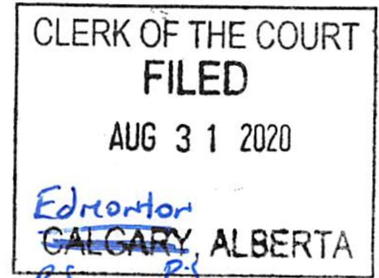

Court of Queen's Bench of Alberta

Citation: Bruno v Samson Cree Nation, 2020 ABQB 504

Date:
Docket: 1403 17729
Registry: Edmonton

Between:

Bonnie Lee Bruno

Plaintiff

- and -

Chief and Council of the Samson Cree Nation and the Samson Cree Nation[1]

Defendants

- and -

The Attorney General of Canada[2]

Third Party

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1 I consider the two named Defendants to be one and the same – the Samson Cree Nation is the institution and the Chief and Council are the people who administer the activities of the Nation – see discussion at S19 TR 61/4-63/24 & 65/3-12.

2 The action against The Attorney General of Canada was stayed pursuant to the Order of the Court dated September 19, 2018.

Reasons for Decision
of the
Associate Chief Justice
J.D. Rooke
on Certification and Summary Judgment

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Glossary

- Bonnick-Kendell Affidavit #1 - affidavit of Leonie Bonnick-Kendell, sworn on June 23, 2017 and filed on June 29, 2017
- Bonnick-Kendell Affidavit #2 - affidavit of Leonie Bonnick-Kendell sworn on August 22, 2017
- Bonnie Bruno Affidavit - affidavit of Bonnie Lee Bruno, affirmed on June 28, 2017
- Cody Bruno Affidavit - affidavit of Cody Bruno, Samson Nation Band Administrator, sworn on January 9, 2018
- DIAND – Department of Indian Affairs and Northern Development
- N8 TR 1/1-10 – November 8, 2018 Transcript of Hearing – page 1, lines 1 to 10
- PCB – Plaintiff Certification Brief
- PCRB – Plaintiff Certification Reply Brief
- PRB – Plaintiff Reply Brief
- PSB – Plaintiff Supplemental Brief
- PSRB - Plaintiff Supplemental Reply Brief
- PSJB – Plaintiff Summary Judgment Brief
- PSJRB – Plaintiff Summary Judgment Reply Brief
- S19 TR 1/1-10 – September 19, 2018 Transcript of Hearing – page 1, lines 1 to 10
- S20 TR 1/1-10 – September 20, 2018 Transcript of Hearing – page 1, lines 1 to 10
- S21 TR 1/1-10 – September 21, 2018 Transcript of Hearing – page 1, lines 1 to 10
- SNCRB – Samson Nation Certification Response Brief
- SNSJB – Samson Nation Summary Judgment Brief
- SNSRB – Samson Nation Supplemental Response Brief
- TASofC – Third Amended Statement of Claim
- Weston Affidavit #1 – Affidavit of Susan Weston, sworn
- January 21, 1999 in Court of Queen's Bench Action No. 9803-13721, and marked Exhibit "C" to Bonnick-Kendell Affidavit #1
- Weston Affidavit #2[3] – Affidavit of Susan Weston, sworn November 15, 2002 in Federal Court of Canada Docket T-354-01, and marked Exhibit "D" to Bonnick-Kendell #1

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[3] Note that Weston Affidavits #1 and #2 are substantially identical.

I. Introduction

[1] This class proceeding relates to a claim of class members from whom, after they were added to the Band List of the Samson Cree Nation (Nation), as "maintained by the Minister"[4], on and after June 29, 1987[5], by virtue of Bill C-31[6], the Nation withheld payment of per capita distributions (PCDs) and Special Pays[7], and interest, for the period of May 1, 1988 to June 1, 1995 (the "class period") as to the Plaintiff, or lesser or greater periods as to other class members.

II. Brief Background

[2] The Nation is a "band" pursuant to the *Indian Act*, RSC 1985, s. I-5, as amended *(Indian Act*). The Chief and Council of the Nation are the "council of the band" within the meaning of that term in the *Indian Act*, and constitute the duly elected governing body of the Nation.

[3] In her brief for certification (PCB), the Plaintiff asserts the following history (paras 9 – 15, and 19 - 20 – footnotes omitted), by way of background:

> For most of its history, the *Indian Act* based entitlement to Registered Indian status and band membership on descent through the male parent. This system of eligibility for Indian registration based on descent through the male line was in effect until Bill C-31 was passed in 1985, in response to the equality commands of the *Charter*.
>
> A key feature of the historical *Indian Act* provisions that Bill C-31 sought to address was the past loss of Registered Indian status and Band membership by Indian women who had married non-status men. Under those historical provisions, a registered Indian woman lost her Indian status when she married a

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4 As defined *infra*, not the different Band List as set by a Band Council Resolution (BCR) in April 1988. The Plaintiff explains this in this way at FN 143 of her PCB, relying on paras 3 and 11 of the Amended Statement of Claim (ASOC) and paras 13, 16, and 29-33 of the Statement of Defence (SOD): "Samson Nation admits that beginning in June 1987, [the Plaintiff] and other individuals' names were entered onto the Samson Nation Band List maintained by the Minister pursuant to Bill c-31... but asserts that the provision of Bill C-32 are of no force or effect and that the Class Plaintiffs only became members of Samson Nation in or about June 1, 1995 when Samson recognized and admitted them as members of the Samson Nation."

5 Note below that the claim of the class is for a period broader than the claim of the Plaintiff personally, who makes no claim from June 29, 1987 to May 1, 1988, whereas there are allegedly 395 class members in that time period – see paras 27-8 of the Bonnie Bruno Affidavit. Note too the amendment, discussed below, to the class to put in a termination date as of today's date - the date of certification, which I have granted herein.

6 *An Act to Amend the Indian Act*, S.C. 1985, c.27, amended on June 27, 1985 (Bill C-31). Cody Bruno, the Samson Nation's Band Administrator, put it this way, in recognizing the historical indigenous meaning of "enfranchisement", at para 73 of the Cody Bruno Affidavit: "Bill C-31 was an attempt by Her Majesty to correct Her past discriminatory enfranchisement of First Nation members. Pursuant to Bill C-31, on April 17, 1985, hundreds of thousands of enfranchised individuals across Canada became entitled to obtain Indian status and to have their names entered in a band list…."

7 Often, whether from capital or revenue accounts (discussed *infra*), collectively simply called "per capita distributions" – Cody Bruno Affidavit, para 51. Counsel for the Plaintiff says (S21 TR 38/6-18), however, in the final analysis they also fall into the concept of "per capita distributions" and nothing turns on the term "Special Pays", other than, perhaps, how they originated.

non-Indian male, and the couple's children were not allowed to be registered as Indians. As Band membership was an attribute of being a registered Indian, the woman and her children were also excluded from Band membership. This exclusion was permanent, surviving even the widowhood or divorce of the woman who had "married out". Losing Registered Indian status for "marrying out" was sometimes referred to as being "enfranchised".

Women who lost their Registered Indian status before 1985 for "marrying out" were restored to status by Bill C-31. These women, and any children they had with their non-Indian husbands, could be registered as Indians pursuant to s. 6 of the *Indian Act*, enacted by Bill C-31.

Bill C-31 also created, for the first time, a conceptual and administrative separation between Indian registration and Band membership. Both before and after Bill C-31, the Government of Canada administers the central Indian registry, and determines eligibility to be registered as an Indian, in accordance with the statutory criteria.

Before Bill C-31, the Government of Canada maintained all Band lists, and determined Band eligibility on the basis of its statutory and administrative rules about parentage and marriage. After Bill C-31, this dual role for Canada continued with respect to many Bands. However, Bill C-31 also gave Bands the option of taking control of their membership by establishing their own membership codes.

Prior to the passage of Bill C-31, there was considerable controversy within many First Nations over, among other things, questions over whether the women who had "married out" should be accepted back into the community and as Band members. After Bill C-31 came into effect, there were numerous challenges before the courts regarding Band membership and the equality rights issues raised by the history of enfranchisement and the attempted solution of Bill C-31.

In providing for Bands to take control of their own membership lists, however, Bill C-31 enacted a major protection for the women who could now regain their Registered Indian status. Section 10(4) of the amended *Indian Act* provides that a Band membership code cannot deny membership to an "acquired rights" individual. The provisions were designed to assure Band membership to the women who were regaining the Indian status they had lost upon marrying out.

...On June 27, 1985, the *Indian Act* was amended through the passage of Bill C-31. This resulted in certain categories of individuals being reinstated to Indian status and, in some cases, to band membership.

Bill C-31 also allowed Indian bands to develop membership rules for their communities. If the membership rules were not in place by June 28, 1987, however, DIAND would continue to maintain an Indian band's membership list, and would then add to the membership list the names of individuals who were entitled to be so entered, pursuant to subsection 11(2) of the amended *Indian Act*.

[4] See also S19 TR 16/12-41/9, which summarizes the alleged background history, and the nature of the certification sought. The Nation responded in oral argument with its description of

the provisions of the *Indian Act* and its position – S19 TR 65/14-69/8, later relying on the Cody Bruno Affidavit – S19 TR 69/12-90/26.

[5] The Plaintiff asserted (at *inter alia*, paras 21 – 22, 24, 32 – 33, and 94 of the PCB[8]) that the Nation never gained control of its membership from DIAND. The Cody Bruno Affidavit, at paras 39 and 77, confirms this. Moreover, in ***Buffalo v Canada (Minister of Indian Affairs and Northern Development)***, 2002 FCT 1299 (***Buffalo #1***) at para 10, Hugessen J so held: see S20 TR 61/17-62/2. I am not convinced of Justice Mactavish's (arguable) findings to the contrary (***Samson Cree Nation v. Samson Cree Nation (Chief and Council)*** 2008 FCT 1308, for the reasons stated by Hugessen J. Nor am I bound by the reasoning of either Mactavish J. or Hugessen J. From the submissions, and the admission on behalf of the Band through, *inter alia*, the Cody Bruno Affidavit, and the judicial finding of Hugessen J, I accept the assertion that the Nation never gained control of its membership from DIAND.

[6] Consequences followed (PCB paras 23 *et seq*, and 49), namely that:

- persons added to membership by virtue of Bill C-31 were not paid a PCD directly, but interest earning trust accounts[9] were maintained by DIAND, which held over $1.5 M as at May 4, 1988, and $4M as at October 1997[10];
- a history of litigation and communication ensued between the Nation and DIAND (as described in the PCB, *inter alia*, paras 32-102; see also SNCRB, paras 118-154);
- reference is made to settlement agreements with some 395 members of the class, "some" for consideration (including in the Cody Bruno Affidavit paras 87-9, and Exhibit 36), but the full details for all class members have not been released (PCB, para 100); and
- after December 2005, monies remaining in the DIAND Samson capital account were transferred to the Kisoniyaminaw Heritage Trust (PCB, para 101, and SNCRB, paras 57 & 160-2), for which the Plaintiff argues (PCB, para 280; S21 TR 10/22 32) that distribution of monies awarded under an aggregate award can be carried out under s. 33 of the *Act*, if the Court, at the common issues trial, issues a declaration that monies are held in trust.

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8 There is extensive evidence filed by the Plaintiff, ostensibly to provide background facts and to respond to the "some basis in fact" requirements of the *Act* and jurisprudence. Those include the following, together with affidavits from other proceedings buried therein: Affidavit of Bonnie Lee Bruno affirmed on June 28, 2017 ("Bonnie Bruno Affidavit"); Affidavit of Leonie Bonnick-Kendell sworn on June 23, 2017 ("Bonnick-Kendell Affidavit #1"); and Affidavit of Leonie Bonnick-Kendell sworn on August 22, 2017 ("Bonnick-Kendell Affidavit #2"). Also filed, by the Defendant, is the affidavit of Cody Bruno sworn on January 9, 2018 ("Cody Bruno Affidavit"). None of the deponents were questioned on their affidavits. Additionally, the parties, in their briefs made extensive reference to these affidavits. Most of the affidavits are consistent with each other, although some address subjects not contained in others. Unfortunately for the reader, this creates often many sources for the same, sometimes, regrettably, repetitive information and cross-references. Prior to rendering these Reasons, I have reviewed the several lengthy affidavits, but, as noted in the transcript (S19 TR 14/26-15/2), I have focussed on the submissions in the briefs in reliance on the affidavit(s) in support, absent a serious challenge.

9 The Nation calls the capital and revenue accounts as "notional accounts", as discussed at S19 TR 66/31-68/31.

10 Para 33 of Weston Affidavit #1, representing the shortfall in the suspense account.

III. Further Detailed Factual and Procedural Background

[7] With the above summary of the Plaintiff's position, we can look in more detail to the background to the Action. The Bonnick-Kendell Affidavit #1 exhibits a copy of Weston Affidavit #1, which provides much detailed direct evidence of that background.

[8] In 1999, when the Weston Affidavit #1 was sworn, Susan Weston was employed by DIAND as a claims officer. Prior to assuming that position in September 1997, she had been employed with DIAND as a Band Funds Officer, responsible for the administration of Indian Band Trust Moneys with respect to the Samson Cree Nation.[11] Weston Affidavit #1 states her personal knowledge[12] of the history leading up to the filing of Action No. 9803-13721 by Samson Nation, which follows below.

[9] As described in the TASofC herein and in the SNCRB, paras 6 *et seq* in more detail[13], by a Surrender of Minerals dated May 30, 1946, the Nation and other Indian Bands (sometimes referenced as "Indians of the Hobbema Agency" or the "Maskwacis Bands"[14]), surrendered their right, title and interest in respect of certain minerals underlying the surface of the Reserve Lands on Reserve No 138A, occupied by the Bands, to the Crown in trust for the use and benefit of the Bands, including royalties derived from mineral production[15].

[10] From time to time, in accordance with the *Indian Oil and Gas Act*, RSC 1985, c. I-7 (IOGA), and the *Indian Oil and Gas Regulations, 1995*, SOR/94-753 (IOG Regs.), the Crown obtained payments (Royalties) for oil and gas production from Reserve No 138A (the Reserve Lands) and directed the money therefrom to the capital account for each of the Bands, which were held and administered by the Crown, together with interest[16] for the benefit of the Bands, and divided on a per capita basis.

