Citation: Brokenhead Ojibway Nation v Nelson, 2026 MBCA 26
Date: 20260320
Docket: AI26-30-10325

IN THE COURT OF APPEAL OF MANITOBA

***B E T W E E N**:*

ZONGIDAYA NELSON, on his own behalf, on behalf of the Roseau River Anishinabe First Nation, and as representing a group of persons who are entitled to receive an annuity payment from the Crown pursuant to Treaty One	)	***B. D. Regehr, K.C.,*** ***C. Steffen*** *and* ***A. R. Hunt*** *for the Applicants*
	)	***H. M. Rosenberg*** *for the Respondent Z. Nelson*
(Plaintiff) Respondent	)	
- and -	)	***J. N. Goodridge*** *and* ***C. D. Williams*** *for the Respondent the Attorney General of Canada*
THE ATTORNEY GENERAL OF CANADA	)	
(Defendant) Respondent	)	
	)	*Chambers motion heard:* ***January 29, 2026***
- and -	)	
BROKENHEAD OJIBWAY NATION and SWAN LAKE FIRST NATION	)	*Decision pronounced:* ***February 5, 2026***
(Moving Parties) Applicants	)	*Written reasons:* ***March 20, 2026***

CAMERON JA

Introduction and Background

[1] This is a motion made under section 25.2(1) of *The Court of Appeal Act*, CCSM c C240, for leave to appeal an interlocutory order denying a motion brought by Brokenhead Ojibway Nation and Swan Lake First Nation (the moving parties) to vary a representation order made by a Court of King's Bench judge on a consent basis on February 11, 2022, pursuant to rule 10.01 of the MB, *King's Bench Rules*, Man Reg 553/88 [the *KB Rules*] (the

representation order), and to be relieved of the binding effect of the representation order pursuant to rule 10.03 (together, the exclusion motion).

[2] The representation order authorized the individual plaintiff, Zongidaya Nelson (the plaintiff), to advance a claim "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." In essence, the claim is for enhanced annuities under Treaty 1 (the Nelson action).

[3] The moving parties are signatories to Treaty 1. On January 20, 2025, they (along with two other plaintiffs) filed class action proceedings in the Federal Court of Canada alleging that the Crown has failed to implement the terms of Treaties 1 and 2 and to honour the Treaty relationship by failing to augment the annual payments under those Treaties (the proposed class action).

[4] The moving parties filed the exclusion motion on May 16, 2025, seeking an order that the representation order not apply to them. They sought an order excluding them and their respective memberships from the representation order and an order "that any judgment, decision, order, or settlement" in the Nelson action be without prejudice to their rights or any claims they may have against the defendant, the Attorney General of Canada (the defendant).

[5] Among other things, the order of the motion judge 1) held that the representation order applied to the moving parties, and 2) held that it should not be varied to exclude the moving parties (see *Nelson v Canada (Attorney*

General), 2025 MBKB 155 [the *motion judge's decision*]). It is from these rulings that the moving parties seek leave to appeal.

[6] I heard the leave motion on January 29, 2026. At that time, the trial in the Nelson action was scheduled to proceed between February 9 and 27, 2026. Given the time constraints, I provided an oral decision on February 5, 2026, simply indicating that I would grant leave to appeal. At that time, I indicated that my written reasons would follow, including the grounds on which I was granting leave. These are those reasons.

The Decision of the Motion Judge

[7] In her written reasons, the motion judge provided a succinct summary of the history of the proceedings in the Nelson action, which I need not duplicate here.

[8] In finding that the representation order applied to the moving parties, the motion judge considered their argument that they were not part of the "group" (*ibid* at para 29) referenced in the representation order and that the group was not defined in that order. In reaching her conclusion to the contrary, she considered that the statement of claim in the Nelson action contained paragraphs referencing the inclusion of the moving parties, as well as an amendment to that claim that proposed alternative relief that the plaintiff represent all individual members of Treaty 1 First Nations' interests relating to the proceedings. As well, she considered a joint brief filed by the plaintiff and the defendant on June 6, 2021, reflecting that the representation order was intended to represent a group of persons entitled to receive payments pursuant to Treaty 1 and that the Nelson action would have precedential value for all individual annuity recipients.

[9] In refusing to vary the representation order to exclude the moving parties, the motion judge summarized what she considered to be the two main issues: whether the plaintiff, as an individual, can prosecute the claim, as in the Nelson action; and whether a claim to enforce treaty rights can be pursued in the context of a class action, as in the proposed class action.

