Federal Court Cour fédérale

Date: 20250522

Docket: T-199-24

Citation: 2025 FC 925

Ottawa, Ontario, May 22, 2025

PRESENT: The Honourable Mr. Justice Zinn

PROPOSED CLASS PROCEEDING

BETWEEN:

CHIEF DEREK NEPINAK and CHIEF BONNY LYNN ACOOSE

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

I. Introduction

[1] Is a class proceeding "the preferable procedure for the just and efficient resolution of the common questions of law or fact" in this litigation or is a representative proceeding the preferable proceeding? This is the sole issue to be determined on this motion for certification,

because the Defendant [Canada] accepts that the four other conditions for certification required by Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 [the Rules], are met by the proposed class action.

II. Facts

[2] Between September 8 and 15, 1874, Canada negotiated what is now known as "Treaty 4" at Fort Qu'Appelle in present-day Saskatchewan. The terms of the treaty are between Her Majesty the Queen, Queen Victoria, and the Cree and Saulteaux Tribes of Indians at the Qu'appelle and Fort Ellice.

[3] Covering territories primarily in southern Saskatchewan and parts of Manitoba and Alberta, Treaty 4 ceded vast tracts of land (some 50,000 square miles) to Canada in exchange for a series of promises to the signing First Nations. Over time, additional First Nations adhered to Treaty 4, bringing the total number of signatories to 34 First Nations [the Treaty 4 First Nations].

[4] The promise by Canada in Treaty 4 relevant to this litigation was its agreement, in exchange for the land, to pay an annuity [the Annuity Payments]:

> As soon as possible after the execution of this treaty Her Majesty shall cause a census to be taken of all the Indians inhabiting the tract hereinbefore described, and shall, next year, and annually afterwards forever, cause to be paid in cash at some suitable season to be duly notified to the Indians, and at a place or places to be appointed for that purpose, within the territory ceded, each Chief twenty-five dollars; each Headman not exceeding four to a band, fifteen dollars; and to every other Indian man, woman and child, five dollars per head; such payment to be made to the heads of families for those belonging thereto, unless for some special reason it be found objectionable.

[5] The Plaintiffs claim that Treaty 4 obliges Canada to preserve the real value of the Annuity Payments through appropriate adjustment or indexation. They seek various forms of relief, including:

(a) Declarations that Treaty 4 contains an augmentation or indexation provision, whether express or implied, and that the annuities paid under Treaty 4 must be augmented or indexed to adjust for losses in purchasing power that are associated with inflation, or such other method of economic indexation as is necessary to maintain the value of the annuities in real terms; and

(b) Damages in an amount equal to the annuities that Canada should have paid less the annuities that were actually paid, special damages, and punitive damages.

[6] Chief Derek Nepinak is the Chief of Minegoziibe Anishinabe First Nation and a beneficiary of Treaty 4 Annuity Payments. Chief Bonny Lynn Acoose is the Chief of Zagime Anishinabek First Nation and a beneficiary of Treaty 4 Annuity Payments. They bring this suit:

> 21 … pursuant to Part 5.1 of the *Federal Courts Rules*, SOR/98-106, on their own behalf, and on behalf of all other Class members, and pursuant to rule 114 of the *Federal Court Rules* [*sic*] SOR/98-106, as a representative of all other Class members.
>
> 22 The members of the Class are:
>
> (a) All persons or the estates of persons who:
>
> i. were or are entitled to receive annuity payments from Canada under the terms of Treaty 4; and
>
> ii. had not died more than two years prior to the commencement of this action.
>
> 23 The following First Nations are successors to the First Nations parties or adherents to Treaty 4, and their members are entitled to receive annuity payments:

(a) Carry The Kettle Nakoda Nation;
(b) Cote First Nation #366;
(c) Cowessess First Nation;
(d) Day Star First Nation;
(e) Fishing Lake First Nation;
(f) Gambler First Nation;
(g) George Gordon First Nation;
(h) Kahkewistahaw First Nation;
(i) Kawacatoose First Nation;
(j) Keeseekoose First Nation;
(k) Kinistin Saulteaux Nation;
(l) Little Black Bear First Nation;
(m) Minegoziibe Anishinabe First Nation;
(n) Mosquito, Grizzly Bear's Head, Lean Man First Nations;
(o) Muscowpetung First Nation;
(p) Muskowekwan First Nation;
(q) Nekaneet Cree Nation;
(r) Ocean Man First Nation;
(s) Ochapowace Nation;
(t) Okanese First Nation;
(u) Pasqua First Nation #79;
(v) Peepeekisis Cree Nation #81;
(w) Pheasant Rump Nakota First Nation;
(x) Piapot First Nation;
(y) Rolling River First Nation;
(z) Sapotaweyak Cree Nation;
(aa) Star Blanket Cree Nation;
(bb) The Key First Nation;
(cc) Tootinaowaziibeeng Treaty Reserve;
(dd) Waywayseecappo First Nation;
(ee) White Bear First Nation;
(ff) Wuskwi Sipihk First Nation;
(gg) Yellow Quill First Nation; and
(hh) Zagime Anishinabek.

[7] Relying on expert evidence regarding the historical context of Treaty 4, the Plaintiffs argue that the annuity provisions of Treaty 4 must be read in light of their original purpose. For them, Treaty 4 was designed to guarantee every First Nation man, woman, and child a fixed-sum payment that would retain a meaningful real value, adjusted to reflect changes in economic conditions over time. They view the Crown’s promise as enduring and not merely symbolic,

given the significance of the land ceded. The Plaintiffs assert that by failing to properly adjust these payments for inflation or economic shifts, Canada has effectively eroded a core treaty right.

[8] The Plaintiffs identified 10 common questions that I categorize into four groups.

1) The first goes to the interpretation of Treaty 4: whether Treaty 4, properly construed, guarantees an annually adjusted annuity that is indexed for inflation or adjusted for changes in purchasing power?
2) The second concerns Canada's fiduciary obligations: whether Canada, acting through the Crown, owes a fiduciary or equitable duty to class members to maintain or augment the real value of the Annuity Payments?
3) The third relates to Canada's ongoing breaches of its duties: whether Canada's continued payment of a fixed sum amounts to an ongoing breach of Treaty 4 obligations and, if applicable, the honour of the Crown and other related duties?
4) The fourth pertains to remedies: whether class members are entitled to damages or equitable relief for Canada's alleged failure to index annuity payments and, if so, what methodology should be used to calculate the past loss or present shortfall?

