Class Actions and Aboriginal Litigation

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1. Origins of the class action

a) The old representative action

Through the nineteenth century, the courts of equity "applied a rule of compulsory joinder, requiring all those interested in the subject matter of the dispute to be made parties": *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 19. Examples were conflicts between tenants and manorial lords or between parsons and parishioners.

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.
>
> *Smith et al. v. Swormstedt et al.*, 16 How. 288 at 302 (U.S. 1853)

> Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.
>
> *Duke of Bedford v. Ellis*, [1901] A.C. 1 at 8

b) The restrictive early twentieth-century representative action

By the early twentieth century, English case law restricted the representative action to cases where a group had a claim on a common fund and where damages were not at issue.

The English Court of Appeal refused to allow one plaintiff to sue on behalf of a larger group having suffered similar damages.

> …I can conceive no excuse for allowing any one shipper to conduct litigation on behalf of another without his leave, and yet so as to bind him. The proper domain of a representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject-matter. Here there is nothing of the kind. The defendants have made separate contracts which may or may not be identical in form with different persons and that is all. […] The relief sought is damages. Damages are personal only. To my mind no

representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.

Markt & Co. Limited v. Knight Steamship Company, Limited, [1910] 2 K.B. 1021 (C.A.) at 1040-41

It must be shown ... that all the members of the alleged class have a common interest, that all have a common grievance, and that the relief is in its nature beneficial to them all.

Smith v. Cardiff Corporatian (No. 1), [1954] 1 Q.B. 210 (C.A.) 220- 221

2. The modern view of the class action

a) The Supreme Court of Canada's trilogy

The Supreme Court of Canada decided in 2001 that the Alberta courts could authorize a class action even without class action legislation and on the basis of a rule which stated: "Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all."

According to the Chief Justice:

> 26 The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.
>
> 27 Class actions offer 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. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times) […].

> 28 Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied […].
>
> 29 Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation […].
>
> *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534

Rumley v. British Columbia, [2001] 3 S.C.R. 184: granted

Later the same year, the Supreme Court of Canada certified a class action on behalf of individuals who had attended a residential school for deaf children open from the early 1950s until 199 and where sexual, physical and emotional abuse of students by staff and peers took place. The Court held that all class members shared an interest in the essential question of whether the school should have prevented the abuse or responded to it differently. A class proceeding would be a fair, efficient and manageable procedure, preferable to others because the individual issues would be a relatively minor aspect of the case.

Hollick v. Toronto (City), [2001] 3 S.C.R. 158: refused

The same day, the Supreme Court of Canada refused to certify a class action on behalf of some 30,000 people who lived near a municipal landfill alleging noise and other pollution. The Court held that a class action was not the preferable means of resolving the claims. All class members had to establish that the landfill emitted physical or noise pollution, but it was likely some areas were affected more seriously than others and at different times. As a result, resolution of the common issue would not significantly advance the individual claims.

b) Criteria for certification and the role of the courts

i. According to the Supreme Court of Canada

48 To summarize, class actions should be allowed to proceed… where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of fact or law common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed.

Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534

1) *Class definition* is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. […] It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria[…]. (para. 38)

2) The *commonality* question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. (para. 39)

3) Third, with regard to the common issues, success for one class member must mean success for all. *All members of the class must benefit from the successful prosecution of the action*, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests. (par. 40)

4) *The proposed representative* need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class […]. (para. 41)

> 49 Other procedural issues may arise. One is *notice*. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.
>
> 50 Another procedural issue that may arise is how to deal with *non-common issues*. The court retains discretion to determine how the individual issues should be addressed, once common issues have been resolved […]. Generally, individual issues will be resolved in individual proceedings.

ii. In the Federal Court and the common law provinces

The class action criteria under the *Federal Court Rules (1998)*, as amended in 2002, and in the three common-law provinces with legislation as of the same year[1] were summarized as follows:

1. *Certification.* A court must approve ("certify") a proceeding as a class proceeding before it can go forward. The criteria are important. They are:

    a. the pleadings disclose a cause of action,
    b. there is an identifiable class of 2 or more persons,
    c. the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members,
    d. a class proceeding would be the preferable procedure for the resolution of the common issues, and
    e. there is a representative plaintiff who
        i. would fairly and adequately represent the interests of the class,
        ii. has produced 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 of the proceeding, and
        iii. does not have, on the common issues, an interest that is in conflict with the interests of other class members.

2. *Class membership.* Potential class members are notified of certification and given an opportunity to decide whether or not they want to be part of

[1] British Columbia, Ontario and Saskatchewan; since then, Alberta, Manitoba, New Brunswick and Newfoundland have adopted legislation.

the class. Subclasses may be formed in situations where some members of the main class share issues that are not common to other members. Each subclass has its own representative plaintiff.

3. *Court Role.* The court actively case manages the proceeding. The court's role includes:

   a. certification of the proceeding as a class action;
   b. approval of
      i. notices to class members (certification of the proceeding, opportunity to decide whether or not to be in the class, resolution of the common issues, whether by settlement or judicial disposition),
      ii. the settlement or discontinuance of the action, and
      iii. any agreement between the representative plaintiff and class counsel for the payment of lawyer fees and disbursements;
   c. exercise of judicial discretion to allow class members to participate in the proceeding; and
   d. making provision for the determination of individual issues separate from the common issues.

4. *Monetary relief.* Class action statutes permit damage awards to be assessed on an individual or aggregated basis (in which case provision is made for subsequent distribution to class members).

5. *Limitation periods.* Limitation periods that would otherwise run against plaintiff class members are suspended during a class proceeding.

Margaret A. Shone, "Facilitating Access to the Courts through Class Actions: Canadian Developments" *News and Views* (Canadian Forum on Civil Justice*)* Issue 4: Spring 2002

iii. Criteria under Québec's *Code of Civil Procedure*

The criteria are similar but not identical in Québec, which adopted Canada's first class action legislation in 1978.