[11] In this way the Samson Band received moneys derived from oil and gas royalties from Reserve No. 138A. Paragraph 64(1)(a) of the *Indian Act* allows the Minister to authorize up to 50 percent of a band's capital trust moneys to be distributed equally among its members, with the consent of the band council. This type of payment is known as a *per capita* distribution (PCD). Through various band council resolutions (BCRs), the Council of the Samson Band had regularly consented to the payment of capital PCDs to its members several years prior to and after the

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[11] Weston Affidavit #1, para 1

[12] This "personal knowledge" gives a better narrative than reference to specific case decisions, but lacks the precision of case citations, which were most often not provided, but which would have been helpful for these Reasons, although some of them may be buried in the Exhibits to the referenced affidavits (for example, see PSJRB, para 11).

[13] I have ignored, for the moment, any conflicts between these passages.

[14] Cody Bruno Affidavit, paras 10-13.

[15] How these royalties were divided among the Maskwacis Bands was part of the history brought forward in this action, but that, as well as a basis of the continuing dispute between these Bands (based on relative population or split equally between the Bands - DIAND has chosen the former), I find it is largely irrelevant to the decisions that are necessary in this case.

[16] Although the Nation argues that interest was never paid by DIAND to the Nation (S20 TR 36/4 – 37/6), but was just "credits into those notional accounts", interest is payable on monies held in trust by DIAND for royalties due to a Nation: ***Ermineskin Indian Band v Canada***, 2006 FCA 415.

passage of Bill C-31 in 1985. These payments continued until April 1988, when further capital PCDs were no longer requested by the Samson band council.[17]

[12] On June 27, 1985, the *Indian Act* was amended through the passage of Bill C-31. This resulted in certain categories of individuals being reinstated to Indian status and, in some cases, to band membership.[18]

[13] Bill C-31 also allowed Indian bands to develop membership rules for their communities. If the membership rules were not in place by June 28, 1987, however, DIAND would continue to maintain an Indian band's membership list, and would then add to the membership list the names of individuals who were entitled to be so entered, pursuant to subsection 11(2) of the amended *Indian Act* (Bill C-31)[19].

[14] In accordance with the relevant provisions of the *Indian Act*, on June 25, 1987, the Samson Band submitted its proposed membership rules to DIAND. On June 24, 1987, Chief Jim Omeasoo, then Chief of the Samson Band, notified the then Minister of Indian Affairs, Hon. Bill McKnight, of his objection to the addition of persons described in subsection 11(2) of the *Indian Act* to the Samson Band membership list. Weston Affidavit #1 attached a copy of Chief Jim Omeasoo's June 24, 1987 correspondence and its enclosures as an exhibit.[20]

[15] The Plaintiff, Bonnie Lee Bruno (Bruno)[21], is a member of the Nation. Her name was added to the Band List of the Nation maintained by the Minister of Indian Affairs and Northern Development (Minister), under the provisions of Bill C-31, the *Indian Act* having previously enfranchised Indian women and their children[22], but who became members of Indian Bands on lists[23] administered by the Minister, unless Nations developed band membership rules approved

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17 Weston Affidavit #2, para 2.

18 Weston Affidavit #1, para 3

19 Weston Affidavit #1, para 4.

20 Weston Affidavit #1, para 5 and Exhibit "A" thereto [(bottom right) machine numbered pages 219-240]

21 The Nation purports to report her antecedents at SNCRB paras 166-181.

22 There is much more background in the material filed by the parties herein that I find not directly relevant to the action (indeed, much of paras 8 – 103 of the PCB relates to background legislation, correspondence between the Nation and the Government, and various action and claims under Bill C-31). Therefore, much of it has been left out as being superfluous to, or in greater detail than needed for, these Reasons. As to some of that, suffice it to say that Bill C-31, was enacted, in face of the *Charter of Rights and Freedoms (Charter)* to deal with alleged discriminatory provisions in the Indian Act, that theretofore had the effect of enfranchising women of Indian birth, who married non-Indian males, and any resulting children, who, by Bill C-31, were readmitted to Band memberships. Nevertheless, much controversy has continued between the Nation and the Government, as to the status of members enfranchised by Bill C-31. Thus, the Plaintiff asserts that the Band List is the one maintained by the Minister, as confirmed by the Federal Court (para 135.1 of PCB). In essence the claim (see para 135 of the PCB) is that the Nation collected is share of royalties based on the per capita allocation based on the Minister's Band Membership List, but distributed a lesser sum based on its own Membership List, in breach of the fiduciary entitlement of the class, who were excluded in the latter list for a period of time, giving an unjust benefit to the Nation at the cost of class members.

23 Many lists of members, accounts, distributions of PCD and Special Pays, and the like are on the record, including, but not limited to: the value of the royalties credited to the Samson Nation's capital account for 1969 – 2004 – Cody Bruno's affidavit, para 42 and Exhibit 20; the history of PCD distributions from 1987 – 2018 - Cody Bruno's affidavit, para 59 and Exhibit 24; capital and revenue PCD paid to Samson Nation members from March 1986 - 1996 – Cody Bruno's affidavit, paras 66-7 and Exhibits 27-8; 233 new members added to the membership lists of the Samson Nation pursuant to Bill c-31, as at June 10, 1987 and as at 2004, and those allegedly paid PCDs from June 29, 1987 – May 1, 1988 – Cody Bruno Affidavit, paras 76 & 83-6 and Exhibits 32-35; **and** PCD amounts paid to the Plaintiff – Cody Bruno Affidavit paras 93- 5 and Exhibits 40-1.

by the Minister on or before June 28, 1987 (see, *inter alia*, SNCRB, para 63 & 72-3), which I find, on the unchallenged evidence before me, was not done – thus giving primacy to the list maintained by the Minister on which the Plaintiff, and allegedly others in the class, had status effective June 29, 1987. 233 individuals were added as at that date.

[16] Payments of PCDs to Bill C-31 Reinstatees between June 29, 1987 and April 4, 1988 were withheld by the Minister, and on or about April 18, 1988, PCD payments totaling approximately $1,519,000 were debited from the Nation's Capital Account and placed in a separate interest-bearing account held by DIAND, called the Suspense Account (SNCRB, paras 75 & 79; Cody Bruno Affidavit, paras 79-80). The PCB alleges that this Action results from the delays in the Nation recognizing the membership of individuals granted status under Bill C-31, and the failure to make payments to those re-instated members.

[17] The details of Ms. Bruno's, and her Brother's lineage, history and knowledge of status is set out at paras 103 - 112 of the PCB, to the date of the original Statement of Claim herein filed on December 4, 2014. The Nation purports to report her antecedents at SNCRB paras 166-181.

[18] The Plaintiff acknowledges that she is not making any claim in relation to PCDs and Special Pays paid for the period June 29, 1987 to May 1, 1988 (which have been paid through the ***Buffalo #1*** action – see paras 22 – 24 of the Bonnie Bruno Affidavit). She does allege that she, and the proposed members of the class in this action, were not paid same for the period May 1, 1988 to June 1, 1995 (PCB, paras 110 – 111, and para 25 of the Bonnie Bruno Affidavit).

[19] From the Royalties[24] "as well as funds related to them", the Nation made per capita distributions (PCDs), monthly or annually, and Special Pays (typically at Christmas and sometimes other times of the year) to members of the Nation, as contained on the Band List of Members maintained by the Minister, but allegedly not the class members for a portion of that time.

[20] There are disputes between the Attorney General of Canada (AG) and the Nation, but the AG is primarily added to this action because the Government holds and administers certain Royalty funds, totalling over $1.5 M, transferred on May 4, 1988, from capital trust accounts of the Government held for the Nation, to Suspense Accounts, bearing interest[25], maintained by the Government on behalf of the Nation, the benefits of which the class seeks. Since February 1, 2006, these funds have been held for the Nation by the Trustees of the Kisoniyaminaw Heritage Trust.

IV. Summary of Decision

[21] By way of summary, on all of the evidence and submissions before me, I decide that this is an appropriate case to proceed by way of a class proceeding, and the majority of 16 common

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[24] While these oil and gas royalties were the original source of the capital account held by DIAND for the Nation, overtime the use of the term "royalties" became confusing (see the Plaintiff's Counsel's comments at S20 TR 54/31-38), and the source of funds in dispute was merely capital funds or revenue funds, as discussed herein.

[25] However, it appears that the interest was only collected from May 5, 1988, not sufficient to cover interest on funds in the suspense accounts not paid going back to June 29, 1987, or later, when an individual first became eligible to receive the PCD and Special Pay funds, requiring additional funds to be paid from the Band's capital and revenue accounts to cover the shortfall. In the result, there are also some "accounting" difficulties. See Weston Affidavit #1, paras 7, 13, 14 and 23.

issues and 4 subclass common issues are approved as sought, or, in some cases, with modification.

[22] Summary judgment is granted on common issues 1 (or striking of the Nation's Defence for abuse of process, in the alternative) and 2, and subclass common issue 1. Summary judgment is denied on subclass common issue 2, and common issues 3 – 5, and 10.

V. Application for Certification

[23] In the Third Amended Application for certification, filed November 7, 2018, the Plaintiff sought certification for a class defined simply as:

> all persons whose names were recorded on the "Band List" ... for [the] Nation maintained by the Minister...at any time on or after June 29, 1987, and from whom Samson Nation withheld payment of *per capita* distributions and Special Pays at any point after the person's name was added ... or, where such person is deceased, the personal representative of the estate of the deceased person.

and a subclass defined simply as:

> all Class Members who obtained Samson Nation's recognition that they were a member of the ... Nation pursuant go an agreement they executed ... whereby the Class Member released Samson Nation of liability for claims with respect to any distribution of money to them at any point after their name was added to the Samson Band List ("Membership Agreement") or, where such person is deceased, the personal representative of the estate of the deceased person.[26]

A. Class Proceeding Criteria, Issues and Analysis

[24] The criteria for certification of a class proceeding have become trite and largely need not be restated. They are addressed by the Plaintiff at paras 128 – 131 of the PCB, and by the Nation at paras 182 – 4 of the SNPB. The bottom line is that the Court has no discretion other than to certify an action as a class proceeding under the Act, if the five-part test set out in s.5 is met. I will examine each element of that test in turn.

1. Cause of Action

[25] The first criterion for certification is that the plaintiff's pleading discloses a cause(s) of action. No evidence is required, but rather the facts, as pleaded, are assumed to be true. The

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[26] The Plaintiff's Mother, Ms. Rowan, entered into a Membership Agreement with the Nation, on behalf of the Plaintiff and the Plaintiff's Brother, on June 1, 1995 (Exhibits A and B, of the Bonnie Bruno Affidavit), under which the Plaintiff was recognized as a member of the Nation since that day and has received her PCD and Special Pays since. That allegedly leaves the PCDs and Special Pays, from May 1, 1988 to June 1, 1995 unpaid (the PVDs and Special Pays between, June 29, 1987 and April 1988 having been paid pursuant to an Order of the Federal Court). As at June 1, 1995, there were apparently 119 persons in this subclass, and ultimately 185 persons were paid part of their PCD and Special Pays – see para 29 of the Bonnie Bruno Affidavit. The Plaintiff relies upon the finding by Hugessen J. in ***Buffalo v. Canada (Minister of Indian Affairs and Northern Development)***, 2002 FCT 1299 (appeal abandoned May 3, 2004), that the Membership Agreements are ineffective and had been obtained in breach of the fiduciary obligations that the Nation owed to the persons to whom the Membership Agreements relate. He also directed that the action proceed as a class action (PCB, para 70, but the class-action certification was dismissed by Justice Mactavish for failure to meet the requirements of the legislation (primarily lack of common issues and a workable litigation plan), as confirmed by the Federal Court of Appeal, and discussed herein.

requirement is satisfied unless it is proved beyond a reasonable doubt that it is "plain and obvious" that the claim cannot succeed: ***Hunt v Carey Canada***, [1990] 2 SCR 959; ***Hollick v Toronto (City)***, 2001 SCC 68 at para 25; ***Warner v Smith & Nephew Inc.***, 2016 ABCA 223 at para 12; ***Starratt v Mamdani***, 2017 ABCA 92 at para 10; ***WP v Alberta (No. 2)***, 2013 ABQB 296 at para 16; and ***Murphy v BDO Dunwoody LLP***, 32 CPC (6th) 358, [2006] OJ No 2729 at para 9. See also PCRB at paras 39 – 42. The pleading is to be read generously: ***Cloud v Canada*** (2004), 73 OR (3d) 401 (CA) at para 41; and ***Abdool v Anaheim Management Ltd.*** (1995), 21 OR (3d) 453 at p 469 (Div Ct). See also the recent Supreme Court case in ***Atlantic Lottery Corp. Inc. v Babstock***, 2020 SCC 19, where Brown J, for the majority, states (at para 1) that the test for establishing a cause of action under s. 5(1)(a) of the Act:

> ... is whether it is plain and obvious, assuming the facts pleaded are true, that ... the plaintiffs' pleaded claims disclose no reasonable cause of action. Simply stated, if a claim has no reasonable prospect of success it should not be allowed to proceed to trial (***R. v Imperial Tobacco Canada Ltd.***, 2011 SCC 42, [2011] 3 SCR 45 at para. 17).

[26] At para 18, Brown J references the "cultural shift" mandated by the Supreme Court in ***Hryniak v Mauldin***, 2014 SCC 7, which "includes resolving questions of law by striking claims that have no reasonable chance of success", and the power to be bold (my term) to "strike hopeless claims": see also paras 35 and 38. This is particularly so for novel claims, as Brown J states at para 19 of ***Babstock***:

> ... a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the pleadings. This is because such claims present "no legal C.R. 83, at para 19). If a court would not recognize a novel claim when the facts are pleaded are taken to be true, the claim is plainly doomed to bail and should be struck.