[9] In addition to this proposed class proceeding, Treaty 4 First Nations have initiated separate actions to compel Canada to address the alleged underpayment or non-augmentation of these annuities. As of mid-August 2024, eleven specific claims have been filed with the Specific Claims Tribunal under the *Specific Claims Tribunal Act*, SC 2008, c 22, seeking indexation of the Treaty 4 annuities, and Pasqua First Nation has also filed a declaration of claim. Additional lawsuits have been brought in various provincial superior courts by parties including Waywayseecappo, Pasqua First Nation, and Little Black Bear First Nation. While a 2013 court

action by George Gordon First Nation has been held in abeyance since 2016, the remaining court and administrative tribunal proceedings remain active.

III. Issue

[10] As noted, the only issue for this Court is whether the Plaintiffs' proposed group litigation should be certified as a class proceeding under Rule 334.16 or permitted to continue as a representative action pursuant to Rule 114.

[11] Beyond this substantive issue, Canada has also raised a preliminary objection regarding the admissibility of specific portions of the Plaintiffs' record. There is merit to this objection.

[12] Canada challenges certain portions of three affidavits submitted by First Nations Chiefs, as well as an expert report authored by a University of Manitoba PhD holder in Native Studies, arguing that they contain inadmissible opinion evidence. It is trite law that opinion evidence is generally inadmissible unless it falls within one of two exceptions. First the common-knowledge exception, which allows lay witnesses to provide opinions on matters of everyday experience. Second, the expert-evidence exception, which permits qualified experts to offer specialized opinions within their area of expertise: *Graat v The Queen*, [1982] 2 SCR 819; *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 [*White Burgess*].

[13] Upon review, the paragraphs identified by Canada in the Chiefs' affidavits repeatedly express opinions on the Crown's obligations, the "spirit and intent" of Treaty 4, and whether Canada has "breached" its promises. These statements go beyond factual observations or matters

of common knowledge. They amount to legal interpretations and policy opinions. As such, they are inadmissible.

[14] Similarly, portions of the expert report extend beyond providing historical context and venture into legal conclusions regarding treaty implementation. While I accept that Dr. Leo Baskatawang is a qualified historian capable of providing factual and analytical insight into the history surrounding Treaty 4, I find his assertions regarding the Crown's legal obligations and declarations of "invalid authority" cross into legal advocacy. Those statements do not satisfy the requirements for expert testimony established in *White Burgess,* which mandates that expert opinions must be grounded in specialized knowledge and must not determine ultimate legal conclusions.

[15] Accordingly, I find that the impugned paragraphs in the Chiefs' affidavits, as well as the sections of the historian's report that interpret Crown obligations or declare treaty breaches, are excluded from my consideration of this certification motion. Purely factual or historical background free of legal inferences in Dr. Baskatawang's report, such as the recitations of relevant dates or known demographic changes, are admissible and will form part of the record.

IV. Legal Framework

A. *The general law on the preferable procedure requirement to certify a class action*

[16] The plaintiff bears the burden of establishing that the proceeding meets the certification criteria under Rule 334.16: *Paradis Honey Ltd v Canada*, 2017 FC 199 [*Paradis Honey*] at para 97; *Doan v Canada*, 2023 FC 968 at para 230.

[17] Part 5.1 of the Rules contains the Federal Court class proceeding framework, which spans Rules 334.1 to 334.4.

[18] The certification process is set out in Rules 334.12 to 334.2. Rule 334.16(1) specifically outlines the five core criteria that must be met for an action to be certified as a class proceeding:

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	**334.16 (1)** Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :
(a) the pleadings disclose a reasonable cause of action;	**a)** les actes de procédure révèlent une cause d'action valable;
(b) there is an identifiable class of two or more persons;	**b)** il existe un groupe identifiable formé d'au moins deux personnes;
(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	**c)** les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	**d)** le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
(e) there is a representative plaintiff or applicant who	**e)** il existe un représentant demandeur qui :
(i) would fairly and adequately represent the interests of the class,	**(i)** représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,	**(ii)** a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,
(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and	**(iii)** n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,
(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.	**(iv)** communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[19] Canada accepts that all these conditions, except for 334.16(1)(d), the preferable procedure, are satisfied.

[20] It has been observed that the preferable procedure in this context is one that fairly and efficiently resolves the common questions compared to alternatives: *Hollick v Toronto (City)*, 2001 SCC 68 [*Hollick*] at para 27; *AIC Limited v Fischer*, 2013 SCC 69 [*AIC Limited*] at para 22. In weighing the options, courts balance judicial economy, access to justice, and behaviour modification; favouring certification where individual claims are economically unviable or where systemic issues demand collective resolution: *Hollick* at para 33; *Rumley v British Columbia*, 2001 SCC 69 [*Rumley*] at para 35.

B. *The comparative framework for assessing preferable procedure*

[21] Rule 334.16(2) provides the following evaluative factors when determining the preferable procedure:

334.16 (2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether	**334.16 (2)** Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :
(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;	**a)** la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;
(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;	**b)** la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;
(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;	**c)** le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;
(d) other means of resolving the claims are less practical or less efficient; and	**d)** l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;
(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.	**e)** les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

[22] Determining whether a class proceeding is the preferable procedure requires courts to compare not only individual lawsuits but also "all reasonably available means of resolving the class members' claims:" *Hollick* at para 31. To determine whether a class proceeding meets the requirement under Rule 334.16(1)(d) that it is "the preferable procedure," courts must answer two questions: *Rumley* at para 35; *Hollick* at para 28.

[23] The first question is whether a class proceeding provides a fair, efficient, and manageable method for advancing the claim. This requires assessing whether the identified common issues can be resolved in a coherent manner without compromising fairness to the class as a whole or becoming unmanageable due to individual complexities.

[24] The second question is whether a class action is preferable to other available procedures. This involves a broad comparative analysis of the advantages and disadvantages of class proceedings relative to alternative mechanisms. This comparison does not demand proof that "the proposed class action will *actually* achieve those goals in a specific case" [emphasis in original], but only that it offers greater advantage over the other options: *AIC Limited* at paras 22-23.

[25] This comparative analysis must be conducted within the specific context of each case. Although Rule 334.16(1)(d) situates the analysis on "the just and efficient resolution of the common questions of law or fact," the established case law requires courts to assess preferability "in the context of the entire claim:" *Hollick* at paras 29–30; *Atlantic Lottery Corp. v Babstock*, 2020 SCC 19 [*Atlantic Lottery*] at para 166. In doing so, courts must compare potential alternatives—separate individual actions, representative proceedings, or administrative

redresses—and select the option that best fulfills the objectives of the class action regime: *Hollick* at para 31; *Rumley* at paras 38–39.

