Federal Court  Cour fédérale

Date: 20170505

Docket: T-237-16

Citation: 2017 FC 447

Ottawa, Ontario, May 5, 2017

PRESENT: The Honourable Madam Justice Strickland

PROPOSED CLASS PROCEEDING

BETWEEN:

POUNDMAKER CREE NATION REPRESENTED BY THE COUNCIL OF POUNDMAKER CREE NATION AND CHIEF DUANE ANTOINE AND ONION LAKE CREE NATION REPRESENTED BY THE COUNCIL OF ONION LAKE CREE NATION AND CHIEF WALLACE FOX

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] This is a motion brought on behalf of the Defendant seeking an Order, pursuant to Rule 8 of the *Federal Courts Rules*, SOR/98-106 ("Rules"), extending the time for service and filing of the Defendant's statement of defence in this proposed class proceeding until after the decision on the motion for certification has been rendered.

[2] On February 8, 2016, the Plaintiffs filed their statement of claim in this proposed class action. The proposed class members are defined as those Indian Nations, including the Poundmaker Cree Nation ("Poundmaker") and the Onion Lake Cree Nation ("Onion Lake"), on whose behalf the Crown accepted a designation of rights and interests in oil and gas on their reserve lands under the *Indian Act*, RSC 1985, c I-5. Poundmaker and Onion Lake are the only named proposed class members at this time. The claim alleges that the Crown breached its fiduciary obligations to Indian Nations and was negligent in failing to: fully and properly exploit the class members' oil and gas rights on designated reserve lands; protect the loss of class members' oil and gas rights; and, properly collect and account to the class members in respect of their oil and gas rights, all resulting in the class members suffering damages.

[3] By Order of the Chief Justice dated February 23, 2016, I was appointed as the Case Management Judge in this matter as assisted by Prothonotary Lafrenière. At the initial case management teleconference held on January 18, 2017, amongst other things, the timing of a request for particulars and the filing of the statement of defence by the Defendant were discussed. In the result, on January 19, 2017, I ordered that the Defendant provide the Plaintiffs with its request for particulars on or before January 20, 2017, that a follow up case management teleconference be held on February 10, 2017 and, in the interim, that pursuant to Rule 8 the time within which the Defendant must file its statement of defence was extended pending further order of this Court. On February 10, 2017, the parties confirmed that the request for particulars had been made and responded to, however, that the issue of the timing of the statement of defence remained outstanding. Accordingly, the Defendant was directed to file a motion seeking to extend the time for filing the statement of defence until after the certification hearing. The

motion was set down to be heard on April 18, 2017. Both parties duly filed and served their motion records. By letter dated April 13, 2017, the Defendant advised that the parties had agreed that the motion need not be heard orally but could proceed on the basis of the written submissions. Accordingly, on April 13, 2017, I issued a direction permitting the motion to be converted to a motion in writing and requiring the Defendant file a reply no later than April 20, 2017.

[4] This Order is in response to that motion.

Defendant's Position

[5] The Defendant submits that Rule 385 provides the Court with authority, as a matter of the exercise of judicial discretion, to extend the time for filing a statement of defence pursuant to Rule 8 (*Always Travel Inc v Air Canada*, 2003 FCT 212 (FCTD) at para 4 ("*Always Travel*"); Rules 8 and 385) and that the case management judge is best positioned to determine whether in a proposed class action the filing of a statement of defence is necessary or useful prior to the certification hearing (*Always Travel* at para 4; *MacLean v Telus Corp,* 2005 BCCA 338 at para 12 ("*MacLean*")).

