Federal Court  Cour fédérale

Date: 20250226

Docket: T-2131-18

Citation: 2025 FC 366

Ottawa, Ontario, February 26, 2025

PRESENT: The Honourable Mr. Justice Gleeson

PROPOSED CLASS PROCEEDING

BETWEEN:

RURAL MUNICIPALITY OF DUNDURN NO. 314

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS AND ORDER

I. Overview

[1] The Rural Municipality of Dundurn [RMD], the Plaintiff, seeks an order certifying this action as a class proceeding pursuant to Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 [*Rules*].

[2] In the underlying action, the RMD alleges Canada is in breach of a road access agreement entered into between the RMD and the Department of National Defence [DND] in 1954. The RMD asserts the agreement provided for permanent, uninterrupted public access, with certain exceptions, across 17 Wing Detachment Dundurn [17 Wing Dundurn or the Detachment].

[3] 17 Wing Dundurn, a defence establishment within the Province of Saskatchewan, is located about 35 kilometers south of Saskatoon. The Detachment – also referred to as the Dundurn Military Reserve and Canadian Forces Base Dundurn [CFB Dundurn] in certain historical documents relevant to this motion – neighbours and divides the RMD.

[4] The Defendant opposes certification arguing that the action is more properly framed as an individual claim by the RMD against Canada.

[5] I find that the RMD has not satisfied several of the certification test criteria. The motion will therefore be dismissed.

II. Background

[6] In pursuing this motion, the Plaintiff has filed the Affidavits of G. Craig Baird sworn on July 13, 2023, and August 25, 2023. The Defendant conducted a cross-examination of Mr. Baird on October 5, 2023. The Defendant has filed the Affidavit of Irvin Marucelj, sworn on August 11, 2023. The Plaintiff cross-examined Mr. Marucelj on October 5, 2023.

[7] The following background facts are taken from the affidavits of Mr. Baird and Mr. Marucelj.

[8] 17 Wing Dundurn was established in 1927 for military training purposes and remains an operational defence establishment. Since its establishment, additional parcels of land have been acquired and today 17 Wing Dundurn encompasses approximately 23,000 hectares. The Detachment is located entirely within the RMD and divides the municipality down the middle. The result is an east and west section of the RMD. The administrative hub of the regional municipality, including emergency and fire fighting equipment, is located within the eastern section of the RMD.

[9] The Detachment houses military training areas that include small arms ranges, artillery ranges, and the largest ammunition depot in Canada. Canada and DND have taken measures throughout the decades to control public access across 17 Wing Dundurn for operational and public safety reasons.

[10] In 1954, the Province of Saskatchewan closed all public access through 17 Wing Dundurn and transferred the administration, control, and management of all road allowances within the boundaries of the Detachment to the Federal Crown (Order-in-Council 573/54 [OIC 573/54]). OIC 573/54 states the closing of public access is necessary to protect the public by "keeping unauthorized persons outside the danger zones and also outside of the [Detachment]" and that the RMD has consented to the closing, "satisfactory arrangements hav[ing] been made

with [the RMD] by Military Authorities to provide for the use of a road by settlers living west of the [Detachment].”

[11] The historical record discloses that public access across the Detachment, for the purpose of facilitating travel between the east and west sections of the RMD, has been a persistent issue.

[12] The RMD submits that its agreement to the transfer of control and Saskatchewan’s closing of all road allowances within the Detachment was given in exchange for the Federal Crown’s agreement to provide permanent, uninterrupted access across the Detachment [Access Agreement] on what is now known as the Strathcona Trail [Trail]. Access pursuant to the Access Agreement was allegedly subject only to restrictions arising from the conduct of military exercises, including artillery firing, and to address other security issues related to the operation and functioning of the Detachment.

[13] The Access Agreement is not comprehensively set out in any specific document but is allegedly reflected in various pieces of correspondence that predated OIC 573/54. The RMD submits the Access Agreement was crystalized in OIC 573/54.

[14] In the decades that followed OIC 573/54, public safety risks related to military training and unexploded ordinance [UXO] remained a concern. In 1985, DND installed gates at the east and west access points of the Trail to prevent public access during periods of active military training. DND adopted a protocol in 1986 to provide notice to the community when the Trail was closed.

[15] In 1999, the Trial was closed for reasons of public safety and security. The Trail was re-opened to local traffic during limited hours in 2004 after completion of a comprehensive UXO study, and the installation of signage advising of the risks and dangers of using the Trail.

[16] In October 2014, following events in Canada that resulted in the deaths of two Canadian Forces members and injury to a third, DND informed the RMD via written notice that DND would implement further access restrictions to address safety and security issues, and operational needs. The Trail was closed indefinitely.

[17] In 2015, DND agreed that, upon request, restricted escorted access across the Trail would be permitted for emergency vehicles and snow removal equipment. DND has also permitted restricted access to members of the general public where advance notice was provided, and DND was in a position to address security and safety considerations.

[18] In 2018, the RMD commenced this action alleging the indefinite closure of the Strathcona Trail was contrary to the access obligations stipulated in the Access Agreement.

III. Issues

[19] The motion raises a single issue: whether this proceeding ought to be certified as a class proceeding pursuant to Rule 334.16(1) of the *Rules*.

