. Ontario et al*, 2025 ONSC 7104.

[42] In deciding whether a r. 12.08 motion is required, I find no basis to distinguish between different types of s. 35 claims. First, the substantive nature of the claim is not a relevant factor, either in the language of r. 12.08 or in the jurisprudence that applies it. In deciding whether r. 12.08 applies, the issue is whether the claim is advanced as a representative action.

[43] In any event, the present action includes a Treaty claim. The plaintiffs submit that the Treaty of Swegatchy is different from historic numbered treaties because it is a peace and friendship treaty that effectively protects title. At this stage, I make no finding on the issue. However, facts of this case illustrate why the application of r. 12.08 turns on the representative rather than substantive nature of the claim. The potential difficulty in distinguishing between different types of s. 35 claims could unduly complicate and add to the expense of addressing representation.

[44] The plaintiffs submit that a r. 12.08 motion is not required on the facts of this case, because nothing further would be served by the motion. All ten AAN communities have been notified of the Kichi Sibi Claim and the fact that they are represented. The AOO has also been notified. There is no indication from any community that it intends to oppose the claim or the plaintiffs' ability to represent them. Moreover, as all 10 communities have received notice, they will be bound by the outcome. The plaintiffs submit that this provides the necessary certainty about who is represented and bound by this claim.

[45] There are two difficulties with this argument. First, bringing a representative action requires more than notice. As we have seen, the purpose of r. 12.08 includes determining whether the plaintiffs constitute an appropriate collective for a representative claim. Among other things,

this requires assessing whether the collective can be clearly defined and whether common issues exist among members of the community. These issues cannot be resolved simply by providing notice to those affected. Interpreting r. 12.08 as the plaintiffs propose would deprive the rule of its meaning and purpose.

[46] Second, the plaintiffs' submission that the criteria under r. 12.08 have been satisfied depends on an assessment of the merits of the motion. I do not have a complete evidentiary record and cannot, at this stage, determine whether the legal test for a representative action has been met in this case.

[47] The plaintiffs rely on a framework agreement, between Algonquin Nation and the National Capital Commission (one of the defendants in this action). The framework agreement defines the Algonquin Nation as the 11 communities the plaintiffs seek to represent in this action. It does not include the non-*Indian Act* members of the AOO. The plaintiffs suggest that the framework agreement informs what position the defendants can legitimately take on the merits of a r. 12.08 motion.

[48] Importantly, however, the framework agreement does not dispense with the need for a r. 12.08 motion. In any event, the agreement does not address the factors the court must consider at r. 12.08, including whether the claim is based on common issues and whether the collective is adequately represented by the plaintiffs.

[49] As noted, the defendants argue that the negotiations with the AOO and what it referred to as "third party issues" make it particularly clear that a r. 12.08 motion is required in this matter. As noted, many of the facts underlying the defendants' assertion are in dispute. For the purpose of this motion, I do not need to resolve these factual issues. A r. 12.08 motion is required in this matter because it has been brought as a representative proceeding. This requirement exists, whether or not there is a competing claim on the Kichi Sibi Lands.

Is the Representation Issue Best left for Trial?

[50] The plaintiffs state that representation issues are best left to be decided at the outset of the trial. In this respect, they rely on *Coon Come*, a case where the parties consented to an order deferring representation matters to trial. As noted, no reasons were provided.

[51] The parties have expressed different views about the impact of deferring the motion to the start of trial. The plaintiffs submit that dealing with representation as a pre-trial motion would cause unnecessary delay and expense and would not be in the interests of access to justice or reconciliation. Conversely, the defendants submit that a representation motion brought at the start of an action promotes the efficient use of resources and provides clarity and certainty. According to the defendants, leaving the determination until trial, makes little practical sense in a claim of this size and complexity.

[52] I am bound by the Court of Appeal's decision in *Caetano*, in which the court held that a representation motion must be brought at the outset of the proceeding. The language of r. 12.08, requires the court's authorization "to bring a proceeding." For the reasons I have already provided, I find that the objectives of reconciliation and access to justice do not support deviating from the procedural requirements, including the requirement to bring a representation motion at the outset of the proceeding.

[53] In my view, it is not open to me to defer representation issues in r. 12.08 motion to trial. However, even if I had the ability to do so, I would not defer the representation issues in this matter to trial. Unlike in *Coon Come*, the parties in this case have not consented to a deferral. Further, the trial of this matter is not expected to be set down until March 2028. I am not satisfied that it would be an efficient use of resources to wait until trial to determine whether the action is properly constituted.

[54] Unlike in *Kelly*, there is no dispute that this is case is a representative action, regardless of the scope of the proposed collective. Therefore, I do not understand the r. 12.08 motion to require a determination of the proper rights holder in this case. Rather, the purpose of the r. 12.08 motion will be to determine whether the plaintiffs can bring an action on behalf of the proposed collective. Whether the proposed collective is the proper rights holder is a matter for trial.

DISPOSITION

[55] For these reasons, the defendants' motion is granted. The plaintiffs are directed to bring a motion pursuant to r. 12.08 to seek the court's authorization to bring their action as a representative proceeding.

[56] No costs were sought and none are awarded.

[57] A case management conference has been scheduled for April 20, 2026, at 3 p.m. EST. The conference will proceed virtually. Counsel is encouraged to discuss a timetable for the r. 12.08 motion in advance of the conference.

Justice Flaherty

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Flaherty J.

Released: March 5, 2026