[6] This issue has been before this Court on only two prior occasions which resulted in written reasons and, in both instances, the Court held that a statement of defence was not essential to the determination of the issues on the certification motion and would not be of assistance to the Court (*Always Travel*; *Horseman v Canada (Attorney General)*, Docket: T-1784-12, Order and Endorsement dated December 3, 2012 ("*Horseman*")). Other than Nova

Scotia, where the class proceedings legislation (*Class Proceedings Act*, SNS 2007, c 28, s 4(6)) specifically provides that a statement of defence need not be filed until after certification, in all other Canadian jurisdictions the defendants are either not required to deliver a defence prior to the certification hearing or the usual practice is not to do so (*Hoffman v Monsanto Canada Inc*, 2002 SKCA 120 at para 23 ("*Hoffman*"); *Field v GlaxoSmithKline Inc*, 2013 SKQB 113 at para 45 ("*Field*"); *Warner v Smith and Nephew Inc*, 2016 ABCA 223 at para 105 ("*Warner*"); *Dominguez v Northland Properties Corp*, 2012 BCSC 328 at para 130 ("*Dominguez*")). And while Justice Perell of the Ontario Superior Court does sometimes order the delivery of the statement of defence prior to certification, he does not do so in every case (*Crosslink Technology Inc v BASF Canada*, 2014 ONSC 1682, leave to appeal denied in 2014 ONSC 4529 ("*Crosslink*"); *Fanshawe College of Applied Arts and Technology v Sony Optiarc Inc*, 2013 ONSC 1477; *Pennyfeather v Timminco Ltd*, 2011 ONSC 4257 ("*Pennyfeather*"); *Brazeau v Canada (Attorney General)*, 2016 ONSC 7836) and his view that pleadings motions should be brought prior to certification has not been adopted by other judges and courts (*Hoffman*).

[7] The Defendant submits that the purpose of the certification hearing is to determine the proper form of the action and whether it should advance as a class proceeding, it is not meant to test the merits of an action (*Tihomirovs v Canada (Minister of Citizenship and Immigration)*, 2006 FC 197 at para 34 ("*Tihomirovs*"); *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 99 ("*Pro-Sys Consultants*")), which distinguishes it from the role of the statement of defence. The first criteria under Rule 334.16 for certification of a class action requires that "the pleadings disclose a reasonable cause of action". As the facts in the statement of claim are assumed to be true and no evidence may be considered (Rule 334.16; *Canada v John Doe*, 2016

FCA 191 at para 23 ("*John Doe*"); *Gottfriedson v Canada*, 2015 FC 706 at para 31), there is no need for a statement of defence in order to decide the first criteria for certification (*Kornblum v Canada (Human Resources and Skills Development)*, 2010 FC 656 at para 30). As to the remaining four criteria, the Plaintiffs have the burden of adducing evidence to show "some basis in fact" that these criteria have been met (*John Doe* at para 24). Pleadings are not evidence (*Hawthorne v Markham Stouffville Hospital*, 2016 ONCA 10 at para 8; *Emerging Equities Inc v Strand*, 2008 ABCA 23 at para 5). Thus, these four criteria are not established or defeated by reference to the pleadings but rather by reference to evidence that the parties will put forward on the certification motion. A statement of defence is therefore of no assistance to the Court in evaluating the evidence put forward to determine if these criteria are met.

[8] The Defendant also submits that production of a statement of defence at this stage is a wasteful endeavor. Class actions are unique in that the plaintiff's theory of a case may evolve up to and through the certification process (*Dugal v Manulife Financial Corp*, 2011 ONSC 6761 at para 13; *Harvey v Western Canada Lottery Corporation*, 2015 SKQB 102 at paras 31-32, leave to appeal denied in 2015 SKCA 75). In the result, the statement of claim may be significantly amended or there may even be a wholly new pleading and, in such circumstances, the statement of defence would have to be re-written (*Brown v Canada (Attorney General)*, 2010 ONSC 3095, reversed in 2011 ONSC 7712; *Ewert v Canada (Attorney General)*, 2016 BCSC 962). There is also the possibility that the proposed class action will not be certified in which case the preparation of the statement of defence would have been particularly wasteful.