IV. General principles governing certification of class proceedings

[20] Rule 334.16(1) of the *Rules* sets out the circumstances in which a judge shall certify a proceeding as a class proceeding. Rule 334.16(2) provides that in determining whether a class proceeding is the preferable procedure, a judge will consider all relevant matters, including those specifically identified:

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

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

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

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

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

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

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

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

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

Matters to be considered

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

Facteurs pris en compte

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

(a) the questions of law or fact common to the class members predominate over any questions

a) la prédominance des points de droit ou de fait communs sur ceux qui ne

affecting only individual members;	concernent que certains membres;
(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;	**b)** la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;
(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;	**c)** le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;
(d) other means of resolving the claims are less practical or less efficient; and	**d)** l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;
(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.	**e)** les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

[21] Rule 334.18 identifies those grounds a judge shall not solely rely upon to refuse to certify a proceeding as a class proceeding:

334.18 A judge shall not refuse to certify a proceeding as a class proceeding solely on one or more of the following grounds:	**334.18** Le juge ne peut invoquer uniquement un ou plusieurs des motifs ci-après pour refuser d'autoriser une instance comme recours collectif :
(a) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the	**a)** les réparations demandées comprennent une réclamation de dommages-intérêts qui exigerait, une fois les

common questions of law or fact;	points de droit ou de fait communs tranchés, une évaluation individuelle
(b) the relief claimed relates to separate contracts involving different class members;	**b)** les réparations demandées portent sur des contrats distincts concernant différents membres du groupe;
(c) different remedies are sought for different class members;	**c)** les réparations demandées ne sont pas les mêmes pour tous les membres du groupe;
(d) the precise number of class members or the identity of each class member is not known; or	**d)** le nombre exact de membres du groupe ou l'identité de chacun est inconnu;
(e) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all of the class members.	**e)** il existe au sein du groupe un sous-groupe dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe.

[22] Before engaging in the required analysis, it is helpful to review certain general principles that govern a motion for certification.

[23] The Rule 334.16(1) criteria are conjunctive. Therefore, if any one of the five criteria is not satisfied the motion must fail. Conversely, where the criteria have been satisfied the motion must be granted; the Court does not have a general discretion to refuse certification where the criteria are met (*Kahnapace v Canada (Attorney General)*, 2023 FC 32 at para 95 [*Kahnapace*]).

[24] In considering the class action certification criteria, the jurisprudence of Ontario and British Colombia is instructive because the criteria in those jurisdictions are substantially the same as those set out in Rule 334.16(1) (*Canada (Attorney General) v Jost*, 2020 FCA 212 at para 23 [*Jost*]).

[25] In considering the first of the five criteria, a pleading will only be struck on the basis that it fails to disclose a cause of action where it is "plain and obvious" that no claim exists (*Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68 at para 25 [*Hollick*]). With respect to the remaining four criteria, the representative of the asserted class must show some basis in fact to support each of the certification criteria. The "some basis in fact" threshold does not require that the party seeking certification establish the certification requirements on a balance of probabilities (see *Pro-Sys Consultants v Microsoft Corp*, 2013 SCC 57 at paras 101-102 [*Pro-Sys*]). The question at the certification stage is not whether the claim is likely to succeed, but whether the action is appropriately prosecuted as a class proceeding (*Hollick* at para 16).

V. Analysis

[26] I will now turn to the five requirements identified in Rule 334.16(1).

A. *Is There a Reasonable Cause of Action?*

[27] In determining whether the pleadings disclose a cause of action, the test is the same that is applied when considering a motion to strike – that is, is it plain and obvious a claim does not exist or has no reasonable chance of success (*Jensen v Samsung Electronics Co Ltd*, 2021 FC

1185 at para 70, aff'd 2023 FCA 89, citing *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 14, *Pro-Sys* at para 63)? The normal rules of pleading apply in a proposed class proceeding, and, at this stage, the Court should be generous and err on the side of permitting novel but arguable claims to proceed.

[28] Pleadings are to be read generously and holistically recognizing the purpose is to inform a defendant of the who, what, where, when, and how that gives rise to liability. A plaintiff must therefore plead the constituent elements of the causes of action, or legal grounds raised. The facts as alleged in the pleading are presumed to be true; however, bald assertions are not allegations of fact and therefore cannot support a cause of action (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at paras 16-20 [*Mancuso*]; *Canada v John Doe*, 2016 FCA 191 at para 23 [*Doe*])].

[29] Where a plaintiff pleads multiple causes of action, Rule 334.16(1)(a) will be satisfied where the pleadings disclose one valid cause of action (*Tippett v Canada*, 2019 FC 869 at para 34).

[30] The Plaintiff pleads causes of action in breach of contract, public nuisance, procedural fairness, honour of the Crown, interference with economic interests, expropriation without compensation, and unjust enrichment.

(1) Breach of Contract

[31] The essential elements for a cause of action in breach of contract are the existence of a contract and its wrongful breach.

[32] At paragraphs 31–45 and 47-52 of the Statement of Claim, the Plaintiff pleads facts alleging a contract or Access Agreement entered by the Parties for valuable consideration, pleads the terms of the Agreement, the facts detailing the conduct of the Parties in implementing the Agreement over time, and pleads the circumstances of the alleged breach or repudiation of the Agreement by the Defendant in October 2014.