The *Code of Civil Procedure* provides that:

> 1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designated if of opinion that:
>
> (a) the recourses of the members raise identical, similar or related questions of law or fact;

(b) the facts alleged seem to justify the conclusions sought;

(c) the composition of the group makes the application of article 59 [mandate] or 67 [joinder] difficult or impracticable; and

(d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

Unlike the *Federal Court Rules*, the *Code of Civil Procedure* does not include among the criteria that a class action must be the preferable procedure.

> While the judge, on a motion for authorization, must be careful to screen out cases which are obviously frivolous or which do not meet the requirements of Article 1003, it is not his role to determine the merits of the claim. At that stage, he need only decide whether the facts alleged in the motion for authorization "seem to justify" a class of action as required by Article 1003 (b).
>
> …
>
> But Article 1003(a) does not require that all of the questions of law or of fact in the claims of the members be identical or similar or related. Nor does the Article even require that the majority of these questions be identical or similar or related. From the text of the Article, it is sufficient if the claims of the members raise some questions of law or of fact that are sufficiently similar or sufficiently related to justify a class action.
>
> *Comité d'environnement de la Baie inc. c. Société d'électrolyse et de chimie Alcan ltée*, [1990] R.J.Q. 655 (C.A.) at 661

Moreover, the criterion for the application of para. 1003 (c), C.C.P., according to the Québec Court of Appeal, is not that use of a mandate or joinder of actions would be impossible, but only difficult or impracticable: *Québec (Curateur public) c. Syndicat national des employés*, [1994] R.J.Q. 2761 (C.A.) at pp.2782-83.

However the Superior Court judge who authorized the Indian residential school settlement in Québec pointed out that "article 4.2 C.C.P. requires that litigants must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action": *Bosum c. Canada (Attorney General)*, [2006] Q.J. No. 14319 (S.C.) at para. 10.

3. Procedural issues for Aboriginal claims

a) Representative versus class actions

Indian bands have routinely been found to meet the test for bringing a representative action through their chief or council: *Afton Band of Indians v. Attorney General of Nova Scotia* (1978), 29 N.S.R. (2d) 226 (S.C.T.D.) at 239, 9 C.N.L.C. 8 at 22

Relying on the old English case law, the British Columbia Court of Appeal held that a claim to Aboriginal rights and title was appropriately brought as a representative action and the Supreme Court of Canada approved.

> A. Is the class capable of clear and definite definition?
>
> The Indian bands are capable of clear and definite definition as their membership is defined under the *Indian Act*. As for the nations it is sufficient that the Indians be able to prove that there was an organized society occupying the specific territory over which the Indians, as descendants of the members of that society, now assert aboriginal title based on the title that existed at the date that sovereignty was asserted by the Europeans.
>
> B. Are the principal issues of fact and law essentially the same as regards all members of the class?
>
> …
>
> If the classification of the rights claimed by the chiefs as members of both the bands and the nations are communal rights, the remedies granted by the courts will also be communal remedies shared by the members of the class to which it was granted.
>
> …
>
> Thus, it appears that a representative action has been endorsed as the correct form in which to bring a claim involving aboriginal rights. The important thing is that all interests be represented at trial and that all persons who may have such a claim are bound by the result. It is only after evidence has been heard that all of the members of the class can be properly identified.
>
> …
>
> I have no hesitation in finding that the plaintiffs have the same interest in the proceeding.
>
> The plaintiffs all assert a common claim based on communal rights held by members of the nations of which they are descendants. The rights which they have inherited are, in my opinion, the same rights.
>
> I do not think that any distinction is to be drawn between rights claimed on behalf of members of specific bands and rights claimed on behalf of members of

specific nations. Originally, all the rights were held in common by the members of all of the nations, whose descendants are the plaintiffs in this action.

The members of the bands assert such rights as have been preserved and recognized by the provisions of the *Indian Act* but in doing so they assert rights which form part of the entire package of rights which they assert as descendants of the original members of the nations.

Looking at the matter in that way, I think that they all have the same interest.

I think the defences raised to the claims which have been advanced are defences which apply equally to all of the plaintiffs.

[C.] Is there a single measure of damages applicable to all members of the class?

The claim for damages in this case is based upon an alleged interference with communal rights. The claim is not personal except in the sense that individual members of the community are advancing a claim related to the interference with those rights which they enjoy as a member of that community.

If damages are granted they will be for trespass to lands and fisheries held in common by all of the plaintiffs. Such damages will be granted, if at all, to replace the rights which have been lost. Such damages will form a common fund or pool of money which will stand in place of the lost rights. The common pool will be enjoyed by all the plaintiffs in the place of their enjoyment of the communal rights.

…

I have concluded that the requirements of Rule 5(11) are satisfied, and that the proceeding revealed by the amended statement of claim is an appropriate representative action in all the circumstances of this case.

Pasco v. Canadian National Railway Company (1989), 56 D.L.R. (4th) 404, [1990] 2 C.N.L.R. 85 (B.C.C.A.), aff'd. by *Oregon Jack Creek Indian Band v. Canadian National Railway Co.*, [1989] 2 S.C.R. 1069.

Recently, four plaintiffs were authorized to bring an action as a representative proceeding on behalf of all members of the Grassy Narrows First Nation concerning their rights under Treaty 3: *Keewatin v. Ontario (Minister of Natural Resources)*, [2006] O.J. No. 3418 (S.C.J.).

The Federal Court has reintroduced Rule 114, to allow for representative proceedings, and which had been repealed when the class action rules were enacted as Part 5.1 of the *Federal Court Rules (1998)*:

> (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.
>
> "Rules Amending Certain Rules Governing Practice and Procedure Applicable to the Federal Courts (Representative Proceedings, Class Proceedings and Other Amendments): Regulatory Impact Analysis Statement", *Canada Gazette* , Vol. 141, No. 26 (June 30, 2007)

The impetus for reinstatement of the Representative Proceedings Rules came from the National Aboriginal Law Section of the Canadian Bar Association, which explained

> The distinction between class actions and representative actions has been identified as "on the one hand, actions [are] being maintained by persons who have the 'same interest' in the proceedings, and on the other, actions being maintained by persons where there is a 'common issue of law or fact' at stake." Essentially, the difference between the two actions is whether the commonality is derived from the nature of the parties or the nature of the issues. 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."
>
> "Impact of Federal Court Class Action Rules on Lawsuits by Aboriginal Nations: Letter to Federal Court Rules Committee", Canadian Bar Association Aboriginal Law Section and Federal Bench and Bar Liaison Committee, August 2004

The Court itself pointed out:

> 13 Given the collective nature of Aboriginal rights and claims under treaty, they are difficult to reconcile with class action procedure. By way of example, Crown counsel point to Rule 299.23, which allows an individual to opt out of a class proceeding. This observation is pertinent because a declaration as to Aboriginal rights and treaty benefits is not a remedy of an individual nature, accruing to only those individuals who participate in the litigation, but a collective right, not amenable to opting out, the result binding each and every member of the entity, here the descendants of a specific group of people.
>
> *Gill v. Canada*, [2005] 2 C.N.L.R. 56 (F.C., Proth.)