Plaintiffs' Position

[9] The Plaintiffs submit that while the Court has discretion to delay the filing of a statement of defence until after certification, the redress is far from automatic (*Always Travel* at para 7). There must be a compelling reason for the Court to exercise this discretion (*Pro-Sys Consultants Ltd v Microsoft Corp*, 2015 BCSC 74 at para 33 ("*Pro-Sys BCSC*"). And, in exercising discretion, the Court should consider among other factors whether the defence would be useful to and/or necessary for the determination of the issues on certification (*Scott v TD Waterhouse Investor Services (Canada) Inc*, 2000 BCSC 1786 at para 40 ("*Scott*"); *Pennyfeather* at paras 86, 88-92); an extensive reformulation of the statement of defence is likely to be required after certification (*Shaver v British Columbia*, 2017 BCSC 108 at para 80 ("*Shaver*")); undue time and effort would be required to deliver the statement of defence prior to certification (*Murray v Alberta (Minister of Health)*, 2007 ABQB 231 at para 29 ("*Murray*"); *Smith v Sino-Forest Corp*, 2012 ONSC 1924 at paras 51-52 ("*Smith*")); and, any unfairness to the defendant would result from requiring a statement of defence to be delivered prior to the certification hearing (*Murray* at para 29; *Smith* at paras 49, 53-54). The nature of the proceedings and the rights asserted are also relevant contextual factors in this determination (*Murray* at para 25).

[10] The onus is on the Defendant to persuade the Court that an extension is warranted. This requires an evidentiary basis, however, the Defendant has not adduced any evidence, by affidavit or otherwise, in support of its motion (*Always Travel* at paras 8-9).

[11] The Plaintiffs submit that while historically Courts have exercised their discretion to delay the filing of a statement of defence until after the certification motion, as it would have little utility (*Smith* at paras 45; *Shaver* at para 81), in recent years courts in Ontario, British Columbia, Alberta and elsewhere have urged judges to end this convention (*Shaver* at para 82; *Pennyfeather* at paras 83-84; *Pro-Sys BCSC* at para 31; *Gay v Regional Health Authority 7*, 2014 NBCA 10 at para 25 ("*Gay*")). Courts have recognized that such a delay is most often a tactical manoeuvre by the defendants (*Smith* at paras 52-54; *Shaver* at para 81).

[12] Moreover, requiring the Defendant to deliver a statement of defence is more effective and cost efficient as it defines the issues early and addresses any disputes about the cause of action, such as the Court's subject-matter jurisdiction (*Scott* at para 48; *Smith* at paras 49 and 88; *Pennyfeather* at para 89). It also assists in the analysis of the certification criteria (*Scott* at paras 35 and 48; *Pennyfeather* at paras 89-90), in particular, with isolating common questions or issues.

[13] The Plaintiffs also submit that even if the adequacy of the claim is not an issue, the filing of a statement of defence before the certification is consistent with and would assist the Court in analyzing the remaining certification criteria, particularly the common questions/issues (*Scott* at para 35; *Smith* at para 48; *Pennyfeather* at paras 89-90). Isolating the common issues, which can be relevant to the certification motion, requires the pleadings in the originating action to be closed (*Scott* at paras 40-41; *Smith* at para 48: *Shaver* at para 82). For example, a limitation defence must be plead and if this is done then it becomes a common issue/question. As the certification motion will be better informed once the Plaintiffs know the Defendant's pleaded

position, it follows that the Court will be better informed as to decide the true issues between the parties (*Shaver* at paras 82-84).

[14] The Plaintiffs also submit that the filing of a statement of defence may also assist the Court in understanding the legislative and historical framework within which the case is being assessed (*Murray* at para 29). Given the centrality of historical background to the issues in this case, a statement of defence will assist the Court in determining the extent to which there is an agreement or disagreement as to the accuracy of the historical narrative and duties, thereby saving time and resources by not dealing with uncontentious matters (*Pro-Sys BCSC* at para 33).