[33] The Defendant does not dispute that the Statement of Claim adequately pleads a cause of action in breach of contract, but submits the privity of contract doctrine limits that cause of action to the RMD. The proposed members of the class, it is argued, do not have standing to enforce any contract or Access Agreement as between the RMD and the Defendant.

[34] The Defendant further argues that it is within the Court's discretion to consider the issue of standing at the certification stage (*Soldier v Canada (Attorney General)*, 2009 MBCA 12 at paras 34-37 [*Soldier*]). In this case, the Defendant argues it is appropriate for the Court to exercise that discretion because the standing of class members is inextricably linked to other criteria the Court must consider in deciding the certification motion. This includes the requirements that there be an identifiable class of persons and that the claims of class members raise common issues. The Plaintiff argues that standing should not be addressed at this stage.

Standing, it argues, engages a factual dispute that is not relevant to the question of certification and is more appropriately addressed at trial.

[35] I agree with the Defendant. The question of standing is distinct from the substantive merits of the action, and, in my view, is properly considered – although not finally decided – on the plain and obvious or no reasonable chance of success standard. I come to this conclusion because the question is of some relevance to the assessment of the other certification criteria. Considering the issue at this stage is also consistent with this Court's role of ensuring that justiciable questions proper for adversarial determination are advanced for consideration and determination by the Court (*Soldier* at paras 29-30, citing Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 209)). Having the benefit of the Parties' oral submissions, I am satisfied that I am well positioned to address the question of standing in this context. I recognize that this may not always be so, and that in other circumstances questions of standing may be more appropriately addressed by other means, including a pre-certification motion (*Soldier* at paras 38-40).

[36] In oral submissions, the Plaintiff initially argued that privity exists as between the Defendant and the proposed class members because the contract was entered into by a public entity, the RMD. The RMD, it was argued, represented the proposed class at the time the Access Agreement was entered into and that it continues to do so. It was argued that the Defendant engaged in negotiations with the RMD instead of the individual proposed class members solely for reasons of efficiency and that on this basis privity is established. The Plaintiff cites no

authority to support this argument, and it is not persuasive. The potential exceptions to the privity doctrine established in the jurisprudence are limited.

[37] The Plaintiff more persuasively argued that if privity was not established, the principled exception applied (*Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, 1999 CanLII 654 (SCC) at para 31). The principled exception provides that privity will not be a bar to a third party enforcing the terms of contract where:

A. The parties to the contract intended to extend the benefit in question to the third party seeking to rely on the contractual provision; and

B. The activities for which the third party seeks to rely on the contractual provision are the very activities contemplated as coming within the scope of the contract in general, or the provision in particular.

[38] The Plaintiff does not expressly plead reliance on the principled exception to the privity doctrine. However, the Plaintiff does plead that the Access Agreement was entered into for the benefit of "settlers living west of the military reserve" (see paragraphs 18 and 32 of the Statement of Claim) and that the Defendant contracted to allow access across the Detachment for public use (see e.g. paragraphs 14 and 33). These facts are material and relevant to the argument that the principled exception applies. The Plaintiff also pleads that the Defendant's conduct has denied access to the public contrary to the Agreement, the very activity the Plaintiff alleges the Access Agreement contemplates. The Plaintiff's failure to expressly plead reliance on the principled exception as the basis for third party class members to enforce the terms of the Access

Agreement does not prevent reliance upon the exception where the relevant material facts have been pleaded (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 22).

[39] Upon review of the Statement of Claim, it is neither plain nor obvious that a claim for breach of contract does not exist or that the proposed class members lack standing to enforce the alleged Access Agreement.

(2) Public Nuisance

[40] The Plaintiff pleads at paragraph 53 of the Statement of Claim that the Defendant's termination of access across 17 Wing Dundurn, and its obstruction of the Trail in October 2014 after having permitted free, safe, and convenient passage, amounts to a public nuisance.

[41] Public nuisance claims seek to address concerns arising from actual or perceived interference with the public convenience or welfare. Historically only the guardian of the public interest, the Attorney General, had standing to bring a civil action in public nuisance. While this restriction has eased, to succeed an individual pursuing a public nuisance claim must demonstrate particular and substantial direct injury beyond that suffered by the public generally (*Gleneagles Concerned Parents Committee Society v British Columbia Ferry Corp*, 2001 BCSC 512 at paras 79-80, citing *Stein v Gonzales*, 1984 CanLII 344 (BC SC); see also *Pelletier v Canada*, 2020 FC 1019 at para 55).

[42] The RMD pleads, at paragraph 34 of its Statement of Claim, that the lack of access to the Trail has historically impeded the RMD's ability to access the east and west portions of the RMD

for the purpose of providing protection and emergency services, snow clearing services, and road maintenance services. It is not specifically pleaded that the Defendant's alleged repudiation of the Access Agreement in October 2014 resulted in similar injuries. However, on a holistic reading of the Statement of Claim, I am satisfied that it has been sufficiently pleaded that repudiation of the Access Agreement triggered the same consequences historically experienced and detailed at paragraph 34 of the Statement of Claim.

