Date: 20081124

Docket: T-880-06

Citation: 2008 FC 1308

Ottawa, Ontario, November 24, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ANDREW MARK BUFFALO also known as ANDREW MARK FREEMAN suing on his own behalf and on behalf of all persons who became members of the SAMSON CREE NATION on or after June 29, 1987

Plaintiffs

and

CHIEF and COUNCIL of the SAMSON CREE NATION and the SAMSON CREE NATION

Defendants (Third Party Plaintiffs)

and

HER MAJESTY THE QUEEN as represented by the MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Defendant (Third Party Defendant)

REASONS FOR ORDER AND ORDER

[1] Andrew Buffalo commenced an action against the Chief and Council of the Samson Cree Nation and the Samson Cree Nation itself (collectively the "Samson defendants"), and against Her

Majesty the Queen as represented by the Minister of Indian Affairs and Northern Development. Mr. Buffalo's action was commenced "on his own behalf and on behalf of all persons who became members of the Samson Cree Nation on or after June 29, 1987".

[2] Mr. Buffalo now seeks to have the action certified as a class proceeding. For the reasons that follow, I find that Mr. Buffalo has not satisfied several components of the test for certification. As a consequence, the motion will be dismissed.

Background to the Action

[3] In order to appreciate the issues raised by the parties in relation to the motion for certification, it is necessary to have an understanding of the complex history of the relations between the parties leading up to the commencement of this action.

[4] This case has its genesis in the differential treatment accorded to Aboriginal men and women who married non-Aboriginals under the provisions of the pre-1985 *Indian Act*. With the passage of the Bill C-31 amendments to the Act in 1985, (the *Act to Amend the Indian Act*, R.S.C. 1985, c. 32 (1st Supp.), s. 4), this legislative differential treatment was eliminated.

[5] In accordance with the provisions of the amended *Indian Act*, a Band list was to be maintained by the Department of Indian Affairs and Northern Development ("DIAND" or the "Crown"), on which every person who was entitled to be a member of the Band in question would be listed.

[6] Commencing on April 17, 1985, certain persons who had not previously been members of the Samson Cree Nation became entitled to have their names entered on to the Band list. As of June 28, 1987, additional persons who had not been members of the Band prior to April 17, 1985 became entitled to be members of the Samson Cree Nation. This latter group included people who were first generation descendants of persons who had previously been excluded from Band membership by virtue of the pre-1985 *Indian Act*.

[7] In accordance with section 10 of the post-1985 *Indian Act*, Bands could assume control over their membership with the consent of a majority of the electors of the Band, as long as proper notice was provided, and the majority of the electors consented to the membership rules established by the Band, amongst other requirements.

[8] After the Bill C-31 amendments came into force, the Samson Cree Nation attempted to regain control of its membership. However, the Band's Membership Code was refused by the Crown in late 1987, because it did not satisfy the requirements of the *Indian Act*. An application for Judicial Review of this decision was dismissed, and a subsequent appeal was later abandoned.

[9] Further amendments to the *Indian Act* were enacted in 1988 which made Band membership available to descendants of the dead. These were known as the "death rule amendments".

[10] Implementation of the new Band membership legislation was fraught with difficulties. Some Bands, including the Samson Cree Nation, were of the view that the 1985 amendments to the

Indian Act interfered with their Aboriginal and treaty rights of self-determination and self-government, as well as their right to control their own membership. As a consequence, there were delays within the Samson Cree Nation in recognizing the membership of certain individuals granted status through Bill C-31. Included amongst these individuals was the Plaintiff, Andrew Buffalo.

[11] The Samson Cree Nation occupies Reserves No. 137 and 137A in Alberta, and has an undivided interest with three other Bands in Reserve No. 138 (also referred to as the Pigeon Lake Reserve).

[12] On or about May 30, 1946, the Samson Cree Nation surrendered its rights, title and interest with respect to petroleum, natural gas and certain minerals on Reserves 137 and 138 to the Crown in trust for the benefit of the Nation.

[13] The Crown negotiates leases for oil production, calculates royalties and pays interest in relation to oil and gas resources on Reserve lands, pursuant to the *Indian Oil and Gas Act*, R.S.C. 1985, c. I-7 and the *Indian Oil and Gas Regulations*, S.O.R./94-753. Royalties from Reserves No. 137 and 137A are paid to the Band, whereas royalties from Reserve No. 138 are divided between Samson and the three other Bands. The payments are calculated on a *per capita* basis, based upon the membership lists for each Band kept by DIAND. It is this latter category of royalties that are in issue in this case.

[14] From time to time, the Samson Cree Nation pays out *per capita* distributions ("PCDs") to individuals recognized as members by the Band. In addition, benefits relating to matters such as housing, education and social assistance are made available from time to time to Band members who are deemed to be entitled to such benefits.

[15] In accordance with the provisions of the *Indian Act*, the Samson Cree Nation maintains both a capital and a revenue account. Payments made by the Samson Cree Nation from its capital account require the approval of DIAND, whereas no such approval is require for payments made from the Band's revenue account.

[16] Until 2005, oil royalties were paid by the Crown into one of the Band's two accounts. Royalty payments initially went into the Band's capital account, and PCD payments were originally paid by Samson to Band members out of that account.

[17] However, in 1987, the Samson Cree Nation took issue with the payment of PCDs to some of the individuals identified as Band members on the DIAND membership list. Litigation was commenced in this Court by both the Band and by Andrew Buffalo. Mr. Buffalo was the representative plaintiff for approximately 391 other class members in Federal Court action T-430-01 (the "Suspense Account litigation").

[18] As a result of interlocutory proceedings, DIAND began transferring the portion of royalty monies which related to the individuals whose membership was contested by the Band into a

"Suspense Account". Payments into this account were made by DIAND between June 29, 1987, and May 1, 1988.

[19] In or around May of 1988, the Samson Cree Nation began making PCD payments out of interest accruing in its revenue account. It is alleged that one of the reasons for this change was to prevent DIAND from paying PCDs to individuals, including Andrew Buffalo, who were not recognized as members by the Samson Cree Nation.

[20] The Suspense Account litigation was ultimately resolved in 2002, through a series of orders issued by Justice Hugessen. On February 12, 2008, Mr. Buffalo signed a Settlement, General Release and Confidentiality Agreement in favour of the Crown. There is a dispute between the parties as to the scope of the release granted by Mr. Buffalo. At a minimum, the document released the Crown from any claims with respect to PCD payments made by the Crown into the suspense account in relation to Mr. Buffalo.