[15] The Plaintiffs submit that the outcome of the certification motion is unlikely to prompt a drastic reformulation of the statement of defence (*Smith* at paras 50-51). And, where the Defendant has not attacked the claim, the benefit of filing a statement of defence prior to certification is the likelihood that the Plaintiffs will leave the certification hearing with their pleadings intact. Further, it is not enough for the Defendant to simply assert that the outcome of the certification motion will impact the content of the statement of defence (*Murray* at paras 28-29). It is also well established that the filing of a statement of defence prior to certification is not a burden likely to generate extensive duplicative work (*Murray* at para 29) because the Defendant will already have investigated the facts and law in preparation of affidavits for the certification hearing and, once this is done, the preparation of a draft statement of defence is usually completed. The delivery of an amended statement of defence will be a minimal incremental effort and expense (*Pro-Sys BCSC* at para 32). Further, the Defendant's concern that it will have wasted time and money delivering an amended statement of defence is

exaggerated as given the legal cost of class actions, the cost of delivery of an amended statement of defence is a mere bagatelle.

[16] Finally, the Plaintiffs submit that there is no unfairness in denying the Defendants this tactical manoeuvre (*Smith* at paras 52-53). Doing so will lead to the just, efficient and cost effective resolution of the action and is in line with the tenet of civil litigation that Plaintiffs are entitled to know the case they have to meet (*Shaver* at para 83; *Smith* at para 49). The Defendant has also adduced no evidence nor is it stated in its written argument that it would be prejudiced by filing its statement of defence prior to certification.

Defendant's Reply

[17] In reply the Defendant submits that neither *Always Travel* or *Horseman* required an evidentiary basis to justify deferral of filing of a statement of defence. In *Always Travel* the Court reached a decision based on the statement of claim. In this case the Plaintiffs' statement of claim demonstrates a considerable amount of complexity as it challenge's all aspects of the Indian Oil and Gas Canada agency as well as oil and gas rights and drainage issues on all Indian reserve lands in Canada. It also contains what the Plaintiffs describe as an extensive historical narrative. The Defendant submits that it cannot be disputed that a proper defence to the claim will require a substantial outlay of resources, time and expense. Nor has the Plaintiff argued or put forward any evidence that they would be prejudiced if the statement of defence is not filed until after the action is certified.

[18] The Defendant also submits that the Plaintiffs have not cited a certification decision that relies on a statement of defence in establishing the common issues and that this is because the issues in certification are determined based on evidence and not on the pleadings. Further, the only concrete example given by the Plaintiffs as to why a statement of defence will be useful for determining issues on certification, being the pleading of limitation periods, is necessary only for a determination of the merits of the claim. The class period is part of the certification process, to be dealt with based on evidence and legal argument, and cannot be looked at in isolation from the applicable limitation periods and discoverability issues irrespective of the statement of defence not having been filed (*Pro-Sys BCSC* at para 26).

Analysis

[19] As noted by the parties, the Rules do not contemplate the filing of a statement of defence subsequent to the determination of the motion for certification of a proposed class proceeding.

[20] Rule 204 requires that a defendant shall defend an action by serving and filing a statement of defence within 30 days after service of the statement of claim, if the defendant is served in Canada. Pursuant to Rule 8, on motion, the Court may extend or abridge a period provided by the Rules or fixed by an order. Rule 3 states that the Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits. And, pursuant to Rule 385(1)(a) and (b), a case management judge may give any directions or make any orders that are necessary for the just, most expeditious and least expensive determination of a proceeding on its merits and, notwithstanding any period provided for in the Rules, fix the period for completion of subsequent steps in the proceeding.

Part 5.1 of the Rules deal with class proceedings. As to the time for service and filing of a notice of motion for the certification of a proceeding as a class action, in the case of an action, Rule 334.15(1) states that motions shall be made returnable no later than 90 days after the later of: (a) the day on which the last statement of defence was filed, and (b) the day on which, under Rule 204, the last statement of defence is required to be served and filed. More generally, Rule 334.11 states that, except to the extent that they are incompatible with the Rules in Part 5.1, the Rules applicable to actions and applications, as the case may be, apply to class proceedings.