[43] The Plaintiff pleads material facts that indicate the Defendant's alleged repudiation of the Access Agreement has impeded the RMD's ability to deliver core services within RMD's territory. The material facts suggest a substantial and direct injury to the RMD, an injury beyond that suffered by the public generally.

[44] However, there are no material facts pleaded to demonstrate that any other member of the proposed class – as that class is variously defined in the Plaintiff's motion, at paragraph 27 of the Statement of Claim, in written submissions, and during oral submissions – have suffered or incurred damages that would not have been suffered by the public generally.

[45] Although I am satisfied that the pleadings support an individual public nuisance claim by the RMD against the Defendant, it is plain and obvious that that cause of action on behalf of all other members of the proposed class will fail.

(3) Duty of Procedural Fairness

[46] The Statement of Claim alleges, at paragraphs 54 and 55, that the Defendant breached its duty of procedural fairness in arbitrarily suspending access across the Detachment without notice. In the Statement of Claim, the Plaintiff relies upon the "*National Defence Act*, RSC 1985 c.N-5, as amended and the Regulations" generally in advancing this cause of action.

[47] The Plaintiff does not address this cause of action in written submissions, and did not advance substantive submissions on the issue in oral argument.

[48] The Defendant submits, and I agree, that an alleged breach of a duty of procedural fairness is not an independent cause of action at law that can provide a remedy in damages in a civil action.

[49] In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 [*Highwood Congregation*], Justice Rowe, writing on behalf of a unanimous Supreme Court of Canada (SCC), found there to be no free-standing right to procedural fairness. Any such claim must instead be "founded on a valid cause of action, for example in, contract, tort, or restitution" (*Highwood Congregation* at para 13).

[50] A breach of the duty of procedural fairness pleaded as an independent cause of action in a civil action for damages is not a recognized cause of action at law. The Plaintiff's proper recourse for the Defendant's alleged breach of procedural fairness would be by way of an

application for judicial review challenging the Defendant's 2014 decision to suspend access to the Trail across 17 Wing Dundurn.

[51] It is plain and obvious the asserted procedural fairness claim will fail.

(4) Honour of the Crown

[52] At paragraphs 56 to 59 of the Statement of Claim, the Plaintiff pleads a breach of the Defendant's duty arising from the Honour of the Crown.

[53] The Honour of the Crown is a constitutional principle in Aboriginal law that recognizes the requirement that Crown servants must conduct themselves with honour when acting on behalf of the sovereign. The principle arises from Crown's assertion of sovereignty over Aboriginal peoples (*Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 65-66 [*Manitoba Metis*]). The principle is engaged, *inter alia*, in defining the rights guaranteed pursuant to subsection 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*], and in circumstances involving the reconciliation of Aboriginal rights with Crown sovereignty (*Manitoba Metis* at paras 68-69).

[54] The principle is not engaged where the constitutional obligation is one in which the Indigenous peoples have only a strong interest, nor is it engaged where the constitutional obligation is owed to a group only partially composed of Indigenous peoples.

[55] The courts have considered but rejected arguments seeking to expand the principle to impose an obligation on Crown servants to act with honour on behalf of the sovereign outside of the Aboriginal law context (*Hardy Estate v Canada (Attorney General)*, 2015 FC 1151 at paras 50 and 51; *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at paras 64 -70).

[56] The Statement of Claim pleads the existence of a generalized but unique relationship between the Defendant and the proposed class members, and that the Defendant's alleged unilateral breach of an agreement entered into in good faith is "dishonourable." The Statement of Claim also pleads that the proposed class includes the Whitecap Dakota First Nation and other "Indian Bands."

[57] However, the Plaintiff has not pleaded the engagement of any rights guaranteed pursuant to subsection 35(1) of the *Constitution Act, 1982*, or the engagement of the reconciliation of Aboriginal rights with Crown sovereignty. However, the facts as pleaded disclose that any Aboriginal rights or interests impacted by the alleged breach of the Access Agreement are not owed exclusively to Indigenous peoples.

[58] Without considering whether an independent cause of action for a breach of duty arising from the principle of Honour of the Crown is available, the material facts as pleaded do not support the cause of action.

[59] It is plain and obvious that the claim of a breach of the duty arising from the principle of Honour of the Crown claim will fail.

(5) Interference with Economic Interests

[60] At paragraph 60 of the Statement of Claim, the Plaintiff pleads the tort of unlawful interference with economic interests.

[61] The essential elements of the tort are that: (1) the Defendant intended to injure the Plaintiff's economic interests; (2) the interference was by illegal or unlawful means; and (3) the Plaintiff suffered economic loss or harm as a result (*Pro-Sys* at para 81).

[62] Again, the Plaintiff has not advanced any submissions to support this claim, and the Statement of Claim does not plead material facts applicable to any of the three elements of the tort.

[63] The claim will fail.

(6) Expropriation without Compensation

[64] The Plaintiff pleads, at paragraph 61 of the Statement of Claim, that the Defendant's breach of the Access Agreement is a unilateral usurpation of its rights, title, and ownership without compensation – in effect, a *de facto* expropriation without compensation that has unjustly enriched the Defendant. The Plaintiff has not advanced any written submissions or made any substantive oral submissions in support of this cause of action.

