Federal Court  Cour fédérale

Date: 20260108

Docket: T-2044-19

Citation: 2026 FC 19

Ottawa, Ontario, January 8, 2026

PRESENT: The Honourable Madam Justice Mandy Aylen

CLASS PROCEEDING

BETWEEN:

GREGORY CHARLES COLLINS

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA AND THE FEDERATION OF NEWFOUNDLAND INDIANS

Defendants

ORDER AND REASONS

[1] This action was certified as a class proceeding by the Federal Court of Appeal on November 4, 2019. Following the completion of discoveries, the Plaintiffs brought this motion seeking leave to amend the Statement of Claim to add a claim for breach of contract and breach of contractual duties and associated damages (together with other minor amendments). The Plaintiff

also seeks an order amending the certification order to add three additional common issues related to the breach of contract and breach of contractual duties allegations.

[2] The Defendant, the Attorney General of Canada [AGC], opposes the motion, arguing that the pleading amendment should be denied because the proposed claims for breach of contract and breach of contractual duties have no reasonable prospect of success, as it is plain and obvious that the Plaintiff does not have standing to enforce the provisions of the contract at issue and the proposed causes of action are time-barred. Moreover, the AGC asserts that it is not in the interests of justice to permit the amendments because: (a) the motion to amend was not brought in a timely manner; (b) the AGC would be prejudiced as a result of the delays in the action that the proposed amendments would cause; and (c) the amendments would not facilitate the Court's consideration of the dispute on the merits. The AGC does not oppose the other minor proposed amendments to the pleading, provided they have a right to conduct an examination for discovery thereon.

[3] The AGC further asserts that the certification order should not be amended to add the proposed common issues because: (a) there is no reasonable cause of action; (b) there is no basis in fact for the existence of a claim of breach of contract or breach of contractual duties as the class members are not third-party beneficiaries and have no standing to claim an alleged breach; (c) there is no identifiable class as the proposed common issues are statute-barred by limitations; and (d) the Plaintiff cannot establish that a class proceeding is the preferrable procedure as a result of the impact of the limitation issues in this case.

[4] The Federation of Newfoundland Indians [FNI] did not file any materials on this motion, having advised the Court in November 2024 that it was no longer able to participate in this proceeding due to a lack of financial resources.

[5] For the reasons that follow, I am satisfied that leave should be granted to the Plaintiff to amend the Statement of Claim in the form proposed and that additional common issues (as detailed below) should be added to the Certification Order to address the breach of contract and breach of contractual duties allegations, as well as the limitations issues related thereto.

I. Background

[6] Under the *Agreement for the Recognition of the Qalipu Mi'kmaq Band* [2008 Agreement], Canada and the FNI recognized the Qalipu Mi'kmaq First Nation [QMFN] Band as a Band and its members as status Indians under the *Indian Act*, RSC 1985, c I-5. Among other things, the 2008 Agreement created criteria for membership in the Band, an Enrolment Committee to review and assess applications for membership in the Band, and an Appeal Master to rule on decisions of the Enrolment Committee.

[7] In response to an unexpectedly high number of applications for membership received, Canada and the FNI amended the membership criteria to make it more difficult to qualify for membership in the Band. They also removed the right to appeal. These changes were made under a Supplemental Agreement in 2013 [2013 Supplemental Agreement]. The Defendants assert they were authorized to do so under the 2008 Agreement, specifically by paragraph 2.15(b) which

permits them to “make corrections or changes” to cure or correct a “mistake, manifest error or ambiguity”.

[8] Following the execution of the 2013 Supplemental Agreement, applications for Band membership were assessed under the new, tougher criteria, as opposed to the more lenient criteria of the 2008 Agreement. As a result, many who had or would have qualified as Band members under the 2008 Agreement no longer qualified.

[9] The underlying proceeding was commenced in March 2017 as an application for judicial review by Gerald Brake arising from the rejection of his application for Band membership. Mr. Brake subsequently took steps to “convert” the application into an action and certify it as a class action on behalf of all potential members of the class who had their applications rejected, including from those that had previously been found eligible under the original 2008 Agreement.

[10] The Federal Court declined to “convert” the application into an action and to certify Mr. Brake’s proceeding as a class proceeding. However, on appeal, the Federal Court of Appeal allowed the appeal, in part, set aside the order of the Federal Court insofar as it denied certification and granted the motion for certification [Certification Order]. The Federal Court of Appeal also directed Mr. Brake to have the Statement of Claim issued. Once issued, the resulting action was to be consolidated with the application for judicial review. The consolidated proceeding was then to be prosecuted and defended as if it were an action.

[11] In the Certification Order, the class is defined as "all individuals whose applications for Qalipu Band membership were rejected in accordance with the 2013 Supplemental Agreement".

[12] In granting certification, the Federal Court of Appeal found all causes of action to be reasonable, including questions going to administrative remedies, breach of fiduciary duty, breach of *Canadian Charter of Rights and Freedoms* [*Charter*] rights, damages and unjust enrichment. The Federal Court of Appeal certified the following common issues:

> 1. Is the rejection of the applications for Qalipu Band membership for the Class under the 2013 Supplemental Agreement, including its annexes and schedules, unlawful pursuant to section 18.1(4) of the *Federal Courts Act*?
>
> 2. Did the conduct of Canada in the establishment and implementation of the 2013 Supplemental Agreement breach a fiduciary duty owed to the class?
>
> 3. Did the conduct of Canada in the establishment and implementation of the 2013 Supplemental Agreement breach the rights of the class to the equal protection and equal benefits of the law without discrimination based on race, national origin and ethnic origin under section 15 of the Canadian Charter of Rights and Freedoms?
>
> 4. If the answer to common issue 3. is "yes," were Canada's actions saved by section 1 of the Canadian Charter of Rights and Freedoms, and if so, to what extent and for what time period?
>
> 5. If the answer to common issue 3. is "yes," and the answer to common issue 4. is "no," do those breaches make damages an appropriate and just remedy under section 24 of the Canadian Charter of Rights and Freedoms?
>
> 6. If the answer to any of common issues 1., 2., and 5. is "yes," can the court make an aggregate assessment of damages under Rule 334.28 suffered by some or all class members as part of the common issues trial, and if so, in what amount?
>
> 7. Has Canada's conduct resulted in unjust enrichment to Canada? If so, is Canada a constructive trustee holding ill-gotten gains for

the benefit of the Plaintiff and the Class Members? What amount is held by Canada in the constructive trust?

8. Does the conduct of Canada justify an award of punitive damages, and if so, what is an appropriate amount of punitive damages?

[13] The Statement of Claim was subsequently issued on December 17, 2019. Since that time, the proceeding has progressed as follows:

1. The Plaintiff delivered his affidavit of documents on December 30, 2020.

2. The FNI delivered its affidavit of documents on September 24, 2021.

3. The AGC delivered a list of documents on November 14, 2024, providing over 15,000 documents and later produced an additional 47 documents on May 29, 2025, following a determination pursuant to subsection 39(4)(a) of the *Canada Evidence Act*, RSC 1985, c C-5.

4. Examination for discovery of the FNI's representative was conducted on September 22, 2022.

5. An initial examination for discovery of the AGC's representative was conducted in July 2022, followed by a further examination in January 2025.

6. The parties' pre-trial conference memoranda and expert reports have been exchanged, but the pre-trial conference scheduled for July 23, 2025, was adjourned as a result of this motion.