[21] Given this and the jurisprudence, I agree with the parties that it is a matter of judicial discretion as to whether, in any given circumstance, the time for filing a statement of defence should be extended until after the determination of the motion for certification of the proposed class action (*Always Travel* at para 4 and 7; Rules 8 and 385; *Shaver* at para 80; *Murray* at para 20; also see Ward K. Branch, QC, *Class Actions in Canada*, (Toronto, ON: Thomson Reuters Canada Limited, 2016) (loose-leaf updated November 2016, release 46) vol 1 at para 4.1390 ("*Class Actions in Canada*")). This was addressed in *Always Travel* which also found that motions of this type will not be granted as a matter of course and that the defendant as the moving party has the burden of persuading the Court that it should grant the relief sought. There, Justice Hugessen found that the absence of any affidavit or other evidence, as is the case in this matter, was a serious drawback. However, it was not fatal as was he was able to reach a decision on his reading of the statement of claim. In that regard, given the complexity of the matter before him, it was unlikely in the extreme that requiring a statement of defence at that stage of the proceedings would lead to a less costly and more speedy resolution of the action. He also found that the statement of defence was not essential to issues which would have to be

determined on the certification motion and was unlikely to be of assistance to the Court at that stage. Rule 299.18 (now, Rule 334.16(1)) defined and limited the questions to be addressed on the certification motion which could be answered solely by reference to the statement of claim and did not require that there be a statement of defence.

[22] In *Horseman* Justice Zinn referenced *Always Travel* and went on to state that the fundamental basis for the ruling on the motion before him was whether the relief sought by the defendant advanced the purposes of Rule 3, to secure the just, most expeditious and least expensive determination. Justice Zinn found that the material filed established that the proposed class action raised complex and important legal issues and that a proper defence would require a substantial outlay of time, resources and expense which would be of little assistance in the certification motion and may have to be duplicated, in part, depending on the result of the certification motion. Nor was there obvious prejudice to the plaintiffs if the order sought was granted. Accordingly, he issued an Order which permitted the time for service and filing of the statement of defence to be extended to 30 days after final determination of the certification motion.

[23] As noted above, these are the only two decisions of this Court, identified by the parties, which address a motion to defer the filing of a statement of defence until after the determination of the certification motion. However, it appears that it is often the usual practice, in various provinces, that a statement of defence will not be filed until after the determination of the certification motion (*Hoffman* at para 27; *Field* at para 45; *Warner* at para 105; *Dominguez* at para 130; *Ring v Canada (Attorney General)*, 2010 NLCA 20 at para 29, leave to appeal to the

Supreme Court of Canada denied in [2010] SCCA No 187 (WL)) and that in Nova Scotia this is the procedure set out in the *Class Proceedings Act* of that province.

[24] That said, as pointed out by the parties, Justice Perell, of the Ontario Superior Court of Justice, in *Pennyfeather* expressed his view that it was appropriate to revisit the convention whereby defendants are not required to deliver a statement of defence before a certification motion. In his view, as a general rule, it would be preferable to close pleadings before the action moves to a certification motion.

[25] Justice Perell noted that s 2(3) of the Ontario *Class Proceedings Act, 1992*, which is similar to Rule 334.16(1), suggested that it was the legislature's intention that the general rule is that the statement of defence should be delivered before the certification motion. Further, that pursuant to s 5 (1) of that Act, a plaintiff must satisfy five interdependent criteria for his or her action or application to be certified as a class proceeding and that a major advantage of closing the pleadings would be that controversies about the first of the five criteria for certification might be resolved or at least narrowed or confined before the certification motion. The requirement of delivering a statement of defence would "call out" the defendant to make its challenges to the statement of claim and, thus, the s 5 (1)(a) criterion might be removed as an issue as would any challenge to the pleading for wanting in particulars or for breaching the technical rules for pleading. This would be particularly useful when the challenge is based on the court not having subject-matter jurisdiction over the plaintiff's claim. If that challenge is upheld, then the class action would be dismissed or stayed and the enormous cost of a comprehensive certification motion avoided (at para 89). Further, hearing an interlocutory motion about the sufficiency of

the pleading might be preferable to having the challenge heard at the certification motion because a common outcome of the s 5(1)(a) analysis is to grant the plaintiff leave to amend the statement of claim, which outcome, at a minimum, exacerbates the complexities of determining the certification motion because of the interdependency of the certification criteria (at para 90).