[65] To establish a claim of *de facto* expropriation triggering a right to compensation the Plaintiff must demonstrate (1) that the Defendant acquired a beneficial interest in the property, and (2) in doing so has removed all reasonable uses of the property (*Canadian Pacific Railway Co. v Vancouver (City)*, 2006 SCC 5 at para 30; *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36 at paras 4, 25).

[66] The Plaintiff pleads that pursuant to section 12 of *The Municipalities Act*, SS 2005, c M-36.1, RMD has direction, control, and management of streets and roads within the RMD. The Plaintiff also pleads that the Lieutenant Governor in Council, through OIC 573/54, closed all roads within 17 Wing Dundurn, and transferred the administration, control, and management of those roads to the Crown in Right of Canada. The Plaintiff does not plead any facts that indicate the RMD, or any other proposed class members, held right, title, and ownership in the roads within the Detachment either historically or at the time of the alleged breach of the Access Agreement. Instead, the facts pleaded in the Statement of Claim indicate the contrary.

[67] The Plaintiff has not pleaded material facts to support or establish a claim of exportation without compensation.

[68] The cause of action is due to fail.

(7) Unjust Enrichment

[69] Pleaded in concert with the expropriation claim, the Plaintiff, also at paragraph 61, pleads the Defendant has been unjustly enriched to the value of roads subject to the Access Agreement,

and that the enrichment has been to the detriment of the Plaintiff and proposed class members. A cause of action in unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Garland v Consumers' Gas Co*, 2004 SCC 25 at para 30).

[70] At paragraph 45 of the Statement of Claim, the Plaintiff also pleads that the Defendant was not motivated by security concerns in breaching the Access Agreement. It is pleaded that instead the Defendant repudiated the Access Agreement because doing so was a cheaper option for the Defendant than compliance. These are bald assertions that cannot be relied upon to ground a cause of action.

[71] In the absence of material facts to support the bald allegations of enrichment, deprivation and improper motive, the cause of action in unjust enrichment cannot succeed.

(8) Summary

[72] Having concluded that the Statement of Claim pleads a single reasonable cause of action in breach of contract, Rule 334.16(1)(a) has been satisfied.

[73] I will now address the remaining four requirements for certification.

B. *Is there an Identifiable Class of Two or More Persons?*

[74] A class proceeding will only be certified where an identifiable class can be clearly defined. This is because it is those individuals – the class members – who are entitled to notice and any resulting relief; they will also be bound by the final judgment (*Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 38 [*WCSC*]).

[75] Three criteria are to be considered: (1) the class must be defined by objective criteria; (2) the class must be defined without reference to the merits of the action; and (3) there must be a rational connection between the common issues and the proposed class definition (*Hollick*, at paras 17-21; *Paradis Honey Ltd v Canada*, 2017 FC 199 at para 23 [*Paradis Honey*]).

[76] The burden is on the Plaintiff to show that the class is defined sufficiently narrowly, such that it meets the above noted criteria (*Paradis Honey* at para 24). However, class action legislation is to be interpreted generously and, as such, the burden on the Plaintiff is not an onerous one. The representative plaintiff need not show that "everyone in the class shares the same interest in the resolution of the asserted common issue[s]" but must show that the class is not "unnecessarily broad" [emphasis in original], "[w]here the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended" (*Hollick* at para 21).

[77] The requirement that there be a rational connection between the common issues and the proposed class is to be approached purposively. It is not essential that the class members be

identically situated *vis-à-vis* the opposing party but that the resolution of the common issues is necessary to the resolution of each class member's claim (*WCSC* at para 39).

[78] Nor is it necessary that every class member be named or known. However, any person's claim to membership in the class must be determinable by stated, objective criteria. Class membership must be objectively identifiable (*Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 BCCA 193 at paras 12, 89; *WCSC* at para 38; *Merlo v Canada*, 2017 FC 51 at para 15).

[79] The Plaintiff has variously defined the class. In the Statement of Claim, the class is defined as follows:

> 27. The Plaintiff, the Rural Municipality of Dundurn, brings this claim on its own behalf, and on behalf of the following class:
>
> > i) those residents, ratepayers and landowners residing in the Rural Municipality, west of CFB Dundurn who desire, or require access to the east side of the Rural Municipality of Dundurn, for social, economic or other reasons;
> >
> > ii) for all those residents on the east side of the Rural Municipality of Dundurn desiring, requiring or needing access to the west side of the Rural Municipality of Dundurn, and the town of Dundurn, for social, economic or other reasons, including access to Provincial Highway #11;
> >
> > iii) access by residents beyond the east, south and west borders of the Rural Municipality of Dundurn who desire to travel to the west side of the R.M., or beyond;
> >
> > iv) those parties utilizing Provincial Highway #11, desiring or requiring access to the west of the R.M. of Dundurn, including the Dakota Dunes Casino;

v) residents of the Whitecap First Nation #94.

vi) area municipalities and Indian Bands.

[80] A similar definition, identifying a number of municipalities by name, is included in the litigation plan. Mr. Baird's July 13, 2024, Affidavit states that the named municipalities have authorized and consented to the RMD proceeding.