[27] The TASofC sets out alleged facts (paras 4 – 21) and pleads (paras 24-38) the following causes of action:

a) breach of fiduciary duty and equitable obligation to the class (para 36);

b) waiver of tort, with entitlement on the basis of restitutionary principles (para 37) (waiver of tort now being denied herein in these Reasons, based on ***Babstock***, although entitlement on the basis of restitutionary principles may still be available); and

c) constructive trust by the Nation, in favour of the class, over the funds claimed in relation to the Capital moneys of the Nation (para 38).

a. Breach of Fiduciary Duty

[28] In support of the allegation of breach of fiduciary duty, the Plaintiff pleads:

a) the Nation's: failing to act with disclosure as to entitlement and distribution toward the class, and equitably in comparison to other members of the Nation, in respect of the distribution of PCDs and Special Pays from June 29, 1987 onwards;

b) unjust enrichment because the Nation received and retained royalties calculated on the basis of the per capita contributions of the class while denying them the financial benefits thereof;

c) equitable fraud on the part of the Nation in entering into Membership Agreements (discussed at, *inter alia*, SNCRB paras 90 – 4), without disclosing (and instead concealing) the class members entitlement; and

d) failing to account and pay interest.

[29] The Plaintiff (PCB paras 140 – 144) relies on ***Lac Minerals Ltd. v International Corona Resources Ltd.***, [1989] 2 SCR 574 at pp 646-7, ***Galambos v Perez***, 2009 SCC 48, [2009] 3 SCR 247 at paras 36-7, and ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24, [2011] 2 SCR 261 at paras 30 – 36, for a *per se* fiduciary relationship between the Nation and the proposed class.

[30] The Plaintiff asserts (PCB para 146, relying on: ***Ermineskin*** at paras 10-12; ***Louie v Louie***, 2015 BCCA 247 at para 29; ***Assu v Chickite***, [1999] 1 CNLR 14 (BCSC); ***Gilbert v Abbey***, [1992] 4 CNLR 21 (BCSC); ***Toney v Annapolis Valley First Nations Band***, [2004] FCJ. No. 2107; and ***Antoine v Cowichan Tribes***, 2015 BCSC 1951 at para 25) that:

> It is well established that a duly-elected chief and members of an elected band council are fiduciaries in relation to the members of the band and owe a fiduciary duty to band members in relation to their acts as representatives of the band.

See also: ***Leonard v Gottfried***, [1981] 21 BCLR 326 at p 300; and ***Rath and Company v Stoney First Nation***, 2013 ABQB 255 at paras 45-46 & 50.

[31] The Nation acknowledges (SNRB, paras 211-2) that the "duly elected chief and council are fiduciaries", with certain duties, and that band members are beneficiaries. Misunderstanding the Plaintiff's claim, however, the Nation asserts (SNRB, paras 213-4) that this Action relates to a claim to royalties, as opposed to PCDs, which I find, *infra*, is not supported. Counsel for the Plaintiff made this clear at paras 47 – 51 of the PCRB, and S21 TR 5/16-6/1, now carried into the TASofC at, *inter alia*, paras 24(c), 25(b), 27(c), and a number of sub-paragraphs to paras 36 and 37.

[32] I agree with the Plaintiff's assertion. The words of Cromwell J., in ***Galambos***, at para 67, are particularly apt in this context: "[a]n important focus of fiduciary law is the protection of one party against abuse of power of another in certain types of relationships or in particular circumstances", ***Assu*** stating (at para 33) that "... the members of the Band are vulnerable to abuse by the Chief or Council member...". The Plaintiff provided evidence in support to state (PCB, paras 119-20) to both fiduciary duties and the subsequent preferable procedure that "most of the Class Members lack the individual resources, the initiative and the sophistication to pursue legal action on their community" and "fear reprisal from the Samson Nation and condemnation from the Samson Cree community".

[33] Additionally, the Plaintiff asserts (PCB at paras 149-153, relying upon: ***Polchies v Canada***, 2007 FC 493 at para 57; ***Yellowbird v Samson Cree Nation No. 44***, 2008 ABCA 270, 433 AR 350 at para 26; ***Samson Cree Nation v Canada (Minister of Indian Affairs and Northern Development)***, 2002 FCT 1299 at para 11; and ***Barry v Garden River Band of Ojibways***, (1997), 33 OR (3d) 782 (CA), [1997] OJ No 2109 at paras 31-2:

> ... where a Band Council undertakes a *per capita* distribution, a trust relationship will arise whereby the Band Council is required to ensure that the monies set aside for distribution are properly kept and distributed fairly to the appropriate recipients. Thus, when a Band Council proceeds with its decision to distribute funds to its Band, a duty found in trust arises. The Band Council is then required to exercise its discretion to distribute the funds in accordance with its fiduciary obligations. Further ... when a band undertakes to make a *per capita* distribution, it must treat band members equally.

Again, I agree.

[34] By way of remedy, the class seeks two forms of relief in the TASofC, namely, for unjust enrichment, an accounting[27] and damages (para 41(b), (d) and (e); and a declaration of a constructive trust in respect of the funds allegedly wrongfully retained (para 41(g) and (h); PCB para 145, relying on: ***Frame v Smith***, [1987] 2 SCR 99 at para 79; and ***Soulos v Korkontzilas***, [1997] 2 SCR 217 at paras 17, 19-20 & 33).

[35] Counsel for the Nation responded (S19 TR 93/10-94/11) that the constructive trust position of the Plaintiff does not automatically result in avoiding a remedial remedy, key to avoiding limitations issues (later – S20 TR4/40-8/19, citing ***Kerr v. Baranow***, [2011] 1 SCR 269, 2011 SCC 10 at paras. 46-52, and ***Pro-Sys Consultants Ltd. v. Microsoft Corporation***, [2013] 3 SCR 477 at paras 90-2), and that there are issues with the terms of the trust agreement, as well as dealing with whether constructive trusts and waiver of trust are proper causes of action. I don't need to go into the details of these arguments, because I have found herein that a cause of action threshold has been reached on these issues by the Plaintiff to get to the common issues trial, and the common issues justice can determine where it goes from there.

[36] While the Plaintiff need not prove the claim at the certification level, she, nevertheless, makes the factual and legal arguments to support same (PCB, paras 146 – 154).

[37] While there is an issue of timing in that the Nation filed its Response Brief (SNRB) on July 23, 2018, before the filing of the TASofC (on October 15, 2019), the Nation argues (paras 188 – 189 of the NRB) that the Plaintiff seeks the Royalties credited to the Nation's Capital Account attributable to the membership on the class on the Band List. While the source of the Capital Account may be royalties, I find that the Plaintiff is not directly claiming royalties, and that any confusion in this regard has been cured by the TASofC, or is mere semantics. This is clear from the total provisions of para 36 of the TASofC. Although the wording of para 36(f) is a little loose, the overall claim is clearly relating to failure to make PCD payments and Special Pays to the class, as it did to other members of the Band list, after June 29, 1987.

[38] In the PCRB, para 47, the Plaintiff makes this clear:

> The Plaintiff is not claiming that Samson Nation's right to the royalties equates to a personal right of the Plaintiff, qua member of the band, to the band's property, or to a share of that property... the Plaintiff is not alleging a pre-existing interest in

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[27] Accounting, which is claimed, based on the records, would appear to be available (S21 TR 5/2-5) to determine who has a claim, who was paid what and when, and what remains owing, but those matters are not specifically relevant to certification (S21 TR3/2-10), but follow from certification.

> the royalties. The Plaintiff is claiming a proprietary remedy as the beneficiary of a defaulting fiduciary, over a portion of the capital moneys of the band.

Lac Minerals at p 676, is referenced in support.

[39] At para 154 of the PCB, the Plaintiff asserts:

> … it is not plain and obvious that, on the basis of those facts alone, and in light of the foregoing authorities, the Plaintiff would be unable to succeed in establishing that the Defendants breached fiduciary obligations it owes to the Class Plaintiffs in connection with Samson's distribution of *per capita* distributions to its members from June 29, 1987 onwards.

[40] I agree that the Plaintiff has pleaded a valid cause of action for the common law action of breach of trust, the merits of which will be determined in the Common Issues trial.

[41] The Plaintiff also asserts equitable, restitutionary claims, alleging other causes of action concurrent to her common law claim: unjust enrichment; waiver of tort; and constructive trust. However, before going down those paths, inconsistent and ambiguous terms should be avoided, as Brown J pointed out at paras 23 of ***Babstock*** (references omitted):

> ... the term "restitution" has been applied inconsistently, sometimes referring to the causative event of unjust enrichment and sometimes referring to a measure of relief.... In my view, *restitution* properly describes the latter – meaning, restitution is the law's remedial answer to circumstances in which a benefit moves from the plaintiff to the defendant, and the defendant is compelled to restore that benefit. Further, restitution stands in contrast to another measure of relief, disgorgement, which refers to awards that are calculated exclusively by reference to the defendant's wrongful gain, irrespective of whether it corresponds to damage suffered by the plaintiff, and, indeed, irrespective of whether the plaintiff suffered damages at all.... While this Court's decisions have occasionally referred to disgorgement variously as "restitution damages" or "restitution for wrongdoing". The ambiguity inherent in such terminology calls for greater precision. [Emphasis in the original.]

I will try to interpret the submissions by the parties herein consistently and in the proper context to this understanding.

[42] ***Babstock*** makes it clear (at paras 24-25, 27, 30 & 32, references omitted, recognizing reliance on ***Moore v Sweet***, 2018 SCC 53, [2018] 3 SCR 303) that:

> ... restitution for unjust enrichment and disgorgement for wrongdoing are two types of gain-based remedies.... Each is distinct from the other: disgorgement requires only that the defendant gained a benefit (with no proof of deprivation to the plaintiff required), while restitution is awarded in response to the causative event of unjust enrichment... where there is correspondence between the defendant's gain and the plaintiff's deprivation.
>
> ... Disgorgement, as a gain-based remedy, is precisely that: a remedy, awarded in certain circumstances upon the plaintiff satisfying all the constituent elements of one or more of various cause of action (specifically, breach of a duty in tort, contract, or equity).

> ...
>
> ... disgorgement should be viewed as an alternative remedy for certain forms of wrongful conduct, not as an independent cause of action.
>
> ...
>
> ... in order to make out a claim for disgorgement, a plaintiff *must* first establish actionable misconduct.
>
> ...
>
> ... disgorgement is available in some forms of wrongdoing without proof of damage (for example, breach of fiduciary duty). [Emphasis in the original].

b. Unjust Enrichment

[43] The standard test for unjust enrichment is: an enrichment of the defendant; a corresponding deprivation of the plaintiff; and the absence of a juristic reason for the enrichment: ***Garland v Consumers' Gas Co.*** 2004 SCC 25, [2004] 1 SCR 629 at para 30.

[44] The Nation's assertion that the royalties were credited to the Nation's Capital Account for the benefits of all members of the Nation, and thus there has been no deprivation, merits no serious consideration, because the claim of the class is that the Nation failed to pay PCDs and Special Pays to individual members of the class, different from other members of the Nation. This is exactly what the first two elements of unjust enrichment require. Moreover, at this stage, the Plaintiff merely needs to allege an arguable cause of action, which she has done. Proof of the allegation is for trial.

[45] The Nation asserted that the Membership Agreements are a juristic reason, and the Nation adds, "whether or not a Membership Agreement is enforceable is an issue that can only be resolved on and individual basis". However, the Plaintiff argues that the Membership Agreements, "were illegal, void, should be set aside or are otherwise unenforceable", which allegations are deemed to be true for the purpose of assessing a cause of action, therefore not open to the defence of a juristic reason, and thus should be left to the trial justice: ***Pro-Sys***, at para 8. I agree with the Plaintiff.

[46] I find that a cause of action for unjust enrichment has been established for the purpose of certification.

c. Waiver of Tort

[47] At paras 37-9 of the TASofC, the Plaintiff pleads, in the alternative, waiver of tort, claiming "restitution of and a constructive trust over the Defendants' unconscionable gains", instead of damages measured by the Plaintiff's and class members loss. This has the effect of avoiding individual proof of loss by each class member.

[48] Until very recently, the established law on waiver of tort remained unclear, with leading authorities providing that it is at least arguable as a cause of action. That lack of clarity was recently resolved, after all submissions had been made by the parties herein[28], by the definitive

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[28] In light of the finality and clarity of the decision in ***Babstock***, I find no need to reopen the hearing for further submissions by the parties, and will determine this case, based on its reasoning. However, if there are any

decision of Brown J, on behalf of the majority, in ***Babstock***, the apparent logic of the false doctrine, and the fallacy of that logic explained at para 29 of ***Babstock***, the result being that it is not properly an independent cause of action, but rather an election "to pursue an alternative, gain-based, remedy".

[49] ***Babstock*** recognized, at para 15 (supported at para 17), that parties in previous cases, including ***Babstock***, had argued:

> ... that a claim relying on waiver of tort as an independent cause of action for disgorgement has at least a reasonable chance of succeeding at trial.... no Canadian authority had recognized such a cause of action, although the plaintiffs rely on a line of class action certification decisions in which courts *refrained* from finding that it is plain and obvious that such an action *does not* exist. The plaintiff place significant emphasis on ***Pro-Sys*** ...where this Court, citing conflicting authorities on this point, declined to resolve it (para. 97).

[50] The motivation for this claimed cause of action in ***Babstock*** was (para 3):

> ... as to waiver of tort, the plaintiffs allege that [the Defendant] breached a duty... This, they say, supports their claim in waiver of tort, which they also say is an independent cause of action that allows for a gain-based remedy to 'be determined at trial of common issues without the involvement of any individual class member'.

[51] ***Babstock*** (at paras 16-23) examined reasons why the issue of whether waiver of tort is a proper cause of action should be determined. At para 23, reaffirmed at para 30 and para 35 (citation omitted), Brown J finally resolved this issue:

> ... the term "waiver of tort" is confusing, and should be abandoned. The concern is not for consistent terminology for its own sake, but rather for clarity of meaning: cases dealing with gain-based remedies tend to employ inconsistent nomenclature that leads to confused and confusing results.
>
> ...
>
> This [a claim for waiver of tort] is not the type of incremental change that falls within the remit of courts applying the common law. It follows that the novel cause of action [waiver of tort] proposed by the plaintiffs has no reasonable chance of succeeding at trial.