[21] In the meantime, on June 1, 1995, Mr. Buffalo entered an agreement with the Samson Cree Nation, whereby the Band recognized him as a member, and Mr. Buffalo released the Band from any claims that he could have against it "by reason of or in respect of any claim [for] *per capita* distribution". Although not specified in the settlement agreement, Mr. Buffalo evidently received the sum of $1,000 from the Samson Cree Nation at that time. Since then, Mr. Buffalo has received PCDs from the Band.

[22] Other individuals whose membership had been contested by the Band also signed similar, although not necessarily identical, settlement agreements and releases with the Samson Cree Nation at various times. The Crown states that these agreements were signed without the knowledge of DIAND.

[23] In his Reasons for Order of December 11, 2002, Justice Hugessen found that the settlement agreement and release between Mr. Buffalo and the Samson Cree Nation could not be set up against Mr. Buffalo in the context of the Suspense Account litigation, because Mr. Buffalo's claim in that case was against the Crown, and the settlement agreement was made with the Samson Cree Nation.

[24] Justice Hugessen acknowledged that such a release "might properly release the Band". However, he goes on to note that the agreement was based on the Band's representation that it controlled its own membership, as otherwise it could not allow Mr. Buffalo to be a member in exchange for the release from liability. Given that this was not in fact the case, Justice Hugessen found that the basic premise of the contract was false, such that the agreement could not be enforced against Mr. Buffalo by the Samson Cree Nation.

[25] Justice Hugessen also observed that the Band owed fiduciary obligations to its members and, as such, had to treat them all fairly and equitably. It was up to the Samson Cree Nation to demonstrate it had not breached its fiduciary obligations to Mr. Buffalo in entering the agreement, which it had failed to do.

[26] Apart from the $1,000 payment referred to above, Mr. Buffalo alleges that he has not received anything from the Samson Cree Nation in relation to PCDs for the period between May 1, 1988, when the Samson Cree Nation began making PCD payments out of its revenue account, and June 1, 1995, when he allegedly settled with the Band. Mr. Buffalo's proposed class action relates to this period. The nature of the claim will be discussed in greater detail further on in this decision.

[27] Before turning to consider the various elements of the test for certification, it is helpful to start with an overview of the general principles governing class actions.

General Principles Governing Class Proceedings

[28] As the Supreme Court of Canada has observed, class actions allow for improved access to justice for those who might otherwise be unable to seek vindication of their rights through the traditional litigation process. Class actions also enhance judicial economy, allowing a single action to decide large numbers of claims involving similar issues. Finally, class actions encourage behaviour modification on the part of those who cause harm: see *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69.

[29] In the above trilogy of cases, the Supreme Court also held that an overly restrictive approach to the application of class action certification legislation must be avoided, so that the benefits of class actions can be fully realized.

[30] Moreover, the Supreme Court noted in the *Hollick* case that:

> … the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action. [at paragraph 16]

[31] In other words, a certification motion is a procedural matter. Its purpose is not to determine *whether* the litigation can succeed, but rather, *how* the litigation should proceed: see *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419, (S.C.J.) at paragraph 12.

[32] In a motion such as this, the onus is on the plaintiff to establish an evidentiary basis for certification. That is, the plaintiff must show some basis in fact for each of the certification requirements, apart from the requirement that the pleadings disclose a reasonable cause of action. This latter requirement is governed by the principle that pleadings should not be struck unless it is "plain and obvious" that no claim exists: see *Hollick*, at paragraph 25.

Applicable Provisions of the *Federal Courts Rules*

[33] Certification motions are governed by Rule 334.16(1) of the *Federal Courts Rules*, which states that:

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;

(*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

b) il existe un groupe identifiable formé d'au moins deux personnes;

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) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

e) il existe un représentant demandeur qui :

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

(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) 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) communique un sommaire des conventions relatives aux honoraires et débours qui sont

representative plaintiff or applicant and the solicitor of record.	intervenues entre lui et l'avocat inscrit au dossier.

[34] It should be noted that Rule 334.16(1) uses mandatory language, providing that a court *shall* grant certification, where all five elements of the test are satisfied.

[35] The parties agree that the list contained in Rule 334.16(1) is conjunctive. As a consequence, if an applicant fails to meet any one of the five listed criteria, the certification motion must fail: see *Sander Holdings Ltd. v. Canada (Minister of Agriculture)*, 2006 FC 327, at paragraph 38.

[36] Also relevant is Rule 334.18, which states that:

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 common questions of law or fact;	*a*) les réparations demandées comprennent une réclamation de dommages-intérêts qui exigerait, une fois les 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	*c*) les réparations demandées ne sont pas les mêmes pour tous

members;	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. [emphasis added]	*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. [Je souligne]

[37] The use of the word "solely" or "uniquement" in Rule 334.18 suggests that while the enumerated factors may indeed be relevant considerations on a motion for certification, none of these factors, either singly, or combined with other factors listed in the provision, will, by themselves, provide a sufficient basis to decline certification: see *Tihomirovs v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 197, at paragraph 41.

[38] With this understanding of the relevant Rules, I turn next to consider whether Mr. Buffalo has satisfied each of the elements of the test for certification, such that the matter should be certified as a class proceeding.

Should This Matter be Certified as a Class Proceeding?

[39] The *Federal Courts Rules* were amended in 2002 to provide for class proceedings. Given the fairly recent introduction of class proceedings in this Court, there is relatively little Federal Court jurisprudence governing the certification process.

[40] The *Federal Courts Rules* regarding the certification of class actions are, however, very similar to the corresponding British Columbia rules: *Sylvain v. Canada (Agriculture and Agri-Food)*, 2004 FC 1610, at paragraph 26, and *Rasolzadeh v. Her Majesty the Queen and Minister of Citizenship and Immigration*, 2005 FC 919, at paragraph 23.

[41] The Rules are also very similar to those provided for in the Ontario class action legislation: see *Le Corre v. Canada (Attorney General)*, 2004 FC 155, at paragraph 17. As a consequence, the jurisprudence that has developed in those jurisdictions is of considerable assistance in determining whether or not certification is appropriate in this case.

[42] With this in mind, I turn now to examine each of the factors enumerated in Rule 334.16(1), starting with a consideration of whether the pleadings disclose a reasonable cause of action.

a) Is There a Reasonable Cause of Action?