[26] Justice Perell also noted that in many cases the technical or substantive adequacy of a plaintiff's statement of claim is not an issue and, therefore, requiring the completion of the pleadings will involve no interlocutory steps and the analysis of the other four certification criteria would be facilitated by a completed set of pleadings (at para 91). For instance, having the statement of defence before the certification motion would provide useful information for analyzing the preferable procedure criterion and the plaintiff's litigation plan (at para 92). Moreover, it may emerge that there are issues worthy of certification in the defendant's statement of defence (at para 92).

[27] In *Smith*, Justice Perell elaborated upon his view, including that the defendants were not concerned about wasted time and effort but did not wish to plead as a tactical maneuver and that no unfairness arose from denying them that maneuver (at paras 46-56).

[28] Justice Perell's view was subsequently reflected in *Shaver*, a recent decision of the British Columbia Supreme Court (at para 81). And, in *Gay*, the New Brunswick Court of Appeal stated that, despite the parties' consent, certification judges should, as a general rule, insist on the filing and exchange of a full set of pleadings before hearing the parties and endorsed *Pennyfeather* in that regard (at para 25). However, the Ontario Superior Court does not appear to

have accepted Justice Perell's approach as a matter of course (see *Crosslink* at para 76) and other Canadian jurisdictions appear to similarly maintain the practice of permitting a defence to be filed subsequent to the determination of a certification motion (see *Warner* at para 105; *Field* at para 45).

[29] I am not bound by *Pennyfeather* or *Smith*, which is not to say that they do not identify legitimate considerations.

[30] What I take from the case law in whole is as follows:

i) whether a defendant must file a defence prior to certification is purely a matter of judicial discretion (see *Class Actions in Canada*, 4.1390 at p 4-85-4-87; *Always Travel* at paras 4 and 7; *Murray* at para 20; *Shaver* at para 80; *MacLean v Telus* at para 10) other than in Nova Scotia where this is the mandated procedure;

ii) whether that discretion should be exercised is fact specific in each case and should be approached in a flexible and liberal manner seeking a balance between efficiency and fairness (*Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 51; *Hoffman* at paras 23, 24 and 27; *Murray* at paras 24-29; *Alberta Municipal Retired Police Officers' Mutual Benefit Society v Alberta*, 2009 ABQB 44 at paras 4-8; also see *MacLean* at para 12 and *Pro-Sys BCSC* at para 34);

iii) while deferred filing may reflect a general practice or convention, it is not automatic or to be granted as a matter of course (*Always Travel* at para 7 and 9; *Gay* at para 25;) and the burden of persuading the Court lies with the moving party (*Always Travel* at para 8; also see *Murray* at para 28);

iv) in that regard, the motion must be grounded on sound reasons which will generally include an evidentiary basis, however, the Court may also rely upon the content of statement of claim in appropriate circumstances (*Always Travel* at paras 8-9; *Murray* at paras 28-29);

v) factors to be considered in considering such a motion can include:

   a. whether the statement of defence would serve any useful purpose at this stage in the proceeding. That is, is the statement of defence essential to a determination of the issues to be addressed at the certification motion or likely to be of assistance to the Court (*Always Travel* at para 6, *Mangan v Inco Ltd*, [1996] OJ No 2655 (OCJ Gen Div) at para 13 ("*Mangan*"); *Horseman* at p 2; *Murray* at para 29;

b. whether the relief sought will advance the most just, efficient and least costly resolution of the litigation (*Always Travel* at para 9; *Horseman* at p 2; *Mangan* at paras 9-12);

c. whether the nature of the proceedings and the rights asserted are relevant contextual factors (*Murray* at para 25);

d. the complexity of the matter (*Mangan* at para 13; *Murray* at para 27; *Horseman* at p 2; *Always Travel* at para 9);

e. the amount of time and effort involved to prepare the statement of defence (*Mangan* at para 13; *Murray* at para 29);

f. whether the statement of defence may have to be entirely reformulated in response to the outcome of the certification hearing (*Mangan* at para 13; *Murray* at paras 27-28); and

g. whether there is any obvious prejudice to the plaintiff (*Horseman* at p 3);