[14] The Plaintiff has also announced an intention to bring a motion for summary judgment, although the Court determined that this motion would have to be heard and determined before the Court would entertain any motion for summary judgment.

II. Proposed Amended Statement of Claim and Amended Common Issues

[15] The proposed amendments to the Statement of Claim fall into one of three categories: (a) amendments that introduce a new cause of action for breach of contract and breach of contractual duties and associated damages, which the Plaintiff asserts are based on an alternate theory of liability arising from the same factual matrix (as set out in paragraphs 1(h), 1(k), 54–61 and 98 of the proposed Amended Statement of Claim); (b) amendments that clarify and particularize the Plaintiff's existing claims and align the pleading with the discovery evidence; and (c) housekeeping amendments. It was accepted during the oral hearing that only the first category of amendments are opposed on this motion and that the latter two categories do not require any amendment to the Certification Order.

[16] The key portion of the proposed Amended Statement of Claim pleads as follows:

> 54. The 2008 Agreement constitutes a binding contract between Canada and the FNI, intended to establish a process and criteria for determining eligibility for enrolment as Founding Members of the Qalipu Mi'kmaq First Nation Band.
>
> 55. The Plaintiff and the Class are third-party beneficiaries of the 2008 Agreement, specifically concerning the eligibility criteria and the enrolment process provisions set out therein. The 2008 Agreement expressly intended to extend and confer a benefit upon the Plaintiff and the Class, as applicants wishing to be enrolled as Founding Members of the Qalipu Mi'kmaw First Nation Band.

56. By entering into the 2008 Agreement, Canada and the FNI conferred upon the Plaintiff and the Class the following benefits:

(a) The right to participate in the enrolment process and to have their applications assessed according to the specific criteria and procedures established by the 2008 Agreement; and

(b) The resulting membership in the Qalipu Mi'kmaq First Nation Band, with associate benefits, if found eligible pursuant to the 2008 Agreement.

57. The activities undertaken by the Plaintiff and the Class, namely, applying for enrolment pursuant to the 2008 Agreement, fall squarely within the scope of the activities contemplated by the enrolment process provisions, and the 2008 Agreement as a whole.

58. As third-party beneficiaries to the contract, the Plaintiff and the Class have standing to enforce the terms of the 2008 Agreement related to the enrolment process pursuant to the principled exception to the doctrine of privity.

59. By virtue of the 2008 Agreement, Canada owed contractual duties to the Plaintiff and the Class Members, as intended third-party beneficiaries, to administer and implement the enrolment process in accordance with the terms of the 2008 Agreement, and to consider any amendments thereto strictly in accordance with the terms of the 2008 Agreement.

60. In addition, Canada owed a contractual duty of good faith and honest performance, and a duty to exercise its discretion in good faith in carrying out its obligations under the 2008 Agreement.

61. By agreeing to sections 2, 6, 8 and 9 and Annex A of the 2013 Supplemental Agreement, contrary to section 2.15 of the 2008 Agreement, Canada breached its contractual obligations to the Plaintiff and the Class. Canada further breached its contractual obligations to the Plaintiff and the Class in agreeing to and implementing sections 2, 6, 8 and 9 and Annex A of the 2013 Supplemental Agreement, and in mandating the review and rejection of applications based on the invalid terms of the 2013 Supplemental Agreement. Canada also breached its contractual duty of good faith in entering into the 2013 Supplemental Agreement.

[17] The Plaintiff seeks to amend the Certification Order to add the following additional common issues to align with the Plaintiff's contested pleading amendments:

1. Do the Plaintiff and Class have standing to enforce the terms of the 2008 Agreement?

2. Did Canada breach the 2008 Agreement or its contractual duties by agreeing to and implementing sections 2, 6, 8, 9, and Annex A of the 2013 Supplemental Agreement?

3. If the answer to (1) and (2) are yes, what remedy is the Plaintiff and the Class entitled to?

III. Analysis

A. *Motion to Amend the Statement of Claim*

[18] Rule 75 of the *Federal Courts Rules*, SOR/98-106, provides that the Court may, at any time, allow a party to amend a document on such terms as will protect the rights of all parties.

[19] In *Canderel Ltd v Canada (CA)*, [1994] 1 FC 3, [1993] FCJ No 777 at page 10, the Federal Court of Appeal held that, while it was impossible to set out all the factors that a judge must take into consideration in dealing with an application to amend pleadings, the general rule is that "an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice."

[20] However, as a preliminary matter, the proposed amendment must have a reasonable prospect of success. If a proposed amendment does not have a reasonable prospect of success, the

Court need not consider any other matter, such as the potential prejudice to the opposing party occasioned by the amendment [see *Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 at paras 29–32]. The burden is on the amending party to demonstrate such a reasonable prospect of success [see *Merck & Co Inc v Apotex Inc*, 2003 FCA 488 at para 46]. In determining whether a proposed amendment has a reasonable prospect of success, its chance of success must be examined in the context of the law and the litigation process and a realistic view must be taken [see *Teva*, *supra* at para 30]. If a proposed amendment would not withstand a motion to strike, the amendment must be refused [see *Lantech.com, LLC v Wulftec International Inc*, 2018 FC 41].

[21] The threshold for striking out a statement of claim is high. A statement of claim will only be struck out where it is plain and obvious that the pleading should be struck on the basis of one of the grounds detailed in Rule 221(1) of the *Federal Courts Rules* [see *Hunt v Carey Canada Inc*, [1990] 2 SCR 959].

[22] Here, the issue is whether the proposed amendments do not disclose a reasonable cause of action. In assessing whether the proposed amendments disclose a reasonable cause of action, the material facts pleaded must be taken as true, unless the allegations are based on assumption and speculation. A pleading must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations made due to any drafting deficiencies. In other words, if a pleading contains bare assertions without material facts upon which to base those assertions, then it discloses no reasonable cause of action and is liable to be struck. However, if there is any doubt as to whether a cause of action can succeed, then the matter should be left for a decision of the trial judge [see *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at paras 7–8,

14, 27, 94; *R v Imperial Tobacco Canada Ltd*, [2011] 3 SCR 45, 2011 SCC 42 at para 17; and *Hunt, supra*].

[23] Once it has been established that the proposed amendments have a reasonable prospect of success, other factors must be considered, including: (a) the timeliness of the motion to amend; (b) the extent to which the proposed amendments would delay the expeditious trial of the matter; (c) the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter; and (d) whether the amendments sought will facilitate the Court's consideration of the true substance of the dispute on the merits. No single factor predominates, nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. Ultimately, it boils down to a consideration of simple fairness, common sense and the interest that the Court has that justice be done [see *Janssen Inc v Abbvie Corporation*, 2014 FCA 242 at para 3].

[24] Turning to the preliminary issue of whether the proposed amendments have a reasonable prospect of success; in this case, the amendments seek to add allegations of breach of contract and of breach of contractual duties. There is no dispute between the parties that these claims are recognized causes of action and that the constituent elements of these causes of action have been pleaded in the proposed amended pleading. I agree with the parties in this regard.

[25] Rather, the dispute between the parties is centered on: (a) whether the Plaintiff has standing to assert these claims as a non-party to the 2008 Agreement; and (b) whether the causes of action are time-barred.

[26] On the issue of standing, the Supreme Court of Canada in *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108, recognized a principled exception to the doctrine of privity of contract which is dependent on the intention of the contracting parties. This principled exception applies where: (a) the parties to the contract intended to extend the benefit in question to the third party seeking to rely on the contractual provision; and (b) the activities performed by the third party seeking to rely on the contractual provision are the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, as determined by reference to the intention of the parties.