In the result, ***Babstock*** denied waiver of tort as a cause of action, as I do here.

d. Constructive Trust

[52] In support of the constructive trust claim, the Plaintiff alleges:

a) unjust enrichment since May 1, 1988;

b) to the deprivation of the class;

c) without juridical reason in law; and

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remaining nuances that either party believes need to be addressed arising from ***Babstock***, they may raise them with the Court before the Certification Order is finalized.

d) the need for protection of the funds claimed and the ability to trace same.

[53] Relying on ***Kerr***, at para 46, the Plaintiff argues, in substance, that, if the class was not entitled to a monetary award for unjust enrichment (because of limitation issues), a restitutionary proprietary remedy would be appropriate.

[54] The Nation argues about the alleged absence of pleadings, and specifically rational connection between the alleged enrichment and deprivation for constructive trust as an enforcement remedy, and why a monetary award is not sufficient (see *inter alia*, S20 TR 4/14 - 11/6) - the answer seems to be intertwined with the limitations issue that may otherwise arise (see Plaintiff's argument summary at S21 TR13/38-17/41, and as to the impact of fraudulent concealment S21 19/35-20/36 & 24/15-25/4, which Counsel for the Plaintiff calls a "hostage taking").

[55] The Nation also raises (S20 TR 12/25 *et seq*) the debate about the different views on constructive trusts, recovery from "different assets" (S20 TR 14/28 – 36) and issues about rendering a constructive trust unjust (S20 TR 16/17/3), etc. However, I believe that the pleadings are appropriate for the certification stage (as I announced at S20 TR 17/7-39), and the appropriate place for all of these arguments on constructive trusts is at the common issues trial.

[56] ***Soulos***, at paras 14, 15, 17, 19, 25, 33-4, 43, is Supreme Court authority for the proposition that, in addition to being a remedy for clearly established loss under the unjust enrichment cause of action, constructive trust, where "good conscience" so requires, "may apply absent an established loss to condemn a wrongful act and maintain the integrity of the relationships of trust". It applies both "where there is a wrongful act but not unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act". The conditions require: an equitable obligation; that the assets (S21 TR 13/21-33) in the hands of the defendant (or trustee) resulted from the defendant's breach of the equitable obligation; a legitimate reason for the plaintiff seeking a proprietary remedy to ensure others maintain their equitable obligations; and no unjust result to others.

[57] In ***Sun Indalex Finance, LLC v United Steelworkers***, 2013 SCC 6 at paras 78 and 227, the Supreme Court added the requirement that "a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an equitable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain". In this case that would be the capital funds, held for the Nation in the Kisoniyaminaw Heritage Trust.

[58] I find that the pleadings disclose a cause of action for a breach of fiduciary duty with a constructive trust remedy. Indeed, it is arguable that constructive trust is a cause of action itself (PCRB, paras 52 – 55, relying on ***Sun-Rype Products Ltd. v Archer Daniels Midland Company***, [2013] 3 SCR 545 at paras 39 – 41, ***Pro-Sys*** at paras 84 and 90-92, and ***Serhan*** at paras 107, and 121-3, such that it is not plain that constructive trust cannot be a cause of action.

e. Forms of Relief & Declaratory Relief

[59] At para 41 of the TASofC, the Plaintiff sought a number of forms of relief, some of which are not controversial, including: (para 41(e)) damages for breach of fiduciary duty (explained by the Plaintiff, at PCB paras 209-21, as related to those members of the class who don't cause a resulting effective limitations defence by the Nation, due to issues of

discoverability, fraudulent concealment[29], etc., such that (PCB, para 218) it is not plain and obvious that the class would not succeed; (para 41(d)) an accounting of the alleged unjust enrichment to the Nation of the detriment of the class due to the alleged failure to pay PCDs and Special Pays; (para 41(f)) tracing; (para 41(i)) punitive damages; and (para 41(j)) interest.

[60] More controversial are the claims for declarations: paras 41(b) – breach of fiduciary duty; para 41(c) – that the Membership Agreements are illegal, void or unenforceable; and, most significantly (paras 41(g) and (h)), that the Capital moneys of the Band in an amount equal to the withheld PCDs and Special Pays are held in a constructive trust and/or equitable lien for the benefit of the class and such Capital funds held in the Kisoniyaminaw Heritage Trust are held in trust for the class. These claims for declaratory relief are reserved for the common issues trial (S21 TR 18/39-41) to address potential Nation limitation defences.

[61] In response, the Plaintiff points out that s. 11 of the *Judicature Act*, RSA 2000, c. J-2, as interpreted by jurisprudence, makes declaratory relief available to satisfy a cause of action criterion for certification: ***Canada v Solosky,*** [1980] 1 SCR 821 at p. 830; ***Johnson v Workers' Compensation Board et al.***, 2007 BCSC 24, [2007] BCJ No 31 at para 48; ***Charmley v Deltera Construction Limited***, 2010 ONSC 7153 at paras 14-16; ***General Motors of Canada Limited v Abrams***, 2011 ONSC 5338, [2011] OJ No 4175 at para 75; and ***Smith v National Money Mart Company***, 2007 CanLII 186 (ONSC) at paras 22, 24 and 25.

[62] While this is for a common issues trial, not certification (PCB, paras 219-21), the Plaintiff submits (PCB, paras 194 -218) that the *Limitations Act*, RCA 2000, c. L-2, and in particular s.1(g)(i) and s. 4(1), do not bar the class from declaratory relief, simply put because a declaration is not a "remedial order", in that the Plaintiff claims that it is possible for "the fruits of the 'declaration' ... [to] be enjoyed without further legal execution or intervention (by ... [some] enforcement mechanism) ...": *inter alia*, ***Joarcam LLC v Plains Midstream Canada ULC***, 2013 ABCA 118, Alta LR (5th) 208 at paras 7 & 90; and ***Yellowbird***, at paras 46-7.

[63] The Nation joins issue with the Plaintiff on these issues at SNRB paras 229-33, to which the Plaintiff replies at PCRB paras 74-*et seq*, but that is left for the common issues trial justice.

f. Conclusion: Causes of Action

[64] As noted above, it is not necessary for the Plaintiff to prove her claim at this point in the class certification analysis. Instead, she need only establish that the TASofC discloses causes of action that the Defendant cannot show, beyond a reasonable doubt, cannot succeed. In my view the Plaintiff's claims for breach of fiduciary duty, unjust enrichment and constructive trust, and the associated forms of relief, are adequately established in the pleadings, and the Nation has not shown beyond a reasonable doubt that they will fail. The claim for waiver of tort, on the other hand, must fail for the reasons set out at paras 47-51 above.

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[29] Addressed by the Nation, at SNRB, paras 215-228. The submission is made by the Nation that the Plaintiff had not plead fraudulent concealment, but this was based on the then existing SofC, not the new TASofC, which at para 36(g) alleges equitable fraud. The Plaintiff replies (PCRB, para 65 - 73) that fraudulent concealment is not a cause of action, but rather a response to a limitation defence, not germane to a certification hearing. For the reasons noted, all of these arguments (including the Nations arguments at SNCRB, paras 313-20) are left for consideration by the common issues trial justice.

2. Identifiable Class

[65] Section 5(1)(b) requires an identifiable class of 2 or more persons, the jurisprudence stating certain further objective criteria and purposes, including

a) a clear, not necessarily perfect, definition of potential claim;

b) a rational relationship between the class, the cause of action and the common issues;

c) not unnecessarily broad nor under inclusive description of the class;

d) not merits based; and

e) describing persons bound by the result; and entitled to notice.

[66] None of these, except inclusiveness, are in theoretical dispute in this case. They therefore require no further discussion. See, *inter alia*: ***Bywater v Toronto Transit Commission***, [1998] OJ No 4913 (Gen Div) at para 10; ***Western Canadian Shopping Centres Inc. v Dutton***, 2001 SCC 46 at para 38; ***Chadha v Bayer Inc.*** (2003), 63 OR (3d) 22 (CA); ***Frohlinger v Nortel Networks Corp.***, [2007] OJ No. 148 (SCJ) at paras 21-22 & 24; ***Keatley Surveying Ltd. v Teranet Inc.***, 2012 ONSC 7120 at paras 159-67; ***Pearson v Inco Ltd.*** (2006), 78 OR (3d) 641 (CA) at para 57; ***Robinson v. Medtronic Inc.***, [2009] OJ No. 4366 (SCJ) at paras 121-146; ***Fehringer v Sun Media Corp.***, [2002] OJ No 4110 (SCJ) at paras 12-13; ***Boulanger v Johnson & Johnson Corp.***, [2007] OJ No 179 (SCJ) at para 22; **Ragoonanan** ***v Imperial Tobacco Inc.*** (2005), 78 OR (3d) 98 (SCJ); ***Silver v Imax Corp.***, [2009] OJ No 5585 (SCJ) at paras 103-7; and ***Warner*** at para 22.

[67] The proposed class definition (paras 223 – 4 of the PCB, as amended by paras 89 – 90 of the PCRB), "substantially similar" to that of Justice Mactavish in ***Samson Cree Nation v Samson Cree Nation (Chief and Council)***, [2009] 4 FCR 3, 2008 FC 1308, appeal dismissed 2010 FCA 165 (***Buffalo #2***)[30] is:

> All persons whose names were recorded on the "Band List", as that term is defined by the *Indian Act*, RSC 1985, c I-5, as amended, for Samson Nation maintained by the Minister of Indian Affairs and Northern Development (the "Samson Band List") at any time on or after June 29, 1987, and from whom Samson Nation withheld payment of *per capita* distributions and Special Pays at any point after the person's name was added to the Samson Band List, until the date of certification of the action as a class proceeding[31], or, where such person is deceased, the personal representative of the estate of the deceased person.

[68] The proposed subclass definition (paras 225 & 235 of the PCB, as amended by the PCRB) is in relation to objective criteria of persons who obtained Samson Nation recognition of their membership pursuant to a Membership Agreement:

> All Class Members who obtained Samson Nation's recognition that they were a member of the Samson Cree Nation pursuant to an agreement they executed or that individuals authorized to do so on their behalf executed whereby the Class

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[30] However, the Plaintiff asserts (PCRB, paras 3-4, 8-9 & 12 & 14-16) that her pleadings are not the same or substantially similar to the allegations *in* ***Buffalo #2***, such that ***Buffalo #2*** is not a binding precedent to deny certification in this case, and that that case was dismissed for failing to identify any common issues – see also PCB, para 102. The Plaintiff further noted (PCRB, paras 18-20) that, while ***Buffalo #2*** claimed declaratory relief based on constructive trust, in the alternative, no arguments were advanced on this issue or analysis made.

[31] Underlined parts added in the PCRB.

> Member released Samson Nation of liability for claims with respect to any distribution of money to them at any point after their name was added to the Samson Band List ("Membership Agreement"), from June 29, 1987 and until the date of certification of the action as a class proceeding, or, where such person is deceased, the personal representative of the estate of the deceased person.

[69] The Nation does not dispute that there is an identifiable class of 2 or more persons (paras 239 and 248, SNRB), but argues (SNRB and S20 TR 18/23-20/33) that the class and subclass definitions are "unnecessarily broad and defective", in that they did not have, *inter alia*, a temporal component, ending on June 1, 1995, as did Mactavish J. That has now been added by the Plaintiff's Reply Brief. Moreover, the Nation argues (para 247 SNRB), in effect, that there are some class members who have commenced and resolved their own litigation who would be over compensated (see allegation in SNCRB, paras 158-9, and, as related to the Plaintiff specifically, paras 173-8), and that it should be narrowed to the "membership issue" with respect to monies withheld. The latter, I believe, is in the definition to restrict the class to those for whom PCD and Special Pays were withheld. If necessary to restrict it to monies withheld due to membership issues cf. other reasons, it could still be done, by agreement of Counsel (see the suggestion of such agreements at S20 TR 21/24-6 & 23/39-24/3) before the Certification Order is finalized, by, for example, changing "withheld payment of" to "withheld, by reason of membership eligibility arising out of Bill C-31, of..." – under both examples, it only relates to those who were unpaid. However, even if there is an over broad definition, the definition can be changed within or after the common issues trial, or in the claims process and accounting of the claim, if liability is found. As the Band List and the record of payments should be what the Plaintiff calls "a readily ascertainable question of fact" (see PCB, paras 41 & 279), accounting should not seem to be issue.

[70] In the PRB, at paras 79 - 94, the Plaintiff agrees (para 80) on the need for an end date, which could be achieved, based on precedent[32], by making the date of certification the end date. However, the PRB argues against adding other limits as proposed by the Nation, because: it would then make the definition one of a merits-basis claim, which is impermissible; parties with more than one action would have to make a subsequent election on which they wish to pursue or opt-out; and that to narrow the claim (para 84, of the PRB) might exclude members who potentially have a claim. Thus, except for the end date, while the wording has some differences, I find that it is essentially the same in substance as in the class definition approved by Justice Mactavish, and appropriate – that is, those members on the Minister's Band list who have not been paid some of the PCD and Special Pays, for the class, otherwise owning, after a proper claims process and an accounting, and those who obtained recognition by the Membership Agreement, for the subclass, again with full accounting during any claims process after a finding of liability. That said, the Plaintiff, Bruno, makes it clear (para 19 of the TASofC) that her personal claim is from May 1, 1988 to June 1, 1995.

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[32] ***Berg v Canadian Hockey League***, 2017 ONSC 2608 at paras 155-162; ***Walter v Western Hockey League***, 2017 ABQB 382 at paras 94-97.

[71] The Nation further argues (para 249 SNRB) that the Plaintiff doesn't even propose a representative plaintiff for the sub-class part of the action and that has not established, under s. 7 of the *Act*, why the interests of the proposed subclass need to be separately represented.

[72] The Nation also argues that there may be other sub-classes or that the main class and any sub-class(es) might be reversed – Counsel for the Plaintiff asserted the rationale for proceeding as she has (S 21 TR 31/8-23) and I find that defensible and not meriting any change. Moreover, the common issues justice has the authority to create further sub-classes if and as necessary.

[73] As to the argument of the Nation that some class members may have debts owing to the Nation to off-set any claims (see, *inter alia*, S20 TR 20/15-21/2), Counsel for the Plaintiff stated that he was not aware of any such debts, but was prepared to consider adding the concept of "without juridical reason" (S21 -30/37 – 31/6). I leave it to Counsel to discuss further prior to the Certification Order being finalized.