However the Federal Court also held:

> [T]he question of whether the band represents all of the band members is irrelevant, [if] the bands are not suing in a representative capacity, rather they are suing in their own right. It is analogous to a band suing one of its members directly. Since it is already clear that a band is capable of bringing an action, the fact that all members of the band may not agree is simply irrelevant. Few corporate bodies will at all times be acting in a way which meets the unanimous approval of all their members.
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> *Sawridge Band v. Canada*, [2003] 3 C.N.L.R. 358 (F.C.) at para. 15

b) Actions versus judicial review

i. In Aboriginal rights litigation

Generally, claims to Aboriginal rights and title will be brought as actions – which provide for the hearing of extensive evidence – rather than as applications for judicial review of administrative action, which are generally meant to be heard in a summary fashion based only on a written record.

The British Columbia Court of Appeal upheld a lower court's decision to refer a judicial review proceeding to the trial list to be heard as an action where the petitioners alleged Aboriginal rights and title: *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*, [1999] B.C.J. No. 1665 (C.A.).

The motions court judge had held (cited at para. 4): "I find it difficult to conceive, on issues as inherently difficult and complex as aboriginal rights and title claims, that, in ordinary circumstances, aboriginal claims can be summarily determined in the context of a judicial review."

The Ontario Divisional Court reached a similar conclusion in a case where the applicants were members of the Grassy Meadows First Nation and beneficiaries of Treaty 3 *Keewatin v. Ontario (Ministry of Natural Resources)* (2003), 66 O.R. (3d) 370 (Div. Ct.).[2]

They applied under the *Judicial Review Procedure Act*, among other things, for declarations: that they had a right to fish and hunt within a given Forest Management Unit; that the province had no authority to approve Forest Licences and Forest Management Plans within those lands, nor to permit activities on those lands that impaired the applicants' right to fish and hunt pursuant to Treaty 3; and that activities by the a logging company within the Forest Management Unit infringed their treaty rights to hunt and fish.

The Minister of Natural Resources and Abitibi-Consolidated successfully quashed the application for judicial review, but the applicants had leave to commence an action to proceed to trial. The Court held that judicial review in Ontario related to "the exercise, refusal to exercise or proposed or purported exercise of a statutory power," not the issue of which level of government had the constitutional authority to issue forestry licences on treaty lands. Moreover, the issues raised would require an extensive review of historical, expert and documentary evidence. Where aboriginal law claims were in issue, an action was appropriate because an application could not provide an adequate evidentiary foundation.

ii. In class action litigation in the Federal Court

The choice of pursuing a claim by action rather than on judicial review does not necessarily belong to the litigants. The Federal Court of Appeal has held that "a decision of a federal agency continues to be legally effective so long as it has not been invalidated": *Canada v. Grenier* (2005), 262 D.L.R. (4th) 337 (F.C.A.) at para. 60.

As a result, the judicial review provisions of the *Federal Courts Act* are mandatory and an action for damages against the federal Crown may not be used "as a mechanism for reviewing the lawfulness of a federal agency's decision": *Grenier* at para. 33. A decision which was not challenged "on an application for judicial review" under s.18(3) of the *Federal Courts Act* cannot generally "be reviewed through an action in damages" under s.17.

Nevertheless, as in the provincial courts, the Federal Court has the discretion, "if it considers it appropriate, [to] direct that an application for judicial review be treated and proceeded with as an action" under s.18.4(2).

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[2] This summary and the ones following which cite the *Canadian Native Law Reporter* are adapted from the headnotes published in that reporter.

If a party alleges both an illegal decision and damages, it may therefore be necessary to commence class proceedings by way of an application for judicial review and obtain the permission of the Court to proceed as an action.

The Federal Court of Appeal has held:

> 1. A desire to seek certification of a class action is a relevant consideration on a motion to convert a judicial review into an action under subsection 18.4(2) of the *Federal Courts Act*. However, such desire is not sufficient to justify conversion.
>
> 2. The matters relevant for consideration on an application for conversion for the purpose of certifying a class action include those in rule 299.18. As a practical matter, the applications for conversion and certification should be heard and considered together unless a party can demonstrate prejudice in doing so. Then, where the applications for conversion and certification are considered together, if the test for certification is satisfied, a conversion order should be made and it should immediately be followed by an order certifying the class action.
>
> *Tihomirovs v. Canada (Minister of Citizenship and Immigration)*, [2006] 2 F.C.R. 531 (C.A.) at para. 22

A recent application to certify a class action on behalf of grain producers against the Canadian Wheat Board alleged negligence and breach of statutory and fiduciary duties in the Board's administration of producers' funds and accounts: *Renova Holdings Ltd. v. Canadian Wheat Board* (2006), 286 F.T.R. 201.

The Federal Court held that the plaintiffs were actually "challenging the legality of the Wheat Board's deductions of allegedly improper expenses from the pooled accounts which resulted in reduced payments to the Plaintiffs for their wheat over a number of years." However the plaintiffs could not "challenge the legality of the Wheat Board's actions through an action and that the administrative law remedy sought can only be obtained on application for judicial review": para. 54.

