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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	**APPEARANCES:**
TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf and on behalf of all members of TATASKWEYAK CREE NATION,	H. MICHAEL ROSENBERG JOHN P. BROWN ERIC S. BLOCK STEPHANIE WILLSEY HARRY S. LAFORME KEVIN HILLE
plaintiffs,	for the plaintiffs
- and -	
ATTORNEY GENERAL OF CANADA,	CATHARINE MOORE SCOTT D. FARLINGER
defendant,	for the defendant
- and -	
MICHAEL DARYL ISNARDY,	ANGELA BESPFLUG MALCOLM N. RUBY ADAM BAZAK MICHAEL A. EIZENGA RANJAN K. AGARWAL SACHA R. PAUL
intervener.	for the intervener
	WRITTEN REASONS PROVIDED: JUNE 29, 2021

JOYAL, C.J.Q.B.

INTRODUCTION

[1] This is a proceeding under ***The Class Proceedings Act***, C.C.S.M. c. C130. The plaintiffs, Chief Spence and Tataskweyak Cree Nation ("TCN") have moved for certification of this action as a class proceeding. Their proposed class proceeding will address class members' entitlement to clean drinking water on Indigenous reserves. The plaintiffs seek both injunctive relief to remedy infrastructure deficits as well as damages to compensate them for the hardships they have suffered.

[2] Canada consents to the certification of the plaintiffs' class proceeding. Despite Canada's consent, the interveners on this motion[1] are objecting to that certification and in so doing, are potentially preventing the parties from turning their attention to the merits of the plaintiffs' claim and the parties' capacity to satisfy the court-ordered timetable governing what should be this case's rapid progress. Pursuant to that court-ordered timetable (formulated and endorsed in the context of case management oversight), the parties have an opportunity to bring this matter to summary judgment (as it relates to the scope of Canada's duties to class members) within a year. In addressing any potential delay and the need to avoid it, counsel for the plaintiffs is correct to assert that it is impossible to overstate the importance of this proceeding to

[1] Although there is legally only one intervener in respect of the legal questions addressed in these reasons, the plural "interveners" is used (when not otherwise specified) when referring generally to both Michael Daryl Isnardy who requests an appointment as representative plaintiff and his counsel (leading the intervention) who seek appointment as class counsel.

class members, especially those who continue to struggle with something as basic as clean drinking water.

[3] In the face of the plaintiffs' and Canada's request for a consent order, which would certify this matter as a class proceeding, the interveners are objecting, alleging as they are on this motion that the plaintiffs have a conflict of interest. They have also raised a last minute and unexpected motion seeking an order appointing Mr. Michael Daryl Isnardy as the representative plaintiff for a subclass of persons in this action.

[4] After providing the interveners a full hearing with respect to their objection on the basis of their contention respecting a conflict, I rejected the interveners' arguments by which they sought to adjourn and stay the plaintiffs' certification claim. At that same hearing and in relation to the unexpected motion seeking the appointment of Mr. Isnardy as the representative plaintiff, I dismissed the motion as ill-timed, made without appropriate standing and/or jurisdiction. Following those determinations, I certified the plaintiffs' action as a class proceeding in accordance with the parties' consent order. At the conclusion of the hearing, I indicated that I would supplement my disposition of the matter (and what would have been the available transcript of my disposition) with brief written reasons to follow at a future date. These are those reasons.

WHO ARE THE INTERVENERS AND WHAT DO THEY SEEK?

[5] The intervention is led by two law firms, Murphy Battista LLP and Gowling WLG (Canada), who are in turn represented by two additional law firms, Bennett Jones LLP and Thompson Dorfman Sweatman LLP. The interveners represent an individual, Michael Daryl Isnardy, who resides in the City of Williams Lake, British Columbia. The interveners have commenced their own class action on behalf of Mr. Isnardy before the Federal Court. Canada has advised that it will not consent to the certification of Mr. Isnardy's Federal Court action as a class proceeding because it is unworkable.