[26] The Supreme Court of Canada has consistently anchored this comparative inquiry to the three core goals of judicial economy, access to justice, and behaviour modification: *Hollick* at para 27; *Pro-Sys Consultants v Microsoft*, 2013 SCC 57 [*Pro-Sys*] at para 137; *Atlantic Lottery* at para 68. These goals may intersect or conflict with each other. Hence, as McLachlin C.J. wrote in paragraphs 28-30 of *Hollick*, the inquiry should adopt a "practical cost-benefit approach" that takes into account the "importance of the common issues in relation to the claims as a whole."

[27] Behaviour modification deters widespread wrongdoing by internalizing costs of misconduct that impact a great number of victims. The Supreme Court has emphasized the importance of this goal where regulatory bodies failed to act: *Pro-Sys* at para 141, or where punitive damages are sought to punish systemic misconduct: *Atlantic Lottery* at para 169. This goal is particularly relevant when liability stems from systemic wrongdoing: *Rumley* at para 34.

[28] Access to justice comprises both procedural and substantive aspects: *AIC Limited* at paras 24–25. Procedurally, a class action may mitigate economic barriers through spreading litigation costs and remove non-economic barriers that deter individual litigation, such as psychological trauma or societal stigma illustrated in cases like *Rumley* and *Thomas v Canada (Attorney General)*, 2024 FC 655. Substantively, it may yield meaningful relief for claims that would otherwise go unredressed. They are interconnected. As noted in paragraph 34 of *AIC Limited*, "class actions overcome barriers to litigation by providing a procedural means to a substantive end."

[29] Judicial economy is considered from the vantage point of whether a class action effectively consolidates the common issues to avoid duplicative fact-finding and disjointed litigation processes: *Rumley* at para 29. When overlapping proceedings or segmented lawsuits can be minimized, judicial economy weighs in favour of certification. If individual issues continue to dominate after the common trial such that the end of the class action marks only the beginning of the overall litigation process, this factor weighs against certification: *Hollick* at para 32. Courts also consider post-certification manageability in evaluating whether a class action advances judicial economy, including the feasibility of case management strategies that can render the entire lawsuit more efficient and effective: *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 at paras 70 and 90.

[30] Ultimately, a class action will likely be deemed preferable under Rule 334.16(1)(d) if it proves to be a "fair, efficient and manageable method of advancing the claim" that enables resolution of the bulk of the alleged grievances and addresses access to justice concerns in a more judicially economic manner than the alternative methods: *Rumley* at para 35; *Pro-Sys* at para 141. Conversely, if a proposed class action would create unmanageable complexity or if an alternative procedure more effectively resolves the dispute, the preferability requirement is not met: *Hollick* at paras 32–36.

V. Analysis

A. *Group litigation in the Federal Courts*

[31] Group litigation has deep common law roots. Its origin dates to the Courts of Chancery in the United Kingdom, where a claimant could bring a representative suit on behalf of a group

whose members shared a common interest and grievance, provided that the relief sought was beneficial to all those represented.[1]

[32] This equitable mode of proceeding was codified as Rule 10 of the *Rules of Procedure* of the United Kingdom in 1873:

> Where there are numerous parties having the same interest in one action, one or more of such persons may sue or be sued or may be authorized by the Court to defend in such actions on behalf of or for the benefit of all parties so concerned.

[33] When the Federal Court of Canada was created by the *Federal Court Act*, SC 1970-72, c 1, in 1971, its Rule respecting representative actions mirrored the English Rule. Rule 1711(1) of the *Federal Court Rules*, CRC 1978, c 663, provided:

> Where numerous persons have the same interest in any proceeding, the proceeding may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them representing all or as representing all except one or more of them.

[34] When the Federal Court of Canada was split in 1998, the new *Federal Court Rules*, 1998 SOR/98-106, continued representative actions in Rule 114(1):

> Where two or more persons have the same interest in a proceeding, the proceeding may be brought by or against any one or more of them as representing some or all of them.

I. [1] See Canada, Federal Court of Canada Rules Committee, Class Proceedings in the Federal Court of Canada – A Discussion Paper (Ottawa: Canada Gazette, 2000) at page 6 for this and the other historical statements below. See also *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at paras 19-25.

[35] When Part 5.1 of the Rules introducing the modern class proceeding regime was promulgated in SOR/2002-417, Rule 114 was repealed on the assumption that the new class action architecture would adequately cover all forms of group litigation.

[36] However, experience quickly showed otherwise. Aboriginal and treaty rights cases involve rights that are communal and indivisible, such as title to land, management of resources, treaty annuities, and fiduciary obligations, where the "commonality" flows more from the collectivity of the Band or Nation than from overlapping individual interests and claims. On August 10, 2004, the National Aboriginal Law Section of the Canadian Bar Association drew that distinction in a submission to the Federal Court of Canada Rules Committee [the Aboriginal Bar Reference Letter], observing that representative actions are premised on the collective character of the right itself, whereas class actions presuppose individual claims that merely share common issues of fact or law:

> Despite the intermingling of the two different types of actions, the two have historically served very different purposes and arguably should continue to do so in the Federal Court.
>
> For First Nations or other Aboriginal communities, advancing claims as representative actions is premised on a commonality derived from their specific nature as a party to litigation. As noted in *Woodward's Native Law*:
>
> > … the band, as an enduring entity with its own government, is a unique type of legal entity under Canadian law. The rights and obligations of the band are quite distinct from the accumulated rights and obligations of the members of the band.
>
> From an Aboriginal perspective, "association with their … collectivities is central to individual and community identity"; advancing their claims as a collective is a reflection of their cultural and political identity, as well as the nature of the rights claimed. The members of First Nations are not "merely individuals living in a close vicinity to each other, who might

> happen to enjoy a particular common interest in the favourable outcome of a court decision." [citations omitted]

[37] Responding to this Reference Letter and to similar concerns voiced by the bar, the Rules were again amended to reinstate representative proceedings. By SOR/2007-301, Rule 114(1) was reintroduced in the following language, which parallels that currently in force:

> 114(1) Despite rule 302, a proceeding, other than a proceeding referred to in section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that
>
> (a) the issues asserted by or against the representative and the represented persons
>
> > (i) are common issues of law and fact and there are no issues affecting only some of those persons, or
> >
> > (ii) relate to a collective interest shared by those persons;
>
> (b) the representative is authorized to act on behalf of the represented persons;
>
> (c) the representative can fairly and adequately represent the interests of the represented persons; and
>
> (d) the use of a representative proceeding is the just, most efficient and least costly manner of proceeding.