Nevertheless the Court refused to strike the claim in its entirety and instead "stay[ed] the action in order to preserve the parties' rights in the event they are successful in pursuing their administrative law remedy": para. 56. The plaintiffs were allowed to "file a motion for an extension of time to file an application for judicial review challenging the legality of the Wheat Board's actions, if necessary, and if successful on the motion, an application for judicial review": para. 57.

c) Federal Court versus the courts of the provinces

As pointed out in *Grenier,* under section 17 of the *Federal Courts Act*, the Federal Court has concurrent jurisdiction with the courts of the provinces to try a claim for damages under the *Crown Liability and Proceedings Act*: para. 21.

At the same time, the Federal Court has the "exclusive jurisdiction to review the lawfulness of the decisions made by any federal board, commission or other tribunal" under sections 18 and 28 of the *Federal Courts Act*.

The particularities of the Federal Court's jurisdiction raise two problems with respect to class actions.

First, as discussed above, the courts of the provinces may dismiss an action for damages against the federal Crown if it can be construed as an indirect means "for reviewing the lawfulness of a federal agency's decision", which should properly be the subject of an application in Federal Court: *Grenier* at para. 33.

Second, the Federal Court may not hear an action for damages under section 17 of the *Federal Courts Act* against co-defendants other than the federal Crown, except in certain specific cases. The Federal Court does not even have jurisdiction over all claims by the federal Crown against third parties whom it might wish to sue in warranty: *Stoney Band v. Canada*, [2005] 4 C.N.L.R. 297 (F.C.A.).

The Federal Court does however have jurisdiction over co-defendants to "disputes in which the [federal] Crown is or may be under an obligation and in respect of which there are or may be conflicting claims": s.17(4).

The Supreme Court of Canada held that this exception applied to a dispute based on provisions of the *Indian Act* and acts of the federal executive pursuant to the *Indian Act* in setting aside reserve lands, as well as on the fiduciary obligations of the Crown to a Band: *Roberts v. Canada*, [1989] 1 S.C.R. 322. As a result, one Band was allowed to sue both the federal Crown and another Band in Federal Court.

But the Federal Court in no case has jurisdiction to hear a claim by a private party against the provincial Crown, not even as co-defendant with the federal Crown: *Lubicon Lake Band v. The Queen* (1981), 13 D.L.R. (4th) 159 (Fed. C.A.), aff'g. [1981] 2 F.C. 317 (T.D.); *Dableh v. Ontario Hydro* (1990), 33 C.P.R. (3d) 544 (F.C.T.D.).

The result is the superior courts of the provinces will generally be a better venue in actions involving defendants other than the federal Crown because they have a general and inherent jurisdiction over all defendants in that province, in addition to their statutory jurisdiction over the federal Crown.

d) Declarations versus damages

Ruling on an application to authorize a class action in Québec, the Supreme Court of Canada held that "it is not necessary to pursue a class action to obtain a declaration of constitutional invalidity and therefore, that it is generally undesirable to do so": *Guimond v. Quebec (Attorney General)*, 1996] 3 S.C.R. 347 at para. 20.

More particularly, the Supreme Court held that except in special circumstances, an action for damages under subsection 24(1) of *Canadian Charter of Rights and Freedoms* cannot be combined with an action to declare legislation invalid under section 52 of the *Constitution Act, 1982*: *Guimond* at para. 19.

The principle was later reformulated to extend beyond the *Charter* and as "a general rule of public law [that], absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional": *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405 at para. 78.

But the Supreme Court also held that "it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality": *Mackin* at para. 81.

In a recent class action, the Supreme Court of Canada explained the exceptions to the rule.

> 103 People generally conduct their affairs based on their understanding of what the law requires. Governments in this country are no different. Every law they pass or administrative action they take must be performed with an eye to what the Constitution requires. Just as ignorance of the law is no excuse for an individual who breaks the law, ignorance of the Constitution is no excuse for governments. But where a judicial ruling changes the existing law or creates new law, it may, under certain conditions, be inappropriate to hold the government retroactively liable. An approach to constitutional interpretation that makes it possible to identify, in appropriate cases, a point in time when the law changed, makes it easier to ensure that persons and legislatures who relied on the former legal rule while it prevailed will be protected. In this way, a balance is struck between the legitimate reliance interests of actors who make decisions based on a reasonable assessment of the state of the law at the relevant time on one hand and the need to allow constitutional jurisprudence to evolve over time on the other.
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> …
>
> 107 It should be noted that, in *Miron*, all of the factors discussed above — good faith reliance by governments, fairness to the litigants and the need to respect the constitutional role of legislatures — favoured a retroactive remedy. In a number of cases, however, these factors may pull in different directions, with some factors favouring a retroactive remedy and others favouring a purely

> prospective remedy. In such cases, once the "substantial change" threshold criterion is met, it may be appropriate to limit the retroactive effect of the remedy based on a *balancing* of these other factors. This balance must be struck on a case-by-case basis.
>
> 108 A second situation that must be distinguished was considered by this Court in its recent judgment in *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, 2007 SCC 1, wherein it held that taxes collected pursuant to an *ultra vires* regulation are recoverable by the taxpayer. The difference between the result in *Kingstreet* and the type of situation in the present case may be understood in terms of a basic distinction between cases involving moneys collected by the government and benefits cases. Where the government has collected taxes in violation of the Constitution, there can be only one possible remedy: restitution to the taxpayer. In contrast, where a scheme for benefits falls foul of the s. 15 guarantee of equal benefit under the law, we normally do not know what the legislature would have done had it known that its benefits scheme failed to comply with the *Charter.* In benefits cases, a range of options is open to government. The excluded group could simply be included in the existing benefit scheme as was the result in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. It could also be included in a modified benefit scheme, adopted by legislative amendments, as occurred in *Schachter*. Also, in *Schachter*, the Court alluded to the possibility of an elimination of the benefit (p. 702). In our political system, choosing between those options remains the domain of governments. This principle points towards limiting the retroactive effect of remedies in s. 15 benefits cases in which the other above-mentioned criteria are met.
>
> *Canada (Attorney General) v. Hislop*, 2007 SCC 10

The British Columbia Court of Appeal expressly declined to follow the rule in *Guimond* and certified a class action on behalf of a group of charitable and religious organizations who sought a declaration that the fees collected by the province in return for the issuance of their licences under the *Lottery Act* were illegal (*ultra vires*) or unconstitutional and who sought restitution of those fees.