[81] At paragraph 56 of its written submissions, the Plaintiff proposes the following class definition:

> The RM of Dundurn, neighboring municipalities, towns and villages, the Whitecap Dakota First Nation, and the public they represent.

[82] Finally, in oral submissions and in response to questions from the Court, the Plaintiff proposed that the class definition be reframed as follows:

> All entities which, or persons who, were denied access or that would have benefited from access across the Dundurn Military base after October 2014.

[83] I am satisfied that the Court possesses the discretion to consider amendments to the proposed class definition as proceedings progress (*Buffalo v Samson Cree Nation,* 2010 FCA 165 at paragraph 12 [*Buffalo*]). I have done so here. However, acknowledging that the requirement that there be an identifiable class is not onerous, I am not persuaded that the Plaintiff has succeeded in defining a class that complies with the three *Hollick* criteria.

[84] The Defendant submits that the proposed class, in any of the forms advanced, is overbroad. It is argued that the Plaintiff has not set out objective criteria in the proposed class definitions, and there is no rational connection between the common issues raised and the proposed class. The Defendant submits that in the absence of objective criteria or a proposed objective methodology, it is not possible to determine the scope of the proposed class nor to explain why individual class members are included. The Defendant submits that the sub-classes or categories of class members identified in the class definitions are not connected to users of the Trail, and there is no evidence or data demonstrating how any member of the proposed class have been affected by the alleged breach of the Access Agreement. I agree.

[85] In *Hollick*, the SCC found there to be an identifiable class because the class definition relied upon objective criteria to bound the class – property ownership inside a specified geographic area and within a specified period of time. A class definition grounded in these objective criteria allowed class membership to be determined without reference to the merits of the action (*Hollick* at para 17).

[86] Similarly, in *Paradis Honey*, the Court found there to be an identifiable class where the class was bounded on the basis of their location in Canada, their commercial purpose of engagement in bee keeping activities, maintaining a minimum of 50 bee colonies, and engaging in that activity after December 31, 2006 (*Paradis Honey* at para 47).

[87] In both *Hollick* and *Paradis Honey*, the criteria relied upon to define the class allowed membership to be objectively determined independently of the merits of the action.

[88] That is not the case here. Although the class definition the Plaintiff proposed during the hearing does introduce an objective temporal component "after October 2014," the class definition is geographically unrestricted and the other stated criteria – a claimed denial of access or a claimed benefit from access – cannot be objectively measured. These criteria also suggest that all of the Defendant's denials of access to the Trail would attract liability on the part of the Defendant; this fails to recognize the nuance in the Access Agreement that contemplates the Defendant's authority to deny access.

[89] A geographical limitation is included in the class definition advanced in the Plaintiff's written submissions, – neighboring municipalities, towns, and villages – but the geographical limitation lacks specificity. The named list of municipalities is similarly not generated based on identified objective criteria but solely on the basis of individual municipalities having provided consent.

[90] Despite having proposed multiple formulations of a class definition, the Plaintiff has failed to demonstrate that those definitions are not unnecessarily broad. Although over-inclusion may not be fatal where it is shown the class cannot be defined more narrowly, in this case the Plaintiff's failure to identify objective criteria to bound the class has essentially left it open to the public generally (*Rae v Canada (National Revenue)*, 2015 FC 707 at paragraph 56, citing *Hollick* at para 21). The Plaintiff states in the litigation plan that there are approximately 10,000 personal class members, but it provides no evidence as to the methodology relied upon to arrive at this estimate, nor was the basis for the estimate detailed in submissions.

[91] *Hollick* states that where the class could be defined more narrowly the Court may consider allowing certification on the condition that the class be amended (at para 21). In this instance, the Plaintiff has not suggested a narrower class definition can be achieved, it has unsuccessfully attempted to redefine the class, and there is little information or data contained in the record that might assist the Court in narrowing the class definition. I therefore see no value in conditionally certifying this proceeding.

[92] The Plaintiff has failed to demonstrate there is an identifiable class of two or more persons that are rationally connected to the identified common issues.

[93] As I have noted above the test for certification is conjunctive. The Plaintiff having failed to satisfy this component of the test, the motion must be dismissed. However, for reasons of completeness, I will briefly consider the remaining components of the test.

C. *Do the Claims of the Class Members Raise Common Questions of Law or Fact?*

[94] To be appropriate for certification as a class action, a proceeding must raise issues of fact or law common to all class members. The SCC set out the following test in *WCSC*:

> [39] Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus, an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be

> determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

[95] The Plaintiff submits that whether contractual obligations are owed by the Defendant, and whether those contractual obligations have been breached are issues that are common to the proposed class.

[96] I agree with the Plaintiff. Whether a class member is advancing a claim on the basis of privity of contract or as a third-party beneficiary relying on the principled exception, the issues of whether contractual obligations arise and whether the terms of any contract might have been breached are issues that would be common to all members of the class.

[97] The Defendant argues the claim fails to raise common issues. The Defendant submits that the Plaintiff's submissions rely on the expansive and unnecessarily broad class definition that the Plaintiff has proposed. This argument highlights the linkages between the different certification criteria, but the issue at this stage is not whether an identifiable class has been defined but whether, recognizing the reasonable causes of action that have been pleaded, common questions of law or fact arise.