[27] Here, the Plaintiff asserts that the proposed amendments specifically plead the required elements of the principled exception — namely: (a) the Plaintiff and the Class are third-party beneficiaries to the 2008 Agreement; (b) the 2008 Agreement expressly intended to extend and confer a benefit upon the Plaintiff and the Class; and (c) the activities undertaken by the Plaintiff and the Class squarely fall within the scope of the activities contemplated by the enrolment process provisions in particular and the 2008 Agreement as a whole.

[28] The Plaintiff asserts that the 2008 Agreement is replete with references to benefits, rights and obligations of applicants seeking membership in the QMFN, including as follows:

1. The Preamble of the 2008 Agreement provides:

> The Parties wish to provide in this Agreement for the following process leading to the recognition […] of a landless band for the Mi'kmaq Group of Indians of Newfoundland, subject to the terms and conditions herein:
>
> The Parties will establish an Enrolment Committee to assess whether applicants meet eligibility criteria established by this

> Agreement to be enrolled as Founding Members of […] the Qalipu Mi'kmaq First Nation Band […]

2. Section 4.4.1 describes the applicants' right to submit applications for consideration to be assessed through the enrolment process contemplated in Chapter 4.

3. Section 4.2.17 described the applicants' right to be provided with written reasons on the determination of their applications.

4. Sections 4.2.18.4 and 4.2.19.1 give eligible applicants the right to have their names listed on the First or Second Founding Members' List, depending on the timing of the determination of their eligibility made on their applications.

5. Section 4.3 expressly references applicants' right to appeal decisions of the Enrolment Committee.

6. Chapter 5 describes the benefits provided to applicants found eligible through the enrolment process described in Chapter 4.

7. Section 8.3 requires applicants to complete and sign an application form that includes a full and final release in favour of Canada, thereby obliging third parties to release rights against Canada in consideration for their eligibility to the Band as provided by the 2008 Agreement.

[29] The Plaintiff relies on a number of recent decisions from this Court and the Ontario Superior Court of Justice [ONSCJ] in support of his assertion that it is not plain and obvious that

the Plaintiff (and the Class) lack standing to assert claims for breach of contract and for breach of contractual duties under the principled exception to the doctrine of privity of contract. Specifically:

1. In *Dundurn No 314 (Rural Municipality) v Canada (Attorney General)*, 2025 FC 366, the representative plaintiff, the Rural Municipality of Dundurn [RMD], sought to certify a proposed class proceeding on behalf of neighboring municipalities, towns and villages, the Whitecap Dakota First Nation and other members of the public, alleging that Canada was in breach of a 1954 road access agreement entered into between RMD and the Department of National Defence. While this Court ultimately refused to certify the proceeding, the Court did address the issue of standing when considering the reasonable cause of action criterion under the certification test. Although Canada, in that case, argued that the proposed class members (other than the RMD) lacked standing to sue for breach of contract, this Court held that the RMD had pleaded that the agreement was entered into for the benefit of settlers living west of the military reserve and that Canada contracted to allow access across the detachment, such that the issue of standing was properly pleaded. This Court went on to find that it was not plain and obvious that the proposed class members lacked standing under the principled exception to the doctrine of privity to enforce the alleged agreement.

2. In *Cameron-Gardos v Crawford and Company (Canada) Inc*, 2024 ONSC 700, the plaintiff was a class member under the terms of a settlement agreement of a class proceeding, and thus, was not a party to the settlement agreement itself. The plaintiff alleged that the settlement administrator (who had specific obligations imposed upon

them pursuant to the settlement agreement) breached the terms of the settlement agreement by failing to pay class members' compensation within a reasonable time. The plaintiff required leave of the court to sue the administrator of the class action settlement and the test for leave was whether the class members' claims against the administrator had a reasonable prospect of success. The ONSCJ found that it was not plain and obvious that a class member's claim (as a third-party beneficiary) for breach of contract against the administrator of a settlement agreement would fail for a lack of standing.

3. In *Dr Koren v Children's Aid Society of the Regional Municipality of Waterloo*, 2024 ONSC 6895, Dr. Koren (who was a defendant in litigation arising from flawed hair strand testing at the Motherisk Drug Testing Laboratory [MDTL]) brought a claim for contribution and indemnity against the Children's Aid Society [CAS], asserting that the CAS had a contract to perform hair testing with MDTL and that the CAS had breached its contract with MDTL by misusing the test results. On the CAS' motion to strike Dr. Koren's claim, the ONSCJ found that, notwithstanding that Dr. Koren was not a party to the contract between the MDTL and the CAS, it was not plain and obvious that Dr. Koren's claim for breach of contract was doomed to fail based on the possibility that new exceptions to the doctrine of privity may be recognized.

[30] Here, the AGC asserts that the Plaintiff's breach of contract and breach of contractual duties claims are doomed to fail as it is plain and obvious that, upon reading the 2008 Agreement, there was no intention by Canada and the FNI to extend the contractual provisions of the agreement to any third party. The AGC asserts that, in order to invoke the principled exception to the doctrine

of privity, the contract at issue must contain clear and explicit language providing for the contracting party to extend the scope of contractual terms to include a third party. The AGC asserts that the 2008 Agreement does the exact opposite by virtue of Section 2.5, which expressly limits the rights, privileges and obligations set out under the 2008 Agreement to only the parties thereto, namely, Canada and the FNI. Section 2.5 of the 2008 Agreement provides:

> 2.5 Rights under this Agreement
>
> > Rights, privileges and obligations under this Agreement accrue to the Parties only. Nothing in this section is intended to prevent individuals from applying for enrolment and appealing a denial in respect thereof.

[31] I accept that there is certainly an argument to be made that, by virtue of the language in Section 2.5, the parties to the 2008 Agreement did not intend, explicit or otherwise, to confer a benefit to any third party. However, there is also an argument to be made (as asserted by the Plaintiff) as to the distinction between the rights and privileges referred to in the first sentence of Section 2.5 and the rights preserved by the second sentence of Section 2.5. Section 2.5 does not use the term "benefits" and, as such, one is left to consider whether the rights and privileges in the first sentence are the only potential "benefits" arising under the 2008 Agreement or whether the rights referenced in the second sentence can be construed as "benefits" as well. The AGC provided the Court with the Black's Law Dictionary definition of the term "benefit" in support of their argument. However, it is certainly not the role of this Court on a motion such as this to engage in a contractual interpretation analysis and to assess the competing positions. Rather, the Court's role is limited to determining whether it is plain and obvious that the contract cannot support the interpretation proposed by the Plaintiff [see *Thompson-Marcial v Ticketmaster Canada LP*, 2024 ONSC 2305 at para 100–101]. Given the arguments advanced by the Plaintiff, coupled with the

various references throughout the 2008 Agreement to what the Plaintiff essentially asserts amounts to benefits to Class Members, I cannot find that it is plain and obvious that the 2008 Agreement cannot support the Plaintiff's interpretation that it was intended to confer a benefit to the Plaintiff and the Class.

[32] Second, the AGC asserts that it is plain and obvious that the Plaintiff's asserted benefits (which the AGC characterizes as the right to participate in the enrolment process in accordance with the procedure set out in the 2008 Agreement and the consequent benefit of resulting membership, if found eligible) are not actually benefits of a contractual provision. Rather, the AGC asserts that the right to participate in the enrolment process is a public access to a procedure, not a benefit, since a benefit requires a third party to receive something that is not available to the public at large. In this case, the AGC asserts that anyone can apply for membership and thus the 2008 Agreement confers no particular "benefit" to the Plaintiff or to any of the Class Members. Further, the AGC asserts that membership in the QMFN is not a distinct benefit, but rather, simply the outcome that would follow if an applicant were found to be eligible.