> [20] But as Mr. Branch responded, the question is not whether the class action is necessary — i.e., whether there are other alternatives — but whether it is the "preferable procedure" for resolving the plaintiffs' claims. Section 4(2) of the [provincial *Class Proceedings*] *Act* states that that question involves a consideration of "all relevant matters" — a phrase that includes the practical realities of this method of resolving the claims in comparison to other methods. In the plaintiffs' submission, what makes a class action preferable in this case are the practical advantages provided by the *Act* for the actual litigation process. Some of these advantages accrue only to the plaintiffs: as Mr. Branch noted, if the claims are aggregated, contingency fee arrangements are likely to be available for the

> plaintiffs. The claims can be pursued by one counsel or a few counsel rather than by many. A formal notification procedure is available. Generally, it is more likely that those charities that have paid provincial licence fees in connection with bingo and casino games can pursue the matter to completion – something very few individual charities could do on their own. Other advantages arising under the *Act* are beneficial to both parties — the assignment to the action of one case-management judge, and the attendant elimination of lengthy Chambers proceedings before different judges. From the Province's point of view, none of these considerations prejudices its ability to defend the action fully, except to the extent that financial constraints on the plaintiffs are eased. Those constraints are not an "advantage" the Province should wish to preserve.
>
> [21] In my view, these factors militate strongly in favour of certification, and are obviously consistent with the stated objectives of the *Act*. The fact that the threshold questions include matters of constitutional law that could be resolved in a shorter declaratory action should not, in my view, overshadow these realities. As Mr. Branch said, the obtaining of a declaration is not the plaintiffs' primary objective; the repayment of their fees is. Nor should the fact that restitution is being sought by individual plaintiffs outweigh the fact that a class action will move the proceedings forward to a considerable extent.
>
> *Nanaimo Immigrant Settlement Society v. British Columbia*, (2001), 84 B.C.L.R. (3d) 208 (C.A.) (emphasis in the original)

In an Aboriginal law case concerning certification of a class action (described below), the Ontario Superior Court recalled the principle in *Guimond* "that where constitutional invalidity is alleged, 'it is generally undesirable' to use a class action," but still examined "the circumstances of [the] particular case": *Perron v. Canada (Attorney General)*, [2003] 3 C.N.L.R. 198 (Ont. S.C.J.) at para. 98.

Ultimately, however, the Court concluded that the primary constitutional issue could "be dealt with more effectively without a class proceeding, but also more efficiently as an individual action" because "the declaratory relief sought would appear to be rather more straightforward to be dealt with if unencumbered in a trial process with all the individual issues": *Perron* at para. 99.

4. Aboriginal law experiences with the class action

a) Litigation brought by First Nations

i. Certifying a class of defendants

Chippewas of Sarnia Band v. Canada (Attorney General) (1996), 29 O.R. (3d) 549 (Ont. Ct. Gen. Div.): granted

> 1 This is a motion by the plaintiff, Chippewas of Sarnia Band (the "Band") for certification of this proceeding as a defendant class proceeding and an appointment of one or more representative defendants to act on behalf of up to six classes of defendants. […] The Band asserts rights in relation to roughly four square miles or 2,540 acres located within the boundaries of the City of Sarnia in the Township of Moore. The disputed lands comprise roughly one-quarter of the Band's original reserve which was recognized and guaranteed by Treaties No. 27 and 29. The Band claims that title to the Cameron Lands was never lawfully surrendered or conveyed. It therefore claims that these lands have been and continue to be unceded aboriginal lands and unsurrendered reserved lands. The Band seeks to assert its claim against everyone claiming interest in the Cameron Lands. Because all competing title and interests to the Band's claim can be traced to the letters patent issued to Malcolm Cameron in 1853, the Band wishes to assert its claim in one proceeding against all affected parties.
>
> …
>
> 20 In a number of the American cases involving aboriginal land disputes where the plaintiff bands have succeeded in obtaining certification of defendant class proceedings, the courts have refused to enter into a detailed inquiry of the willingness of the proposed representative party to represent the interest of the class members. […]
>
> 24 At the present time, Ontario is the only jurisdiction in Canada with a comprehensive class proceedings statute which expressly authorizes a defendant's class proceeding in addition to the more common plaintiff class actions. […]
>
> 46 All the proposed class members and the proposed representatives have the same interest in putting forward the arguments that the Band's rights to the Cameron Lands have been extinguished and/or that the Band is now barred from attacking the transaction giving rise to the purported conveyance in 1853 of title to the Cameron Lands. […]

ii. Certifying an action for recognition of group rights

Davis v. Canada (Attorney General) (2007), 263 Nfld. & P.E.I.R. 114 (Nfld. S.C.T.D.): refused

> 1 The plaintiffs claim to be Indians of Mi'kmaq ancestry. Jake Davis and Bert Alexander live on the island of Newfoundland. John Oliver lives in British Columbia.
>
> 2 They have applied as representative plaintiffs under the *Class Actions Act* for certification of a class action on behalf of over 7,000 persons of Mi'kmaq ancestry, both residents and non-residents of the province.

3 The essence of the claim is that, since this province joined Canada in 1949, the government of Canada and the government of the province have been under a fiduciary duty to the plaintiffs to protect their culture and communities and to advise of and provide a statutory regime of programs and benefits. The plaintiffs assert that the governments have committed various breaches of this fiduciary duty. They say that the government of Canada failed in 1949 to bring legislation into force (the federal *Indian Act*) in the new province which would have made available various programs, services and other benefits then made available to Indians elsewhere in Canada; that once such legislation was subsequently brought into force in 1952, the governments failed to consult with and advise the Mi'kmaq of their rights and entitlements; that the government of Canada failed to establish bands under the *Indian Act* for the Mi'kmaq and, together with the province, failed to establish reserves for such bands. The plaintiffs further assert that, since s. 15 of the *Charter of Rights and Freedoms* came into effect on April 17, 1985, the government of Canada has breached the plaintiffs' s. 15 equality rights by failing to provide the same programs, services and benefits which have been and are being provided to Indians in other provinces and territories. Various remedies are sought, including declarations of entitlement to statutory status and benefits, to bands, band membership and reserves, and damages.