[6] The interveners allege that the plaintiffs have a conflict of interest that prevents them from representing both First Nations and their members. It is the interveners' position that band members must be free to bring claims against their own First Nations for the failure to bring clean drinking water on reserves. Given the position of the interveners, they now propose that only TCN be proposed to represent a class that is limited to impacted First Nations that elect to opt in. With what the plaintiffs describe as a last minute or "surprise" motion, the interveners also propose that Mr. Isnardy be appointed as a representative plaintiff in the present case thereby displacing Chief Spence, to represent a subclass of First Nation members. The plaintiffs however, say the term subclass as used in the present context is a misnomer because the subclass contains the entirety of the class, save for TCN. The plaintiffs are correct when they suggest that the unexpected motion now brought by the interveners, seeks what would effectively be carriage of the class proceeding and that TCN would be relegated to a subclass. It would seem that the interveners' litigation plan suggests

that they do not actually intend to represent a subclass; they propose to prosecute a parallel action.

[7] With the interveners' motion, Mr. Isnardy is seeking to have his Federal Court action certified as a class proceeding while simultaneously seeking to be appointed as a representative plaintiff in the overlapping class proceeding before this Court. As part of the context for the interveners' motion, I note that the motion was brought with seemingly little warning and it comes following this Court's denial of the interveners' request for an adjournment of what had already been the scheduled certification hearing.

[8] I also note that Canada does not have instructions to consent to the certification of a class proceeding led by Mr. Isnardy. It is telling as well that it is Canada's position that Mr. Isnardy's proposed litigation plan does not appear workable.

[9] In the circumstances of this intervention and unexpected motion, were this Court to accede to Mr. Isnardy's request on this motion, it is likely that the class members would be denied a class proceeding flowing from what is the purposeful and rigorous court-ordered timetable respecting a matter that is of obvious and urgent importance. That result would be untenable for the many thousands of class members who need the determinations that underlie the relief they seek.

[10] For the reasons that follow, I have determined that Mr. Isnardy is not a member of the proposed class, that he cannot commence an action in this Court and that he does not have the standing to bring the motion that he has brought. Moreover and more fundamentally, the conflict alleged by the interveners does not exist.

ISSUES

[11] Based on the submissions of the parties and the governing law, the issues to be decided can be reduced to the following questions:

1. Do the interveners have standing to bring what the plaintiffs characterize as the "surprise motion"?
2. Does there exist a conflict of interest?
3. Is there any basis to order separate representation for a subclass?
4. Should this action be certified as a class proceeding in accordance with the parties' consent order?

FACTUAL BACKGROUND AND CONTEXT

[12] For the limited purposes of addressing and deciding the above issues, including the question of certification, I rely upon and largely adopt the facts that have been set out by the plaintiffs in their certification factum. Moreover, on the basis of, amongst other things, the various affidavit evidence, I have determined more specifically and find as fact, the following, all of which also importantly, informs my analysis with respect to the issues identified above:

i. That there is in the present case, no conflict of interest between First Nations and their members and indeed, First Nations and their members have significant common interests that should be addressed together;

ii. That the interveners themselves sought to represent a class of First Nations and their members;

iii. That Mr. Isnardy maintains parallel litigation before the Federal Court, which is both narrower and broader than the proposed class action in the present case;

iv. That the basis upon which the interveners sought and were granted standing was limited and it was only for the purposes of making submissions on a narrow legal issue; and

v. That the timing of the interveners' motion poses a real threat to the plaintiffs' efforts to secure access to justice for class members.

[13] As it relates to the question of a conflict of interest as between First Nations and their members, Chief Spence explains in her June 18, 2020 affidavit, her rationale for advancing a class proceeding on behalf of First Nations and their members (June 18, 2020 affidavit at paragraphs 24 and 25):

> This litigation is vitally important to those whose rights I am seeking to vindicate. I consulted widely with members of the proposed class, both before and after filing suit. These conversations have reinforced my belief that we can only achieve meaningful results by advancing a claim on behalf of individuals and communities. To do otherwise would needlessly fragment the claim. This would diminish our chances of success by narrowing the grounds on which we might establish a right toclean drinking water.
>
> In an action like this one, First Nations and their members have significant common interests that should be addressed together. Everyone wants to establish a right to clean drinking water on reserves, and everyone wants compensation for having been deprived of that right.

[14] According to Chief Spence, this proposed class proceeding does not give rise to any conflict between First Nations and their members. She notes as follows (June 18, 2020 affidavit at paragraph 31):

> I was elected to represent the interests of the members of my First Nation, and I am myself a member. I believe that I am well positioned to speak for both the

> community and the individuals who are members of the community. I do not see any conflict of interest between my role as Chief and my representation of the proposed class. This is not a zero sum game. Both First Nations and their members want water security. They also want compensation. I intend to seek full compensation for the damages suffered by communities and individuals; that is how I will instruct counsel. There is no need to pit individual claims against community claims when they can be advanced together in harmony. The class, taken together, must be made whole.