[33] In response, the Plaintiff asserts that the enrolment process established under the 2008 Agreement is a benefit offered not to the public at large but only to a circumscribed group. The Plaintiff denies that he and the Class Members are asserting an abstract right as suggested by the AGC. Rather, the Plaintiff argues that they are asserting a right to participate in the enrolment process and to have their applications assessed in accordance with the 2008 Agreement. The Plaintiff argues that if the ONSCJ in *Cameron-Gardos* found that the principled exception from

Fraser River could sustain a breach of contract claim in that case, it can equally sustain a similar claim of breach of contract in this case.

[34] Again, I find that it is not the role of the Court on a motion such as this to undertake a contractual interpretation exercise to determine whether participation in the enrolment process and any resulting membership in the QFMN constitute as "benefits" under the 2008 Agreement. Rather, the Court's role is limited to a determination as to whether it is plain and obvious that the Plaintiff's assertion, that they amount to benefits, is doomed to fail. I simply cannot find that to be the case.

[35] The Supreme Court of Canada has noted that the principled exception approach could be extended to establish a new exception to the doctrine of privity [see *Fraser River*, *supra* at para 32; *Cameron-Gardos*, *supra* at para 80] and multiple courts across Canada have recognized that the doctrine of privity and the exceptions thereto remain a developing area of the law [see *Dr Koren*, *supra*; *Cameron-Gardos*, *supra*; *Ladysmith Maritime Society v Ladysmith (Town)*, 2023 BCSC 2285 at para 58]. Given this recognition and taking into consideration the determinations made in the jurisprudence relied upon by the Plaintiff, I simply cannot find that the breach of contract and breach of contractual duties claims are bound to fail on the basis of a lack of standing on the part of the Plaintiff or the Class Members.

[36] The AGC further asserts that the proposed amended pleading does not disclose a reasonable cause of action as the Plaintiff has failed to plead "the particulars of the contracts and the basis upon which [the Plaintiff] alleges the parties intended to extend a benefit to the Plaintiff and the

Class." There is no merit to this argument. The specific provisions of the 2008 Agreement and the 2013 Supplemental Agreement relied upon by the Plaintiff are pleaded in the proposed Amended Statement of Claim. The Plaintiff has also properly pleaded the requirements to assert that the principled exception to the doctrine of privity of contract applies.

[37] As for the AGC's assertion that something more is required of the Plaintiff to further particularize exactly how the parties to the 2008 Agreement intended to extend a benefit to the Plaintiff and the Class Members, I note that the AGC has provided no authority to the Court in support of such a requirement. It is clear from the proposed Amended Statement of Claim that the Plaintiff relies on the terms of the 2008 Agreement itself, and I am not satisfied that there is an obligation on the Plaintiff to further particularize this aspect of the pleading. The AGC is well-positioned to understand "who, when, where, how and what gave rise" to its asserted liability for breach of contract and for breach of contractual duties, and the Plaintiff's standing to assert such claims.

[38] The AGC also opposes the proposed amendments on the basis that the new causes of action are time-barred and, as they do not arise out of substantially the same facts as pleaded in the original Statement of Claim, they are subject to limitations periods and do not benefit from the exception in Rule 201 of the *Federal Courts Rules*. Rule 201 is available to a party to raise a new cause of action if it arises out of substantially the same facts as alleged in the original statement of claim, notwithstanding that the new cause of action is barred by a limitation period [see *Biomarin Pharmaceutical Inc v Dr Reddy's Laboratories Ltd*, 2021 FC 402 at para 43; *Houle v Canada*

(TD), [2001] 1 FC 102; *Scottish & York Insurance Co v Canada*, [2000] FCJ No 6 at paras 68–70].

[39] There is a live issue between the parties as to whether the new causes of action are time-barred. The AGC asserts that the new causes of action are time-barred under both the two-year limitation period in Newfoundland and Labrador's *Limitations Act*, SNL 1995, c L-16.1, and the six-year limitation period under the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [*CLPA*], although the AGC asserts that the applicable limitation period is the former. The AGC states that the pleading asserts that Canada breached its contractual obligations in agreeing to the 2013 Supplemental Agreement and, as such, the AGC asserts that that cause of action arose as of June 30, 2013, when the 2013 Supplemental Agreement was signed into force. The AGC also asserts that the cause of action was discoverable no later than November 6, 2013, when the Enrolment Committee sent a letter to the Plaintiff and to all applicants for membership in the QFMN setting out the evidentiary requirements which had been clarified in the 2013 Supplemental Agreement and affiliated Directive. The letter confirmed that applications would be assessed in accordance with the 2008 Agreement and the 2013 Supplemental Agreement. As a result, the AGC asserts, all elements of the new causes of action were discoverable by no later than November 6, 2013, and thus, the new claims were time-barred as of November 6, 2015. The AGC further asserts that the limitation period for the new causes of action was not tolled when the original common issues were certified and that this Court has no inherent jurisdiction to permit a new cause of action to be commenced that is entirely out of time.

[40] Finally, the AGC asserts that Rule 201 has no application in this case as the new causes of action do not arise out of substantially the same facts as alleged in the Statement of Claim, since the original pleading does not contain the following material facts necessary to advance a breach of contract claim: (a) facts establishing that Canada and the FNI entered into a contract in the Plaintiff's and Class Members' favour; (b) facts that demonstrate that Canada and the FNI intended to extend and confer a benefit upon the Plaintiff and the Class; (c) facts alleging what benefit or benefits the 2008 Agreement conferred upon the Plaintiff and the Class Members; and (d) facts setting out the activities contemplated by the 2008 Agreement and undertaken by the Plaintiff and the Class.

[41] The Plaintiff asserts that the new causes of action are not time-barred. Contrary to the assertion of the AGC that the limitation period began to run on November 6, 2013, the Plaintiff notes that the Amended Statement of Claim pleads that Canada breached its contractual obligations by agreeing to and implementing the 2013 Supplemental Agreement. As such, the Plaintiff asserts that his breach of contract claim only crystallized when he received a final decision, which occurred on December 29, 2017. It was only then that his previously accepted application was reconsidered and rejected under the new evidentiary criteria.

[42] Moreover, the Plaintiff asserts that no limitation period issues arise given the tolling effect of the class proceeding. The Plaintiff relies on this Court's decision in *Hinton v Canada*, 2017 FC 140, which held that limitation periods are tolled on the filing of proceedings proposing a class action. As the final decisions on applications for membership that were reconsidered under the 2013 Supplemental Agreement were issued on or after January 31, 2017, and certification of the

proceeding was sought on June 16, 2017, the Plaintiff asserts that the limitation period has been tolled as of June 16, 2017.

[43] The Plaintiff acknowledges that this Court recently held, in *Jacques v Canada*, 2024 FC 851, that limitation periods are tolled only when a class proceeding is certified. He argues, however, that the decision should not be followed as the tolling of limitation periods only upon certification runs counter to the access to justice goals of class proceedings and ignores the practical realities of advancing a class proceeding.