…

127 The plaintiffs - or at least Jake Davis and those in a similar position - are not asserting that they have been wrongfully denied access to the registration process. Davis and others have in fact been registered, but they wish to be members not of the Conne River Band, but of a band yet to be created. In short, they want their own band. The other plaintiffs also want their own band, presumably a different one; once such bands are established, they say, they would then make the decision whether they want to be a member or not (I note the logical and legal difficulty in creating a band without first determining the necessary "body of persons" who make up the band). Be that as it may, the only route through which a band may now be created for any particular body of persons among the plaintiffs is for a band to be declared by the Governor in Council under par. 6(1)b of the *Indian Act*. By declaration, a named group of founding members is declared to be a band. The evidence is that the Conne River Band was created by order of the Governor in Council in 1984 following extensive consultation and negotiations. The decision to create this band was political and not legal. Similarly, the Conne River reserve was created in 1987 after negotiations with the band and the respective governments.

128 A band for the purposes of the *Indian Act* cannot be created or ordered by the court. While a decision of the Governor in Council may indeed in certain circumstances be subject to judicial review, that is a far cry from the proposition that the court has the jurisdiction to order the Governor in Council - in the first instance - to make a particular discretionary decision. A decision to declare a band to be in existence is a political one. Thus a court could not order one of the primary orders sought by the plaintiffs.

129 Further, a court lacks the jurisdiction to determine whether or not any particular individual should - in the first instance - be entitled to be registered as an Indian under the *Indian Act*. Registration is a statutory process. A necessary precondition is an application for registration. The determination of whether a person is entitled to have his or her name added to the Indian Register is by statute left to the Registrar (subs. 5(3)). The only role for the court is to consider appeals from decisions of the Registrar on a protest - (ss. 14.2 and 14.3). As noted, a judicial determination that an individual is of Mi'kmaq ancestry - as that may be defined by the court in a proceeding - is not a determination of entitlement to registration under the *Indian Act.* The court cannot through the litigation process create a separate scheme for the registration of individuals who could then claim benefit to any entitlements or benefits available under the *Indian Act*.

130 The evidence is that any of the potential class members may presently be registered under the *Indian Act* if they apply and meet the registration requirements - essentially a prescribed degree of linkage to an already-registered Indian. Failing this, registration may only be achieved by becoming a founding member of a new band declared by the Governor in Council or by subsequently establishing the necessary statutory linkage to such a founding member and now-registered Indian. Registration as a founding member of a band is through the discretionary and political decision of the Governor in Council. It is not a decision that can be made or ordered by the court.

…

132 I appreciate that the foregoing comments to address issues of merit and substance rather than issues relating to the form of the action. But, given the objective of class actions, it seems to me to be burying ones head in the sand to ignore - even at the certification stage - the fact that much of the underlying relief sought by the plaintiff cannot be granted by a court. To ignore this and to go on to spend hundreds of thousands of dollars just in notifying potential class members - not to mention the cost of the litigation itself - would in my view be contrary to the objectives sought to be achieved by class proceedings. But as noted earlier, and despite having considered relief-related issues, I do not think is productive at this point to go on to consider the issue of the jurisdiction of a provincial superior court to adjudicate the plaintiffs' claim or claims. If necessary, that determination will be made later.

133 There are other concerns relevant to the preferability inquiry.

134 I discussed previously the exclusion of FNI [Federation of Newfoundland Indians] members from the proposed class. This exclusion of a large body of individuals is not because of any difference in the legal position or Mi'kmaq ancestry of the FNI members; the exclusion is a result of a political difference between the two groups over, not the claimed legal obligations and duties, but

> rather the nature of the relief that should be sought. The underlying legal and factual issues are the same. In my view, it would be inappropriate for the court to accommodate and recognize this political difference by allowing the class action of a 'splinter group' to proceed without reference to others in the same legal position. It does not serve the interests of justice to proceed with a determination of these issues while deliberately excluding thousands of others who claim the same rights. No doubt the court could refuse to exclude FNI members from the proposed class; however, in the circumstances of this case, and in particular given the evidence of the relationship between Bert Alexander and the FNI, I do not consider that to be a wise course of action.
>
> 135 There is also ongoing litigation in the Federal Court involving exactly the same issues. The presence of another action involving the same claims is mentioned in par. 5(2)(b) of the *Act*. I recognize that the FNI action is presently in abeyance pending the results of negotiations. Nonetheless, the action may be revived and it cannot be simply disregarded.
>
> 136 The common issues I have set out are dwarfed by the individual issues and by the significant relief that cannot in any event be addressed by a court. Given this disparity, increased attention must be given to other potential avenues for resolution of the claims. In my view, relief may be sought by more practical, more efficient and less expensive means (pars. 5(2)(d) and (e) of the *Act*).

b) Litigation brought on behalf of individuals

i. Against the federal government

Daniels v. Canada (Attorney General), [2003] 2 C.N.L.R. 98 (Sask. Q.B.): refused

Two war veterans and the widow of a war veteran, applied for certification of a class action on behalf of Indian war veterans and their dependants. They alleged that Indian war veterans, at the time of their discharge, were not properly informed of their right to apply for the veteran's benefits that they were entitled to by reason of their service in the First and Second World Wars and the Korean War. The plaintiffs claimed damages for loss of benefits on the basis of systemic negligence, breach of trust, breach of fiduciary duty, and unjust enrichment.

The Court held that all claims were out of time unless the cause of action of action had only been discovered in the six years before the action was filed. On the issue of whether a class action was the preferable procedure, the court held it would be necessary to have an inquiry into the state of mind of each individual plaintiff over a period of 40 years. Such a class action would be unmanageable and certification would result in a multitude of individual trials which would override any advantage that might be derived from a trial of a few potential common issues.

Cloud v. Canada (Attorney General), [2005] 1 C.N.L.R. 8 (Ont. C.A.): granted

The plaintiffs commenced an action seeking damages on behalf of all students who attended the Mohawk Institute Residential School between 1922 and 1969, their siblings and their families. They alleged negligence, breach of fiduciary duty and breach of Aboriginal rights.