[10] Prior to commencing her analysis, the motion judge reviewed the law pertaining to representative and class actions in the context of treaty interpretation, including *Soldier v Canada (Attorney General)*, 2009 MBCA 12 [*Soldier*]; *Behn v Moulton Contracting Ltd*, 2013 SCC 26 [*Behn*]; *Ontario (Attorney General) v Restoule*, 2024 SCC 27 [*Restoule*]; and *Chief Derek Nepinak and Chief Bonny Lynn Acoose v Canada*, 2025 FC 925 [*Nepinak*], appeal as of right to the FCA.

[11] In her analysis, the motion judge reviewed rule 10.03 of the *KB Rules*, which states:

RELIEF FROM BINDING EFFECT OF ORDER	**LIBÉRATION DE L'ORDONNANCE**
10.03 Where a person or estate is bound by an order under this Rule, a judge may order in the same or a subsequent proceeding that the person or estate not be bound where the judge is satisfied that,	**10.03** Un juge peut, par une ordonnance dans la même instance ou dans une instance ultérieure, libérer la personne ou la succession qui est liée par une ordonnance rendue conformément à la présente Règle s'il est convaincu, selon le cas :
(a) the order was obtained by fraud or non-disclosure of material facts;	a) que l'ordonnance a été obtenue par fraude ou non-divulgation de faits pertinents;
(b) the interests of the person or estate were different	

from those represented at the hearing; or	b) que les intérêts de la personne ou de la succession étaient différents de ceux qui ont été représentés dans l'instance;
(c) for some other sufficient reason the order should be set aside.	c) que l'ordonnance devrait être annulée pour une autre raison valable.

[12] Regarding rule 10.03(a) of the *KB Rules*, she found no fraud was alleged. That finding is not contested by the moving parties.

[13] Regarding rule 10.03(b) of the *KB Rules*, she concluded that the interests of the moving parties were not different from the plaintiff in that both the Nelson action and the proposed class action sought the same relief.

[14] In considering if there was some other sufficient reason the representation order should be set aside pursuant to rule 10.03(c) of the *KB Rules*, the motion judge:

- stated that the fact that Treaty 1 annuity payments have always been made to individuals was important to her analysis;
- noted that all Treaty 1 First Nations were kept informed of the status of the Nelson action and were provided with multiple opportunities to participate in it in different ways, but that the moving parties chose not to do so;
- accepted the plaintiff's submission that, when the Chief of the Brokenhead Ojibway Nation (Chief Bluesky) responded to a

> question on cross-examination as to why the Nelson action falls short of representing the interests of the Brokenhead Ojibway Nation, he stated that "the leadership [was] not involved", he was referring to the fact that the Nelson action is not being prosecuted by the moving parties' leadership.

[15] In dismissing the motion, the motion judge concluded (the *motion judge's decision* at para 63):

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

[16] In addition, she stated that the binding effect of treaty interpretation on all Canadians and the need for only one outcome "lend themselves to the context of a representative action because the opt-out provisions in class proceedings would give rise to a multiplicity of proceedings, interpretations, and outcomes, such that the pursuit of a class action in a treaty interpretation case is simply not appropriate" (*ibid* at para 65). She concluded by noting that it was difficult to see how the proposed class action could be certified in the Federal Court given the *Nepinak* decision, and by observing that a hearing date had not been set for the certification hearing.

The Test for Leave to Appeal

[17] The test for leave to appeal was set out by Pfuetzner JA in *Knight v Daraden Investments Ltd et al*, 2022 MBCA 69. To obtain leave, the applicant must demonstrate that 1) the proposed ground of appeal has arguable merit, and 2) it is of sufficient importance to warrant the attention of a full panel of this Court (see *ibid* at para 22).

[18] In determining arguable merit, the court may consider the following non-exhaustive list of factors (see *ibid* at para 23):

- Is the proposed ground prima facie frivolous or vexatious?
- Is it prima facie destined to fail, taking into account the standard of review that will likely be applied?
- Does it have a reasonable prospect of success?
- Can it be dismissed through a preliminary examination?
- Is it likely to be rendered moot due to the natural progression of the proceedings?
- Will it unduly or disproportionately delay or add to the cost of the proceedings?