[43] The parties are in agreement that the test to be imposed at this stage is similar to that used in connection with motions to strike pleadings. That is, the question is whether it is "plain and obvious" that the pleadings do not disclose a reasonable cause of action: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at paragraphs 32-33. The parties also agree that this is a low threshold: see, for example, *Manuge v. Canada*, 2008 F.C. 624, at paragraph 38, *Peppiatt et al. v. Nicol et al.*, [1993] O.J. No. 2722, (1993), 16 O.R. (3d) 133, at pp. 140-1, and *Denis v. Bertrand & Frère Construction Co.*, [2000] O.J. No. 5783.

[44] The parties also agree that unlike a motion to strike under Rule 221(1) of the *Federal Courts Rules*, in this case, the onus is on the plaintiff to demonstrate that his pleadings do in fact disclose a reasonable cause of action.

[45] Mr. Buffalo's current action was commenced by statement of claim issued on May 24, 2006. The claim alleges that Mr. Buffalo did not receive PCDs from either the Crown or the Samson Cree Nation for the period between May 1, 1988 and June 1, 1995, and that others amongst the plaintiffs did not receive PCDs for the same or greater or lesser periods.

[46] Briefly stated, Mr. Buffalo's statement of claim asserts that the Samson Cree Nation received royalty payments from the Crown in relation to the Pigeon Lake Reserve Samson lands, calculated using DIAND membership numbers that included the members of the proposed class.

[47] The statement of claim further alleges that the Samson defendants then excluded the plaintiffs from distribution of PCDs and other payments, as well as from access to benefits. According to the statement of claim, in so doing, the Samson defendants breached the fiduciary duty that they owed to the plaintiffs.

[48] The statement of claim identifies the particulars of the breach of fiduciary duty as using the plaintiffs' names for the purposes of obtaining a greater *per capita* share of oil royalties from its Reserve lands, while denying the plaintiffs the financial benefits associated with Band membership,

thereby unjustly enriching the Band. The statement of claim further asserts that the Samson defendants committed equitable fraud.

[49] It is also alleged that the Band failed to account to the plaintiffs "for the excess royalties received on a *per capita* basis in the Agreement signed by some or all of the Plaintiffs and in doing so fraudulently concealing and continuing to fraudulently conceal the extent of their equitable entitlement".

[50] Finally, the statement of claim alleges that the Samson defendants treated the plaintiffs inequitably in relation to other members of the Band in the distribution of PCDs and other benefits from June 29, 1987 onward, and in fraudulently concealing and continuing to fraudulently conceal the enrichment.

[51] Insofar as the claim against the Crown is concerned, Mr. Buffalo pleads that the Crown has received oil and gas royalty payments from oil and gas companies, in trust, for the benefit of the relevant Bands, including the Samson Cree Nation. The claim further asserts that the Crown has the ability to trace these royalties, together with interest paid thereon.

[52] The claim further asserts that the Crown owes a fiduciary duty to the Samson Cree Nation, including its members, and that the Crown breached this duty by failing to disclose to the plaintiffs that oil royalties were being calculated based upon their membership in the Samson Cree Nation.

[53] It is also alleged that the Crown breached the fiduciary duty owed to the plaintiffs by crediting royalties and interest to Samson, when the Crown knew that Samson was acting dishonestly and fraudulently in not treating its Band members equitably. The Crown further breached its fiduciary duty, the plaintiffs say, by failing to take any steps to protect the financial interests of the plaintiffs from the inequitable treatment by Samson, thereby fraudulently concealing from the plaintiffs the extent of their equitable entitlement.

[54] Each of the defendants provided substantial submissions as to the alleged deficiencies in the statement of claim, in support of their position that it does not disclose a reasonable cause of action. As it is not determinative of the outcome, I am prepared to assume for the purposes of this motion that the statement of claim does in fact disclose a reasonable cause of action.

b) Is There an Identifiable Class of Two or More Persons?

[55] The Supreme Court of Canada has observed that the definition of the class "is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment": *Western Canadian Shopping Centres Inc.*, previously cited, at paragraph 38.

[56] As the Supreme Court also noted at paragraph 21 of the *Hollick* case, this requirement is not an onerous one. However, while Mr. Buffalo need not show that everyone in the class shares the same interest in the resolution of the asserted common issue, there must be some showing that the class is not unnecessarily broad.

[57] That is, Mr. Buffalo must demonstrate that the class could not be defined more narrowly, without arbitrarily excluding some people who share the same interest in the resolution of the common issues: *Hollick*, at paragraph 21.

[58] In order to satisfy this criterion, what Mr. Buffalo must show is that there is an identifiable class of two or more persons, which class is not unlimited, and which is defined by reference to objective criteria: *Hollick*, at paragraph 17.

[59] The parameters of class definition suggested by Mr. Buffalo have varied throughout these proceedings. The statement of claim identifies the putative class as Mr. Buffalo "on his own behalf and on behalf of all persons who became members of the Samson Cree Nation on or after June 29, 1987".

[60] During his oral submissions, counsel for Mr. Buffalo acknowledged that this definition was somewhat open-ended, suggesting that the proposed class definition be modified to add the words "and who are not recognized as members by the Samson Cree Nation". According to Mr. Buffalo, there would be approximately 400 people who would come within this class.

[61] When the Court pointed out that this amended class definition would exclude Mr. Buffalo, who has himself been recognized as a member of the Samson Cree Nation since 1995, counsel then proposed a further modification to the definition, namely that it include Mr. Buffalo "on his own behalf and on behalf of all persons who became members of the Samson Cree Nation on or after

June 29, 1987, and who were from time to time not recognized as members of the Samson Cree Nation". The motion was then argued on the basis of this proposed class definition.

[62] In his reply submissions, counsel for Mr. Buffalo proposed a further modification to the class definition, suggesting that it be further amended to include Mr. Buffalo "on his own behalf and on behalf of all persons who became members of the Samson Cree Nation on or after June 29, 1987, and who were from time to time not recognized as members of the Samson Cree Nation between June 29, 1987 and June 1, 1995, inclusive".

[63] Counsel then suggested that there should also be a subclass created of those members of the class who had never signed settlement agreements with the Samson Cree Nation. When the Court asked counsel whether there would not have to be a separate representative plaintiff for the subclass, given that Mr. Buffalo would not be a member of the subclass, counsel stated that the Court would have to decide whether this was appropriate. No individual was proposed as an appropriate representative for the subclass.