The courts below denied certification because they saw no identifiable class of plaintiffs and only issues unique to each student. The Court of Appeal reversed and certified the action as a class proceeding. It held that a class action would be a fair, efficient and manageable method of advancing the claim and that it would be preferable to other reasonably available means of resolving the claims of class members.

An important part of the claims of all class members turned on the way the respondents ran the School over the time frame of the action. The assertion was that by running the School in the way they did, the respondents were in breach of the various legal obligations they owed to all class members.

Even though there were substantial individual issues to be dealt with after the common issues were resolved, the Court of Appeal held that in this case, the common issues were critical. Class members would be able to succeed only if they succeed on the common issues. A single trial of the common issues would achieve substantial judicial economy and enhance access to justice, given the vulnerability of many members of the classes.

After *Cloud*, all residential school class actions were settled in an agreement ratified by the superior courts of all the territories and most of the provinces: *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.); *Quatell v. Canada (Attorney General)*, [2006] B.C.J. No. 3231 (S.C.); *Semple v. Canada (Attorney General)*, [2006] M.J. No. 498 (Q.B.), 40 C.P.C. (6th) 314; *Sparvier v. Canada (Attorney General)* [2006] S.J. No. 752 (Q.B.), 35 C.P.C. (6th) 110; *Fontaine v. Canada (Attorney General)*, [2006] Y.J. No. 130 (S.C.).; *Ammaq v. Canada (Attorney General)*, [2006] Nu.J. No. 26 (C.J.); *Bosum c. Canada (Attorney General)*, [2006] Q.J. No. 14319 (S.C.); *Northwest v. Canada (Attorney General)*, [2006] A.J. No. 1612 (Q.B.); *Kuptana v. Canada (Attorney General)*, [2007] N.W.T.J. No. 1 (S.C.).

Perron v. Canada (Attorney General), [2003] 3 C.N.L.R. 198 (Ont. S.C.J.): refused

Connie Perron, her child and grandchildren, sought a declaration s. 6 of the *Indian Act*, R.S.C. 1985, c. I-5, is contrary to the *Canadian Charter of Rights and Freedoms*, the *Constitution Act, 1982*, the *Canadian Bill of Rights* and other international instruments, and is in violation of the fiduciary duty owed to Aboriginal people by the Crown because she was is unable to pass on "status" under the *Indian Act* to her grandchildren and her children to their children. They also sought damages for various losses resulting from the breach of their *Charter* rights.

The Court struck the claim for damages arising from the breach of constitutional rights – both Aboriginal and under the *Charter* – because there was no basis for a claim of bad faith or abuse of power or deliberate wrongdoing. Without a claim for damages, the main remaining claim left was for a declaration that s. 6(2) is unconstitutional.

It was preferable for that claim to be dealt with on an individual basis, rather than as a class action, because test case would achieve a similar result effect in a much more efficient way. The central issue of the constitutional validity of s. 6 of the Indian Act did not require a class proceeding for its determination.

ii. Against provincial governments

Picard v. Québec (Attorney General), [1997] 4 C.N.L.R. forthcoming (Qué. S.C.): granted

> [3] The facts are simple and are not contested. They are set forth in paragraph 2 of the motion for authorization. The Court will explain them with certain modifications to take into consideration the elements contested:
>
> - The petitioner is an Indian registered in the Indian register of the Department of Indian Affairs and Northern Development Canada and is on the list of Betsiamites lnnu band members, as it appears from his card, a copy of which is attached as Exhibit R-1,
>
> - The petitioner is Grand Chief of the Assembly of First Nations of Québec and Labrador and, as part of his duties, must travel to all Québec Indian reserves, as well as Cree and Naskapi lands.
>
> - The petitioner purchased gasoline from retailers on Indian reserves within the meaning of section 2 of the *Indian Act* or on Cree Category 1A land within the meaning of the *Cree-Naskapi (of Quebec) Act.*
>
> - Under section 87 of the *Indian Act* and section 188 of the *Cree-Naskapi (of Quebec) Act*, the petitioner's real and personal property is exempt from taxation provided it is on a reserve or Cree or Naskapi Category 1A or 1A-N land.
>
> - Despite the tax exemption granted him under the federal legislation, which has primacy, the petitioner had to pay the provincial fuel tax when purchasing gasoline or fuel oil on the reserves and Cree Category 1A land.
>
> - The petitioner submitted no application to the Minister of Revenue for reimbursement of his payments of the fuel tax, which were never reimbursed.

[4] Ghislain Picard adopts the position that all Indians who are members of the group are entitled, as he is, to the exemption of tax on their real and personal property on a reserve or Cree or Naskapi Category 1A or 1A-N land. Hence, they are in the same legal position, except for those who filed reimbursement applications and were reimbursed.

…

[53] The respondents argue first that the action Ghislain Picard intends to institute is essentially aimed at the reimbursement of the fuel tax allegedly paid by the members of the group. But the respondents say that the F.T.A. [*Fuel Tax Act*], while being a law of general application, is also a fiscal law within the meaning of paragraph (*a*) of section 1 of the A.M.R. [*Act respecting the Ministère du Revenu*], the application of which is entrusted to the Minister of Revenue by section 57 of the F.T.A.

…

[56] As we can see, it is the application for a reimbursement that gives rise to the Minister's intervention and refusal, which triggers the right to object to the refusal and, if unsuccessful, the taxpayer's right to appeal. If the Minister responds by the deadline to the application and reimburses the amounts claimed, there will be no refusal equal to a notice of assessment, the objection will be unnecessary and the appeal to the Court of Québec moot.

[57] That is the limited scope of the jurisdiction of the Court of Québec in matters of reimbursement of taxes. That jurisdiction stems from both a taxpayer's application for a reimbursement and the decision of the Minister to accept or refuse it.

[58] But what happens if an Indian, like Ghislain Picard, who enjoys the tax exemption provided for in section 88 of the *Indian Act* and who pays the fuel tax does not apply for any reimbursement but wants to contest before the courts the validity of certain provisions of the. F.T.A., including those that compel him to pay the tax, in violation of what he claims is a general and absolute exemption from paying it? To which court must the Indian apply? That is the question raised by the respondents in the preliminary exception in the form of a declinatory exception.