[19] The non-exhaustive list of factors that the court may consider in determining the sufficient importance of a proposed ground of appeal includes (see *ibid* at para 25):

- Does it raise a novel or unsettled point of law or of practice?

- Will resolution of the issue likely affect the determination of disputes between others (aside from the parties to the proceedings)?

- How significant is the order to the course or outcome of the proceedings?

[20] In addition, leave may be granted where it is in the interests of justice even where the two above-mentioned criteria have not been met (see *ibid* at para 26).

The Proposed Grounds of Appeal and Positions of the Parties

[21] The moving parties have nine proposed grounds of appeal. I have summarized them as alleging that the motion judge erred:

1) in finding that rule 10 of the *KB Rules* and the resulting representation order permitted the plaintiff in the Nelson action to represent the moving parties absent a valid Band Council Resolution (BCR) from each of them;

2) by failing to apply legal principles, including the right to self-government and self-determination as protected by section 35 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Constitution Act*];

3) by interpreting rule 10 of the *KB Rules* in a manner that violates procedural fairness, natural justice and the *audi alteram partem* rule;

4) by misinterpreting the case law related to representative actions;

5) by failing to recognize that the collective nature of the right to Treaty 1 annuity payments meant that the moving parties are necessary parties;

6) by failing to consider the unique historical, legal and constitutional context between the moving parties and the Crown in reaching her conclusions regarding standing to bring a claim for a treaty breach and the availability of a class action;

7) in finding that Roseau River Anishinabe First Nation had jurisdiction to authorize an action on behalf of the moving parties and in misapprehending the evidence that Roseau River Anishinabe First Nation endorsed the moving parties' ability to proceed independently of the Nelson action;

8) by misconstruing the relief that the moving parties were seeking in the proposed class action and by narrowly interpreting the term "interests" in rule 10.03(b) of the *KB Rules*; and

9) by failing to address the dispute between the plaintiff and the defendant regarding the scope of the representation order prior to the filing of their joint brief of June 6, 2021.

Positions of the Parties

The Moving Parties

[22] At the hearing of the leave motion, the moving parties explained that

the first six proposed grounds of appeal generally relate to the finding of the motion judge that, because the right to the annuity under Treaty 1 is a collective right that is exercised individually, the plaintiff cannot advance the claim on behalf of all annuitants absent a BCR from the moving parties. The arguments they advanced in this regard allege several errors.

[23] First, the moving parties argue that the motion judge erred in her interpretation of the relevant jurisprudence. In their view, *Behn*, *Restoule* and *Nepinak* do not support her conclusion that an individual member of a Treaty 1 First Nation (in this case, the plaintiff) can advance the Nelson action on behalf of all annuitants without the consent of all Treaty signatories. They maintain that the law governing an individual's ability to bring a representative action asserting a Treaty right on behalf of all signatory First Nations remains unsettled. In support of their position, they rely on *Soldier*, where Steel JA observed that the law in this area lacked sufficient clarity (see para 46).

[24] Next, the moving parties submit that the motion judge misinterpreted rule 10.01(1) of the *KB Rules* when considering whether their consent was required to be included in the representation order. Rule 10.01(1) of the *KB Rules* states:

Proceedings in which order may be made **10.01(1)** In a proceeding concerning,	**Instances dans lesquelles l'ordonnance peut être rendue** **10.01(1)** Si une instance a l'un des objets suivants :
(a) the interpretation of a deed, will, agreement, contract or other instrument, or the interpretation of a	a) l'interprétation d'un acte scellé, d'un testament, d'une entente, d'un contrat ou d'un autre

statute, order in council, order, rule, regulation, by-law or resolution;

(b) the determination of a question arising in the administration of an estate or trust;

(c) the approval of a sale, purchase, settlement or other transaction;

(d) the approval of an arrangement under section 59 of *The Trustee Act*;

(e) the administration of the estate of a deceased person; or

(f) any other matter where it appears necessary or desirable;

a judge may by order appoint one or more persons to represent any person or class of persons, including;

(g) unborn persons; or

(h) persons who cannot readily be ascertained, found or served;

who have a present, future, contingent or unascertained interest in, or may be affected by, the proceeding.