[74] Returning to the issue of representative plaintiff, as I understand it, the Plaintiff is both a member of the class and the subclass (S19 TR 58/34-38), so, she is knowledgeable about[33] and willing and able (see PCB paras 41-45) to fulfill the role of representative plaintiff for both the class and sub-class, and nothing further is necessary, absent a conflict discussed *infra*.

[75] I find that the subclass is necessary, because it involves additional and different causes of action arising out of an alleged unconscionable transaction involving the Membership Agreements, rather than merely a breach of trust. I agree with the Plaintiff that interests of the subclass justify that they be separately represented by formally recognizing that its members have claims arising out of the Membership Agreements that raise common issues not shared by all of the class members. I further agree that, per s.7 of the Act, it is not necessary in every case in which there is a subclass for that subclass to be represented by someone other than the representative appointed for the main class. As the Plaintiff is a member of both the class and the subclass, it is appropriate that she be appointed as the representative of both.

[76] However, the temporal limits need to be added as I have done by putting in the date of first entitlement and the date of certification, as the end points, as agreed to by the Plaintiff in the PRB, after consideration.

3. Common Issues

[77] Section 5(1)(c) of the *Act* requires that "the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members", predominance being an issue on the next section, preferable procedure, under s. 5(2)(a).

[78] The Plaintiff has listed 16 class common issues and 4 subclass common issues attached as Schedules A and B to the PCB. The Nation raises issues with all, or almost all, of the proposed class and subclass common issues.

[79] The Plaintiff set out the basic principles under s. 5(1)(c) at paras 238-240 of the PCB, as follows:

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33 The Nation argues (see, *inter alia*, S20 TR 66/20-35) that a better representative plaintiff would be someone who actually signed a Membership Agreement, whereas Ms. Bruno was only 14 at the time and not actually knowledgeable about the facts surrounding those Membership Agreements. However, Counsel for the Plaintiff advises that no one else was prepared to come forward as a representative plaintiff – S21 TR 27/21-28/6.

> ... For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim. The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class. ... the commonality requirement [is] the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.
>
> An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member. However, the commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent; it is enough that the answer to the question does not give rise to conflicting interests among the members; success for one member must not result in failure for another.
>
> The common issue criterion presents a low bar. An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. Even a significant level of individuality does not preclude a finding of commonality. A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.

[80] The Plaintiff relies on the following authorities: ***Hollick*** at para 18; ***Dutton,*** at paras 39, 40 & 54; ***Ernewein v. General Motors of Canada Ltd.***, 2005 BCCA 540, leave to appeal to SCC ref'd, [2005] SCCA No 545; ***Merck Frosst Canada Ltd. v Wuttunee***, 2009 SKCA 43 at paras 145-46 and 160, leave to appeal to SCC refused, [2008] SCCA No 512; ***McCracken*** at para 183; ***Pro-Sy,*** at paras 106 & 112; ***Fehringer v Sun Media Corp.***, [2003] OJ No 3918 at para. 3, 6 (Div Ct); ***Vivendi Canada Inc. v Dell'Aniello***, 2014 SCC 1 at paras 44–46; ***Carom v Bre-X Minerals Ltd.*** (2000), 51 OR (3d) 236 at para 42 (CA); ***Cloud*** at para 52; ***203874 Ontario Ltd. v Quiznos Canada Restaurant Corp.***, [2009] OJ No 1874 (Div Ct), aff'd 2010 ONCA 466, [2010] OJ No. 2683 (CA), leave to appeal to SCC refused [2010] SCCA No 348; ***Hodge v Neinstein***, 2017 ONCA 494 at para 114; and ***Harrington v Dow Corning Corp.***, 2000 BCCA 605, leave to appeal to SCC ref'd [2001] SCCA No 21. The Nation adds reference to ***Dutton*** at para 48. I accept the Plaintiff's statement of principles as, at least the starting point, for this requirement under the Act. With these principles in mind, I will address each of the proposed common issues in turn.

[81] I should note here, collectively, as I do individually below, that, to the extent that certification is granted with respect to a common issue, it behooves Counsel to make any helpful changes to clarify and simplify the wording, by agreement, before the Certification Order is issued.

a. Common Issue 1: Validity of Bill C-31

[82] Common issue 1 is stated as: "Were the provisions of *An Act to Amend the Indian Act*, RSC 1985, c.32 (1st Suppl.) ("Bill C-31") of no force or effect during the Claim Period?" I find that this should not need to be a common issue in the sense that the Plaintiff should need only point to a statutory provision – here Bill C-31 - as the basis for its claim, and the presumption of validity (discussed below and see discussion at N8 TR 21/29-31 & 42/4-38) applies, absent a constitutional challenge in the case in question – see discussion at S20 TR 29/22-4. That challenge has not been properly or timely brought forward in this case. However, the Nation claims that the amendments made to the *Indian Act* under Bill C-31 are not constitutionally binding on them, and as I understand it, that is the reason the Plaintiff raises this as a common issue.

[83] I not only allow this to proceed as a common issue for this Action[34], but, as discussed further below, I have granted summary judgment with respect to this issue, in the context of this action. Absent a successful challenge by the Nation to date, and in view of the findings of other Courts (see the findings on this point by Hugessen J, in ***Martel v Samson Nation***, 2002 FCT 729 – also see discussion at S20 TR 69/24 – 72/10), the Nation is bound by the provisions of the *Indian Act* as amended by Bill C-31, with the result that the answer to this question is found to be "Yes".

b. Common Issue 2: Control of Membership

[84] Common issue 2 is: "Did Samson Nation have control of its own membership during the Claim Period?"

[85] I find, on this record (including the sworn statement of an officer of the Nation – see PCB, para 94), that the answer to this question is "No". No further discussion is necessary, with summary judgment resulting, as it pertains to this action, as discussed further below.

c. Common Issue 3: Royalty Calculations

[86] Common issue 3 was amended slightly at the hearing (see discussion at, *inter alia*, S21 TR 36/10 – 19), to read: "During the Claim Period, did Canada credit to Samson Nation's capital account… the Royalties that were calculated based on the number of members recorded on the Samson Band List, and interest paid thereon?" I would add the words "as maintained by the Minister," after "List" to distinguish from the list purported to be maintained by the Nation.

[87] I have denied summary judgment on this common issue, as discussed below.

[88] As the hearing proceeded, it became clear that the question was less about the royalties that Reserve 183A earned and paid to the Nation, but more about whether the class members were treated equally to other members of the Nation in respect of any PCDs and Special pays, whatever the source of funds. Nevertheless, to the extent that the question needs answering, it should be easily answered in substance, though the details of the credit and interest may be important. This may be relevant to determining any declaration or entitlement under the alternative causes of action.

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34 I use the term "this action" because while I intend this finding to be binding in this action, I am not making this decision of validity to respond to a future challenge in some other action - see discussion at S20 TR 33/7-31.

[89] The Nation again argues that royalties were not credited to any particular member, but to all members – see S20 TR 34/5-10. I have rejected this argument at other places in these Reasons, but the matter is quite simple. To the extent that royalties were assigned to the Nation, it is true that they were clearly for the benefit of all members. However, when PCDs and Special Pays were granted, by the actions of the Chief and Council, pursuant to sections 64(1)(k) and 66(1) of the *Indian Act*, they were paid to all members on the Nation's Band List, as maintained by the Minister, except (allegedly, and discriminatorily) not to some members of the class (see S20 TR 35/3-7). Some of these payments were apparently made to members of the sub-class through the Membership Agreements.[35] In any event, contrary to what the Nation argues (SNRB, para 257), it is arguably false that "no member has a personal right to that property or to a particular share of that property by virtue of the alleged breaches of the duties of the Nation to allocate them to those members".

[90] The Nation proposes to have common issue 3 reworded (see discussion at S20 TR 35/9 – 36/2) to remove the "*per capita* share distributions", to become, in essence: "During the Claim Period, did Canada credit to Samson Nation's capital account Royalties that were calculated based on the proportionate number of members recorded on the Samson Band List, as maintained by the Minister, in comparison to other Bands within the Maskwacis Bands?" There is also an issue with respect to the words "and interest thereon" – see discussion at S20 – TR 36/4-37/25. As to the former, in my view the result is the same to me, namely, the credit to the Nation was their proportionate share, based on population, in comparison to the three other Maskwacis Bands, from which, ultimately, *per capita* distributions were granted to individual Samson Nation members. The "interest thereon" may or may not be important to the common issue, but, if it is, it may require more analysis at the common issues trial. I leave it to Counsel to determine if the wording could be better and to advise of any agreements in this regard, before the certification order herein is finalized.

[91] The Nation claims (*inter alia*, at SNRB, paras 54-5 & 259) that all *per capita* distributions (PCDs) were not made from capital accounts arising from the royalties, but only from revenue accounts, the difference being described by the Nation at, *inter alia*, SNCRB paras 16-17, 38-43 and 52. Cody Bruno addressed this extensively in the Cody Bruno Affidavit, at paras 21 – 34. The Nation also asserts (at SNCRB, para 81) that, in May 1988, DIAND authorized the Nation to distribute revenue PCDs from the Revenue Account[36]. This is contradicted and discussed in the Plaintiff's Reply Brief (PCRB, paras 96 and 121). However, it is not clear to the Court that whether PCDs and Special Pays came from capital or revenue accounts makes any difference to the class claims herein. Moreover, it does not appear to have mattered to Justice Hugessen in ***Shirley Yellowbird v Samson Nation*** (SNCRB, paras 123-6; see also the Cody Bruno Affidavit at paras 52-56 & 680, which sets out some of the history of the difference accounts and their use over time). I believe that the best conclusion is that whether these moneys came from capital or revenue accounts, and the source of these accounts, is irrelevant to the ultimate issue, namely that the Nation allegedly discriminated against its legitimate members whose status originated through Bill C-31. See the discussion to this effect

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[35] Paras 2 and 3, and Exhibits A and B, of Bonnick-Kendell Affidavit #1 – see also, on the same basis, para 29 of the Bonnie Bruno Affidavit.

[36] It is clear, from, *inter alia*, the Cody Bruno Affidavit, paras 30 & 48-60, that all PCDs and Special Pays, where taken from capital or revenue accounts, and had to be and were authorized by both the Nation and DIAND.

at, *inter alia*, S19 TR 25/22-30/20 & S20 TR 50/30-38. To the extent that there are issues that remain in this regard, they can be determined at the common issues trial.

[92] Subject to further agreement between Counsel, prior to the finalization of the Certification Order, Common issue 3 will go forward to the common issues trial, as amended during the hearing, and above, in the following form: "During the Claim Period, did Canada credit to Samson Nation's capital account the Royalties that were calculated based on the number of members recorded on the Samson Band List, as maintained by the Minister".

d. Common Issue 4: PCD Obligations

[93] Common issue #4 was also amended during the hearing (see the discussion at *inter alia* S21 TR 36/21-30), to delete subparagraphs (i) to (iv), to the following effect: "Did the Defendants owe to the Class Plaintiffs, in relation to per capita distributions (PCD) paid to members of Samson Nation during the Claim Period, legal, equitable, fiduciary or other obligation(s)? If so, what are they?" I would qualify this somewhat with, after "they", the words "based on the pleadings herein".

[94] I have denied summary judgment on this common issue, as discussed below.

[95] The Nation acknowledges (SNCRB) that "it is not in dispute that a duly elected chief and council are fiduciaries and the band members are beneficiaries. Chief and council, thereby, have a duty of good faith to act in the best interests of all band members and in the management of the band's assets."

[96] Common issue #4 will therefore go forward to the common issues trial as: "Did the Defendants owe to the Class Plaintiffs, in relation to per capita distributions paid to members of Samson Nation during the Claim Period, legal, equitable, fiduciary or other obligation(s)? If so, what are they, based on the pleadings herein".

e. Common Issue 5: Breach of PCD Obligations

[97] Common issue 5 is: "Did the Defendants engage in conduct during the Claim Period which breached an obligation identified in (4) above? If so, in what way(s) did the Defendants do so?"

[98] I have denied summary judgment on this common issue, as discussed below.

[99] The Nation argues (SNCRB) that the proposed common issue is "vague", and must be "defined with a certain amount of specificity to prevent [the case] devolving into a series of individual issue trials". However, it is clear from common issue 4 that this relates primarily, if not exclusively, to the commonality of all "Class Plaintiffs", not individual claimants. For clarity, the words "to the Class Plaintiffs", could be added after "obligation", but that may be redundant – common issues are just that, common, not individual. Even so, the common issues trial justice could determine the commonality and, if there are individual issues that remain to be determined, could do so at or after the common issues trial (see the discussion at S19 TR 53/27 37). Therefore, absent further agreement among Counsel, common issue 5 will read: "Did the Defendants engage in conduct during the Claim Period which breached an obligation to the Class Plaintiffs identified in (4) above? If so, in what way(s) did the Defendants do so?"

f. Common Issue 6: Fraudulent concealment

[100] Common Issue 6 reads as follows: "Did the Defendants fraudulently conceal material facts relating to the causes of action asserted in this proceeding? If so, what facts and in what way(s) and during what period or periods of time did the Defendants do so?"

[101] The Nation (SNCRB, paras 262-270) repeats it claim that the Plaintiff has failed to adequately plead fraudulent concealment. The Plaintiff replies (PCRB paras 69-71 & 97; S19 TR45/25-47/6) that it is not required to plead fraudulent concealment as part of its claim, but, in effect, that the issue only arises in answer to the Nation's limitations defence. Moreover, the Plaintiff provides details (PCRB para 70) of its Response to Demand for Particulars regarding the allegations, and notes that the Nation filed its Statement of Defence, and Amended Statement of Defence, thereafter.

[102] The point remains that, based on the pleadings, including the Nation's Amended Statement of Defence, the allegation of fraudulent concealment is an issue requiring determination. As the Plaintiff asserts (PCRB paras 99 & 100), answering this common issue "will meaningfully advance the resolution of the question of whether section 4 of the *Limitation Act* is engaged in a particular case by addressing the first and second constituent elements required to establish fraudulent concealment" (perpetration of a fraud, and whether such concealed fraud concealed a material fact), leaving the element of discoverability to the individual assessment stage of the proceedings (if necessary), on the basis that "a common issue need not dispose of the litigation and [may] address only limited aspects of the liability question". Therefore, absent improved wording agreed to by the parties to clarify the intent herein identified, Common Issue 6 will go forward as: "Did the Defendants fraudulently conceal material facts relating to the causes of action asserted in this proceeding? If so, what facts and in what way(s) and during what period or periods of time did the Defendants do so?"