[15] Prior to entering into the Retainer Agreement, independent legal advice was provided to Chief Spence from counsel specializing in Aboriginal Law.

[16] It should be noted that the interveners themselves sought to represent a class of First Nations and their members. It was in early March 2020 and continuing for the next two months that the interveners repeatedly expressed an interest in forming a consortium with class counsel and consolidating the *Isnardy* action and the *Curve Lake First Nations* action to advance a national class action of First Nations and their members. At no time during those two months did the interveners suggest that there was any conflict that would prevent class counsel from acting for a class composed of First Nations and their individual members. Indeed, the interveners expressed a desire to represent this same proposed class and they seemed to share the view that it was important to address the First Nations' ongoing water problems in addition to seeking compensation for their individual members.

[17] It should also not be overlooked that Mr. Isnardy maintains parallel litigation before the Federal Court. The plaintiffs note that Mr. Isnardy is an individual who resides in an assisted-living facility in Williams Lake, British Columbia. The plaintiffs contend that he waited until the last moment before bringing this "surprise motion". That motion gives rise to various concerns on the part of the plaintiffs, but in addition

to those concerns, they (the plaintiffs) argue that based on class counsel's cross-examination of Mr. Isnardy on the carriage motion in the Federal Court, they do have serious concerns about his (Mr. Isnardy) suitability to serve as a representative plaintiff.

[18] As part of the context for the present motion, I note that Mr. Isnardy's proposed Federal Court class action is both narrower and broader than the proposed action in the present case. In that connection, Mr. Isnardy does not seek to advance any claims on behalf of First Nations, nor does he seek injunctive relief to remedy the water insecurity in reserve communities. Conversely, the present case is limited to First Nations and their members who experienced drinking water advisories lasting more than one year from 1995 onward. It appears that Mr. Isnardy would include every Indigenous person, for all time, who has ever been inconvenienced by a drinking water advisory (of any duration) on a reserve.

[19] When considering the background and context to this motion and the arguments raised by the interveners, it need be remembered that they (the interveners) sought and were granted very limited standing to make submissions on a narrow legal issue. As further background and context to the granting of that limited standing, it should be noted that on June 11, 2020, this Court held a case management teleconference to address the scheduling of the certification motion. Prior to that case conference, the interveners and class counsel made written submissions. At the case conference, they also made oral submissions. After the case conference, they also made further written submissions. It was the interveners' position that the certification hearing should be adjourned until after the Federal Court had decided the carriage motion. It would seem

that the interveners by this time were prepared to see this Court certify a class proceeding for First Nations, but they were nonetheless insistent that Mr. Isnardy's Federal Court class proceeding be certified to represent the individual class members.

[20] In the context of this Court's direction that the certification hearing proceed, the interveners sought and were granted standing to make submissions on the narrow legal issue of a conflict of interest between the plaintiffs and the members of the proposed class. The plaintiffs are correct when they maintain that the interveners did not seek standing to participate in the certification hearing more broadly nor did they seek leave to bring a motion to stay this action or to contest any part of the carriage of the proceedings in this Court.

[21] The interveners themselves acknowledge in their July 6, 2020 cross-motion the limited standing they were granted respecting the submissions they would be permitted to make on a narrow legal issue (the alleged conflict of interest). They also acknowledged the Court's direction (which direction was confirmed by the Court in a June 19, 2020 email) respecting what could be decided on the July 14, 2020 hearing date:

> Joyal CJ confirmed that Mr. Stanley [counsel for Mr. lsnardy] and his client were granted leave **to make submissions on the narrow legal issue of the purported conflict of interest between the members of the proposed class**. Presumably, those submissions will be made. Joyal CJ agrees with Mr. Rosenberg [Class Counsel] that however carriage is decided in the Federal Court, Mr. Stanley and his client will still have to show why the action in the Court of Queen's Bench should not be certified as a class proceeding. At this stage, the hearing date is set. Leave for Mr. lsnardy **to make submissions** has been granted on the issue identified. Accordingly, it should be understood that the motion for certification is before the Court on July 14, 2020 and may very well be decided.
>
> [emphasis in original]

[22] Following the case management conference on June 11, 2020, there was no contact made with class counsel (from the interveners) respecting their participation in this action, except for confirmation of the hearing date. As a result, the plaintiffs delivered their motion record and factum in support of the parties' consent certification order. It was not until July 6, 2020 that the interveners advised class counsel of the unexpected motion which suddenly stipulated that the interveners were seeking "an order appointing Isnardy as the representative plaintiff for a subclass of … persons" in this action.