[64] Given the evolving nature of the proposed class definition, counsel for the defendants were then permitted to make additional submissions by way of sur-reply.

[65] In the course of the hearing, the Court queried whether it was the intention of the plaintiff that individual class members would be able to maintain a claim for damages arising in the period after June 1, 1995. Counsel for Mr. Buffalo stated that it was his understanding that claims for

damages would be capped as of June 1, 1995 for all of the members of the class, apart from claims for pre-judgment interest.

[66] However, in a letter provided to the Court after the hearing was completed, counsel indicated instead that "individual class members will have suffered different damages (corresponding losses) either before or after June 1, 1995, particularly those who have not signed agreements with Samson and therefore have never received PCDs, should she find them to be members of the class" [*sic*].

[67] While I will return to this issue when examining the suitability of Mr. Buffalo as a representative plaintiff, I should preface my analysis regarding the existence of an identifiable class by expressing my very real concern with respect to the lack of thought that appears to have been given to the question of class definition by the plaintiff.

[68] As I observed at the outset, the definition of the class is critical in a class action for a number of different reasons. The proposed class definition in this case has been a moving target, with the plaintiff continually modifying the proposed class definition in an attempt to address concerns raised with respect to the proposed definition by the opposing parties and by the Court.

[69] I have a second concern in approaching this issue, which arises out of the failure of Mr. Buffalo to identify any issues of fact or law common to all of the class members. This concern will be addressed in greater detail in the next section of this decision. However, it should be noted at this

juncture that there must be some rational relationship between the identifiable class and the common issues. This is because the definition of the identifiable class will often depend in part upon the identification of common issues, and *vice versa*: see *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924, (Ont. C.A.) at paragraph 48, leave to appeal refused, [2005] S.C.C.A. No. 50.

[70] As a result, the failure on the part of Mr. Buffalo to identify any common issues for resolution through a class proceeding makes the proper identification of the class more difficult.

[71] I am also concerned that the class definition ultimately proposed by Mr. Buffalo does not relate to essential facts giving rise to the claim, as it has been framed by the plaintiff. As I understand it, central to the plaintiffs' claim is the inclusion of certain Band members' names on the Band list maintained by DIAND, which was used in the calculation of royalties payable to the Band in relation to the Pigeon Lake Reserve. This in turn gave rise to an enhanced *per capita* share of oil royalties having been paid to the Samson Cree Nation, allegedly resulting in the unjust enrichment of the Band.

[72] Also important to the claim, and thus to the proper identification of the class, is the corresponding non-recognition of class members by the Band after the members were recognized by the Minister, which allegedly resulted in PCD payments and other benefits being denied to these individuals, and the corresponding unjust enrichment of the Samson Cree Nation.

[73] Despite the difficulties identified above, and keeping in mind the teachings of the Supreme Court of Canada that the requirement that there be an identifiable class is not an onerous one, I am nevertheless satisfied that there is an identifiable class of two or more persons in this matter, which class is not unlimited, and which can be defined by reference to objective criteria.

[74] This class can properly be described as:

> All persons who became members of the Samson Cree Nation between June 29, 1987 and June 1, 1995, inclusive, whose names were recorded on the membership list maintained by the Minister of Indian Affairs and Northern Development at any time during this period, and who were not recognized as members of the Band by the Samson Cree Nation at any point between the time that the member's name was added to the membership list maintained by the Minister and June 1, 1995.

[75] As noted above, in his reply submissions, Mr. Buffalo also proposed the creation of a subclass, which, he says, would be confined to the approximately 42 individuals who have never signed settlement agreements with the Samson Cree Nation.

[76] The creation of subclasses is governed by Rule 334.16(3) of the *Federal Courts Rules*, which permits the creation of subclasses "whose members have claims that raise common issues of law or fact that are not shared by all of the class members so that the protection of the interests of the subclass members requires that they be separately represented".

[77] There is an issue in this litigation as to the binding effect of the settlement agreements and releases that have been signed by some members of the putative class, including Mr. Buffalo, in favour of the Samson Cree Nation. (Although not referred to by Mr. Buffalo in relation to the question of class definition, there is also an issue with respect to the legal effect of releases signed by members of the proposed class in favour of the Crown in the context of the Suspense Account litigation.)

[78] The difficulty with the subclass proposed by Mr. Buffalo is that it purports to create a subclass of individuals whose claims do *not* raise the common issue, rather than a subclass whose members' claims *do* raise the common issue. He has also not explained why protection of the interests of the proposed subclass members requires that they be separately represented. As a result, Mr. Buffalo has not satisfied me of the existence of a subclass that meets the requirements of Rule 334.16(3).

[79] Before leaving this issue, I should note that because the class definition identified by the Court contains a clear temporal limitation, I do not agree with the defendants that the composition of the class would be forever changing, or that any individuals who are born and added to the DIAND list after June of 1995 would become members of the class. On the basis of the Court's class definition, no one added to the DIAND membership list after June 1, 1995 would be eligible for inclusion in the class.

c) Do the Claims of the Class Members Raise Common Questions of Law or Fact?

[80] To be appropriate for certification as a class action, a case must raise issues of fact or law common to all class members: see *Western Canadian Shopping Centres Inc.*, at paragraph 39.

[81] Indeed, the question of commonality of issues has been described as lying at the heart of a class proceeding: see *Manuge*, at paragraph 26, and *Campbell v. Flexwatt Corp.*, [1998] 6 W.W.R. 275, 44 B.C.L.R. (3d) 343 (B.C.C.A.), at paragraph 52, leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 13.

[82] In identifying whether a given case raises issues of fact or law common to all class members, the Court should approach the matter purposively. As the Supreme Court of Canada observed at paragraph 39 of the *Western Canadian Shopping Centres Inc.* case, the question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis." According to the Supreme Court, an issue will be 'common' "only where its resolution is necessary to the resolution of each class member's claim".

[83] The Supreme Court went on to note that:

> 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: paragraph 39.

[84] To be appropriate for certification, the common issues do not have to determine the question of liability for all of the members of the class, or otherwise dispose of the action: see *Campbell v. Flexwatt Corp.*, previously cited.