[38] The Regulatory Impact Analysis Statement accompanying the reintroduction of representative proceedings stated:

> (i) Class proceedings
>
> (1) The purpose of the current amendments is to reinstate Former Rule 114 [which provided for Representative Proceedings in the Federal Court of Canada and which was found in Part III of the Federal Court Rules, 1998 (FCR 1998) – Rules Applicable to All Proceedings]. Former Rule 114 was repealed by SOR/2002-417, s. 17 which brought into force an expanded Class Actions Proceedings (enactment of Rules 299.1-299.42 effective

> November 21, 2002) in the Federal Court of Canada. Former Rule 114 applied to actions only.
>
> (2) Soon after the repeal of Former Rule 114, it became apparent that the procedural lacunae identified with Former Rule 114 were "deficiencies" in the context of group litigation where the interest of the class is a common issue but they were not necessarily deficiencies in the context of group litigation where the class is defined by the commonality of the Parties. Such is the case in the majority of aboriginal litigation where common or *sui generis* rights are litigated.
>
> (3) To provide for a comprehensive Class Proceedings Rules (new Part 5.1) which will include Actions and Applications other than applications for judicial review under section 28 of the *Federal Courts Act* and which will entail the option between two mechanisms, one, under the Class Proceedings Rules and another under reinstated proposed Rule 114.
>
> (4) To enunciate that a representative proceeding may be brought by or against two or more persons that have a collective interest upon certain other conditions stipulated in the Rules.

[39] Read together, the Aboriginal Bar Reference Letter, the Regulatory Impact Analysis Statement, and the text of Rule 114 confirm that representative actions were revived to accommodate disputes that are "collective by nature." Paradigmatic examples of addressing disputes on collective rights through representative proceedings actions are Band-centric or Nation-centric claims, such as:

1) Issues of riparian rights seen in *Pasco v Canadian National Railway Company* (1989), 34 BCLR (2nd) 344 (BCCA);

2) Claims to use and benefits of reserve lands seen in *Joe et al. v. Findlay et al.* (1981), 26 BCLR 376 (BCCA); and

3) Matters of treaty interpretation seen in *Soldier* v *Canada (Attorney General)*, 2009 MBCA 12 [*Soldier*], *Kelly v Canada (Attorney General)*, 2013 ONSC 1220 [*Kelly Trial*], and *Gill v Canada*, 2005 FC 192 [*Gill*].

In each of these examples, the rights involved have been characterized by the courts as communal and indivisible, rather than shared but individually divisible.

[40] What, then, is the difference between representative and class proceedings in the Federal Court?

[41] The practical distinction lies in the source of commonality. A representative proceeding is suitable where claimants assert the same *collective* right because the right is inherently *communal*. It requires "common issues of law or fact" asserted by and affecting the persons represented by the representative plaintiff or issues that "relate to a collective interest shared by those persons." Conversely, a class proceeding is suitable where distinct individuals advance *personal* claims that happen to raise *common issues*. It requires that the claims of the class members "raise common questions of law or fact." The Aboriginal bar, in the Reference Letter, writes that representative proceedings are maintained by persons who have the "same interest" in the proceedings; whereas class proceedings are maintained by persons where there is a "common issue of law or fact" at stake. Hence, "[e]ssentially, the difference between the two actions is whether the commonality is derived from the nature of the parties or the nature of the issues" [emphasis in original].

[42] This fundamental distinction also shapes, and is consequently reflected in, each framework's procedural mechanisms. A representative proceeding does not provide an easy opt-

out mechanism, since represented individuals are bound by virtue of their collective identity. In contrast, a class proceeding incorporates an easy opt-out mechanism to safeguard the interests of absent class members precisely because these members lack the natural cohesion and direct communication found within groups bound by a collective identity, placing their individual legal interests at greater risk when common issues are adjudicated.

[43] The result of the distinction is that representative and class proceeding frameworks in the Rules provides the Federal Court with complementary tools tailored to specific group litigation contexts. Where the gravamen is the vindication of a *collective* right arising from the nature of the parties, such as a declaration of Aboriginal title binding every member of the corresponding Aboriginal policy, the representative action under Rule 114 tends to be more suitable. Where the claim concerns *individual* harm arising from systemic wrongdoing that gives rise to common issues, such as abuses in residential schools, Part 5.1's class action architecture, with its notice, opt-out, and individual issue resolution mechanisms, generally offers the superior procedural avenue.

B. *Persons who have the "same interest" in the proceeding*

[44] Given the differences between the two frameworks, and at first blush, it appears that this action ought to have been brought as a representative action, because the commonality is derived from the nature of the parties rather than the nature of the issues. This is because the claims advanced by the Plaintiffs are based on collective rights.

[45] In *Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (Minister of Agriculture and Lands)*, 2012 BCCA 193, Justice Smith observed at para 107:

> The *Class Proceedings Act* provides a procedure for the advancement of multiple individual claims arising from a common wrong. It is not designed to advance multiple collective rights claims for multiple collective entities. Claims of this nature (for collective rights) are generally made through a representative action, where a member (or members) of the Aboriginal entity asserting the rights, sues in a representative capacity on behalf of himself or herself and all of the other members of the Aboriginal entity. [emphasis added]

[46] Similarly, in *Twinn v Canada*, [1987] 2 FC 450 at page 452, this Court noted the collective nature of proceedings going to Aboriginal rights, stating that it was appropriate to join band members "as plaintiffs in a class action under Rule 1711, as Aboriginal rights are fundamentally communal in nature" [emphasis added]. The term "class action" in that context referred to the representative proceeding regime established by Rule 1711 from the *Federal Court Rules*, CRC 1978, c663.

[47] In the present case, the right to collect an annual treaty payment stems from Canada's promise in Treaty 4. The Supreme Court of Canada has consistently held that rights derived from a treaty are collective rights, which belong to the band as a whole and not to individual members: *R v Sundown*, [1999] 1 SCR 393 [*Sundown*] at para 36*; R v Marshall*, [1999] 3 SCR 533 [*Marshall*] at paras 17, 37; *R. v Sappier*; *R v Gray*, 2006 SCC 54 [*Sappier*] at para 31; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 35, applied in *Gill* at para 12.

[48] The Supreme Court of Canada confirmed the collective nature of treaty rights in *Behn v Moulton Contracting Ltd.*, 2013 SCC 26 at para 33 [*Behn*]. In *obiter dicta* comments, the Court also observed that:

> … certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights …

[49] It is of note that the Supreme Court did not say that some treaty rights may be considered uniquely individual.