[23] Canada has confirmed its position that there is no conflict of interest between the plaintiffs and class members in respect of the proposed common issues. Canada has also advised that it has no instructions to consent to the certification of the class proceeding that Mr. Isnardy now proposes. Indeed, counsel for Canada notes that Mr. Isnardy is in fact, seeking certification of an entirely different proceeding, which will proceed on an entirely different track and timetable. Such an analysis accords with the plaintiffs' position that while the interveners insist that they are not barring the plaintiffs' efforts to secure access to justice for class members, that is in fact precisely the effect of this motion and more specifically the order they now seek.

ANALYSIS

(i) DO THE INTERVENERS HAVE STANDING TO BRING WHAT THE PLAINTIFFS CHARACTERIZE AS THE "SURPRISE MOTION"?

[24] In addressing this question, it must be underscored that the intervener and his counsel were granted leave to intervene on a single issue: whether there is a conflict

of interest between the plaintiffs and class members that would prevent the Court from certifying a class proceeding. Given the limited nature of the leave that was granted respecting that intervention and given the discussions and submissions surrounding the case management meeting with this Court, it is not unfair for the plaintiffs to characterize the interveners' motion (seeking an order appointing Mr. Isnardy as the representative plaintiff for a subclass) as a "surprise motion".

[25] It is not inaccurate to assert, as the plaintiffs do, that the interveners had expressed little interest in this action prior to June 9, 2020. Currently, Mr. Isnardy has no action in this Court. He has pleaded no facts that would allow Canada to answer his claim or permit this Court to decide his entitlement to relief. As the plaintiffs have persuasively argued, Mr. Isnardy cannot now step into the shoes of Chief Spence. Her pleadings present the facts of her case, not his.

[26] No less important as to whether I hear Mr. Isnardy on the issue of whether he ought to be appointed the representative plaintiff for a subclass, is the issue of jurisdiction (see ***Meeking v. Cash Store Inc. et al.,*** 2013 MBCA 81 at paragraph 118). Based on the interveners' statement of claim (at paragraphs 3 to 7), Mr. Isnardy is a resident of British Columbia and he claims to have incurred damages in British Columbia. He has no apparent connection to Manitoba. I am in agreement with the submissions of the plaintiffs that the Manitoba courts can assume jurisdiction over the claims of class members resident in other provinces when they are represented by a Manitoba plaintiff with whom they share common issues (see ***Meeking*** at paragraph 97). With respect to Mr. Isnardy however, as the interveners have insisted,

Mr. Isnardy is not a member of the proposed class, which is defined to exclude him (at paragraph 42 of the interveners' factum they state, "the proposed class definition in the Manitoba class action expressly excludes Isnardy"). The Manitoba Court of Appeal has directed that "[t]he plaintiffs who bring the certification action must have standing to sue as if it were an individual action" (see ***Soldier v. Canada (A.G.)***, 2009 MBCA 12 at paragraph 30). In other words, even if this Court were prepared to entertain this unexpected motion, it does not have jurisdiction to appoint Mr. Isnardy as a representative plaintiff. Neither does it have an action in which to do so.

[27] I note that Mr. Isnardy moves under s. 15(1) of ***The Class Proceedings Act***, which permits "one or more class members to participate in the proceeding". As Mr. Isnardy is not a member of the proposed class, I am not persuaded that this provision provides Mr. Isnardy assistance. Mr. Isnardy's only standing flows from the Court's Practice Direction regarding *Class Action Judicial Protocol* dated September 4, 2019. In the present case, the interveners only sought limited standing under the protocol and indeed, that is all they were granted. The plaintiffs are correct to insist that the interveners never sought to vary that order and there is no basis to do so. Accordingly, the interveners' limited standing does not permit a motion to displace Chief Spence as the representative plaintiff.