[85] The determination of the common issue or issues does, however, have to have sufficient significance in relation to the claim being asserted such that its resolution will advance the litigation in a meaningful way: see *Carom v. Bre-X Minerals Ltd*., [1999] O.J. No. 1662 (Ont. Sup. Ct.), at paragraph 63, and *Rosedale Motors Inc. v. Petro-Canada Inc*., [2001] O.J. No. 5368 (Ont. Div. Ct.).

[86] In this case, Mr. Buffalo's memorandum of fact and law identifies what he says are the common issues in the following terms: "on questions of fact, the members of the proposed class are all members of Samson", and "on questions of law, they are all governed by the same federal statutory regime and they are all owed the same fiduciary obligations".

[87] In his oral submissions, counsel for Mr. Buffalo identified the common issues of fact as being "on behalf of all these people the Samson Cree Nation received oil royalties" and "until they signed agreements, members of the class did not receive any benefits from the Samson Cree Nation".

[88] With respect, while the foregoing may relate to common attributes of the putative class, none of the matters identified by counsel for Mr. Buffalo are common issues which require resolution in order to move this litigation forward in a meaningful way. Indeed, I do not understand any of these so-called "common issues" to be seriously in dispute in this case.

[89] To be appropriate for certification in a class action, common issues require precise definition for inclusion in the certifying order, and are usually framed in the form of questions to be answered in the course of the litigation.

[90] By way of example, in *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, aff'd [2000] B.C.J. No. 2237, one of the questions certified by the British Columbia Supreme Court was "Are silicone breast implants reasonably fit for their intended purpose?"

[91] Similarly, in *Manuge*, this Court certified a number of questions including, amongst others, "Does the Crown owe fiduciary duties to the Plaintiff and the Class and has the Crown breached the fiduciary duties owed to the Class by implementing section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102?", "Has the Crown [been] unjustly enriched and is an Order for restitution appropriate?" and "Is the Crown liable for general damages for discrimination, breach of fiduciary duties and bad faith?".

[92] No such common issues have been identified by the plaintiff in this case.

[93] As was noted at the outset of this analysis, the onus is on the plaintiff to show some basis for each of the certification requirements, including the existence of common issues of fact or law common to all class members, the resolution of which will advance the litigation in a meaningful way.

[94] Whatever common issues of fact or law may in fact exist in this matter, having failed to identify any such issues on this motion, Mr. Buffalo has clearly failed to satisfy the onus on him in this regard.

[95] As was noted earlier, the test for certification is conjunctive. Mr. Buffalo having failed to satisfy this component of the test, it follows that his motion must be dismissed. However, in the event that a reviewing court may take a different view of the matter, I will proceed to address the remaining components of the test.

d) Is a Class Action the Preferable Procedure for the Fair and Efficient Resolution of the Common Questions of Law or Fact?

[96] The question of preferable procedure was the primary focus of the defendants' submissions on this motion.

[97] In *Caputo v. Imperial Tobacco Ltd.*¸ [2005] O.J. No. 842, (Ont. Sup. Ct.), Justice Winkler (as he then was), described the consideration of whether a class proceeding is the preferable procedure as "a matter of broad discretion": at paragraph 29.

[98] In determining whether a class action is the preferable procedure to be followed in this case, Rule 334.16(2) of the *Federal Courts Rules* directs that the Court consider:

334.16(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	**334.16**(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 affecting only individual members;	*a*) la prédominance des points de droit ou de fait communs sur ceux qui ne 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.

[99] The focus of the parties' submissions was on the factor identified in Rule 334.16(2)(a), namely whether the questions of law or fact common to the class members predominate over any questions affecting only individual members.

Do the Common Questions Predominate Over Questions Affecting Only Individual Members?

[100] In the *Hollick* decision cited earlier, the Supreme Court of Canada directed lower courts not to take an overly restrictive approach to questions as to the preferable procedure at the certification stage. The Supreme Court noted that the preferability requirement could be met, even in cases where there were substantial issues requiring an individualized assessment, as long as the resolution of the common issues would significantly advance the action.

[101] In *Cloud*¸ the Ontario Court of Appeal observed that the assessment of the relationship between common and individual issues is a qualitative and not a quantitative inquiry, and that the importance of the common issues must be considered in relation to the claim as a whole: see paragraph 84.

[102] However, the Ontario Court of Appeal also observed in *Cloud* that the determination of whether the resolution of the common issues will significantly advance the action can only be carried out in light of the specific common issues identified. In this regard, the Court observed that "without an articulation of what the common issues are, any assessment of their relative importance in the context of the entire claim cannot be properly made": at paragraph 77.

[103] This observation is particularly apposite in this case, as the failure of Mr. Buffalo to identify any common issues of fact or law requiring resolution through the class proceeding has made the qualitative assessment of the preferable procedure component of the test for certification virtually impossible.

[104] That said, it does bear noting that there are significant issues raised by this litigation that will require individualized assessment.

i) The Limitations Issues

[105] As was noted above, Mr. Buffalo's claim relates, in part, to the denial of PCDs that he says were owed to him by the Samson Cree Nation between May 1, 1988 and June 1, 1995. His statement of claim was not issued until May 24, 2006, nearly 11 years after he was recognized as a member by the Samson Cree Nation, and as such began receiving PCDs.

[106] In accordance with subsection 39(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to proceedings in the Federal Court in respect of any cause of action arising in that province.

[107] Insofar as the claim relates to the Crown, section 32 of the *Crown Liability and Proceedings Act*, R.S., 1985, c. C-50, provides that the laws relating to the limitation of actions in force in a

province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province.

[108] In this case, the provincial limitations legislation in issue is the Alberta *Limitations Act*, R.S.A. 2000, c. L-12. Subsection 3(1) of the Act provides that:

> 3(1) Subject to section 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[109] Section 11 of the Act further provides that:

> 11. If, within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment or order for the payment of money, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[110] The defendants assert that Mr. Buffalo was in possession of all of the essential facts necessary to initiate this action by August of 2000, when he retained counsel and initiated the Suspense Account litigation. Having failed to commence this action within two years of when he knew, or ought to have known of essential facts giving rise to the claim, the defendants say that the claim is statute barred.

[111] In the alternative, the defendants assert that Mr. Buffalo's claim is barred by paragraph 3(1)(b) of the *Limitations Act*, which, they say, bars any claim brought more than 10 years after the occurrence of the last wrong complained of. According to the defendants, the last possible date upon which Mr. Buffalo's claim could have arisen was June 1, 1995, namely the date upon which he executed his agreement with the Samson Cree Nation and began receiving PCDs. As the statement of claim was not issued until May 24, 2006, the defendants say that Mr. Buffalo's claim is out of time.