[50] In my view, the right to receive an annual treaty payment is a collective right that is exercised individually. The fact that an individual may exercise a treaty right or be able to assert a treaty right does not change the nature of the underlying right.

[51] The right to receive the Annuity Payments is transmitted to individuals because of their membership in a particular Treaty 4 Band; it is not held by them in their individual capacity. Put alternatively, entitlement to receive Annuity Payments under Treaty 4 is derived solely from, indeed inseparable from, this unique legal relationship with a Treaty 4 Band. Should an individual cease to be a member of a Treaty 4 First Nation, that cessation alone extinguishes any further legal entitlement to the annuity.

C. *Preferable procedure given the context of the action*

[52] When assessing preferability, the common issues must be considered in the context of the action as a whole and the Court must consider the "importance of the common issues in relation to the claims as a whole" *AIC Limited* at para 21, citing *Hollick* para 30. In *Hollick* at para 29, the Supreme Court accepted that courts should adopt a "practical cost-benefit approach to this

procedural issue, and… consider the impact of a class proceeding on class members, the defendants, and the court."

[53] In *AIC Limited* it was held that the preferability analysis is a comparative exercise where the Court is asked to consider the extent to which the proposed class action may achieve the goals of behaviour modification, access to justice, and judicial economy. The overarching question before this Court is whether "other available means of resolving the claim are preferable."

[54] I turn now to consider which approach better satisfies these three core objectives of behaviour modification, access to justice, and judicial economy.

(1) *Behaviour Modification*

[55] The parties paid little attention to the impact of behaviour modification on their choice of proceeding. This is understandable given that both representative and class proceedings can ensure Canada is held accountable for alleged damages if the Plaintiffs succeed. Neither mechanism offers a distinct advantage in behaviour modification. As the case law discussed above demonstrates, any ruling on the interpretation of treaty rights, including those under Treaty 4 in the present case, would be *stare decisis* clarifying Canada's duty to augment annuities and influencing all future Crown conduct. I therefore find this factor to be neutral, as both methods would provide redress for the Plaintiffs in the event of a breach and promote future compliance.

(2) *Access to Justice*

[56] The Plaintiffs submit that a class proceeding is the preferable mechanism to ensure broad participation and cost-sharing among Treaty 4 beneficiaries, particularly given the modest value of individual claims that may otherwise deter individual litigation. They argue that a class action automatically includes all potential claimants without requiring each to obtain separate authorization from their respective First Nation, and thus guarantees that even those with modest claims are afforded an opportunity for remedies. Moreover, the Plaintiffs emphasize that class proceedings afford uniform notice to all class members and facilitate enhanced court supervision over critical procedural steps, including settlement approval and the administration of fees. In their view, these procedural safeguards not only help overcome economic barriers to litigation but also make certain that the claims of all prospective participants are addressed comprehensively, including the award of damages.

[57] Canada disputes the notion that representative proceedings pose a significant barrier to access to justice. It maintains that representative proceedings are fully capable of unifying thousands of claimants and alleviating the burden of individual suits. According to Canada, when First Nations councils elect to proceed collectively, there are no insurmountable barriers. Canada emphasizes that representative actions under Rule 114 already include court supervision over key procedural steps, such as settlement approval and fee arrangements, which ensures fairness and accountability without requiring the opt-out mechanism of class actions. While acknowledging the Plaintiffs' preference for the cost protections and judicial guidance that class proceedings provide, Canada argues that similar safeguards are available in representative actions, as the Court has the authority to impose conditions on these matters. Canada further

contends that concerns about access to justice are more theoretical than practical, noting that the Plaintiffs have already expressed a willingness to proceed via a representative action if class certification is denied and that no real significant individual issues have been identified in this case or in analogous past proceedings.

[58] I find Canada's position on access to justice more persuasive. I accept that a representative action can effectively address the Plaintiffs' core access-to-justice concerns in this case.

[59] A class proceeding automatically includes all claimants, while a representative action typically requires each participating First Nation's council to authorize collective litigation: *Kelly Trial* at paras 116-119; *Kelly v Canada (Attorney General)*, 2014 ONCA 92 [*Kelly Appeal*]. Nevertheless, the Plaintiffs have not provided "some basis in fact" to show that this requirement would meaningfully exclude or discourage Treaty 4 annuitants with modest claims from joining a unified proceeding. If the First Nations' leaders opt to bring or join a representative action, the represented members are effectively pooled in the same manner as a class: *Kelly Trial* at para 121. There is no evidence showing that such an approach deprives low-value claimants of redress.

[60] The Plaintiffs highlight the no-costs regime and the structured notice and settlement-approval features of class proceedings as particularly more advantageous. Canada responds that, while representative actions have fallen into disuse, their modernized framework in this Court under Rule 114 now incorporates procedural safeguards akin to those in class actions. Under Rule 114(2)(b), the Court has the authority to impose notice requirements, and under

Rule 114(2)(c), it may supervise both settlement terms and counsel fees. Indeed, as previously noted, the Federal Court reinstated the representative action regime just five years after its repeal precisely to address concerns raised by the Aboriginal litigation bar and to recognize that certain types of Aboriginal litigation, such as treaty claims, may be effectively managed through this mechanism: *Canada (Royal Mounted Police) v Canada (Attorney General)*, 2015 FC 1372 at para 62, citing "Rule-Making in a Mixed Jurisdiction: The Federal Court (Canada)" (2010), 49 SCLR (2d) 313.

[61] While the Plaintiffs maintain that automatic inclusion in a class action is critical for individuals whose own claims may be too small or too diffuse to justify litigation, I find there to be little reason to suspect those same individuals would be turned away from a representative suit if their First Nation is committed to pursuing treaty rights for its membership. Access to justice is fundamentally about lowering or eliminating barriers that would otherwise hinder claimants from obtaining meaningful relief. Here, both forms of collective action reduce these barriers by consolidating legal costs, providing a single team of counsel, and spreading any risk or expenses among potentially thousands of annuitants.

[62] Nor does the possibility that a First Nation's council might decline to authorize a representative action negate the fact that representative actions may promote access to broader participation. Given that notice, settlement, and costs remain subject to this Court's oversight under the modernized Rule 114, a First Nation that recognizes the value of augmenting Annuity Payments has every incentive to pursue a representative action just as it would a class action. Indeed, the Plaintiffs themselves have pleaded an alternative request for a representative order should class certification be denied. This demonstrates that the economic and procedural

advantages typically associated with “access to justice” are not exclusive to class actions but are also potentially attainable through representative actions under Rule 114.