[103] This may also require the parties to determine, before the Certification Order is issued herein, whether they wish to add to or change the Subclass Common issues.

g. Common Issue 7: Enrichment

[104] Common Issue 7 is stated, per agreement by Counsel during the hearing as "If the Defendants engaged in conduct during the Claim Period which breached an obligation identified in (4) above, have they enriched themselves at the expense of the Class by their receipt and retention of all, or any part, of the Capital Contributions and gains related to them *and by their retention of the class members share of PCDs and Special Pays, paid or payable*, while denying the Class Members the financial benefits, by way of PCDs and Special Pays, of Band membership during the same period?" In oral argument, Counsel for the Plaintiff proposed (S21 TR37/9-16), that the words "receipt and retention of", be replaced by words to the effect of "being credited with"? I wonder aloud whether this should be "Capital" or should more properly be some combination of "capital or revenue"?

[105] The Plaintiff asserts (PCB, para 243), that establishing unjust enrichment can constitute a common issue: ***Fulawka v Bank of Nova Scotia***, 2012 ONCA 443 at para 106 and cases cited therein; ***Elder Advocates*** at paras 95-96; and ***Walter v Western Hockey League***, 2017 ABQB 382 at paras 59-60.

[106] The Nation's assertion (SNCRB, para 280) with respect to common issue 7 is merely that it is vague, and that it "provides no basis or particulars whatsoever in regard to how Samson

Nation allegedly breached Common Issue #4". However, clearly read, it follows any finding of a breach in common issue 4, to determine if there has been an enrichment to the Nation to the detriment to the class. This is clearly a common issue.

[107] I therefore approve the substance of this common issue, but leave it to Counsel to try to agree on more precise wording prior to the finalization of the Certification Order.

h. Common Issue 8: Juristic Reason

[108] Common issue 8 follows on the findings in common issue 7, namely: "If the Defendants have enriched themselves at the expense of the Class as in (7) above, has the Plaintiff shown that no juristic reason from an established category exists to deny recovery of all or any part of the Capital Contributions and all gains earned therefrom from the Defendants?"

[109] The Plaintiff asserts (PCB, para 244), relying on ***Garland***, at paras 43-4, that the juristic reason test places the onus on each party, in that the onus is initially on the plaintiff, but can be rebutted by the defendant. Brown J, in ***Babstock*** explains the latter point at para 70, referencing ***Moore*** at paras 57-58:

> The juristic reason element of the unjust enrichment analysis proceeds in two stages. First, the plaintiff must demonstrate that the defendant's enrichment cannot be justified by any of the established categories of juristic reason. If none of the established categories of juristic reason are present, the plaintiff has *a prima facie* case for unjust enrichment. At the second stage, the defendant can rebut the plaintiff's *prima facie* case by showing that there is a residual reason to deny recovery.

[110] The Nation asserts that the juristic reason, especially as it relates to the Membership Agreements (which, in relation to subclass issue 1, I have found in the summary judgment sections of these Reasons to be illegal, void and unenforceable, except as to accounting), can only be determined on an individual basis. In light of my findings on summary judgment, I need not consider the issue further, other than to reference the arguments that I considered leading to that conclusion.

[111] While there may well be individual accounting issues to be resolved for some subclass members following from the Membership Agreements, the Plaintiff does not concede (PCRB, para 116) that the legal effect of the Membership Agreements can only be resolved on an individual basis, and references the subclass common issues. In this regard, it is noted that the Plaintiff earlier pointed out (PCB, para 70), that in ***Buffalo #1:***

> On December 11, 2002 Hugessen J issued Reasons for Order dismissing Samson Cree Nation's action and granting Andrew Mark Buffalo's application for judgment. Hugessen J ruled that a purported settlement agreement that Samson Cree Nation had entered into with Mr. Buffalo – identical to the agreements Mrs. Bruno's mother signed on her behalf and on her brother Shane's behalf -- was ineffective for want of consideration and had been obtained in breach of the fiduciary obligation Samson owed to Mr. Buffalo as a Band member to deal with him fairly.

See also SNCRB para 113-4, regarding the same matter.

[112] Recognizing that there may be an internal onus (in respect of which the Plaintiff must prevail), I approve the common issue 8, as above, subject to the capital or revenue issue.

i. Common Issue 9: Residual Defences

[113] Common issue 9 is: "If there is no juristic reason from an established category of law, have the Defendants established as a matter of law any residual defence which may constitute a juristic reason for their enrichment?"

[114] As no arguments were forthcoming from either party on this issue, it will go forward as drafted.

j. Common Issue 10: Constructive trust

[115] The Plaintiff asserts (PCB, para 246) that common issues 10 – 13 relate to the Class Plaintiff's alternative waiver of tort claim (now denied as a valid cause of action, based on ***Babstock***) and entitlement to recover under restitutionary principles. Although now perhaps irrelevant in the context of the failure of the waiver of tort cause of action, I should note that the Plaintiff (PCB, para 246) also relied on ***Anderson v St. Jude Medical Inc.***, 2010 ONSC 77, [2010] OJ No. 8 at para 27, for the proposition that commonality arises in waiver of tort claims and that it is better to determine such matters on a full factual record. See also ***Heward v Eli Lilly & Company***, 91 OR (3d) 691 (Div. Ct.), 295 DLR (4th) 175 at para 31.

[116] The Plaintiff also explains, referencing ***Soulos***, at paras 34 & 50 (PCB, para 248), the logic of common issue 10 as follows:

> If it is found, for example, that Samson wrongfully acquired the Capital Contributions by fraud or breach of fiduciary duty, there may not be any need to investigate the individual circumstances of class members or sub-classes thereof in order to determine whether the remedy sought of constructive trust regarding the Capital Contributions should be imposed....

[117] Common issue 10 reads as follows: "Has the Plaintiff shown that the individual circumstances of class members or sub-classes thereof are not relevant to the determination of whether the remedy sought of constructive trust and/or equitable lien regarding the Capital Contributions should be imposed?" I have denied summary judgment on this common issue, as discussed below. Thus, common issue 10 will go forward to the common issues trial as stated.

k. Common Issue 11: Remedies in law or equity

[118] Common issue 11 follows, mirroring (PCB, para 249) ***Heward***, at para 25, and incorporating logic from ***Serhan***, at para 24: "If one or more of the common issues (1) through (10) are answered in the Plaintiff's favour, to what remedies in law or in equity are the Class entitled?"

[119] This common issue 11, as originally referenced, sought to determine "are the Defendants liable on a restitutionary basis: (i) to account for disgorgement". I raise this because ***Babstock*** contained a number of comments on disgorgement (sometimes – e.g. paras 2, 3, 23-25, 27, 29, 57-60 & 67) referenced therein, and other potential remedies, as a "gain-based award", in that

case "quantified by the profit" earned, whereas in the case at Bar, it would be in reference to PCDs and Special Pays not paid.

[120] The Nation repeats its argument (SNCRB, para 287) that constructive trust is not a cause of action. I have already dealt with that above - see discussions in reference to ***Sun-Rype*** and other cases.

[121] The Nation also argues (SNCRB, para 288) that for a constructive trust, the Plaintiff would have to establish that the deprivation came from the same account as the expenditure. The Plaintiff argues (PCRB para 122) that there is no authority for that proposition. As noted earlier, if there is any further argument to the point, it seems at odds with the aforementioned authorities, but could be raised at the common issues trial.

[122] Further, the Nation argues (SNCRB, para 289) that there may have been some duplicate compensation and thus the doctrine of "clean hands" prevents recovery on a constructive trust basis. My answer is that this would be a merits issue for the common issues trial, a simple matter of tracing and accounting for what is owing and what has been paid. Limitation arguments were also raised by the Nation, but I have dealt with those elsewhere in these Reasons.

[123] In the result, common issue 11 will go forward as stated, with the redaction proposed by the Plaintiff in her substantive Supplemental Brief of October 16, 2019, unless Counsel agree on a better way to articulate it.

I. Common Issues 12 – 14: Constructive trust relief

[124] Common issues 12 – 14 relates to the potential relief that might arise from a finding of a constructive trust in relation to the Kisoniyaminaw Heritage Trust:

> 12. Should the Trustees be declared a constructive trustee for the benefit of the Class – and if so in what amount, and for whom are such proceeds held?
>
> 13. Is the relief, if any, to which the Class Members may be entitled capable of assessment on an aggregate[37] basis, and, if so, what amount should the Defendants disgorge/hold for the benefit of the Class, for whose benefit and why?
>
> 14. Does the conduct of the Defendants justify an award of punitive or exemplary damages? If so, what amount or amounts are to be awarded to members of the class, sub-classes or individuals thereof?

[125] Counsel for the Plaintiff summarized the Plaintiff's position on these proposed common issues at S19 TR 48/3 – 49/4: the issues focus on the Defendants' conduct across the class and subclass; the Plaintiff relies on ***Anderson*** as set out in common issue 10; reference is made to s. 30 of the *Act* and ***Jeffery v London Life Insurance***, 2016 ONSC 5506 at paras 66 – 72, (PCB paras 250-51) as to monetary relief, being less restrictive than damages, thus seeking

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[37] The Plaintiff (at PCB, paras 276-7), notes that, in addition to restitutionary relief, beyond damages, being available for only a part of a class, sections 30(2) and 31-3 of the Act "afford the court a variety flexible mechanisms for receiving and resolving individual claims in order to give effect to an aggregate award", although a class action may still be preferable when an aggregate award is not available on a class wide basis, and some individual assessments are necessary. The Nation says, however, that, relative to the Litigation Plan, aggregate damages have to be dealt with after both the common issues and individual issues are decided - the Plaintiff proposes after the common issues trial at para 59 of Exhibit E of the Bonnie Bruno Affidavit, but also proposes some relief at the end of the common issues trial at para 61 – see SNCRB, paras 294-6, as discussed at S20 TR 77/29-78/12.

restitutionary relief in the form of a constructive trust, a proprietary remedy; and reference to cases supporting punitive or exemplary damages against the Defendants for their conduct.

[126] The Nation raises the issue of the Trustee not being a party, but the Plaintiff proposes to bypass this issue by the evidence that the Trustee has agreed to the result. If necessary, the Plaintiff can add the Trust in as a party, as discussed below.

[127] The Nation again raises limitation issues (SNCRB, paras 295-6), saying that, in the result, it would not "be appropriate to award any remedy" prior to finding liability in regard to the limitation issue. However, as otherwise noted herein, for a simple declaration relief, not restitution, there may not be a limitations issue, because of the Plaintiff asserts that she does not seek a remedial order. However, even if liability is ultimately denied, the quantification of same is relevant, so as not bifurcate the remedy from the liability.

[128] Further substantive issues relating to aggregate and punitive/exemplary damages (PCB, paras 250-6, and 257 respectively and S19 TR58/8-32; see the Nation's position on substantive issues needing to be resolved before a damage assessment can be determined; and see also S20 TR 58/29-59/35), can be argued at the common issues trial, and need not be addressed here.

[129] Accordingly, common issues 12 – 14 will proceed as proposed.

m. Common Issues 15 and 16: Interest and costs

[130] Common issues 15 and 16 relate to interest and costs:

13. Should the Defendants pay prejudgment and post-judgment interest, and at what annual interest rate?
14. Should the Defendants pay the costs of determining any individual issues or of administering and distributing any judgment? If yes, who should pay what costs, why, and in what amount?

Counsel for the Plaintiff discusses these at S19 TR 49/4-53/1.

[131] The Nation argues that these issues should be determined after the resolution of all common and individual issues. However, I find that there are factual issues relating to whether the amounts claimed have been, or should have been, accumulating interest, and there may be issues to what, if any, interest was actually collected/paid and if not, what are the appropriate principles is to liability, rate and amount.[38] The parties can raise their substantive arguments at the appropriate time. For example, if the Plaintiff class is entitled to a remedial order or declaration as to a constructive trust on monies to which its members are entitled, which are held in trust with interest, there would be an argument that amount of money and the interest earned, would be to the entitlement of the Plaintiff class. Otherwise further arguments could be made as to whether interest should follow in law, and at what rate[39]. The common issues trial is the best place to determine these issues. Thus, common issue 15 will go ahead as drafted, absent any wording changes agreed by the parties.

[132] However, the matter of costs – when found, directed to be paid, and in what amount – are always a matter that can be addressed after any decision in a matter, including this certification

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38 See, for example, PCB, para 41. See also paras 23-25 of Watson Affidavit #1. Note that s. 61(2) of the *Indian Act* states that the interest rate is set by the Federal Cabinet.

39 Again, see para 25n of Watson Affidavit #1.

decision, and that is left to the discretion of the individual decision maker in this certification proceeding or at the common issues trial, after submissions from the parties. The parties can make those submissions at the relevant time(s). However, costs are not a common issue, and thus proposed common issue 16 is struck.

n. Subclass Common Issues

[133] I will deal with these as one consideration. A subclass under s. 1(o) of the *Act* "means persons who are class members but who also make up a subclass of the class members ... [who] have a claim that raises common issues that are not shared by all the class members...".

[134] The Plaintiff proposed the following subclass common issues:

1. Are the Membership Agreements illegal, void or otherwise unenforceable?

2. Was Samson Nation's conduct in entering into the Membership Agreements unconscionable conduct towards these Class Members?

3. Did the Membership Agreements conceal the fact that Samson Nation's wrongdoing towards these Class Members had occurred?

4. Did Samson Nation knowingly fail to inform these Class Members of Samson Nation's wrongdoing towards them and to account to them for their share of *per capita* distributions paid to members of Samson Nation during the Claim Period?

[135] Below, I have granted summary judgment on subclass issue #1, but denied it on subclass common issue #2.

[136] The Nation raises concerns about these issues requiring only individual, not common, consideration, and that no representative plaintiff has been suggested for the subclass. I have dealt with the latter earlier, and will add additional comments later.