[28] In addition to the above, it behooves me to note the potentially and unjustifiably disruptive nature and impact of the interveners' motion as it relates to the certification motion. The plaintiffs describe the interveners' action as "a late arriving carriage contest that they [the interveners] do not have standing to marshal and to which the

plaintiffs have not had an opportunity to respond". In addressing the potential "disruption", I acknowledge that Chief Spence and TCN have spent months engaging with Canada to negotiate a consent certification order, which, by the interveners' own apparent admission, is advantageous to the class. It is not lost on me that Chief Spence and TCN have, as the plaintiffs suggest, spent months assembling their case on the merits so that they can adhere and attorn (in the context of a designated case management) to a timetable that will enable them to argue for judgment on the first-stage common issue within a relatively brief period of time. For various reasons, courts have consistently rejected what can be objectively seen as disruptive efforts on the part of an intervener, even when such intervention is made on behalf of actual class members who wish to participate in the certification motion. See for example ***Fairview Donut Inc. v. TDL Group Corp.***, 2008 CanLII 60983 (Ont. S.C.J.) at paragraph 11; ***Romeo v. Ford Motor Co***., 2017 ONSC 6674 at paragraphs 18 and 19; and ***Kidd v. Canada Life***, 2011 ONSC 6324.

[29] For the reasons noted, Mr. Isnardy is not a member of the proposed class, he cannot commence an action in this Court and he does not have standing to bring what the plaintiffs have characterized as the "surprise motion".

(ii) DOES THERE EXIST A CONFLICT OF INTEREST?

[30] The interveners' arguments respecting the alleged conflict of interest were set out in the interveners' June 10, 2020 correspondence to the Court and in their submissions made in respect of the hearing in this Court for which the interveners were granted limited standing on this very issue.

[31] Amongst other arguments, the interveners suggest the following:

a) That the plaintiffs have presented the common issues in such a way that makes clear that they are "not shared by all the class members and unique to the First Nations' individual's subclass (proposed by Isnardy)" (see paragraph 32 of the interveners' factum);

b) That some of the proposed common issues apply only to individual class members and not to their First Nations;

c) That the First Nations and their members have divergent interests because First Nations cannot assert ***Charter*** claims and as a result, cannot seek relief under s. 24(1) of the ***Charter*** (see paragraph 54 of the interveners' factum);

d) That First Nations and their members have divergent interests because only individuals "can suffer the results" of certain breaches such as "a lack of adequate access to potable water in terms of both quality and quantity" (see paragraph 56 of the interveners' factum);

e) That First Nations and their members have divergent interests because some heads of damages are only available to individuals, such as "loss of income and loss of advantage" and "loss of opportunity to live on First Nation lands" (see paragraph 60 of the interveners' factum);

f) That First Nations and their members have divergent interests because only individuals can assert a claim of nuisance (see paragraph 58 of the interveners' factum);

g) That individual class members may have claims against their own First Nations that reflect their claims against Canada (see paragraphs 72 to 75 of the interveners' factum); and

h) That even in the absence of claims against a multitude of First Nations, a conflict would nevertheless arise in apportioning fault between First Nations and Canada (see paragraph 76 of the interveners' factum).

[32] I have examined carefully the above arguments and indeed all of the submissions made by the interveners in respect of their position on the issue of conflict of interest. I am not persuaded by those submissions such so as to find the alleged conflict.

[33] Before setting out my brief reasons disposing of the conflict of interest argument, it is well to note as context, three points.

[34] First, it cannot be ignored that the interveners make their arguments with respect to the purported conflict of interest only after it had apparently become clear that they could not form a consortium with class counsel. I note with interest that prior to that, the interveners had sought to join class counsel in representing the same class of individuals and First Nations before the Federal Court.

[35] Second, I also recognize that in Mr. Isnardy's own action before the Federal Court the claim is only against Canada and does not allege that any other person has liability for the damages suffered by his proposed class. As was underscored by the plaintiffs, Mr. Isnardy alleges (as do the plaintiffs) that Canada remains liable to the class members, despite any effort to offload responsibility for water to First Nations.

[36] Third, I wish to state my agreement with the plaintiffs when they appropriately assert that if any party has legitimate reason to raise a conflict of interest, it is Canada — which might seek to apportion liability. Nonetheless, Canada has not in this case, raised the issue of conflict. To the contrary, Canada has consented to the certification of the plaintiffs' class proceeding on the basis that pursuant to s. 4(e)(iii) of ***The Class Proceedings Act***, the plaintiffs do not have a conflict of interest with members of the class in respect of the common issues.

[37] With the above context having been set out, I move now to explain my rejection of the interveners' argument in respect of the alleged conflict.