[59] The respondents acknowledge the tax exemption of Ghislain Picard and the Indians he wants to represent. Once the specific nature and scope of the exemption are established, the central question raised by this legal debate is whether the obligation to pay the fuel tax violates the exemption and, if so, whether the reimbursement mechanism provided for in the A.M.R. constitutes, for the Indians, an acceptable alternative or replacement solution.

[60] Viewed from that perspective, the legal questions that this case raises go well beyond an application for reimbursement of taxes paid unfairly. It is true that the planned action implies, as a result an affirmative response to the central question, a claim for the restitution of taxes paid illegally, but that is a consequence of the principal debate.

…

[71] Here, Ghislain Picard is an Indian within the meaning of the law. He wants to represent all Indians—except Cree beneficiaries within the meaning of the *Cree-Naskapi (of Quebec) Act*—who paid a fuel tax when purchasing gasoline or fuel oil on an Indian reserve or Cree or Naskapi Category 1A or 1A-N land.

[72] In his allegations, Ghislain Picard states that he and the members of his group are statutory beneficiaries of a general exemption from taxes on their real and personal property located on a reserve. For the petitioner, gasoline and fuel oil, once purchased at the pump, become [TRANSLATION] "real and personal property" on a reserve. He says that purchase must be tax-exempt.

[73] Ghislain Picard states that he purchased gasoline or fuel oil on a reserve and paid the fuel tax. He believes the tax was paid illegally, with no regard for his tax exemption. Accordingly, the general tax reimbursement mechanism established by the Minister of Revenue is illegal, as it does not comply with the general tax exemption enjoyed by the Indians. The reimbursement mechanism, which arises *a posteriori,* in a manner of speaking, is not a legal or adequate response, or a satisfactory alternative to, or replacement measure for, the general tax exemption.

[74] As I mentioned in disposing of the question of the Superior Court's jurisdiction, the problem as posed may involve a conflict between a federal law—the *Indian Act*—and a provincial law—the F.T.A. It is also possible to see the question of a conflict originating in or leading to the constitutional aspect of jurisdiction over Indian affairs. That is sufficient to conclude that the motion for authorization raises serious questions to be resolved.

[75] Moreover, there is the question of the demand for restitution of the tax paid, which lends itself well to a class action. In that context, the question will arise as to whether the recourse for restitution or for damages is prescribed and, if it is not, what is the quantum of those claims?

[76] The Court is of the opinion that the criterion in paragraph (*b*) of article 1003 [of the *Code of Civil Procedure*] is satisfied, since not only are these questions serious but they are of considerable significance to all the parties.

[79] The group that Ghislain Picard is asking to represent consists of Indians living in Québec and other provinces who purchased gasoline in Québec.

> Québec's Indians number about 65,000, 45,000 of whom reportedly live on a reserve and 18,000 of whom live off-reserve. They are dispersed throughout Québec.
>
> [80] The Court has no hesitation in concluding that the application of articles 59 and 67 would be difficult or impracticable, especially given that these people are often presented as having little schooling and living in difficult conditions.
>
> [81] The Court is of the opinion that the criteria of article 1003 of the C.C.P. are satisfied in this case. The institution of the action must therefore be authorized.

Note that in *Picard*, the Superior Court expressly declined to follow the decision in *Rousselot* v. *Québec (Procureur général)*, [1988] R.D.F.Q. 94 (C.S.). In the earlier case, the Superior Court refused to authorize a class action concerning the collection of provincial sales tax on alcohol and tobacco sold on reserve and accepted the province's argument that the Court of Québec had exclusive jurisdiction to hear the case because it concerned reimbursement of a provincial tax. The correctness of the *Rousselot* decision had already been questioned in *Union of Nova Scotia Indians v. Nova Scotia (A.-G.)* (1988), 54 D.L.R. (4th) 639 (N.S.S.C.).

iii. Against other parties

Jolly c. Compagnie de Construction Cris (Quebéc) Ltée, [1997] 2 C.N.L.R. 75 (Qué. S.C.): refused

The Cree Construction Company (Quebec) Ltd. carried out a contract in 1991 with the respondents the James Bay Development Corporation and the provincial Ministry of Transport for the construction and maintenance of the 214-kilometer road, called the Route du Nord.

The applicant was a tallyman on a trapline which the road crossed over a length of approximately 22.5 kilometers. According to Cree custom, anyone wishing to hunt, fish or trap on a trapline had to obtain the tallyman's permission. The Route du Nord crossed eight traplines, each of which was under the supervision of a tallyman, and 32 Cree carried on permanent hunting, fishing and trapping activities along the Route du Nord.

The applicant applied to institute a class action on behalf of all Cree beneficiaries of the James Bay and Northern Quebec Agreement (JBNQA) whose hunting, fishing and trapping grounds were affected by the Route du Nord. At a public meeting of the Cree Trappers Association in March 1995, half of those with traplines along the road refused to be represented by the applicant and he did not obtain the support of the Association.

The Court found that the applicant and the other trappers knew each other and could contact each other, as the applicant had done in the past concerning other issues, through

the Cree Trappers Association, of which he was a member. He could therefore have obtained mandates to institute proceedings from all the members of the group. As a result, the group was not sufficiently numerous to justify a class action.

Moreover, the applicant did not prove that he had sufficient support among the group to allow him to represent all of its members adequately. On the contrary, a large number of trappers refused to be represented by the applicant in these proceedings.

In addition, the legal and factual situation of each of the trappers varied widely. There were differences in where they were situated relative to previously existing roads; differences in the distribution of wildlife over the route taken by the Route du Nord; differences in the extent of consultations held and the acceptance of suggestions concerning changes to the route; differences in the presence of other activities on the traplines; differences in the contractors who had carried out work on each section of the road.

The applicant's situation was unique in requiring him to relocate his camp. Since the applicant was not capable of providing evidence characteristic of the whole of the claims by individual members of the proposed group, evidence as to the damages suffered by each member of the group would be required.

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