[98] The Defendant also argues that common issues are not raised because the Plaintiff has failed to plead material facts to support an exception to the doctrine of privity. I have already

concluded that the Plaintiff's breach of contract pleadings discloses a reasonable cause of action. The argument is therefore not persuasive.

[99] The Defendant further argues that reliance on the principled exception will require individual findings on the question of the contracting parties' intent to extend the benefit of the contract to "the specific and ascertainable third-party/nonparty." This submission fails to acknowledge that the jurisprudence recognizes that the principled exception to privity is of application to an "ascertainable group or class of persons" (*Price Security Holdings Inc v Klompas & Rothwell*, 2019 BCCA 36 at para 38, citing *Brown v Belleville (City)*, 2013 ONCA 148 at para 101). Individual findings on the threshold issue of whether a class member benefits from the Access Agreement will not necessarily be required.

[100] The Plaintiff also identifies damages, their proper measure, and the calculation of aggregate damages as common issues. The Plaintiff argues that the calculation of an equitable aggregate damages award for all members of the class will be possible. I disagree.

[101] The Plaintiff has submitted that it will rely upon expert evidence to prove the "pecuniary quantification of damages to [RMD]" and states the remainder of the class members' damages can be similarly determined.

[102] In considering the question of commonality of harm in *Pro*-Sys, the SCC considered how strong the evidence must be at the certification stage to satisfy the court that harms can be proven on a class wide basis. The SCC stated that:

> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis... [t]he methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[103] While the Plaintiff submits it will rely on expert evidence, it has not identified a methodology that will be relied upon to quantify damages for the RMD, nor has it addressed how this methodology might be applied to class members beyond the RMD. The Plaintiff has also failed to identify the source(s) of data upon which it might rely. In the absence of a methodology establishing on "some basis in fact" that issues of causation and damages are common, I can only conclude that causation and damages will have to be considered on an individual basis. I therefore decline to certify as common issues damages, their proper measure, and the calculation of aggregate damages.

[104] Finally, the Defendant argues that even if the Court certifies as common the issues of whether contractual obligations are owed by the Defendant and whether there has been breach of those obligations, significant individual issues remain. Individual class members will be required to prove injury, causality, and damages arising from any contractual breach. The Defendant submits these are core issues, are intrinsically individualistic, they overwhelm the common issues and therefore certification will not avoid duplicate fact finding or legal analysis.

[105] In my view, this argument is more appropriately considered when assessing whether the class proceeding is preferable and is addressed below.

D. *Is a Class Action the Preferable Procedure for the Fair and Efficient Resolution of the Common Questions of Law or Fact?*

[106] In assessing whether a class action is a "preferable procedure," a plaintiff has the burden of establishing that the class proceeding would be a fair, efficient, and manageable process for the resolution of the common issues of law and fact, and that is preferable to other reasonably available means of resolving the class members' claims (e.g., a joinder or consolidation).

[107] While Rule 334.16(1)(d) refers to the resolution of the common issues, the litigation must be assessed as a whole (*Hollick* at paras 29-31; *AIC Limited v Fischer*, 2013 SCC 69 at paras 19-20). In doing so, the Court must "assess and compare the available recourse by reference to the objectives of class action proceedings [– judicial economy, behaviour modification, and access to justice –] to determine which process best achieves those objectives" (*Doe* at para 26). While the importance of the common issues in relation to the claim as a whole must be considered, this factor is not determinative.

[108] The core question to be asked is whether a class proceeding is preferable to other methods of resolving the claim (*Hollick* at para 30). Certification may be appropriate where individual inquiries will be required after the common issues are resolved if the resolution of the common issues will still serve to significantly advance the action (*Dennis v Ontario Lottery and Gaming Corporation*, 2013 ONCA 501 at paras 53, 58). Rule 334.16(2), reproduced at paragraph 20, above, includes a list of factors to consider in determining whether a class proceeding is the preferable procedure.

[109] The Plaintiff argues that access to justice considerations are preeminent in undertaking the preferability assessment in this case. A class proceeding, it is argued, will provide a vehicle for those who would not seek to individually access the courts to enforce their rights. A class proceeding will address common issues at the heart of litigation – the existence and nature of any contractual obligations the Defendant owed to class members, and whether those obligations have been breached – while also serving as a warning and a deterrent to the Defendant.

[110] The Defendant submits that class proceedings are not appropriate where the litigation requires detailed individual assessments of circumstances surrounding fault, injury, causality, and damages for each individual class member. It is submitted that the predominance of individual issues relating to potential class members who have used, may have used, and/or were prevented from use of the Trail will require an incalculable number of individual assessments and gives rise to a circumstance that weighs against concluding a class proceeding is an efficient process to advance the RMD's claim.

[111] The Defendant submits other resolution mechanisms are available, including non-certification and allowing the RMD to pursue an individual action. It is argued the common issues in this case are negligible when considered against the predominant individual issues that will require determination after the decision on the merits of the action – issues that must be assessed in relation to an Access Agreement that provided for restricted access to an identified segment of the RMD population.