[44] Even if the new causes of action are time-barred, the Plaintiff asserts that Rule 201 permits him to make the proposed amendments as the new causes of action arise from the same factual basis as the judicial review cause of action — focusing primarily on whether the 2013 Supplemental Agreement was validly enacted in light of Section 2.15 of the 2008 Agreement. The Plaintiff included, as Schedule "A" to his written representations, a chart of the existing material facts pleaded in the original Statement of Claim that correspond to the proposed new causes of action in support of this argument.

[45] Having considered the submissions of the parties, I find that there is a live issue as to whether the new causes of action are time-barred, including when the limitation period began to run and, importantly, when the limitation period was tolled by virtue of this class proceeding. There is contradictory case law from this Court on the latter issue and the Federal Court of Appeal has made no pronouncement on this issue. It is not the Court's role on a pleading amendments motion to determine this live issue. Rather, my role is limited to determining whether it is plain

and obvious that the new causes of action are time-barred, and I simply cannot find that that is the case. As such, the fact that the new causes of action may be time-barred does not stand in the way of permitting the amendments. It will, of course, remain open to the AGC to assert a limitations defence in response to these claims.

[46] While the parties urged the Court to make a determination on the applicability of Rule 201, Rule 201 and the obligation on a Plaintiff to demonstrate that the new causes of action arise from substantially the same facts as alleged in the original Statement of Claim has no application where the claims are not time-barred [see *Proprio Direct Inc v Vendirect Inc*, 2018 FC 1089; *Seanix Technology Inc v Synnex Canada Ltd*, 2005 FC 243]. As the parties do not agree that the claims are time-barred, and the Court will not make such a determination on this motion, I see no proper basis for applying Rule 201.

[47] The Federal Court of Appeal has repeatedly held that leave to amend a statement of claim in a proposed class proceeding should only be denied in the "clearest cases" and I find that the same commentary applies to already certified class proceedings [see *Michel v Canada (Attorney General)*, 2025 FCA 58 at para 81]. For the reasons given above, I am not satisfied that this is one of those "clear cases". Rather, I am satisfied that the proposed amendments have a reasonable prospect of success.

[48] I now turn to consider the remaining factors that must be considered on a motion to amend a pleading. The Plaintiff asserts that the timeliness of the motion to amend, the lack of any potential delay to the trial of this matter, the parties' positions in the litigation and ensuring a full

consideration of the true substance of the dispute on its merits, all militate in favour of granting leave to amend.

[49] The AGC asserts that it is not in the interests of justice to permit the amendments as the amendments would cause prejudice to the Defendants given that: (a) the Plaintiff has not acted with diligence to advance the new causes of action, only seeking leave to amend the pleading seven years after the claim was filed and on the eve of the pre-trial conference; (b) permitting the amendment will delay the trial of this matter; and (c) the amendments will not facilitate the Court's consideration of the true substance of the dispute on the merits.

[50] In all of the circumstances, I am satisfied that the interests of justice support granting leave to the Plaintiff to amend the pleading as proposed. While it is self-evident that there has been a substantial delay in the Plaintiff seeking leave to amend the pleading, I accept that the timing of the motion was driven, at least in part, by the recent decisions in *RMD*, *Cameron-Gardos* and *Dr Koren*.

[51] Moreover, the Federal Court of Appeal has repeatedly emphasized that pleading amendments may be made at any stage in an action if it assists in determining the real questions in controversy, provided that it would not result in an injustice not compensable in costs and that it will serve the interests of justice [see *Canada v Pomeroy Acquireco Ltd*, 2021 FCA 187 at para 4; *Apotex Inc v Bristol-Myers Squibb Company*, 2011 FCA 34 at para 33]. I am satisfied that the proposed amendments here will accomplish the aforementioned goal, without resulting in any

injustice to the Defendants, notwithstanding the Plaintiff's delay in bringing forward these additional causes of action.

[52] I do not accept the AGC's assertion that any meaningful delay will be occasioned by the new causes of action. The Plaintiff has confirmed that it is not seeking any further document production nor examinations for discovery of the Defendants' representatives related to the amendments. As such, the only further steps required will be the filing of an Amended Statement of Defence and a brief examination for discovery of the Plaintiff, should the AGC choose to exercise that right. As the next steps in this proceeding (including the scheduling of the common issues trial) have not yet been timetabled, the amendments will not occasion any material delay and can be completed relatively expeditiously.

[53] As noted above, the AGC has not opposed the pleading amendments that clarify and particularize the Plaintiff's existing claims and align the pleading with the discovery evidence, nor the housekeeping amendments. I am satisfied that it is in the interests of justice to permit these additional amendments as well.

[54] Accordingly, the Plaintiff is granted leave to amend the Statement of Claim in the form appended as Appendix A to the Notice of Motion.

B. ***Motion to Amend the Certification Order***

[55] As detailed above, the Plaintiff seeks to amend the Certification Order to add a number of common issues related to the breach of contract and breach of contractual duties claims.

[56] The Federal Court of Appeal acknowledged in the Certification Order that this Court may, upon receiving submissions from the parties, wish to amend the common issues and has a "free hand" to do so [see Certification Order at para 102]. Indeed, the Federal Court of Appeal in *Buffalo v Samson Cree Nation*, 2010 FCA 165 at para 12, had previously recognized that, post-certification, this Court can "be quite active and flexible because of the complex and dynamic nature of class proceedings" and "must always remain open to amendments to such matters as […] the common issues".

[57] Pursuant to Rule 334.19, this Court may, on a motion, amend an order certifying a proceeding as a class proceeding. A motion to amend a certification order is governed by the requirements for certification in Rule 334.16, which provide that a proceeding shall be certified as a class action where all of the following requirements are met: (a) the pleading discloses a reasonable cause of action; (b) there is an identifiable class of two or more persons; (c) the claims raise common questions of law or fact; (d) a class proceeding is the preferable procedure for the just and efficient resolution of those common questions; and (e) there is an appropriate representative plaintiff [see *Tippett v Canada*, 2021 FC 1338 at para 17, aff'd 2023 FCA 198 at paras 7–8; *Levac v James*, 2019 ONSC 5092 at paras 19–20].

[58] As a general statement of the objectives of class action legislation, Chief Justice McLachlin (as she then was) provided the following explanation in *Hollick v Toronto (City)*, 2001 SCC 68 at para 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. […]
>
> [Emphasis added.]

[59] Other than the first requirement of Rule 334.16(1) — that the pleadings disclose a reasonable cause of action — the threshold for meeting the remaining requirements for certification is the establishment of "some basis in fact" to support the certification order. The law is clear that the "some basis in fact" threshold is low. It does not require that the party seeking certification establish the certification requirements on a balance of probabilities. Indeed, this standard does not require that the Court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that, at the certification stage, the Court is ill-equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight [see *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at paras 101–102; *Gottfriedson v Canada*, 2015 FC 706 at para 24].

[60] That said, while a certification motion is not a merits-based screening intended to determine the actual viability and strength of the contemplated class action, it must nonetheless operate as a meaningful screening device and not be reduced to a mere formality [see *Pro-Sys*, *supra* at para 103; *Desjardins Financial Services Firm Inc v Asselin*, 2020 SCC 30 at para 74; *Jensen v Samsung Electronics Co Ltd*, 2023 FCA 89 at para 49].

[61] The Plaintiff asserts that only two of the five criteria (whether the amended pleading discloses a reasonable cause of action and whether the new claims raise common questions of fact or law) are engaged on this motion and that the balance of the criteria were already finally determined by the Federal Court of Appeal in the Certification Order such that they cannot be revisited on this motion.