[38] I observe at the outset that First Nations frequently bring actions in the name of the chief on behalf of the First Nation and all of its members as a means of asserting collective rights (see for example, ***Tsilhqot'in Nation v. British Columbia***, 2014 SCC 44. Indeed, at least five First Nations are proceeding with representative actions against Canada in the Federal Court respecting their entitlement to clean drinking water on their reserves. All of these actions are brought by the chief on behalf of the First Nation and all of the members of the First Nation. They all assert claims similar to those advanced in the present case on behalf of both individuals and the collective.

[39] I accept as does Canada, that pursuant to s. 4(e)(iii) of ***The Class Proceedings Act***, the conflict inquiry is limited to the proposed common issues. As was noted in ***Berg et al. v. Canadian Hockey League et al.***, 2019 ONSC 2106 (at paragraph 78):

> Thus, a conflict arises when one subgroup of the class will have an adverse result from the resolution of the common issue, not from some speculative consequence that is irrelevant to the resolution of the common issue. As put by the motion judge, at para. 233:
>
> > If the difference between the situation of the representative plaintiff and the class members does not impact on the common issues, then the difference does not affect the representative plaintiff's ability to adequately and fairly represent the class and there is no conflict of interest.

[40] As the plaintiffs have argued persuasively in the present case, the proposed common issues are entirely directed at Canada's several liability and they raise no apparent prospect of a conflict of interest among class members. As the plaintiffs explain, the first-stage common issue asks what duties Canada owes to First Nations and their members. The second-stage common issue asks whether Canada breached those duties, and if so, what remedy should ordered. It should go without saying that

First Nations and their members have an obvious interest in seeing each of these issues determined in favour of the Class.

[41] On some of the common issues referred to by the interveners, it would seem clear that if it is established that Canada owed a duty to a First Nation, the question remains whether Canada breached that duty. The plaintiffs are well to emphasize that the common issues would apply equally to individuals if it was established that Canada owed duties to individuals. The plaintiffs submit that the common issues use the language of "members" rather than referencing the subgroup as a whole. As was explained by the Supreme Court of Canada in ***Pro-Sys Consultants Ltd. v. Microsoft Corporation***, 2013 SCC 57 at paragraphs 133 - 35, class actions aggregate the claims of class members, but the class itself does not assert a common claim. In fact, class actions exist to resolve the claims of class members, not of classes. Nonetheless, this does not pre-empt members of a class from sharing common issues.

[42] I accept that the possibility that common issues may be answered differently for different class members does not necessarily make them any less common (see ***Vivendi Canada Inc. v. Dell'Aniello***, 2014 SCC 1 at paragraph 46).

[43] First Nations and their members do not necessarily have divergent interests because First Nations cannot assert ***Charter*** claims (as contended by the interveners) or seek relief under s. 24(1) of the ***Charter***. The plaintiffs are well to question that stark proposition particularly in relation to claims pursuant to s. 2(a) of the ***Charter***. In fact, First Nations are legal entities that have the capacity to bring suit in their own name to advance collective interests (see ***Kelly v. Canada (Attorney General)***, 2013

ONSC 1220 and ***Bighetty et al. v. Government of Manitoba et al.***, 2011 MBQB 44 at paragraph 34). The Supreme Court of Canada has already acknowledged that some sections of the ***Charter*** have individual and collective aspects (see ***Alberta v. Hutterian Brethren of Wilson Colony***, 2009 SCC 37 and ***Loyola High School v. Quebec (Attorney General)***, 2015 SCC 12).

[44] In considering the plaintiffs' response to the interveners' argument, I am persuaded by the proposition that all class members suffer the consequences of Canada's breaches of its duties. This contests the interveners' assertion that First Nations and their members have divergent interests because only individuals can suffer the results of certain breaches. As the plaintiffs have submitted, expansion of housing and economic opportunities are "stunted" by the expense of securing clean drinking water all of which further contributes to the departure of community members. Further, as Chief Spence explained at paragraph 31 of her affidavit, "Elders have noticed that the community's youth are disenfranchised from their culture and are increasingly turning to alcohol and drugs. The loss of traditional knowledge sharing about TCN's water ceremonies will have intergenerational impacts."

[45] Neither is it persuasive to argue as the interveners have, that First Nations and their members have divergent interests because it is alleged that some heads of damages are only available to individuals. It seems clear that damages that are suffered most immediately by individuals can also have a devastating impact on a community. Where such damage to a community arises from a breach of duty to that community, those damages are potentially recoverable by that community (see

Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344).