[112] Finally, in the event that Mr. Buffalo's claim falls within the transitional provisions of the *Limitations Act*, the defendants say that the applicable limitation period is the earlier of the period prescribed under the predecessor legislation or that prescribed in the new legislation. In this case, the earlier period would be the six year period for the commencement of claims relating to the breach of fiduciary duty, with the result that Mr. Buffalo's claim became statute barred on June 1, 2001.

[113] The defendants also argue that an individualized assessment would have to be carried out with respect to each and every member of the class, in order to determine what each individual knew and when they knew it, so as to determine whether they had a viable cause of action as of the date upon which Mr. Buffalo's statement of claim was issued.

[114] In response, Mr. Buffalo submits that his cause of action did not arise until December of 2005, when he received a copy of a document entitled "Samson Cree Nation Information on the Capital Account from 1969 to 2003".

[115] Mr. Buffalo also relies on section 4 of the Alberta *Limitations Act*, which provides that:

> 4(1) The operation of the limitation period provided by section 3(1)(b) is suspended during any period of time that the defendant fraudulently conceals the fact that the injury for which a remedial order is sought has occurred.
>
> (2) Under this section, the claimant has the burden of proving that the operation of the limitation period provided by section 3(1)(b) was suspended.

[116] According to Mr. Buffalo, given that his claim asserts that the defendants fraudulently concealed the fact that the Samson Cree Nation was receiving royalties based upon membership numbers that included the members of the class, the limitation period did not start to run until 2005.

[117] Finally, Mr. Buffalo argues that no individualized assessment is required with respect to the limitations question as it relates to the issue of fraudulent concealment. According to Mr. Buffalo, a

finding that the limitations period had not run in relation to his personal claim would govern all of the other members of the class.

[118] I do not agree with Mr. Buffalo that a finding in his favour in relation to the limitations issues would bind all of the members of the class. If this were correct, a person who may have had full actual knowledge as far back as 1995 of all of the matters alleged in Mr. Buffalo's statement of claim, whose claim would otherwise be statute-barred, could have that claim resurrected, simply by virtue of that individual's membership in the class.

[119] Whatever other advantages may be afforded by class proceedings, the *ex post facto* resurrection of statute-barred claims is not one of them.

[120] Moreover, subsection 4(2) of the *Limitations Act* makes it clear that it is the *claimant* who has the burden of proving that the operation of the limitation period provided by section 3(1)(b) was suspended as a result of fraudulent concealment by a defendant.

[121] Thus, there will clearly be a question as to when each of the individual members of the class knew, or ought to have known, of the essential facts giving rise to their cause of action. The issue of discoverability cannot be determined in a global fashion: see *Daniels v. Canada (Attorney General)* 2003 SKQB 58, at paragraph 65. Rather, it requires the individualized assessment of the state of knowledge of each member of the class or subclass: see also *Signalta Resources Ltd. v. Dominion*

Exploration Canada Ltd., [2007] ABQB 636, and *Knight v. Imperial Tobacco Canada*, 2006 BCCA 235.

ii) The Claims for Lost Benefits

[122] Unlike PCDs, which are paid out equally to each recognized member of the Samson Cree Nation in accordance with a fixed formula, benefits such as housing, education and social assistance are made available from time to time to Band members who are deemed to be entitled to such benefits.

[123] According to the affidavit of Clifford Potts, a paralegal with the Samson Cree Nation, decisions relating to the eligibility for benefits are not dependent upon or otherwise related to whether an applicant has become a Member of the Samson Cree Nation by virtue of the Bill C-31 amendments to the *Indian Act*.

[124] By way of example, funding of post-secondary education is determined on a case-by-case basis. Monetary grants and awards through the Samson Education Trust Fund may depend upon scholastic achievement, availability of grant monies and whether an individual requests funding assistance.

[125] Similarly, applications for on-reserve housing are also assessed on a case-by-case basis. Whether an individual receives funding for housing may depend upon factors such as the size of the family, the availability of funds, and whether an individual requests funding assistance.

[126] Insofar as eligibility for welfare and social assistance benefits is concerned, such benefits are awarded based on criteria including where an individual resides, whether an individual demonstrates the requisite financial need, and whether an individual has actually requested benefits.

[127] As a consequence, it is very clear that to the extent that the claim relates to lost benefits, an individualized assessment will have to be carried out with respect to the claims of each individual member of the class.

iii) The Release Issues

[128] Finally, there will be issues with respect to the enforceability of releases signed by certain members of the class in favour of the Samson Cree Nation that will require individualized assessment. Indeed, counsel for Mr. Buffalo conceded in argument that it would be necessary to look at the personal circumstances of each claimant in relation to the negotiation and execution of each release.

[129] Similarly, it will also be necessary to examine the individual situation of any individuals who were involved in the Suspense Account litigation, who may have signed releases in favour of the Crown.

Conclusion with Respect to the Predominance of the Individual Issues

[130] As was noted earlier in this analysis, in considering whether the common questions of law or fact predominate over questions affecting only individual members, the proper approach is to

focus not on whether there are issues that require individualized assessment, but on whether there are common issues that could advance the litigation by their resolution.

[131] In this case, however, Mr. Buffalo has not identified any common issues of law or fact that could advance the litigation by their resolution, whereas the defendants have identified several issues that will require individualized assessment. In such circumstances, the individual issues clearly predominate, such that proceeding by way of a class action is not the preferable procedure for the just and efficient resolution of the issues in this claim.

Other Considerations Regarding the Preferable Procedure

[132] As was noted above, the focus of the parties' submissions was on the factor identified in Rule 334.16(2)(a), namely whether the questions of law or fact common to the class members predominate over any questions affecting only individual members. However, reference was also made to the value of the potential claims as a factor militating against certification.

[133] One of the benefits of class proceedings is that it allows for claims of a relatively small size to be prosecuted in circumstances where individual actions would simply not otherwise be financially viable. Indeed, the small size of individual claims may be a factor weighing in favour of certification: see, for example *Manuge*, at paragraph 28, *Sorotski v. CNH Global N.V.*, 2007 SKCA 104, at paragraph 66 and *Bodnar v. The Cash Store Inc.*, 2006 BCCA 260, at paragraphs 19 and 20.