[137] While individual issues may require resolution for this sub-class – the Nation says (SNCRB, para 306-7) "they will necessarily require at least some individual factual and legal analysis" – I find that is not a necessity or a certainty, as it appeared Justice Mactavish thought it was required in ***Buffalo #2***, at paras 128-9. However there, unlike here, there were no subclass common issues proposed. Mactavish J. says "will require individual assessment", whereas I say "may require". Thus, I find that any issues approved for the common issues trial, must, before individual consideration, relate to those issues that might be solved common to all subclass members. The Plaintiff says (PCRB, at para 131) that these are issues that "may be resolved on a common basis without individualized evaluation" – I agree, but ultimately it is for the common issues trial justice to determine.

[138] There are, however, a couple more matters to consider. As to subclass common issue 1, the summary judgment decision in these Reasons makes it clear that this common issue consideration is before any individualized assessment.

[139] As to common issue 4, it has two distinct parts that should be separated.

[140] Thus, subclass common issues 2 and 3 remain as proposed, but common issues 1 (for which summary judgment is issued below) and 4 are amended as follows:

1. Independent of any individual subclass member considerations, are the Membership Agreements illegal, void or otherwise unenforceable?

4. Did Samson Nation knowingly fail to:

a. inform these Class Members of Samson Nation's wrongdoing towards them; or;

b. account to them for their share of *per capita* distributions paid to members of Samson Nation during the Claim Period?

4. Preferable Procedure

[141] Under s.5(1)(d) and (2) of the Act, the Court is to determine whether the proposed class proceeding would be the preferable procedure for the fair and efficient resolution of common issues – in other words, whether it would be an appropriate method of advancing the claims of class members and better than other methods of individual claims even with joinder, consolidation, etc.: ***Markson v MBNA Canada Bank*** (2007), 2007 ONCA 334, 85 OR (3d) 321, [2007] OJ No. 1684 (CA), following ***Hollick,*** conducted through the "lens of judicial economy, behaviour modification and access to justice": ***AIC Limited v Fischer***, 2013 SCC 69, at paras 24-38; ***Cloud v. Canada*** (2004), 73 OR (3d) 401 (CA) at para 52; ***T.L. v Alberta (Child, Youth and Family Enhancement Act, Director)***, 2009 ABCA 182 at para 26; ***1176560 Ontario Limited v The Great Atlantic and Pacific Company of Canada Ltd.*** (2002), 62 OR (3d) 535 at para 45 (SCJ), aff'd (2004), 70 OR (3d) 182 (Div Ct); and ***Musicians' Pension Fund of Canada (Trustee of) v Kinross Gold Corp.***, 2014 ONCA 901.

[142] The Plaintiff adds (PCB, para 272) that findings of an identifiable class and common issues creates a basis for a finding of class proceeding being a preferable procedure, consistent with the goals of the *Act* – access to justice, judicial economy and behavioural modification (also see discussion at PCB, para 284), unless the defendant provides evidence (not a mere assertion) that it is not a preferable procedure – there is no evidence from the Defendant here.

[143] The Plaintiff also asserts evidence of her knowledge of the class (para 36 of the Bonnie Bruno Affidavit) that this is the preferable procedure "to provide access to justice to a vulnerable group of people who have been treated inequitably and unconscionably by the Samson Nation", and that "most of the Class Members lack the individual resources, the initiative and the sophistication to pursue legal action on their own", and "are intimidated by the legal process and fear reprisal from Samson Nation and condemnation from the Samson Cree community at large". This is consistent with evidence that no one, other than the Plaintiff, came forward to volunteer as class representative. Counsel for the Nation took great exception to this assertion (S20 TR 62/28-64/41) but it is some evidence that purports to be based on fact, although untested by cross-examination. Further reasons for this being the preferable procedure are asserted at paras 37-40 of the Bonnie Bruno Affidavit.

[144] The Court is to consider: the nature of the common issues and their importance to the claim as a whole (which I have analyzed above); what individual issues remain after determination of the common issues – that will depend on the common issues trial findings; the relevant factors in s. 5(2) – see below; the complexity and manageability of the action as a whole; alternative ways of proceeding; furtherance of the objectives of the Act; and the rights of the parties: ***AIC*** at paras 27-38, & 48-9; ***Hollick*** at para 28; ***Cloud*** at para 52; ***Chadha v Bayer Inc.*** (2003), 63 OR (3d) 22 (CA); ***Musicians'*** at para 125; ***Amyotrophic Lateral Sclerosis***

Society of Essex County v Windsor (City), 2015 ONCA 572 at para 62; and ***Caputo v Imperial Tobacco Ltd.***, [2004] OJ No 299 (SCJ) at paras 62-7.

[145] I will first address some of these on a macro level, and then follow with a micro analysis under s. 5(2).

[146] The only realistic alternative in these circumstances is individual actions by each claimant. However, this alternative offends the access to justice objective of the Act, and would not be fair for "effective redress" for other members of the class, which may be particularly so for members of the Nation, especially when the very Nation to which the class members are also members is vigorously defending and intransigent in its position against all claimants who have come forward to date, based on cases cited (see PCB, para 282, 287, 289 and 291). Thus, it is obvious to me that, to reference the passages from ***AIC*** above, there are economic, psychological and social barriers to access to justice, preventing a just and effective remedy for the claims of the class, absent this class proceeding, which can address them. Moreover, no other "reasonably available means to resolve the claims" has been established, or even proposed, by the Nation – and, I agree with the Plaintiff (para 272 of the PCB) that a mere assertion that other procedures may exist does not make those procedures preferable. Additionally, judicial economy does not accord with the individual action alternative (PCB, paras 283 -5). In these contexts alone, I find that a class proceeding is the preferable procedure.

[147] Behaviour modification is also an important consideration, as argued by the Plaintiff (PCB, paras 288 and 291-4).

a. Common Issues Predominate

[148] As found by Mactavish J in ***Buffalo #2***, there *might, at one time, have been* (but, I believe not definitely "are", as she states) individual issues, in the subclass, as to the enforceability of the Membership Agreements (but for the summary judgment in these Reasons concluding the matter otherwise), and limitations issues, if the latter arises. Counsel for the Nation relied on this extensively in both his response brief and oral argument (see S20 TR45/3 – 20; 62/11-17 & 65/2-11). However, it is clear (see 2010 FCA 165, paras 4-7) that Mactavish J primarily dismissed the certification because the plaintiff there had failed to state any common issues or provide a litigation plan, and she only determined that individual issues predominated because of the plaintiff's failure to identify any common issues made the "task of assessing this ... 'virtually impossible'", aided by the defendants' assertion of individual issues, and, in the result, it all added up to lack of establishment of a suitable representative plaintiff. Nevertheless, there is practical utility in deciding common issues, even if significant individual issues remain, when there are, as I find here, the resolution of the common issues will significantly advance the action – in other words, the determination of common issues need only advance the case, and need not decide it completely: ***Warner*** at para 35; ***Cloud*** at para 74-7; and ***Metera v Financial Planning Group***, 2003 ABQB 326 at paras 69 & 72. See also the discussion at S20 TR 44/36-45/1 and 46/5-7 regarding judicial economy (and access to justice) by advancing the claim, without resolving all aspects of it – i.e. moving the claim "part way up the ladder". Moreover, there are procedures to handle same: s. 28 of the *Act*. Other than the Membership Agreement issue (later determined herein by way of summary judgment), there are almost exclusively common issues to this class proceeding, so the answer, in main, to s. 5(2)(a) is "Yes", common issues predominate over individual issues. As to any other individual issues remaining for the main class, if liability is found on the common issues, I see that no individual issues would

remain that could not be handled by an individual claim process, with details based on the records of the Nation and DIAND (some of which are already on the record in this proceeding).

[149] The Nation also argues (SNCRB paras 326-41) that individual issues predominate over common issues, including discoverability and enforceability of "various release agreements", relying upon a number of cases. Quite simply, on the record in this case, while individual issues may come to have a role, there appears to be an identical or similar systematic way in which the Nation pursued both the constitutional issue regarding Bill C-31 and Membership Agreements (see the arguments of Plaintiff's Counsel at S19 TR 45/16-23). I do not agree with the Nation that individual issues will necessarily predominate as to liability, although there may be an accounting individually in any claims process. Thus, this does not detract from my finding that a class proceeding is the preferable procedure in this case, having regard to all considerations. For example, it may be open to the Plaintiff, in the common issues trial, to prove that the alleged fraud was identical amongst all the class plaintiffs, was committed on a class wide basis, and was relied upon by all class plaintiffs.

b. Interest in Individually Controlling the Prosecution of Separate Actions

[150] The Nation addresses this at SNCRB paras 342-7, on the basis of the significant amount of each claim, and the "potential conflicts" between class plaintiffs, giving the representative plaintiff a conflict of interest. However, as discussed under the next heading, there is no evidence that any "significant number of the prospective class members have" any real interest, never mind a "valid interest, in individually controlling the prosecution of separate actions', although there have been some such historical actions prior to 2008 (SNCRB para 348). Thus, the answer to the question in s. 5(2)(b) is "No".

[151] Limitation issues are raised by the Nation, along with the assertion of a need for individual assessment, as negative to a class proceeding being the preferable procedure. However, such individual assessment may not be necessary (or only necessary as a matter of accounting during the claims procedure), if the Plaintiff succeeds on the constructive trust argument at the common issues trial. Therefore, at this time, I don't find it fatal to the class action proceeding due to unpreferable procedure. If that were to change during the common issues trial, the justice hearing that can make the necessary decisions.

c. Claims Subject of Other Proceedings

[152] The class proceeding in ***Buffalo #2*** was found not to be preferable, on the basis (paras 133 – 9) that the individual claims might be near $200,000, thus "substantial, such that individual prosecution is indeed a viable option", and that individual members might have an interest in individually controlling the prosecution of separate actions. I do not agree that the former reason is a viable answer for judicial economy – indeed, the test is not the amount of a claim – in some class proceedings the individual claims are in the $millions – the test is judicial economy, access to justice and behavior modification. Moreover, there is no evidence of other individual actions post- 2008. However, as the Plaintiff argues, and I have found herein, the main reason that ***Buffalo #2*** did not find a class proceeding preferable was the plaintiff there did not identify any common issues.

d. Other Means Less Practical and Efficient Means and Administrative Issues

[153] Having regard to the nature of the class, I find that this is not an appropriate case for a representative action or test case (SNCRB, paras 351-6). Moreover, whatever the resulting issues, I am confident that the Representative Plaintiff, aided by competent Counsel, would not result in "significant case management difficulties" – the evidence from the Plaintiff on this point, and the steps taken, is summarized in the PCB, at paras 123-7.

[154] To the extent that individual issues need not be considered or predominate, which I find to be the case, at least at this stage, I do not find that this class proceeding is less practical and less efficient, in relation to s.5(2)(d) – indeed, it is the opposite.

[155] I do not find that there is any evidence the administration of the within class proceeding would create greater difficulties than other means, so as to suggest a class proceeding would not be preferable.

e. Conclusion: Preferable Procedure

[156] In the end result, I agree with the Plaintiff (PRB, para 141) that "any individual issues that may need to be resolved ... do not predominate over the common issues and even if they did a class proceeding would still be preferable way of deciding them".

5. Representative Plaintiff

[157] Section 5(1)(e) of the *Act* requires fair and adequate representation, a workable litigation plan and no conflict of interest in the context of common issues. The Plaintiff discusses these factors at PCB, paras 296-9, her motivation to pursue them at PCB, para112, and her ability to fulfil them (for both the class and subclass) at PCB, paras 300-3. See also the discussion of the plan, and its content at para. 34 and Exhibit E of the Bonnie Bruno Affidavit.

a. Fairly and Adequately Represent

[158] The qualities of the Plaintiff as a representative plaintiff are documented in her affidavit filed June 29, 2017. They include: she has retained competent counsel (*inter alia*, paras 6, 26 & 46); she has achieved post-secondary education (para 14); she has work experience (para 16); she has secured the services of her counsel through a contingency fee retainer (para 18); and there was no one else who was interested in pursuing a class action, when the ***Buffalo #2*** action as a class proceeding failed in Federal Court (para 26).

[159] The Defendants' allegation that the Plaintiff is not an appropriate representative plaintiff because she was a minor when the Nation entered into the Membership Agreement with her mother, Ms. Rowan, such that she has no direct knowledge, is disputed by the Plaintiff (PRB, para 144), and, even if so, is extremely disingenuous. The fact that the Membership Agreements were found by Justice Hugessen to be unconscionable, means that the Nation's conduct in the past in trying to reduce its liability as a result of failing to comply with the amendments to the *Indian Act* under Bill C-31, makes it the author of is own complaint.

[160] Moreover, with credible Counsel, she has already mailed notices to 360 persons (of which 82 were returned) believed to be included in the class of the ***Buffalo #2*** action, and set up a website and phone number which resulted in 127 other contacts of potential class members (Bonnick-Kendell Affidavit #1, paras 21-24; Bonnie Bruno Affidavit, para 31).

b. Workable Plan

[161] As I found in ***Windsor v. Canadian Pacific Railway Limited***, 2006 ABQB 348 at para 162, the litigation plan need not be perfect, but must be a workable method of advancing the proceedings, that is capable of being implemented.

[162] The Plaintiff asserts (PCB para 118 and PCRB, paras 145-6) that the Plaintiff's Litigation Plan (Exhibit E to the Bonnie Bruno Affidavit), prepared by class Counsel, does address: individual issues at paras 60, and 79-83; notice at paras 34(4) to 35 and Schedule A; discovery at paras 25-31, and 37-39 (which may need some refinement, as seen in the discussion at S20 – TR 75/11); and common issues at paras 40-58. The Nation was concerned (S20 TR 66/37 – 67/29) about issues that have since disappeared (third party claim and, with these Reasons, the constitutional issue) and the role of Canada in document production, individual document production (which Counsel for the Plaintiff resisted – S21 TR 39/12-40/4 & 41/17-33), and expert witnesses, all matters which Counsel can now better address, with these Reasons in place. As such I do not find that the Litigation Plan, as proposed, is fatal to the action being certified, but it can be amended as Counsel agree, or on specific application by the parties.