[63] Therefore, while a class action might offer a straightforward approach for automatically encompassing all prospective annuitants, I am not convinced that the Plaintiffs have shown “some basis in fact” of class proceedings surpassing the representative model in reducing cost or logistical hurdles. A modern representative action under Rule 114 similarly aggregates claims, spreads litigation expenses, and ensures court supervision for critical steps. Consequently, both mechanisms can effectively facilitate access to justice, and the Plaintiffs have not established that a class action is more preferable for achieving this goal.

(3) *Judicial economy*

[64] The Plaintiffs assert that a class proceeding is the optimal vehicle to consolidate all Treaty 4 annuitants’ claims and avert fragmented litigation across multiple courts over the central question of whether Treaty 4 annuities must be augmented or indexed. They emphasize that the predominance of common issues favours a class action. This form of collective litigation, they contend, would streamline both factual and legal determinations by centralizing evidence, such as expert testimony on treaty interpretation and economic valuation, and by standardizing procedural steps under judicial supervision. For the Plaintiffs, this would eliminate redundant fact-finding and reduce the risk of inconsistent rulings on identical treaty provisions. While acknowledging there might be potential individualized damage assessments, they contend such concerns are secondary under *Hollick*, as the resolution of core liability issues on a class-wide basis would significantly advance judicial economy by resolving the bulk of the issues

underlying the disputes. A unified proceeding through class action, they explain, ensures consistency in interpreting Treaty 4's annuity clause and avoids piecemeal adjudication of identical claims.

[65] Canada concedes that class actions can, in general, consolidate claims, but argues that its opt-out mechanism erodes judicial economy in practice, given that treaty interpretation is the focus of this lawsuit. It warns that opt-outs could fracture the litigation, inviting contradictory interpretations of Treaty 4's annuity clause. It references ongoing specific claims and parallel proceedings launched by Treaty 4 First Nations in tribunals and provincial superior courts as evidence that conflicting rulings are a tangible risk, not a hypothetical concern. Citing my related decision of *Horseman v Canada*, 2015 FC 1149 [*Horseman*], Canada emphasizes that class actions are ill-suited for treaty interpretation because divergent rulings on treaty rights directly undermine reconciliation and legal certainty. Arguing that this shows the willingness for opt-outs are not merely theoretical, Canada contends that judicial economy is best served by a procedure that not only consolidates claims but also minimizes duplicative litigation, rather than one that invites it. Accordingly, Canada advocates for representative actions under Rule 114, which bind all represented parties unless the Court grants specific exceptions. This form of collective litigation, Canada states, ensures finality and uniformity while preventing the proliferation of parallel suits.

[66] Having weighed the submissions, I conclude that judicial economy favours a representative proceeding. Treaty interpretation demands consistency and uniformity. In the context of Treaty 4, the same provisions on Annuity Payments must yield the same outcome for all annuitants rather than different results for various subgroups. Because class proceedings

permit members to "opt-out" with relative ease, it risks spawning parallel litigations in which identical treaty obligations may be interpreted differently. Such fragmentation undermines judicial economy for this group litigation, even if, in the long run, appeals and the principle of *stare decisis* will eventually result in the unification of differing interpretations. It is a risk that, in my view, a representative action would better minimize.

[67] Decades of provincial and federal jurisprudence stress the need for consistent adjudication of treaty rights: *Kelly Trial* at paras 106 and 109-110; *Gill* at paras 12-13; *Soldier* at para 78; *Horseman* at paras 78-82. At paragraph 82 of *Horseman*, I made this observation in *obiter*:

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

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

[68] The Plaintiffs attempt to distinguish the present case from the established line of case law by invoking the recent Supreme Court decision of *Ontario (Attorney General) v Restoule*, 2024 SCC 27 [*Restoule*]. They rely specifically on paragraphs 190 to 192, which state that the annuity promised under the Robinson Treaties "has been paid in cash to individuals" for over 170 years.

Based on this description, the Plaintiffs argue that the annuity rights under Treaty 4 should similarly be viewed as treaty rights that are individual, rather than collective in nature, and thus are more suitable for a class action. With respect, this effort is misguided for at least two reasons.

[69] First, the Plaintiffs misinterpret *Restoule* by overemphasizing its discussion of "individual payments." A full reading of *Restoule* reveals that its reference to individual disbursements is merely an observation about historical payment methods and administrative practices, not a statement about the legal nature of the annuity rights. The Supreme Court makes it clear that, notwithstanding the individual manner of payment, the annuity rights themselves are collective and made to the "Chiefs and their tribes": *Restoule* at para 196. Hence, while the Plaintiffs correctly observe that annuity payments have in practice been made to individuals, this does not transform Canada's treaty obligations on annuities into a purely individual right in law.

[70] Consequently, *Restoule* does not provide the Plaintiffs with the legal support they seek. On the contrary, it reinforces the view that, even if the payment mechanism appears individual, the substantive question of how annuities should be augmented in the present case remains inherently tethered to the collective right of the Band provided by Treaty 4. As *Restoule* does not sway the established jurisprudence or affect my analysis for the purposes of certification, the legal framework continues to require a single, unified judicial determination to avoid fragmented litigation and inconsistent interpretations. This is a goal most effectively achieved through a representative action.

[71] Second, the Plaintiffs' focus on characterizing the annuity as "individual" conflates the issue of standing with that of procedural preferability. This is a distinction clearly articulated in case law: *Soldier* at para 59; *Behn* at para 33. Whether treaty rights manifest along an individual-collective continuum and where do Treaty 4 annuity rights fall on it are irrelevant here, because Canada has not contested the Plaintiffs' standing to bring this claim. It has conceded that, for this point, the "plain and obvious" threshold is met.

[72] With the issue of standing undisputed, the central question now is therefore whether a class action is the appropriate vehicle for resolving the interpretive question concerning Treaty 4's annuity obligations in a way that advances judicial economy.

[73] The answer is no. I repeat—a well-established body of Supreme Court jurisprudence confirms that treaty rights are inherently collective in a legal sense: *R. v Sparrow*, [1990] 1 SCR 1075 at p. 1112; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 115; *Sundown* at para 36; *Marshall* at paras 17 and 37; *Sappier* at para 31; *Behn* at para 33. By focusing and relying on how members of First Nations individually exercise their collective rights in *Restoule*, the Plaintiffs overlook the fundamental legal requirement that interpretation of such collective rights must yield one single, binding resolution applicable to the entire signatory group, not fragmented outcomes for different subgroups. This requirement is precisely why courts have recognized that treaty interpretation disputes are incompatible with class actions.