instrument, ou d'une loi, d'un arrêté ministériel, d'un décret, d'une règle, d'un règlement, d'un règlement municipal ou d'une résolution;

b) la résolution d'une question relative à l'administration d'une succession ou d'une fiducie;

c) l'homologation d'une vente, d'un achat, d'une transaction ou d'une autre opération;

d) l'homologation d'un arrangement intervenu en vertu de l'article 59 de la Loi sur les fiduciaires;

e) l'administration de la succession d'un défunt;

f) une autre question jugée nécessaire ou opportune,

un juge peut, par ordonnance, nommer une ou plusieurs personnes pour représenter des personnes ou catégories de personnes, notamment des personnes :

g) non encore nées;

h) qui ne peuvent être aisément identifiées, retrouvées ou notifiées par voie de signification,

> lesquelles ont un intérêt actuel, futur, éventuel ou indéterminé dans l'instance ou peuvent être touchées par celle-ci.

[25] The moving parties contend that representative actions are intended to address administrative or private law matters involving the efficient management of undefined interests. They argue that the rule was not designed to resolve broad disputes concerning treaty rights.

[26] The moving parties further argue that consent is intrinsic to the concept of representation, rendering any express requirement for it in rule 10.01(1) of the *KB Rules* unnecessary. They argue that the motion judge erred by contrasting rule 114(1)(b) of the *Federal Court Rules*, SOR/98-106 [the *Federal Rules*]—which requires that the representative be authorized to act on behalf of the represented persons—to rule 10.01(1) of the *KB Rules*, and by relying on that comparison to conclude that the moving parties' consent was not required for their inclusion in the representation order.

[27] The moving parties further submit that relying on rule 10.01(1)(f) of the *KB Rules* as a broad, catch-all basis for the representation order undermines the treaty relationship between the defendant and the moving parties, who assert their status as self-determining First Nations with treaty rights protected under section 35 of the *Constitution Act.*

[28] The moving parties contend that each individual First Nation maintains a bilateral nation-to-nation relationship with the Crown. They argue that a core treaty right is the authority of each First Nation to manage

its own treaty relationship. They contend that the First Nations' signing of Treaty 1 does not establish that the Treaty was concluded between the Crown and a collective body of Treaty 1 First Nations.

[29] Regarding procedural fairness, the moving parties argue that for a court to make a decision impacting their treaty rights without them having been afforded the right to meaningful participation would affront their right to be heard.

[30] I have summarized the arguments relating to the first six proposed grounds of appeal in the order that they were made at the hearing as opposed to how they were listed by the moving parties in their written materials.

[31] In my view, proposed grounds 7 and 9 are connected. Both relate to the motion judge's finding that the moving parties were included in the representation order. As mentioned, she relied on the statement of claim in the Nelson action and the joint brief filed by the plaintiff and the defendant in reaching this conclusion. The moving parties argue that the motion judge misapprehended the evidence when she failed to consider that Roseau River Anishinabe First Nation had passed a BCR dated May 9, 2025, endorsing the moving parties' ability to proceed with the proposed class action independently of the Nelson action. Similarly, the moving parties submit that the motion judge failed to consider that the plaintiff and the defendant disagreed about the scope of the representation order before they filed their joint brief on June 6, 2021.

[32] Proposed ground 8 concerns rule 10.03(b) of the *KB Rules* and the motion judge's conclusion that the moving parties' interests did not differ from those of the plaintiff. The moving parties argue that the motion judge

erred by focusing solely on the similarity of the relief sought in the Nelson action and the proposed class action. They contend that she failed to consider the substantive differences between the two proceedings, including that the proposed class action is being advanced by the First Nations themselves as opposed to an individual. Further, distinct from the Nelson action, they maintain that the proposed class action alleges the Crown breached the implied terms of the treaties. Alternatively, they submit that the Crown breached its fiduciary duty, breached the honour of the Crown and committed equitable fraud by failing to include an augmentation clause regarding the annuities in Treaty 1.

[33] In support of their argument, the moving parties also assert that the motion judge misconstrued the evidence of Chief Bluesky when he said that the only difference between the two actions was that "the leadership [was] not involved." She interpreted this statement to mean that the leadership of Brokenhead Ojibway Nation was not involved. The moving parties state that, when the statement is considered in the context of the proceedings, Chief Bluesky was referring to the fact that none of the First Nations who were signatories to Treaty 1 were involved in the Nelson action.

[34] In summary, the moving parties submit that the proposed grounds of appeal are of arguable merit and of sufficient significance to merit the attention of a full panel of this Court.