[62] The AGC, however, asserts that the motion engages two additional criteria — namely, whether there is an identifiable class of two or more persons and whether a class proceeding is the preferable procedure for the just and efficient resolution of the proposed additional common questions. The AGC argues that the Certification Order should not be amended as the Class Members lack standing to assert the new causes of action and the new causes of action are time-barred. The AGC stresses that it is not asking the Court for a determination on this motion as to whether the claims are, in fact, time-barred. Rather, the AGC argues that the limitation issues make it obvious that these new causes of action are not suitable for certification, since the Plaintiff cannot meet the preferred procedure and identifiable class criterion as a result.

(1) Whether the amended pleading discloses a reasonable cause of action

[63] Under this requirement, the Plaintiff need only show that the cause of action is not doomed to fail. Put differently, it must not be plain and obvious that the cause of action as pleaded will fail [see Certification Order at para 54; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at paras 23–31].

[64] Given my findings on the motion for leave to amend, I am satisfied that the Plaintiff has demonstrated that the breach of contract and breach of contractual duties claims are not doomed to fail.

(2) Whether the new claims raise common issues of fact or law

[65] Rule 334.16(1)(c) requires the Plaintiff to demonstrate some basis in fact for the claims of the Class Members raising common questions of law or fact, regardless of whether those common questions predominate over questions affecting only individual members.

[66] In *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46, the Supreme Court of Canada addressed how to consider the commonality question, stating that the underlying question is whether allowing the action to proceed as a class action will avoid duplication of fact-finding or legal analysis. Chief Justice McLachlin (as she was then) directed the following approach to the commonality question, at paras 39–40, which was again endorsed by the Supreme Court of Canada in *Pro-Sys, supra* at para 108:

1. The commonality question should be approached purposively.

2. An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.

3. It is not essential that the class members be identically situated vis-à-vis the opposing party.

4. It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

5. 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.

[67] Even a significant level of difference among class members does not preclude a finding of commonality. If ultimately certified and material differences emerge, this Court can deal with them when the time comes [see *Dutton, supra* at para 54].

[68] On the other hand, certification should be refused where numerous individual issues overwhelm common issues and where the issues are intrinsically individualistic. A common issue cannot be dependent upon findings of fact that have to be made with respect to each individual claimant [see *Kenney v Canada (Attorney General)*, 2016 FC 367 at para 37].

[69] In this case's Certification Order, the Federal Court of Appeal determined that the judicial review, the breach of fiduciary duty, the *Charter* and unjust enrichment claims raise common issues of fact or law. Indeed, the Federal Court of Appeal stated:

> [80] When the proper legal test is applied, the common issues offered by Mr. Brake meet the requirement in Rule 334.16(1)(*c*). There are common issues of law and fact and resolving those issues will advance the class members' individual claims because the individual claims share a substantial common ingredient. The

> common issues are significant in relation to the individual issues and certification will reduce duplicative fact-finding and analysis. Certification as a class proceeding will yield considerable benefits by saving the scarce resources of the Court and the litigants.
>
> [81] It is true that the determination of the common issues in this case will not necessarily determine all aspects of each class member's claim. It may only significantly advance that determination, in which case individual determinations will be necessary after a common issues trial. But Rule 334.18(*a*) explicitly states that this is not a reason to deny certification and Rules 334.26 and 334.27 establish a process specifically for dealing with such determinations.
>
> [82] The common issues broadly relate to the legality of administrative decision-making surrounding the 2013 Supplemental Agreement, whether legal duties were owed to the class, whether those legal duties were breached and, if so, what remedies ought to follow. These issues are not unlike the common issues found in *Wenham*, *Rumley*, *Cloud*, and other cases such as *Dolmage v. Ontario*, 2010 ONSC 1726, 6 C.P.C. (7th) 168.
>
> [83] Mr. Brake claims that Canada breached its fiduciary duty to the class in negotiating the terms of the Supplemental Agreement. This issue falls to be determined on a review of the actions taken by Canada without reference to the question whether an individual claimant may or may not have a valid claim. By determining this issue, the claims of the class will be significantly advanced.
>
> [84] If this proceeding were certified as a class proceeding, the common issues trial would determine the appropriateness of the implementation of the 2013 Supplemental Agreement. If successful at that stage, there would be individual determinations of eligibility under a process derived from Rule 334.26.
>
> [Emphasis added.]

[70] The Plaintiff asserts that the very same findings can and should be made in relation to the proposed additional common issues. The Plaintiff asserts that the first proposed common issue — "Do the Plaintiff and the Class have standing to enforce the terms of the 2008 Agreement?" — is focused on whether the parties to the 2008 Agreement intended to extend the "benefits" in question

to the Plaintiff and the Class, and whether the activities of the Plaintiff and the Class are the very activities contemplated as coming within the scope of the 2008 Agreement. The Plaintiff asserts that the determination of these aspects of proposed common issue 1 is common to all Class Members as it will be focused on Canada's conduct (not that of the individual Class Members) and the interpretation of the 2008 Agreement.

[71] The Plaintiff asserts that the resolution of the second proposed common issue — "Did Canada breach the 2008 Agreement or its contractual duties by agreeing to and implementing sections 2, 6, 8, and 9 and Annex A of the 2013 Supplemental Agreement?" — relates solely to Canada's conduct and thus does not depend on the evidence or an assessment of the circumstances of individual Class Members. The Plaintiff asserts that a decision as to whether the 2013 Supplemental Agreement was validly enacted and implemented in accordance with the 2008 Agreement would be equally applicable to every Class Member.

[72] The Plaintiff asserts that the answer to the third proposed common issue — "If the answer to (1) and (2) are yes, what remedy is the Plaintiff and the Class entitled to?" — would apply equally to all Class Members. While it may be that, following the common issues trial and determination of an appropriate remedy, individual issues will remain for determination, the Plaintiff asserts that this does not detract from the commonality of this issue.

[73] The fact that the Court may permit the Plaintiff to amend his Statement of Claim to assert the additional causes of action does not prove, as the AGC asserts, that common issues exist for

certification as this stage of the certification test requires an evidentiary foundation for each cause of action. I agree with the AGC on this point.

[74] The AGC argues that, in this case, there is no basis in fact to ground the proposed common issues as the 2008 Agreement and the 2013 Supplemental Agreement plainly do not contemplate third-party beneficiaries. The AGC asserts that the factual matrix in which the 2008 Agreement was adopted (which included the backdrop of the Supreme Court of Canada's decision in *R v Powley*, 2003 SCC 43) is indicative of the contracting parties' intent not to extent third-party benefits to the Plaintiff and the Class who were rejected for membership in the QMFN and did not guarantee any particular result to any individual applicant for membership.

[75] I agree with the Plaintiff that the commonality of the three proposed common issues is clear and similar in nature to those common issues already certified by the Federal Court of Appeal, as they turn on the interpretation of the 2008 Agreement, the interpretation of the 2013 Supplemental Agreement and Canada's conduct in implementing the 2013 Supplemental Agreement.

[76] Moreover, I find that the same evidentiary basis underpins the new proposed common issues as underpins the existing common issues — namely, the two agreements and Canada's implementation thereof. As the Federal Court of Appeal found that the Plaintiff had met the evidentiary threshold of "some basis in fact" for the existing common issues, I find that the Plaintiff has similarly met the evidentiary threshold on this motion.