[74] The Plaintiffs also attempt to distinguish the current proceeding from the established jurisprudence on factual bases. They contend that, unlike in *Horseman*, where fifteen representative actions were pending, the current situation involves only one unaffiliated

overlapping action and a few specific claims that are moving slowly at best. In their view, the relatively small footprint of parallel litigation under Treaty 4 reduces the likelihood of fragmenting proceedings and conflicting rulings. In short, they argue that *Horseman* is distinguishable based on scale: with fewer pre-existing representative or individual actions, the possibility of "dueling interpretations" is remote. Consequently, the Plaintiffs assert that a class proceeding remains a more efficient, consolidated vehicle in this instance than in *Horseman* and better serves judicial economy for the case at hand.

[75] With respect, this argument misses the point. While it is true that fewer overlapping actions are present in the current case, their very existence, even if fewer than in *Horseman*, provides evidence of a real willingness among different Treaty 4 First Nations to pursue separate suits to compel indexation of the Annuity Payments. Indeed, the jurisprudence on point cautions that even a small number of concurrent proceedings, including those brought by individuals or First Nations who opt out of a class action, can undermine judicial economy by creating the risk of conflicting interpretations regarding the "augmentability" of Treaty 4 annuities. Even a single conflicting ruling resulting from a litigation arising from a group of opt-out litigants would further undercut the certainty that a resolution of treaty rights should provide. In this context, the concern is not the number of parallel actions, but the qualitative risk they pose to judicial coherence.

[76] Hence, it is immaterial that numerically fewer overlapping lawsuits exist here than in *Horseman*. The inherent risk remains that class proceedings allow any number of potential class members to opt-out, freeing them from the class action's outcome and enabling them to pursue their own separate litigation. This gives rise to the separate, possibly conflicting proceedings

that work against the goal of judicial economy. The Plaintiffs have not made any substantive and persuasive submissions on this core concern.

[77] The parties also spar on whether *stare decisis* would favour one procedure over another. As with my analysis of behavioural modification, I find that this principle confers no procedural advantage on either side. *Stare decisis* neither promotes nor undermines judicial economy under either procedural model, and therefore does not weigh in favour of one over the other in terms of preferability. Regardless of whether the action proceeds under Rule 334.16 or Rule 114, any first-instance judgment from this Court will have horizontal binding effect and will be subject to appellate review by the Federal Court of Appeal. The combined structure of horizontal and vertical *stare decisis* thus ensures a single, authoritative interpretation of the Treaty 4 annuity clause, barring the rare and legally defined exceptions: *Re Hansard Spruce Mills Ltd*, [1954] BCJ No 136, (BCSC); *Carter v Canada (Attorney General)*, 2015 SCC 5. Neither party has argued that such an exception is likely to arise. Accordingly, *stare decisis* sufficiently imposes the ultimate uniformity both parties profess to want. The form or procedure of the group litigation does not. For the ultimate question of treaty interpretation and not the fragmentation of this case, neither party's preferred mechanism offers an advantage in advancing judicial economy.

[78] Turning to the cost-effectiveness for the options, I find that a representative action under Rule 114 better minimizes duplicative fact-finding and enhances manageability. By design, Rule 114(3) guarantees that the outcome of a representative action binds all members of a First Nation who have chosen to sue or be sued, unless a specific and more demanding motion for exclusion is granted. This contrasts starkly with a class proceeding's comparatively simple "opt-out" mechanism. More stringent mechanisms for opt-out translate into a lower risk of parallel

suits and contradictory rulings, which is precisely the risks that a consolidated proceeding, aimed at achieving a unified and binding treaty interpretation, seeks to eliminate.

[79] The Plaintiffs argue that subgroups might still withdraw from a representative action, invoking the example of Sandy Bay Ojibway First Nation's pursuit of an exclusion order in a representative action ordered by Justice Edmond dated February 11, 2022, in the Court of King's Bench of Manitoba (*Nelson v Canada*, File # CI19-01-22143), by seeking an amendment (underlined) to the Order:

> THIS COURT ORDERS that a Representation Order is granted in favour of the Plaintiff, Zongidaya Nelson, to bring the claim forward on his own behalf and on behalf of the Roseau River Anishinabe First Nation, to represent a group of persons who are entitled to receive the annuity payment pursuant to Treaty 1 from the Crown, <u>except those who are members of Sandy Bay Ojibway First Nation.</u>

[80] However, requiring a formal court consent for exclusion, rather than a simple opt-out procedure, imposes a higher threshold. This additional step ensures that all members of the relevant Bands remain engaged unless a compelling justification for exclusion is established, thereby discouraging casual exits that could lead to parallel litigation. One must recall that the assessment of the preferable procedure is not about identifying the procedure that conclusively resolves all issues for judicial economy, but rather about determining which procedure is *better* at promoting it. The analysis is comparative. In my view, these procedural safeguards provided by the representative proceedings regime more effectively reduce the risk of duplicative or fragmented litigation and thus better promote judicial economy.

[81] Equally important, a representative framework does not sacrifice all the efficiencies typically sought in a class proceeding. Concerns over manageability, such as cost-sharing and economies of scale, do not inherently tilt the balance in favour of a class action. A single counsel team can represent an entire Band or even a collection of Bands, pooling resources effectively, and evidence can be collected once for the whole group. Furthermore, under Rule 114(2), this Court can manage the litigation process in a consolidated manner, in many similar ways as it could in class proceedings. Thus, from a manageability perspective, a modernized representative action under Rule 114 can capture many of the same advantages as a class action.

[82] As to the Plaintiffs' assertion that a class action is the more efficient and effective mechanism to ascertain the monetary relief for the annuitants, I am not persuaded. The Plaintiffs structure their reasoning on two key procedural tools available under the class proceedings regime. First, because Rule 334.28 allows this Court to assess aggregate damages, the parties can "sidestep […] many of the complexities that can arise in determining any single class member's entitlement." Then, Rule 334.26 provides for a more tailored sub-issue resolution mechanism that better tackles "individual issues determinations… without the need for a follow-on action to obtain relief for [individual] class members." This one-two punch framework, according to the Plaintiffs, makes class proceeding preferable.

[83] While these procedural tools undoubtedly offer advantages, I do not find that the Plaintiffs have supplied sufficient evidence to show that their benefits elevate the class proceeding regime in the present case. First, Rule 334.28(3) allows a court to assess damages in the aggregate only if there is "some basis in fact" that a workable class-wide methodology exists.