[31] Put otherwise, what emerges from the jurisprudence is that the mere fact of the existence of the convention as a usual practice at the Federal Court and in other jurisdictions is, in and of itself, not determinative of whether the filing of a statement of defence is to be deferred until after the hearing of the certification motion. The case management judge must consider the motion with a view to the just, most expeditious and least expensive determination of the proceeding. In making this determination, the extent to which the statement of defence will assist the Court, the complexity of the legal issues, the extent to which the statement of defence may need to be reformulated, the time and expense that preparation of a statement of defence will entail at this stage are all important considerations. The burden is on the defendant to persuade the Court that the delay should be permitted and the absence of an evidentiary basis, while not necessarily determinative, is certainly not helpful to the defendant.

[32] As applied in this matter, with respect to the first factor, as noted by the Defendant, the case law is clear that the test for certification does not concern the merits of the action but rather

it's form (*Tihomirovs* at para 34; *Pro-Sys Consultants* at para 99). The test for certification under Rule 334.16 states that a judge shall certify a class proceeding if:

a. the pleadings disclose a reasonable cause of action;

b. there is an identifiable class of two or more persons;

c. the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

d. a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

e. there is a representative plaintiff or applicant who

    i) would fairly and adequately represent the interests of the class,

    ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

    iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

    iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

[33] In *John Doe* the Federal Court of Appeal noted that when considering the first criteria, the facts alleged in the statement of claim are assumed to be true and that the plaintiffs must establish that there is a reasonable prospect of success should the claim be permitted to proceed towards trial. Further, that for the other four criteria, the plaintiffs have the burden of adducing evidence to show some basis in fact that these criteria are met (at paras 23-24).

[34] In this matter neither party suggests that there are anticipated disputes about the cause of action, such as subject matter jurisdiction, which seems unlikely. Nor am I convinced that the statement of defence is necessary for analyzing the remainder of the certification criteria. Thus, I

tend to agree that the statement of defence has no real utility in determining the issue of certification *per se*. The first part of the test is based on what is disclosed in the statement of claim and the remainder is based on evidence, and a statement of defence does not contain evidence.

[35] However, in this case, as in *Always Travel*, the Defendant has not provided any affidavit evidence or other evidence in support of its position that its motion ought to be granted. Its written argument essentially articulates the legal basis upon which courts across Canada have traditionally permitted the late filing of a statement of defence until after certification.

[36] That said, in the absence of an evidentiary basis for the motion, in *Always Travel* Justice Hugessen turned to the statement of claim to determine whether the motion should still be granted. On that pleading, Justice Hugessen held that if he were to require that statements of defence be produced within the usual time or some reasonable extension of time, the logical next steps would be documentary production and discoveries. Thus, in an action in which certification had not yet been granted and where it was uncertain whether or not the action would go forward as a class action or at all, it would be "uncommonly burdensome" for both plaintiffs and defendants to undertake that kind of work, documentary production and discoveries, without any assurance that it would produce any benefit for anybody in the event that the action was not certified or is only partly certified (at para 12).

[37] In *Horseman*, while it is not apparent from that decision whether Justice Zinn had before him an evidentiary basis upon which to grant the defendant's motion, he stated that on reading

the materials filed he agreed with the submissions of the defendant that the proposed class action raised complex and important legal issues involving eleven separate treaties negotiated over a significant period of time, and well as the actions or inactions of the defendant over a longer time period. A proper defence at that time would require a substantial outlay of resources, time, and expense which would be of little assistance to the Court on the certification motion and may have to be duplicated, in part, depending on the result of the certification motion. Further, that there was no obvious prejudice to the plaintiffs if the order sought was granted.