[134] Little information has been provided with respect to the size of the individual claims in issue in this case, although counsel for the plaintiff did mention at one point that Mr. Buffalo's personal claim would be worth somewhere in the vicinity of $192,000.

[135] Mr. Buffalo's statement of claim also asserts that at least as of May of 1988, Samson's annual budget contemplated monthly PCD payments in the amount of $500 each, along with four quarterly distributions, each in the amount of $600.

[136] I have also been also provided with the decision of Justice Slatter, then of the Alberta Court of Queen's Bench, in *Yellowbird v. Samson Cree Nation No. 444*, 2006 ABQB 434, aff'd 2008 ABCA 270. Although framed differently, the *Yellowbird* action involved claims for PCDs brought by individuals whose memberships in the Samson Cree Nation were affected by Bill C-31.

[137] The judgment indicates that the value of one individual's entitlement to PCDs for the period between June of 1987 and February of 2006 was $197,547.55, inclusive of interest.

[138] What this indicates is that the value of the individual claims in issue here may well be substantial, such that individual prosecution is indeed a viable option. Moreover, the potential size of these individual claims is such that class members could indeed have an interest in individually controlling the prosecution of separate actions.

Conclusion Regarding the Preferable Procedure

[139] For these reasons, Mr. Buffalo has not persuaded me that a class action is the preferable procedure to be followed for the just and efficient resolution of the issues in this claim.

e) Is Mr. Buffalo a Suitable Representative Plaintiff?

[140] The requirements for establishing that the proposed representative plaintiff would indeed be an appropriate one are set out in Rule 334.16(1)(e). This provision requires that it be established that the proposed representative plaintiff:

334.16(1)(e)(i) would fairly and adequately represent the interests of the class,	**334.16**(1)(e)(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.

[141] Mr. Buffalo submits that he is a suitable representative plaintiff, primarily on the basis that he was found to be such by Justice Hugessen in the context of the Suspense Account litigation.

[142] Mr. Buffalo has sworn that he has been advised by his counsel that his interests are not in conflict with those of other members of the proposed class. He has also provided a copy of the contingency fee arrangement that he has entered into with his counsel.

[143] Insofar as a litigation plan is concerned, Mr. Buffalo has suggested a method for advertising for class members, but offers no other suggestions for the prosecution of this action.

[144] I agree with the defendants that the fact that Mr. Buffalo may have been approved as a suitable representative plaintiff in the context of the Suspense Account litigation does not mean that he is necessarily a suitable representative plaintiff in this case.

[145] First of all, there is no suggestion in the decisions of Justice Hugessen which have been provided to me that there was any objection to Mr. Buffalo acting as a representative plaintiff in that case. That is not the case here.

[146] I am also troubled by the failure of Mr. Buffalo to prepare even a rudimentary litigation plan in this matter, as required by Rule 334.16(1)(e)(ii). When he was questioned about this by the Court, counsel's response was that the matter was under case management, and that a litigation plan

could be worked out through the case management process. At another point in his submissions, counsel referred to the *Federal Courts Rules* as providing "a template" for his litigation plan.

[147] With respect, this is simply not sufficient.

[148] I accept that a litigation plan is not to be scrutinized in great detail at the certification stage because the plan will likely be amended during the course of the proceeding. The plan must, however, demonstrate that the plaintiff and his counsel have thought the process through, and that they grasp its complexities: see *Sorotski*, at paragraph 95. See also *Williams v. College Pension Board of Trustees*, 2005 BCSC 788 at paragraphs 139-140, and *Fakhri v. Alfalfa's Canada, Inc. (c.o.b. Capers Community Market)*, 2003 BCSC 1717, at paragraphs 77-78.

[149] The litigation plan will also assist the Court in determining whether a class proceeding is the preferable procedure in a given case, and whether the litigation is manageable in its constituted form: see *Carom*, previously cited.

[150] I also agree with the Saskatchewan Court of Appeal that there are no fixed rules or requirements for a litigation plan, and that the appropriate content of a litigation plan will depend on the nature, scope and complexity of the particular litigation to which it relates: see *Sorotski*, at paragraph 78.

[151] However, the jurisprudence has established the following non-exhaustive list of the matters to be addressed in a litigation plan:

> (i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
>
> (ii) the collection of relevant documents from members of the class as well as others;
>
> (iii) the exchange and management of documents produced by all parties;
>
> (iv) ongoing reporting to the class;
>
> (v) mechanisms for responding to inquiries from class members;
>
> (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries;
>
> (vii) the need for experts and, if needed, how those experts are going to be identified and retained;
>
> (viii) if individual issues remain after the termination of the common issues, what plan is proposed for resolving those individual issues; and
>
> (ix) a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided.

See: *Sorotski*, at paragraph 78. See also *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375, at paragraph 130, *Bellaire v. Independent Order of Foresters* (2004), 5 C.P.C. (6th) 68 (Ont.Sup.Ct.) at paragraph 53, and *Boucher v. P.S.A.C.* (2005), 18 C.P.C. (6th) 391 (Ont.Sup.Ct.) at paragraph 29.

[152] Finally, as was noted in *Sorotski*, at a minimum, the litigation plan provided by a proposed representative plaintiff must allow the motions judge to determine "whether the representative

plaintiff should be entrusted with the responsibility of moving the claim forward on behalf of class members": at paragraph 81. The "plan" provided by Mr. Buffalo does not meet this minimum threshold.

[153] It is open to the Court to allow counsel to file a revised litigation plan, where the other requirements for certification have been met: see, for example, *Sorotski*, at paragraph 82. See also *Carom v. Bre-X Minerals Ltd.* (1998), 20 C.P.C. (4th) 163 (Ont. Gen. Div.), and *Tom's Grain & Cattle Co. v. Arcola Livestock Sales Ltd*., 2004 SKQB 338.

[154] However, I am not prepared to do so here, in light of my finding that other requirements for certification have not been met, and given the other concerns that I have with respect to the suitability of Mr. Buffalo as a representative plaintiff, which will be discussed below.

[155] I have several other reasons for concluding that Mr. Buffalo is not a suitable representative plaintiff in this case. His failure to identify any common issues of fact or law causes me to question his ability to "fairly and adequately represent the interests of the class", as contemplated by Rule 334.16(1)(e)(i). So too does his failure to have given due consideration to the proper description of the proposed class.