[112] I am not persuaded that a class proceeding would be a fair, efficient, and manageable process for the resolution of the common issues of law and fact, or that it is preferable to other reasonably available means of resolving the claim. In reaching this conclusion, I have considered the circumstances relevant to the proposed litigation including the following:

A. The RMD is the only party to the alleged Access Agreement.

B. The RMD is the only proposed class member that, on this motion, has asserted suffering a loss as a result of the Defendant's alleged breach or repudiation of the Access Agreement in October 2014. That being the case, the RMD has advanced little evidence to indicate how losses would be quantified at trial suggesting that issues of causation and quantification of RMD established harms will require an individualized assessment.

C. That there is little data indicating frequency of Trail use by either the RMD or other potential class members prior to October 2014; the post-October 2014 frequency of requests for access to the trail and by whom; or the frequency with which requests for access have either been denied or granted in that period. In the absence of some data on these issues, and in the absence of any meaningful estimates as to the size of the class, it is not possible to consider whether the assessment of causation and damages will have to be individually undertaken or might be determined within sub-classes thereby providing some efficiencies. There is no basis upon which to conclude that certification will obviate or lessen the need for individual class members to pursue individualized proceedings to enforce any contractual rights.

[113] I have also considered the Plaintiff's submissions that certification will serve a deterrence role, but have balanced this argument against the facts the Plaintiff has pleaded and certain of the evidence the Parties led on this motion. The material facts and the evidence suggest that, contrary to the Plaintiff's allegations, DND implemented the denial of access to the Trail for reasons of public safety and security. The evidence also suggests some degree of restricted public access to the Trail remains available. While I make no findings in relation to these facts, that they are in dispute causes me to conclude that it is at least premature to rely on deterrence as a basis to justify judicial action.

[114] I have also given significant weight to the Plaintiff's submissions that certification will facilitate procedural justice and access to justice more broadly. However, and as I have noted above, the Plaintiff has not demonstrated on the "some basis of fact" standard that certification of this proceeding will obviate the need for individual actions to determine what, if any, legal rights the individual may have *vis-à-vis* the Access Agreement, whether those rights have been breached, and if so, what damages the individual may be entitled to. The individual issues are significant, and on this basis, I am not convinced that certification is the preferred process to facilitate access to justice. Other procedural options available under the *Rules*, including joinders and consolidation (Rules 103 and105 of the *Rules*), will be equally effective.

[115] For all of the above reasons, I am of the opinion that certification of this proceeding will not efficiently and effectively advance the three principal goals or objectives of class actions. I find it is not the preferable procedure in the circumstances.

E. *Is the RMD a Suitable Representative Plaintiff?*

[116] Rule 334.16(1)(e) requires that a representative plaintiff, in this case the RMD, be a party who:

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

[117] In *WCSC*, the Supreme Court of Canada describes the factors a court should consider in assessing this final criterion for certification:

> 41 Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see *Branch*, supra, at paras. 4.210-4.490; Friedenthal, Kane and Miller, supra, at pp. 729-32.

[118] In *Jost*, the Federal Court of Appeal held that the *Rules* suggest that a representative plaintiff should be a member of the relevant class:

> [103] Mr. Jost's suitability as a representative plaintiff in this case depends on whether someone who is not a member of a certified class can in fact be a suitable representative plaintiff. Neither side has directed the Court to any Federal Court or Federal Court of Appeal decisions that are directly on point with respect to this issue. However, a review of the Federal Courts Rules suggests that a representative plaintiff should indeed be a member of the relevant class.

[119] The Defendant submits the RMD is not a suitable representative plaintiff for individual class members and that the RMD's mere identification as a proposed class member is not sufficient to conclude it is one. The Defendant notes that the RMD has not filed a council resolution or other evidence to satisfy the Court that it is properly authorized to act on behalf of all the proposed class members and further argues the RMD has not produced a workable litigation plan.

[120] As a municipal body, the RMD is a unique class member, which has a unique relationship with the Defendant insofar as it is the only proposed class member that is a party to

the alleged Access Agreement. However, the RMD's unique circumstances do not disqualify it from acting as the representative plaintiff in a class proceeding, nor does it suggest the RMD would not fairly and adequately represent the interests of the class. The RMD's affiant, the Chief Administrative Officer of the RMD, confirmed in cross-examination that it is his understanding that the RMD council is in a position and willing to fund the litigation.

[121] The Litigation Plan placed before the Court is lacking in a number of respects but again this alone would not exclude the RMD from the role of representative plaintiff. Instead, had I concluded certification to be appropriate, I would have required as a condition for certification the filing of an updated and more comprehensive litigation plan for approval.

[122] The proposed representative plaintiff and their counsel have demonstrated that they are competent, have the capacity to advance the proposed Action, and are a suitable representative plaintiff.

VI. Conclusion

[123] For the above reasons, I find that the RMD has failed to define an identifiable class of two or more persons or demonstrate that a class proceeding is the preferable procedure for the just and efficient resolution of this matter.

[124] The test for certification being conjunctive, the motion is dismissed.

[125] Pursuant to Rule 334.39(1) of the *Rules*, no costs are awarded for this motion.

ORDER IN T-2131-18

THIS COURT ORDERS that the motion is dismissed without costs.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
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APPEARANCES:

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