[77] While the AGC points to other evidence it asserts undermines the Plaintiff's position on the new proposed common issues (such as Section 2.5 of the 2008 Agreement and the factual matrix in which the 2008 Agreement was adopted), it must also be recalled that a review of the evidence to satisfy the existence of a claim at this stage of the analysis is different from weighing the merits of the claim. As stated by this Court in *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185, aff'd 2023 FCA 89 at para 212, "[t]here is a fundamental difference between weighing the merits of the claim (which the courts cannot do at certification) and determining whether some minimal evidence exists to support the existence of the claim (i.e., the two-step test)." Therefore, the Court does not engage in the assessment of competing evidence on a motion such as this. Rather, the Court's task is limited to determining whether there is some evidence that supports the Plaintiff's claim, even in the face of evidence that may detract therefrom.

[78] As such, I am satisfied that the new claims raise common issues of fact or law.

[79] However, I am also satisfied that there is a live limitations issue related to these new claims and, as requested by the AGC, additional common issues should be added to address whether the claims are time-barred. Even though there may be individual discoverability issues, I am satisfied there are aspects of the limitations issues that are common to all Class Members and their resolution is necessary to the resolution of each Class Member's breach of contract and breach of contractual duties claims.

[80] In their written representations, the AGC proposed that the following additional common issues be added to the Certification Order:

> (a) What limitation period applies to the breach of contract cause of action advanced in this case?
>
> (b) Is the cause of action in breach of contract time barred?

[81] While the Plaintiff does not share the AGC's view that any further common issues should be added, he proposed the following alternative wording in his written representations (as he asserted that the AGC's wording was too broad):

> Does the limitation period for Class Members' claims for breach of contract run from the date of the Supplemental Agreement or the date that each Class Member was informed of the rejection of their application pursuant to the Supplemental Agreement, and the expiry of any appeal rights? If the former, what limitation period applies and when was that limitation tolled by this class proceeding?

[82] At the hearing of the motion, a further discussion occurred regarding the proposed wording of the additional common issues and the following refined proposal was suggested by the Plaintiff:

1. What limitation period applies to the claims: two years under Newfoundland and Labrador's *Limitations Act* versus six years under the *CLPA*?

2. Subject to individual Class Member discoverability arguments, when did that limitation period begin to run?

3. When was the limitation period suspended by virtue of this proceeding, if it all?

4. If the limitation period has expired, can the Court make a curative *nunc pro tunc* order? If so, should the Court make such an order?

[83] The AGC advised that it agreed with the first question, that the second question was encompassed by their broader proposed wording and that the third and fourth questions were not required.

[84] I am satisfied that greater precision than that proposed by the AGC is required to properly address the common limitation period questions. I find that the refined questions as proposed by the Plaintiff meet that need for precision. Accordingly, these additional common issues shall be added to the Certification Order.

(3) Whether a class proceeding is the preferable procedure for the just and efficient resolution of the proposed common questions

[85] To satisfy the preferable procedure requirement in Rule 334.16(1)(d), a representative plaintiff must establish some basis in fact that a class proceeding would be a fair, efficient and manageable means of advancing the common issues that is preferable to any other reasonably available means of resolving the class members' claims. This analysis must be conducted through the lens of the three principal goals of class proceedings — namely, access to justice, judicial economy and behaviour modification [see *Pro-Sys*, *supra* at para 137; *Voltage Pictures, LLC v Salna*, 2025 FCA 131 at paras 126–127; *Canada (Attorney General) v BW*, 2025 FCA 199 at para 78].

[86] Rule 334.16(2) provides that "all relevant matters" shall be considered in determining whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions, including whether:

1. The questions of law or fact common to the class members predominate over any questions affecting only individual members;

2. A significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

3. The class proceeding would involve claims that are or have been the subject of any other proceeding;

4. Other means of resolving the claims are less practical or less efficient; and

5. The administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[87] In comparing possible alternatives with the proposed class proceeding, it is important to adopt a practical cost-benefit approach to this procedural issue and to consider the impact of a class proceeding on class members, the defendant(s) and the Court [see *Hollick, supra* at para 29].

[88] The AGC asserts that the proposed common issues in this case are based on speculation, having no factual underpinning to advance a credible breach of contract claim. Even if the Class could put forward a theory under which they are third-party beneficiaries, the AGC asserts that their claims are subject to different individual limitations issues and the Plaintiff has not put forward any just or efficient means to overcome the necessity for individualized assessments to resolve the proposed common questions; nor has the Plaintiff demonstrated that the determination of the common issues would substantively advance the Class Members' claims. As such, the goals

of class proceedings are not served by certifying the proposed common issues. The AGC points to a number of decisions where this Court has found that certifying time-barred claims would not be preferrable [see *Jacques*, *supra*; *Tihomirovs v Canada (Minister of Citizenship and Immigration)*, 2006 FC 197; *Buffalo v Samson First Nation*, 2008 FC 1308].

[89] The AGC's assertion that the new causes of action are based on speculation, with no foundational theory to underpin their asserted status as third-party beneficiaries, is inaccurate. While the Plaintiff and the Class Members may ultimately not succeed on these new causes of action, I find that, as articulated above, there is some basis in fact for their assertion of standing and for Canada's breaches.

[90] The difficulty that I have with the balance of the AGC's arguments on this issue is that they ignore the context in which this motion arises, and consider the question of preferability in a vacuum, divorced from the reality that the Federal Court of Appeal has already certified this proceeding as a class proceeding. In so doing, the Federal Court of Appeal has already determined that a class proceeding is the preferred procedure for the just and efficient determination of the original list of common questions. While I agree with the AGC that the Court performs an important "gatekeeping" function on a certification motion (and also on a motion to amend a certification order), one cannot ignore the fact that the Federal Court of Appeal has, in this case, already "opened the gate".

[91] I have trouble accepting the AGC's position that this criterion is engaged on this motion given the Federal Court of Appeal's Certification Order. However, I will nonetheless address the

AGC's arguments but in the proper context in which they arise. Therefore, the question before this Court is whether, in that context, it is preferable to add these additional common issues to the existing class proceeding or to compel the Plaintiff (and arguably the other Class Members) to conduct a separate action to determine the breach of contract and breach of contractual duties claims.

[92] In considering that question, it must be recalled that the Federal Court of Appeal based its determination that a class proceeding is the preferable procedure for the original common issues in this case on the following findings:

> [91] This is a case where a class proceeding advances the interests of judicial economy, behaviour modification and access to justice. These objectives are well-served in this case by a class proceeding that will determine important common questions affecting over 80,000 people: the propriety of the 2013 Supplemental Agreement, the existence and breach of a fiduciary duty, the engagement and breach of the Charter, the claims of unjust enrichment and the claims for damages.
>
> [92] At some point, there may be individual issues that will require resolution. As discussed above, the *Federal Courts Rules* specifically provide ways to accommodate those issues. Rule 334.26 provides for a court-supervised individual assessment process to address the reconsideration of individual applications for membership in the Band, or any necessary causation determinations, that might be required after the determination of the common issues. Rules 334.26(1)(*b*) and 334.26(1)(*c*) allow the Court to fashion a process for those determinations, including appointing "one or more persons to evaluate the individual questions".
>
> [93] Mr. Brake submits that, absent a class proceeding, significant access-to-justice impediments exist for individual litigants. I agree. These include a lack of resources to retain legal counsel, the likelihood that the cost of enforcing their rights will be less than the recovery, the disincentive to sue the Government of Canada with all its resources and its discretionary power over benefits, and the potential for adverse cost consequences.