[156] As a final matter, I would note that I have not been asked to make a definitive ruling either on the question of whether Mr. Buffalo's claim is statute barred, or with respect to the effect of the releases that he has signed, and I have not done so here. I am, however, satisfied that there is at

least a question as to whether Mr. Buffalo himself has a viable claim, which further calls into question his suitability as a representative plaintiff.

[157] As a consequence, Mr. Buffalo has failed to persuade me that he is a suitable representative plaintiff in this case.

Conclusion

[158] For these reasons, I find that Mr. Buffalo has failed to identify any common issues of fact or law which may be resolved through the class proceedings process. He has also failed to persuade me that a class proceeding is the preferable procedure for the just and efficient resolution of this matter. Finally, he has not persuaded me that he is a suitable representative plaintiff in this case.

[159] As was noted at the outset of this analysis, the list contained in Rule 334.16(1) of the *Federal Courts Rules* is conjunctive. Having failed to satisfy at least three of the criteria for certification, it follows that the motion is dismissed.

Costs

[160] The defendants acknowledge that as a general rule, costs are not awarded in relation to certification motions, regardless of their outcome. Nevertheless, the defendants submit that in this case, the conduct of Mr. Buffalo is such that they should be entitled to their costs.

[161] Rule 334.39 (1) of the *Federal Courts Rules* provides that:

334.39 (1) Subject to subsection (2), no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding or to an appeal arising from a class proceeding, unless	**334.39** (1) Sous réserve du paragraphe (2), les dépens ne sont adjugés contre une partie à une requête en vue de faire autoriser l'instance comme recours collectif, à un recours collectif ou à un appel découlant d'un recours collectif, que dans les cas suivants :
(*a*) the conduct of the party unnecessarily lengthened the duration of the proceeding;	*a*) sa conduite a eu pour effet de prolonger inutilement la durée de l'instance;
(*b*) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or	*b*) une mesure prise par elle au cours de l'instance était inappropriée, vexatoire ou inutile ou a été effectuée de manière négligente, par erreur ou avec trop de circonspection;
(*c*) exceptional circumstances make it unjust to deprive the successful party of costs.	*c*) des circonstances exceptionnelles font en sorte qu'il serait injuste d'en priver la partie qui a eu gain de cause.
(2) The Court has full discretion to award costs with respect to the determination of the individual claims of a class member.	(2) La Cour a le pouvoir discrétionnaire d'adjuger les dépens qui sont liés aux décisions portant sur les réclamations individuelles de membres du groupe.

[162] Relying on Rules 334.39(1)(a) and (c), the Samson defendants submit that there were a number of "holes" in Mr. Buffalo's motion, including his failure to identify any common questions of fact or law, which would justify an order of solicitor and client costs in their favour.

[163] The Samson defendants further argue that they have worked long and hard to resolve the complex and emotional issue of Band membership in the wake of the Bill C-31 amendments to the *Indian Act*, and that the vast majority of members of the putative class have already settled their differences with the Samson defendants, and have decided to move on with their lives.

[164] According to the Samson defendants, Mr. Buffalo's attempt to put the matter back before the Courts is an attempt to undo everything that has been accomplished by both the Samson Cree Nation and those who claim membership in it.

[165] While recognizing that an award of costs against Mr. Buffalo could have a "chilling effect", the Samson defendants submit that such an effect "is not a bad thing in some cases".

[166] The Crown also seeks its costs in this matter under the "exceptional circumstances" provision of Rule 334.39(1)(c). Pointing to Rule 334.17(1), the Crown notes that an order certifying a proceeding as a class proceeding must set out the common questions of law or fact for the class. Having failed to identify any common questions of fact or law for resolution through the class proceedings process, there was nothing in the motion to which the Crown could respond.

[167] The Crown also points to the fact that it did not seek its costs in the course of the Suspense Account litigation, even though it incurred costs and was not directly interested in the outcome of that case. Given that it is once again being asked to defend a case in which similar issues are being raised, the Crown submits that it should be entitled to something by way of costs.

[168] Mr. Buffalo argues that the ordinary "no costs" rule should apply in this case, pointing to the fact that Justice Hugessen did not award any costs in relation to the Suspense Account litigation. Mr. Buffalo further points to the chilling effect that an order of costs against him would have, arguing that there was nothing so extreme in his conduct of this matter that would justify such an order.

[169] Because of the numerous deficiencies in Mr. Buffalo's motion materials and arguments which have been identified in these reasons, I have given very serious consideration to the defendants' request for costs. I have also had regard to the policy considerations underlying the presumptive "no costs" rule.

[170] As was noted earlier in these reasons, class proceedings are intended, in part, as a means of providing increased access to justice. There is ordinarily no added personal benefit accruing to a representative plaintiff in return for assuming that role, and additional costs will usually be associated with pursuing a matter as a class proceeding, rather than as an individual action. As a consequence, an award of costs against an unsuccessful would-be representative plaintiff could have the effect of deterring potential future representative plaintiffs from bringing class actions, thereby defeating the access to justice goal of class proceedings: see, for example, Alberta Law Reform Institute, *Class Actions: Final Report Number 85* (Edmonton, Alberta: Alberta Law Reform Institute, December 2000) at p. 143-4.

[171] While Rule 334.39(1) of the *Federal Courts Rules* does authorize costs awards in limited circumstances, it is clear that an award of costs in relation to an unsuccessful motion for certification will be exceptional. Having regard to the factors identified in the Rule, the circumstances of this case, and in the exercise of my discretion, I decline to make any order of costs in this matter.

ORDER

THIS COURT ORDERS AND ADJUDGES that the motion is dismissed, without costs.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-880-06
STYLE OF CAUSE:	ANDREW MARK BUFFALO ET AL v. CHIEF AND COUNCIL OF SAMSON CREE NATION ET AL
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	October 27 & 28, 2008
REASONS FOR ORDER AND ORDER:	Mactavish J.
DATED:	November 24, 2008

APPEARANCES:

Terence Glancy	FOR THE PLAINTIFFS
Marco Poretti	FOR THE DEFENDANT (SAMSON)
Kevin Kimmis Teresa Crotty-Wong	FOR THE DEFENDANT (CROWN)

SOLICITORS OF RECORD:

ROYAL McCRUM GLANCY & TESKEY Barristers and Solicitors Edmonton, Alberta	FOR THE PLAINTIFFS
PARLEE MCLAWS Barristers and Solicitors Edmonton, Alberta	FOR THE DEFENDANT (SAMSON)
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE DEFENDANT (CROWN)