The Plaintiff

[35] The plaintiff's overarching submission is that there is no utility to the proposed appeal. He submits that there can only be one interpretation of the Treaty 1 right in question and it is to be determined in the Nelson action.

He asserts that any inconsistent interpretation of the same annuity clause would create absurdity and undermine the Supreme Court of Canada's directive in *Restoule* (see paras 112-13), that treaty rights are to be interpreted once and for all time.

[36] The plaintiff further argues that he is an appropriate representative for the Nelson action and that he has consistently made efforts to engage the moving parties in that action to no avail.

[37] In relation to the moving parties' arguments relating to the ability of an individual to bring a representative action absent the consent of all First Nations who are signatories to Treaty 1, the plaintiff submits that it would be an error to inject the requirement that the representative be authorized to act on behalf of the represented persons found in rule 114(1)(b) of the *Federal Rules* into rule 10.01(1) of the *KB Rules*.

[38] Regarding the arguments made by the moving parties that the motion judge erred when she found the interests in the two actions to be similar, the plaintiff submits that Chief Bluesky's concession regarding commonality of interest between the parties was determinative of the issue under rule 10.03(b) of the *KB Rules*.

[39] The plaintiff argues that the proposed grounds of appeal are not of arguable merit and amount to a collateral attack on the representation order.

[40] Finally, the plaintiff submits that the motion for leave to appeal constitutes an effort to undermine the Nelson action, threatens the scheduled trial dates and has implications for the evidence to be led at the trial regarding the scope of the group and the calculation of damages.

The Defendant

[41] The defendant argues that the proposed grounds of appeal lack arguable merit. While acknowledging that proposed grounds 1 to 6 and 9 raise questions of law, the defendant argues that most of the proposed grounds can be dismissed on the basis that, unlike rule 114(1)(b) of the *Federal Rules*, rule 10.01(1) of the *KB Rules* does not require that the representative be authorized to act on the represented persons included in a representative action. The defendant further asserts that *Restoule*, *Soldier* and *Nepinak* support the finding that an individual can bring a representative action in circumstances such as these.

[42] The defendant observes that the moving parties have not particularized their arguments regarding self-government and section 35 of the *Constitution Act*.

[43] In relation to the procedural arguments raised by the moving parties, the defendant emphasized that the moving parties have been given the ability to participate in the Nelson action, either by being added as a necessary party or applying to intervene, but that they have not availed themselves of those mechanisms.

[44] The defendant further argues that to the extent that proposed grounds 7 and 8 relate to an assertion that the motion judge misconstrued the evidence, those issues are to be reviewed on the standard of palpable and overriding error and therefore not likely to succeed.

[45] Regarding whether the proposed grounds of appeal are of sufficient importance to merit review by a full panel of this Court, the defendant argues

that this case would not create a unique precedent given the case law, such as, among other cases, *Restoule* and *Nepinak*, which were representative actions relating to annuity rights granted pursuant to a treaty.

[46] The defendant argues that it is not in the interests of justice to grant leave, given the imminent trial dates in the Nelson action, as granting leave would create uncertainty and undermine any decision in that action.

Analysis

Leave to Appeal on Proposed Grounds 1, 2, 4 ,5, 6 and 8 is Granted

[47] Having reviewed the proposed grounds of appeal, I am of the view that leave should be granted on proposed grounds 1, 2, 4, 5, 6 and 8.

[48] In my view, proposed grounds 1, 2, 4, 5 and 6 are related to the extent that they address the moving parties' arguments that the motion judge erred when she held that the representation order applied to them and that it should not be varied to exclude the moving parties.

[49] The overarching issue raised by these proposed grounds concerns an individual's ability, on their own behalf and/or on behalf of their First Nation, to advance a representative action in relation to a treaty right on behalf of First Nations who are signatories to the treaty but do not consent to be included in the Nelson action.

[50] The proposed grounds of appeal relating to these issues involve questions of law, including statutory interpretation of the intent and scope of rules 10.01 and 10.03(c) of the *KB Rules* in a situation such as this. The arguments raised by the moving parties in support of their assertion that their

consent was required before they could be included in the representation order involve consideration of their asserted right to self-government and self-determination in the context of section 35 of the *Constitution Act*, the historical and legal relationship between the moving parties and the defendant, the collective nature of the treaty right and the jurisprudence relating to representative and class actions brought by individuals asserting treaty rights in these circumstances. In this latter regard, my review of the cases of *Behn*, *Restoule*, *Nepinak* and *Soldier* leads me to conclude that the moving parties have raised an arguable case that the law is not necessarily settled in this regard.