[93] I find that judicial economy and access to justice are key considerations on this motion. There is an existing class proceeding in which these additional claims can be advanced. It would be an inefficient use of the Court's limited resources to deal with the additional claims in a separate proceeding or, potentially, multiple separate proceedings. Moreover, to compel the Plaintiff and the Class Members to bring separate legal proceedings to advance these additional claims would impose an access to justice impediment as the cost of separate proceedings would undoubtedly be beyond the means of a not insignificant portion of the Class Members.

[94] It must be recalled that the new causes of action simply add an additional legal theory, based on the current evidentiary record, to an existing class proceeding. It would defy common sense to compel the commencement of separate proceedings to address these claims.

[95] Moreover, as detailed above, by adding the limitations issues to the common issues, the question of whether the Class Members' claims are time-barred will be largely determined in an efficient manner through the class proceeding. While some individualized assessments may be required, as noted by the Federal Court of Appeal in the Certification Order, the *Federal Courts Rules* specifically provide ways to accommodate the determination of those issues.

[96] Accordingly, I find that the existing class proceeding is the preferable procedure for the just and efficient resolution of the proposed common questions.

(4) Whether there is an identifiable class of two or more persons

[97] Rule 334.16(1)(b) requires the Court to consider whether there is some basis in fact to conclude there is an identifiable class of two or more persons. Put differently, the evidence must demonstrate some basis in fact that two or more persons are able to determine if they are class members [see *Doan v Clearview AI Inc*, 2025 FCA 133 at para 15].

[98] With respect to the requirement of an "identifiable class", all that is required is some basis in fact supporting an objective class definition that bears a rational connection to the common issues and is not dependent on the outcome of the litigation [see *Wenham*, *supra* at para 69; *Dutton*, *supra* at para 38].

[99] The Federal Court of Appeal has already determined that an identifiable class of two or more persons exists — namely, "all individuals whose applications for Qalipu Band membership were rejected in accordance with the 2013 Supplemental Agreement" — and that this class definition bears a rational connection to the common issues as framed in the Certification Order and is not dependent on the outcome of the litigation.

[100] The AGC asserts that in *Hollick*, the Supreme Court of Canada explained that a class should have at least a "colourable claim" and that the issue is "whether there is a rational connection between the class as defined and the asserted common issues" [see *Hollick, supra* at paras 19–21]. For the reasons articulated above, the AGC asserts that the claims of the Class Members are time-barred and, as such, the Class as defined cannot have a colourable claim.

[101] The Plaintiff does not seek to amend the class definition in any way and, according to the Plaintiff, a consideration of this criterion does not arise on this motion as the Federal Court of Appeal's determination in the Certification Order is binding. I agree with the Plaintiff.

[102] In any event, there is clearly a rational connection between the Class as defined by the Federal Court of Appeal and the proposed common issues put forth on this motion. Just as the judicial review, breach of fiduciary duty, unjust enrichment and *Charter* claims are rationally connected to the Class, I find that so too are the breach of contract and breach of contractual duties claims.

[103] I would also note that the AGC's argument turns on a lack of a colourable claim based on the AGC's assertion that these new claims are time-barred. While the AGC repeatedly stressed during the hearing that it was not asking the Court to decide whether these new claims are time-barred (that is, to decide the merits), that is in fact what the AGC is asking the Court to do if it were to accept the ACG's argument on this criterion, which is improper.

[104] Accordingly, for the reasons set out above, I am satisfied that the Certification Order should be amended to add the Plaintiff's proposed additional common issues, together with the limitation period common issues identified above.

IV. Other Relief Sought by the Plaintiff

[105] The Plaintiff has requested an order that the Defendants deliver an Amended Statement of Defence within 14 days of service of the Amended Statement of Claim. The AGC objects to this

relief and proposes a 45-day window for delivery of their amended pleading, noting the difficulty of obtaining instructions within the window proposed by the Plaintiff.

[106] While I appreciate that the process of obtaining instructions from the various government clients engaged by this mandate may be more onerous than would be the case for a typical defendant, as rightly pointed out by the Plaintiff, the AGC has been on notice of the proposed amendments since August of 2025. Moreover, the scope of the amendments is narrow and based on the AGC's arguments on this motion. The AGC is therefore already well aware as to how it intends to plead vis-à-vis the Plaintiff's allegations of breach of contract and breach of contractual duties.

[107] At the hearing of the motion on December 3, 2025, I also warned the AGC that, should the motion be granted, I was not inclined to grant the AGC 45 days to provide an Amended Statement of Defence; and that, as such, the AGC should begin working on an amended pleading out an abundance of caution.

[108] Accordingly, I am satisfied that a 21-day window from the date of this Order for the delivery of an Amended Statement of Defence is sufficient.

[109] The Plaintiff also requested an order that any further examination for discovery of the Plaintiff with respect to the permitted amendments to the Statement of Claim be completed within 30 days of service of the Amended Statement of Claim. The completion of any further examination for discovery will depend upon the availability of the Plaintiff and counsel for all parties. The

parties shall confer on possible dates for such an examination (if any) and shall, by no later than 14 days from the date of this Order, provide the Court with a jointly-proposed date for completion of any such examination. In the event that the parties are unable to reach an agreement, the matter shall be determined by the Case Management Judge.

V. Costs

[110] As a result of Rule 334.39(1) of the *Federal Courts Rules*, the parties did not seek a cost award on this motion. Accordingly, no costs will be awarded.

ORDER in T-2044-19

THIS COURT ORDERS that:

1. The Plaintiff is hereby granted leave to amend the Statement of Claim in the form appended as Appendix A to the Notice of Motion. The Plaintiff shall serve and file their Amended Statement of Claim within four (4) days of the date of this Order.

2. The Certification Order is hereby amended to add the following additional common issues:

    a. Do the Plaintiff and the Class have standing to enforce the terms of the 2008 Agreement?

    b. In relation to the breach of contract and breach of contractual duties claims:

        i. What limitation period applies to the claims: two years under Newfoundland and Labrador's *Limitations Act* versus six years under the *CLPA*?

        ii. Subject to individual Class Member discoverability arguments, when did that limitation period begin to run?

        iii. When was the limitation period suspended by virtue of this proceeding, if it all?

        iv. If the limitation period has expired, can the Court make a curative *nunc pro tunc* order? If so, should the Court make such an order?

c. Did Canada breach the 2008 Agreement or its contractual duties by agreeing to and implementing sections 2, 6, 8, 9 and Annex A of the 2013 Supplemental Agreement?

d. If the answer to (a) and (c) are “yes”, what remedy is the Plaintiff and the Class entitled to?

3. The Defendants shall, by no later than 21 days from the date of this Order, serve and file their respective Amended Statement of Defence.

4. The parties shall confer on possible dates for a further examination for discovery of the Plaintiff (if any) and shall, by no later than 14 days from the date of this Order, provide the Court with a jointly-proposed date for completion of any such examination. In the event that the parties are unable to reach an agreement, the matter shall be determined by the Case Management Judge.

5. There shall be no award of costs.

“Mandy Aylen”
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-2044-19
STYLE OF CAUSE:	GREGORY CHARLES COLLINS v THE ATTORNEY GENERAL OF CANADA AND THE FEDERATION OF NEWFOUNDLAND INDIANS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 3, 2025
ORDER AND REASONS:	AYLEN J.
DATED:	JANUARY 8, 2026

APPEARANCES:

David Rosenfeld Sue Tan Caitlin Leach	FOR THE PLAINTIFF
Craig Collins-Williams Sarah Rajguru	FOR THE DEFENDANTS

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