The evidentiary threshold is low, but it is not illusory. On this certification motion, the Plaintiffs must provide evidence demonstrating that "there is a workable methodology for determining issues on a class-wide basis and without proof from individual class members": *Jacques v Canada*, 2024 FC 851 at paras 108-111; *Canada v Greenwood*, 2021 FCA 186 at para 188. Here, the Plaintiffs provided none, resulting in a factual vacuum insufficient to support that aggregate damages can be calculated.

[84] By contrast, I find that Canada has demonstrated that if an indexing factor is ultimately established, the calculation of individual entitlements is straightforward. Each annuitant is entitled to a uniform annual sum, subject only to two simple exceptions beyond the standard $5 per member: $25 for chiefs and $15 for headmen or councillors. The Crown already possesses the necessary annual head-count records. Multiplying a fixed sum by a known number of individuals each year is an arithmetic task that can be accomplished within either a representative or a class proceeding. It neither requires aggregate damages assessment nor justifies invoking the additional procedural mechanisms outlined in Part 5.1.

[85] Concerning the potential need of individualized assessment of questions of fact or law, the Plaintiffs argue that variations, such as differing limitation periods and discoverability, could necessitate numerous person-specific inquiries, thus overwhelming a representative proceeding. Although the Plaintiffs highlight plausible subgroups, including those impacted by the displacement of Indigenous children during the Sixties Scoop, they offer little evidence indicating that entitlement calculations cannot be readily accomplished using Canada's existing annual records. Additionally, there is no indication of missing essential records, nor any evidence suggesting that variations in age of majority or residency significantly impact the

quantum. The Plaintiffs have also failed to demonstrate scenarios where limitation defences hinge upon unique, individualized facts. In short, the Plaintiffs have not provided the requisite factual basis to substantiate claims of frequent or complex individualized assessments.

[86] I find that, without concrete evidence showing a genuine risk of large-scale, individualized mini trials, the Plaintiffs' residual issue argument remains mostly theoretical. Theoretical concerns alone cannot satisfy the "some basis in fact" evidentiary threshold under Rule 334.16(1)(d). Conversely, the risk of opt-outs leading to parallel proceedings, and therefore conflicting treaty interpretations, has been recognized by courts across different jurisdictions as a concrete and unacceptable threat to judicial economy, as established in *Gill*, *Soldier*, *Kelly Trial*, and *Horseman*. Balancing this tangible systemic risk against the Plaintiffs' theoretical concerns regarding individualized assessments, I find the representative proceeding remains procedurally superior.

[87] In summary, Rule 114's approach to representative litigation is especially well suited to advance judicial economy in this case. I emphasize that I am not declaring that class actions in this Court are now entirely replaceable by representative actions. On the contrary, class proceedings offer distinct advantages, one in fact being the simplicity of opting out. However, in the specific context of a treaty interpretation dispute that requires uniformity and consistency of outcome, a class action with an opt-out mechanism is less ideal. The key concern is preventing subgroups from pursuing conflicting parallel actions, which could lead to duplicative litigation and inconsistent interpretations of treaty rights stemming from the group litigation at hand. While class proceedings may seem expedient at first glance, their opt-out feature undermines judicial efficiency. By contrast, once a Treaty 4 First Nation opts into a representative action,

the litigation process becomes more stable and manageable for all represented members. This is the approach that better serves judicial economy in this case.

VI. Appropriate Order

[88] In addition to an Order dismissing the Plaintiffs' motion for certification, Canada proposes that this Court issue this order:

> "authorizing this action to proceed as a representative action, and authorizing the plaintiffs to represent their respective First Nations and any other agreeable First Nations, on the following terms:
>
> a. Chiefs Nepinak and Acoose may respectively represent Minegoziibe Anishinabe First Nation and Zagime Anishinabek First Nation;
>
> b. Chiefs Nepinak and Acoose or their counsel must notify each of the Treaty 4 First Nations (as set out in paragraph 23 of their claim) of their right to participate as set out below;
>
> c. Chiefs Nepinak and Acoose may represent any Treaty 4 First Nation that provides a band council resolution consenting to representation by them;
>
> d. Any Treaty 4 First Nation that does not consent to representation by Chiefs Nepinak and Acoose may elect to join the action as an added party plaintiff."

[89] It is unusual in a representative action that the plaintiff seeks the consent of the others affected by the claim to represent their interests. However, in the context of claims arising from Treaty interpretation where several First Nations are signatories, I accept that as each First Nation is a distinct entity, making such an order is appropriate here.

[90] Canada did not seek costs, and none are awarded.

ORDER in T-199-24

THIS COURT ORDERS that:

1. The Plaintiffs' motion for an Order certifying this action as a class proceeding is dismissed.

2. This action shall proceed as a representative action, and the Plaintiffs shall represent their respective First Nations and any other agreeable Treaty 4 First Nation, on the following terms:

    a. Chiefs Nepinak and Acoose may respectively represent Minegoziibe Anishinabe First Nation and Zagime Anishinabek First Nation and their members entitled to the Annuity Payments under Treaty 4;

    b. Chiefs Nepinak and Acoose or their counsel must notify each of the Treaty 4 First Nations (as set out in paragraph 23 of their statement of claim) of this action and their right and their members' right to participate as set out below;

    c. Chiefs Nepinak and Acoose may represent any Treaty 4 First Nation and its members entitled to the Annuity Payments under Treaty 4, that provides a band council resolution consenting to representation by them; and

    d. Any Treaty 4 First Nation that does not consent to representation by Chiefs Nepinak and Acoose may elect to join the action as an added party plaintiff

3. The style of cause is amended to henceforth read as follows:

    Chief Derek Nepinak, on his own behalf, and on behalf of the Minegoziibe Anishinabe First Nation, and Chief Bonny Lynn Acoose, on her own behalf and on behalf of the Zagime Anishinabek First Nation; and both as

representing a group of persons who are entitled to receive an annuity payment from the Crown pursuant to Treaty 4; and

4. No costs are awarded.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-199-24
STYLE OF CAUSE:	CHIEF DEREK NEPINAK and CHIEF BONNY LYNN ACOOSE v HIS MAJESTY THE KING
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	FEBRUARY 13, 2025
ORDER AND REASONS:	ZINN J.
DATED:	MAY 22, 2025

APPEARANCES:

Michael Rosenberg	FOR THE PLAINTIFFS
Scott Farlinger Neil Goodridge	FOR THE DEFENDANT

SOLICITORS OF RECORD:

McCarthy Tétrault LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFFS
Attorney General of Canada Winnipeg, Manitoba	FOR THE DEFENDANT