[51] Proposed grounds 1, 2, 4, 5 and 6 are interrelated and have arguable merit. The issues of consent and the release of the moving parties from the representation order are novel and could affect the disputes between others. Thus, they are of sufficient importance to merit the attention of a full panel of this Court.

[52] Regarding arguable merit, I have considered the plaintiff's argument that to grant the leave motion will "derail" the Nelson action to the extent that it will affect the evidence presented at the trial and the calculation of any award should the plaintiff be successful. I understand that the trial has now concluded with the decision currently under reserve. In my view, the concerns raised do not outweigh the other factors that I have considered above.

[53] I have also considered the plaintiff's and defendant's submissions that the possibility of inconsistent verdicts is contrary to the interests of justice. However, I note that this possibility should not prevent the moving parties from making their motion at this stage of the litigation.

[54] Proposed ground 8 relates to the motion judge's finding that because the relief sought in the Nelson action and the proposed class action are similar, she was not satisfied that the moving parties' interests were different for the purposes of rule 10.03(b) of the *KB Rules*.

[55] The moving parties submit that the motion judge erred in construing the word "interests" too narrowly. While they do not dispute that they are seeking relief related to the Treaty 1 annuities, they state that the motion judge failed to recognize that, unlike the Nelson action, the proposed class action claims the Crown breached its fiduciary duty, breached the honour of the Crown and committed equitable fraud by failing to include an augmentation clause regarding the annuities in Treaty 1. They also assert that their interests are different because the proposed class action seeks remedies and damages not included in the Nelson action. Finally, they maintain that the proposed class action involves Treaties 1 and 2 First Nations and, because their interests are intertwined, it is important that they be heard together.

[56] The above involves a question of statutory interpretation regarding the scope of interests referred to in rule 10.03(b) of the *KB Rules* and therefore constitutes a question of law. While it may exist, I am unaware of any jurisprudence interpreting the scope of section 10.03(b) of the *KB Rules*. I cannot say that the argument is prima facie destined to fail or that it can be dismissed through a preliminary examination. Thus, I would grant leave on proposed ground 8.

[57] The submission that the motion judge misconstrued what Chief Bluesky meant when he said that the difference between the proposed class action and the Nelson action was that "the leadership [was] not involved"

is subject to review on the standard of palpable and overriding error. While I have granted leave to appeal on proposed ground 8, I am of the view that this argument adds little to the statutory interpretation of the word "interests" in rule 10.03(b) of the *KB Rules*. However, I leave that to be determined in the appeal proceedings.

Leave to Appeal on Proposed Grounds 3, 7 and 9 is Denied

[58] Regarding proposed ground 3, no substantive submissions were made as to how the motion judge's interpretation of rule 10 breached the principles of procedural fairness, natural justice, or the *audi alteram partem* rule, aside from the assertion by the moving parties that their forced inclusion in the representation order breached these principles. No legal argument was developed, nor was I provided with any case law. As noted by the defendant, there are procedures that could have been taken by the moving parties that could have allowed them to advance their positions. Therefore, I would deny leave on this proposed ground.

[59] Regarding proposed ground 7 and the assertion that the motion judge misapprehended the evidence when she did not consider that Roseau River Anishinabe First Nation had passed a BCR on May 9, 2025, endorsing the moving parties' ability to proceed with the proposed class action, I am not of the view that an argument of sufficient merit is raised. In a subsequent BCR dated July 2, 2025, the Roseau River Anishinabe First Nation acknowledged the resolution of May 9, 2025, but indicated that it preferred the Nelson action to the proposed class action and maintained its support of the Nelson action. In consideration of the subsequent BCR and the nature of

the argument advanced, I see no arguable case and would deny leave on this proposed ground.

[60] Similarly, I would deny leave on proposed ground 9. The fact that the motion judge did not address any dispute between the plaintiff and the defendant regarding the scope of the representation order prior to the filing of their joint brief consenting to that order is not of sufficient arguable merit.

[61] In the result, leave is granted on proposed grounds 1, 2, 4, 5, 6 and 8 and denied on proposed grounds 3, 7 and 9.

[62] Costs of the motion are to be determined in the appeal of this matter.

Cameron JA