[46] As it relates to the interveners' argument on the issue of nuisance, I am in agreement with the plaintiffs when they say that it suffices that First Nations as a collective can assert a claim in respect of a nuisance on lands that are owned collectively, while individuals can assert a claim in respect of a nuisance on lands that had been allotted or leased to them. In ***Bighetty*** (at paragraphs 27 and 34), it was expressly determined that First Nations can assert claims for nuisance in respect of lands that had not been allotted to their members.

[47] When the interveners allege that individual class members may have claims against their own First Nations that reflect their claims against Canada, they (the interveners) present no evidence of any such liability on the part of First Nations. Such a contention remains speculative and conjectural.

[48] I reject as well the interveners' suggestion that even in the absence of claims against the multitude of First Nations, the conflict would nevertheless arise in apportioning fault between First Nations and Canada. Instead, I am persuaded by the plaintiffs who are correct to stipulate that if ever apportioning were in issue (however unlikely), both First Nations and their members would seek to maximize their recovery from Canada as Chief Spence herself confirms at paragraph 26 of her affidavit.

[49] In examining the entirety of the interveners' submissions, I am of the view that even where there exists different entitlements to relief, such different entitlements do not require subclasses. I accept the submission of the plaintiffs that on a proper view

of the claim, the most that might be said in the present case is that class members may differ in their entitlement to relief. Nonetheless, this does not require subclasses let alone does it raise a conflict of interest such that it would require separate counsel for a subclass (see ***Anderson et al. v. Wilson et al.***, 1998 CanLII 18878 (Ont. Div. Ct.) at paragraph 54, varied on appeal, but affirmed on this point). See also ***1176560 Ontario Ltd. v. Grant Atlantic & Pacific Co. of Canada Ltd***., 2004 CanLII 16620 (Ont. Div. Ct.) at paragraphs 20 to 23, leave to appeal refused, [2004] O.J. No. 2009 (C.A.) and ***Grant v. Canada (Attorney General)***, 2009 CanLII 68179 (Ont. S.C.J.) at paragraphs 95 and 96.

[50] It should be apparent from the above reasons, and given the manner in which the parties have crafted the common issues, that there is no potential conflict of interest that might prevent the representative plaintiffs from representing a class composed of First Nations and their members. Put simply, the intervener's position respecting a conflict of interest is without merit.

(iii) Is there any Basis to Order Separate Representation for a Subclass?

[51] As I explain below, the plaintiffs have satisfied me that irrespective of my earlier determinations, there is in any event, no basis to order separate representation for a subclass. As the plaintiffs have persuasively submitted, the requirement for separate legal representation would require a real and immediate conflict that is apparent from the pleadings. None is apparent. Moreover, the governing legal authorities suggest a clear preference for preserving the class. Additionally, I note that class counsel have

made appropriate plans to address any conflict of interest that might arise. No less important is the fact that I have determined that the parallel proceedings proposed by the interveners are not in the interests of class members.

[52] An exclusion of a subclass requires at the certification stage an obvious and direct conflict between the interests of class members that is plain on the face of the pleadings (see ***Pro-Sys Consultants Ltd.***). It is very difficult if not impossible to determine the requirement for subclasses with separate legal representation at the certification stage (see ***Merck Frosst Canada Ltd. v. Wuttunee***, 2009 SKCA 43 (CanLII) at paragraph 120). A more fair, sensible and expeditious approach would commend a supervisory role for the Court pursuant to ***The Class Proceedings Act***. If and where subclasses need be determined, that can and will occur as the need arises (see ***Bendall v. McGhan Medical Corp.*** (1993), 14 O.R. (3d) 734 (Ont. S.C.J.) at paragraph 71). Yet even then, as the plaintiffs are right to identify, courts are reluctant to separate a subclass to be then separately represented on all common issues.

[53] The plaintiffs are correct when they argue that given the apparent judicial restraint on this issue as found in the jurisprudence, the intervener and his counsel are asking the Court to do something that no Canadian court has done before.