[38] In my view, in this motion neither party has provided a particularly compelling argument as to why, based on the specific facts and circumstances of this matter, the filing of the statement of defence should or should not be deferred until after the certification motion. This may be because of the very early stage of the proceeding when no steps have been taken other than the filing of the Statement of Claim and the making of and response to a request for particulars.

[39] Further, at this time only two potential class members have been identified although the Plaintiffs assert that there are 70 other First Nations reserves that may be captured by the proposed class action. During the case management conference, the Defendant indicated that there are currently other active claims before this Court that are much further advanced than this action and which also allege drainage issues and other issues pertaining to the Defendant's control and management of leases in reserves for oil and gas development. The Defendant also indicated that other such actions have been stayed and/or are in case management. Thus, First Nations in other such claims have brought actions on their own behalf yet, in this matter, the Plaintiffs purport to be suing on their own behalf, on behalf of each other and on behalf of other

First Nations. The Defendant was of the view that a class action is not necessary or conductive because there would be many individual issues that pertain only to the reserve of each of the First Nations. I would also note that the Plaintiffs assert that they do not have information pertaining to the identification of other potential class members but that this lies with the Defendant.

[40] The composition of the class pertains to the certification of the proposed class action and is not the issue now before me. However, this highlights that the preparation and filing of a defence at this time and in this circumstance is unlikely to be of assistance to the Court and clearly will not lead to a less costly and more speedy resolution of the action. Put otherwise, these matters will inevitably be addressed during the certification hearing and it is not clear what utility, if any, a statement of defence would have at this stage. As demonstrated by the Statement of Claim, the matter is complex as it will involve the treaty and other rights of each of the proposed class members which may, or may not, overlap as well as the manner in which the Defendant addressed those rights. As well, the Statement of Claim raises potentially complex legal issues grounded in historical and scientific considerations as the Plaintiffs assert that here are 70 designated reserve lands that were producing oil and gas under the control of Indian Oil and Gas Canada ("IOGC") in British Columbia, Alberta, Saskatchewan and Manitoba.

[41] A reading of the Statement of Claim also indicates that the proposed class proceeding engages with the potential legal obligations owed by several entities including the Department of Indian Affairs and Northern Development (now Indigenous and Northern Affairs Canada and hereinafter referred to as ("Department")), the Crown and IOGC; it similarly engages with the

legal obligations arising from the terms of various legislative provisions; the claim identifies at least 12 fiduciaries duties; the claim identifies 17 reasons why the Crown, the Department and the IOGC owed and reasonably expected that they did owe, a fiduciary duty to each class member; the claim identifies 5 reasons why the class members were owed a duty of care; the claim identifies 26 circumstances in which the Crown, the Department and IOGC failed to meet the required standard of care; and as noted by the Plaintiffs in the response to the request for particulars, expert evidence will be led in the context of the assessment of damages which it appears will be a highly complex determination given the nature of the economic losses claimed and their cause.

[42] Ultimately, I have concluded that, at this stage in the process, I will exercise my discretion and extend the time within which the statement of defence must be filed. However, with leave, the extension can be revisited in the event, as the matter proceeds, it becomes apparent that there would be utility in requiring the filing.

ORDER

THIS COURT ORDERS that:

1. The time for service and filing of the Defendant's statement of defence in this proposed class proceeding is, unless otherwise ordered by this court, extended to 30 days after the determination of the certification motion, should that motion be successful.

2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-237-16
STYLE OF CAUSE:	POUNDMAKER CREE NATION REPRESENTED BY THE COUNCIL OF POUNDMAKER CREE NATION AND CHIEF DUANE ANTOINE AND ONION LAKE CREE NATION REPRESENTED BY THE COUNCIL OF ONION LAKE CREE NATION AND CHIEF WALLACE FOX v HER MAJESTY THE QUEEN

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	STRICKLAND J.
DATED:	MAY 5, 2017

WRITTEN REPRESENTATIONS BY:

Harvey Strosberg Heather Rumble Peterson Patricia A. Speight	FOR THE PLAINTIFFS
Catherine Coughlan Travis Henderson Kathleen Kohlman	FOR THE DEFENDANT

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