[54] The preponderance of legal authority seems to favour maintaining the integrity of the class at least until an insurmountable conflict arises on the common issues. See for example ***Anderson v. Wilson***, 1998 CanLII 18878, 1998 CarswellOnt 698 (Ont. Div. Ct.) at paragraphs 57 – 58, varied on appeal but affirmed on this point, [1999] O.J. No. 2494 (C.A.) at paragraph 40, leave to appeal refused, ***Anderson v. Wilson***,

[1999] S.C.C.A 476. The general view appears to be that if and when a real problem arises, it should not be difficult to create separate representation. Prior to that need arising, "economy favours single representation" (see ***Anderson v. Wilson***, 1999 CanLII 3753, 1999 CarswellOnt 2073 (Ont. C.A.) at paragraph 39, leave to appeal refused, ***Anderson v. Wilson***, [1999] S.C.C.A. 476).

[55] As earlier noted, class counsel have made appropriate plans to address any conflict of interest that might arise. Were such a need for separate representation required, the plaintiffs advise that the parties' litigation plan provides that McCarthy Tétrault LLP will represent a subclass of individuals, while Olthuis Kleer Townshend LLP, will represent the subclass of First Nations. I agree with the plaintiffs that this approach is preferable to relegating individual class members to Mr. Isnardy's potentially unworkable Federal Court proceedings or subjecting them to what the plaintiffs say could be duplicative and costly litigation proposed by the intervener and his counsel. I accept class counsel's submission that their approach will more likely than not facilitate access to justice and judicial economy and is more likely to avoid additional expense and delay.

[56] Finally, it is my view that parallel proceedings as proposed by the intervener are not in the interests of class members. As the plaintiffs have convincingly and importantly set out, the interveners are not actually proposing to represent a subclass in the action before the Court. Instead, they are seeking to conduct an entirely separate class proceeding on behalf of the entire class, save for TCN. Such an approach and the corresponding proposed litigation plan, is as argued, incompatible

with both the parties' court-ordered timeline for this action and the litigation plan to which the parties have consented. It is an approach and timeline that appears at first blush somewhat unrealistic and it holds out the prospect of considerable delay for the plaintiff class.

[57] In the circumstances of the present case, there is no basis to order separate representation for a subclass.

(iv) SHOULD THIS ACTION BE CERTIFIED AS A CLASS PROCEEDING IN ACCORDANCE WITH THE PARTIES' CONSENT ORDER?

[58] Based on the above analysis and based upon the consent of Canada, there is nothing before this Court that ought to pre-empt the requested certification of this action as a class proceeding in accordance with the parties' consent. Moreover, in the particular circumstances of this case, such a certification is consistent and in accord with the legal principles and pre-conditions governing certification in a class proceeding.

[59] The matter should now proceed pursuant to the court-ordered timelines with a view to bringing this urgent and important matter to summary judgment within the appropriately expedited time period.

CONCLUSION

[60] As should be apparent from the foregoing analysis, I have answered the first three questions in issue in the negative. I have answered the fourth question in the affirmative.

[61] In doing so, I am both applying the governing law and acknowledging the importance and urgency of this claim. The class members have experienced drinking

water advisories on their reserves. This class proceeding seeks both retrospective compensation and injunctive relief to ensure that class members have adequate access to clean drinking water. Mr. Isnardy's late and unexpected intervention has threatened to disrupt the consent certification of a class proceeding that quite obviously, promises at least the possibility of resolving fundamentally important claims for a disadvantaged group.

[62] I am persuaded that neither Mr. Isnardy, nor his claim, have any connection to Manitoba and that he has no standing to seek appointment as a representative plaintiff in a Manitoba class proceeding. In addition, his ill-timed and unexpected motion, wherein he seeks appointment as a representative plaintiff, has the real potential to cause delay, disruption and prejudice to the plaintiff class in the present case.

[63] Separate and apart from the problematic procedural aspects of Mr. Isnardy's motion and the potential to cause prejudicial delay, I am not convinced that there is a basis to appoint him as a representative plaintiff or to appoint his counsel, Murphy Battista LLP and Gowling WLG (Canada), as class counsel. As earlier noted, given the manner in which the parties crafted the common issues, there is no potential conflict of interest that might prevent the representative plaintiffs from representing a class composed of First Nations and their members. Neither is there a need for subclasses, additional class representatives or separate counsel for the class.

[64] Accordingly, based on my earlier oral disposition of this matter, I am certifying this action as a class proceeding. The representative claimants shall be Tataskweyak

Cree Nation and Chief Doreen Spence, and class counsel shall be McCarthy Tétrault LLP and Olthuis Kleer Townshend LLP.

[65] I am advised that counsel have settled the matter of costs amongst themselves.

_____ C.J.Q.B.