[163] If a more workable plan is available, there are many precedents that I do not need to trace to demonstrate that it is always open to the parties to work together, under court supervision, to make it better, most specifically between now and the filing of the Certification Order.

[164] If there are litigation plan issues in respect of items 9 – 14 of the Plaintiff's Amended Application of July 25, 2017 that flow from certification (discussed at S20 – TR 78/31-80/39), the parties can make such changes as are necessary in the Litigation Plan as are included in the Certification Order, that are drawn to the attention of the Court, or can discuss same with the Court for direction.

[165] While other minor issues were raised by the Nation with respect to some specific parts of the litigation plan (e.g. para 36(2) regarding restraint of communications – responded to by the Plaintiff S21 TR 41/1-7), the Plan is approved as it is, subject to agreements of Counsel for changes before the Certification Order is filed, or on application by the parties at any time.

c. Conflicts

[166] The Plaintiff denies the Nation's assertion that there is a conflict between the Plaintiff and her mother, Ms. Rowan, but even if so, there is no resulting conflict between the Plaintiff and other prospective class members in respect of the common issues. I find that the Nation has not established a conflict under the Act.

[167] The bottom line is that I find that the Plaintiff meets the requirements to be appointed as representative plaintiff for both the class and the subclass, which I do.

6. Other Considerations

[168] The Nation argues (SNCB, paras 378 – 383) that: the Plaintiff's claim is based on hearsay evidence from other proceedings, and that the Nation is thus "barred from any meaningful cross-examination on such evidence"; and that necessary defendants have not been added. The Plaintiff did not address these arguments in its written submissions, but does note (PCB, para 5) that none of the deponents in the affidavits in support of the action were questioned on their affidavits. However, in the absence of any applications being brought by the Nation to address the procedural issue of cross-examination, I find that this issue is not fatal to certification.

[169] As to the claim that there may not be unjust enrichment to the Nation, because it may owe other Bands parts of the royalties, that is, at best, a defence by the Nation against the Plaintiff, and is entirely in the Nation's control, rather than a need for the Plaintiff to bring in those Bands as third parties.

[170] As to the terms of the Trust Deed relating to the Kisoniyaminaw Heritage Trust, if the Plaintiff finds that the Trust is a necessary party for recovery, they can seek appropriate relief at the appropriate time. In the interval, the Trust has been left out as a party, on the undertaking to be bound by what the Court orders (para. 33 and Exhibit D of the affidavit of the Plaintiff, filed June 29, 2017; see 19 TR 56/8-57/16 & 90/37-92/19).

[171] I find, in the result, that none of these other considerations or issues are prejudicial to certification – just stones being thrown by the Nation to impede the class from obtaining a remedy based on the Nation's alleged failure to obey the law.

7. Supplemental Submissions

[172] After all hearings had been concluded in November 2018, apparently prompted by the Court's letter to the parties on October 4, 2019, discussing the timing of a release of the reserved decision in this case, and the Court's request to advise if there had been any productive settlement discussions, or any change of circumstances, the Plaintiff, on October 16, 2019, filed additional submissions (Supplemental Substantive Brief) and later on October 31, 2019 filed a Supplemental Leave Brief, seeking leave for that purpose. Pursuant to directions from the Court, the Nation Response to the Plaintiff's Supplemental Leave Application was filed on November 12, 2019 and the Plaintiff filed a Reply Supplemental Brief on leave. Subsequently, the Court advised that it was unable to decide the leave application in the absence of discussion of the substance and, pursuant to directions from the Court, the Nation filed is Supplemental Response Brief on March 3, 2020, and the Plaintiff filed her Supplemental Reply Brief on June 9, 2020.

[173] There are two issues here: (1) the right to make such supplemental submissions; and (2) the substance of the supplemental submissions. However, before I get there, I will signal my decisions on these two issues, considered in the context of the decision as rendered above.

a. Right to Make Supplementary Submissions

[174] In this case, I exercise the broad discretion I have under the jurisprudence applicable to re-opening the case under Rule 9.13, to permit the filing the substantive Supplemental Submissions by both parties on the record, not because they are necessary for this certification application but rather for the purpose of the merits decision in the common issues trial, where the real battle will play out.

[175] Generally[40], Rule 9.13, and similar rules, are used to file evidence and material that was not and could not have been known, at the time of the original submissions. However, here that is not the case but rather one where Counsel for the Plaintiff did not want to file new evidence, but did want to file further, already existing, case law to buttress arguments on the highly contested, and, frankly, not completely clear law on the availability of a declaration for a constructive trust. It is in this vein that the authorities and arguments advanced by the parties will be useful to the merits as determined in the common issues trial, as set out below.

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[40] But note the difference between the rules applicable to trial, compared to appeal, courts and that Rule 9.13 does not apply to appeal courts: ***Behm***, at para 20.

[176] Specifically, on October 20, 2019, Counsel for Plaintiff wrote to the Court advising that there

> ... is a change of circumstances... concern[ing] the recent development that the Plaintiff is requesting the Court's permission to supplement[41] the Plaintiff's legal submissions, specifically with respect to the availability of a constructive trust in this action.

He added that:

> ... these further submissions are necessary to identify for the Court certain legal authorities that[42] the Plaintiff's counsel was not aware of in November 2018, has only become aware of in the interval since then, and that the Plaintiff contends are of immediate relevance....

[177] Especially in the way in which I have dealt with this issue herein, this is not the case in which to either summarize the law on or provide conclusions relating to the issue of opening-up a case for further legal submissions. However, I will list the authorities provided, in some cases with a word or two of the principle involved.

[178] The Plaintiff relies upon the following authorities: *Judicature Act, RSA 2000, c J-2,* section 8; *Act,* sections 6(1), 13(1) (broad procedural discretion to ensure the fair and expeditious determination of the proceeding) and 41; *Alberta Rules of Court,* Alta Reg 124/2010, Rules 1.2, 1.3, 1.4, 2.9,.4.14 and 9.13; ***Warner v Smith & Nephew Inc,*** 2016 ABCA 223 at para 9 (purposive approach to the *Act*); ***Kristal Inc. v Nicholl and Akers,*** 2006 ABQB 168 para 82 (*Act* to be applied in a flexible and liberal manner, seeking a balance between efficiency and fairness); ***Starratt v Mamdani,*** 2017 ABCA 92 at paras 8-9 and ***Ashraf v SNC Lavalin ATP Inc.***, 2017 ABCA 95 at para 4 (substantial deference to the exercise of judicial discretion of a case management justice, particularly in the context of class proceedings) ; ***Evans v The Sports Corporation,*** 2011 ABQB 478 at para 15 (extremely broad authority to do what is correct, but dealing with a re-opening a trial after judgment, makes it more available before judgment); ***Paniccia Estate v Toal,*** 2012 ABQB 11, aff'd 2012 ABCA 397 at paras 35-9 (interpreting Rule 1.2 in relation to a fair and just resolution of disputes in a timely and cost effective way, the benefit to an appeal court to have a "more fully developed trial level consideration for the facts and law, and discussing factors under Rule 9.13 – see also ***Behm v Hansen***, 2019 ABQB 813 at para 20; ***Westpoint Capital Corporation v Solomon Spruce Ridge Inc***, 2017 ABQB 497 at para 59 (avoidance of the possible risk of incomplete argument and analysis, or oversight or potential error, avoiding a costly appeal); ***MAK v TJK***, 2019 ABQB 547 at paras 12-20 (relating to re-open before decision, but in this case to allow further evidence; the test for new evidence and submissions at trial, is not limited by the discovery with due diligence applicable to appeal courts – see also ***Westpoint*** at para 6-15); and ***The Toronto-Dominion Bank v The Queen***, 2009 TCC 564, aff'd 2011 FCA 221 at paras 9, 12-13 (filing a further Memorandum of Fact and Law after reserve, before decision, "in order to assist the Court in reaching its decision"). The result of these submissions, in the Plaintiff's assertion (para 18 of the Plaintiff's Supplemental Leave Brief), was that the

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41 The Nation uses the word "bolster" in this context, and the Plaintiff describes it as referring "the Court to additional legal authority', and argument: Plaintiff Supplemental Reply Brief on Leave, paras 2 & 6.

42 Were in existence and available to Plaintiff Counsel, as the Nation notes at para 13 of its Supplemental Response Brief, referencing the Plaintiff's Supplemental Leave Brief.

> ...Court has broad discretion, limited only by the purpose and intention of the Rules consistent with the [Act], to permit additional submissions in writing so as to avoid an injustice and ensure efficiency ... depend[ing] on the individual circumstances and the overarching concern of the interests of justice... intended to serve: fairness of the hearing, completeness of analysis ... of the law, avoiding a miscarriage of justice and ... unnecessary proceedings.

[179] The Nation agrees (paras 2 and 18-20 of the Nation's Supplemental Response Brief on Leave) that the Court has a broad discretion, but submits (paras 3-4) that it should not be exercised in this case for all the reasons that it elaborated on in its Supplemental Response Brief, including no alleged factual or legal error (including, *inter alia*, paras 21-4, 27, 29).

b. Substantive Supplementary Submissions

[180] The Supplemental Submissions relate to 5 additional cases purportedly relevant to the Plaintiff advancing a cause of action for a declaration of a constructive trust, in turn relevant to avoiding limitations issues: ***BNSF Railway Company v Teck Metals Ltd.***, 2016 BCCA 350; ***Atlas Cabinets and Furniture Ltd. v National Trust Co. Ltd.***, 1990 CarswellBC 76, (1990) 45 BCLR (2d) 99 (CA); ***Scott & Associates Engineering Ltd v Finavera Renewables Inc***, 2015 ABCA 51; ***Shade v Canadian Pacific Railway Limited***, 2017 ABQB 292; and ***Tracy (Representative ad litem of) v. Instaloans Financial Solutions Centres (B.C.) Ltd.***, 2010 BCCA 357.

[181] The Nation responded with two new cases: ***Paragon Finance Plc v D.B. Thakerer & Co.*** [1999] 1 All ER 400; and ***Wales v Wales Estate***, 2017 BCSC 546.

[182] The Plaintiff replied with 4 new cases: ***Foskett v McKeown*** 2000 WL 571214 (2000) (H.L.); ***Westdeutsche Landesbank Girozentrale v Islington London Borough Council*** [1996] AC 669, [1996] CLC 90 (1996) (HL); ***FHR European Ventures LLP & Ors v Cedar Capital Partners LLC*** [2015] 1 AC 250 (UKSC); ***First Majestic Silver Corp. v Davila***, 2013 BCSC 717; and ***Ermineskin Indian Band & Nation v Canada***, 2009 SCC 9.

[183] However, before I reviewed the substance of the Supplemental Briefs and these cases, I had concluded that the Plaintiff had *prima facie* established a cause of action for declaratory relief by way of constructive trust, and set common issues, without relying on those additional submissions, and thus they were not necessary for my analysis, except to alter Common Issue 11, as noted above. However, as I know the issue will remain hotly contested leading to a decision on the merits in the common issues trial, those submissions can be filed for that purpose. In the result, costs for the Supplemental submissions (which the parties addressed in their Supplemental Briefs on Leave) will await the conclusion of the common issues trial.

8. Conclusion: Class Certification

[184] The action is certified to proceed to a common issues trial on the common issues approved herein as set out above.

a. Further Directions

[185] Counsel for the Plaintiff, in conjunction with Counsel for the Defendant, is to prepare a Certification Order with attachments for common issues approved herein, a finalized Litigation Plan and Notices that are required.

[186] As to Notices, while I am prepared to hear further arguments, and while a provision for an opt-out now should be in the Notice, my preliminary view is that any opt-out option should not be a once only option, such that class members may have another option on any proposed settlement.

b. Costs

[187] As the Plaintiff has been successful in obtaining certification of the action as a class proceeding, she is entitled to costs thereof, in any event of the cause, in such amount as may be agreed by Counsel, or assessed by the Assessment Officer, payable, with interest pursuant to the *Judgment Interest Act*, RSA 2000, c J-1. Insofar as there may be issues beyond the jurisdiction of the Assessment Officer, they may be the subject of a specific application by the Plaintiff and sequential written arguments of the parties, followed by oral arguments, if required.

VI. Summary Judgment

[188] The Plaintiff also applied for Summary Judgment for part of the relief it seeks at the common issues trial.

[189] The principles applicable to summary judgment are variously stated but have become trite in recent years.

[190] Under Rule 7.3(1)(a) the Court may grant summary judgment with respect to all or part of a claim, where there is no defence. Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication: ***Windsor v Canadian Pacific Railway Ltd.*** 2014 ABCA 108 at paras 15, 16 & 21; ***Tottrup v Clearwater (Municipal District No 99)***, 2006 ABCA 380, 401 AR 88 at para 11. A triable issue is no longer the test, since ***Hryniak***, but rather the test is, as the Plaintiff submits (PSTB, at para 43) "whether there is any issue of merit that genuinely requires a trial or, conversely, whether the claim or defence is so compelling that the likely it will succeed is very such that tit should be determined summarily", and "whether an adjudication and disposition is fair and just to both parties": ***W.P. v Alberta***, 2014 ABCA 404, 7 Alta. L.R. (6th) 319 at para 26. See also: ***776826 Alberta Ltd. v Ostrowercha***, 2015 ABCA 49 at paras 10-11; and ***Canada v Lameman***, 2008 SCC 14 at para 16.

[191] Consideration should also be given to ***Weir-Jones Technical Services Incorporated v Purolater Courier Ltd.***, 2019 ABCA 49, which was released after the briefs in this matter were filed and the oral hearing took place. ***Weir-Jones*** is the 5-member panel decision on the standard for summary judgment after the "paradigm shift" or "shift in culture" based on (at para 16) the principle pf "proportionality" in civil litigation, introduced in ***Windsor***, and the approach approved in ***Hryniak***. Under this approach, with apologies for some duplication, summary judgment:

- Must be based or found to be appropriate and fair based on a full analysis of the facts, law and issues, and under the proper exercise of judicial discretion, where the presiding justice "has a duty to take 'a hard look' at the merits of a claim" (paras 29 & 44);
- Is only appropriate after finding a proven factual record, if the presiding justice is "sufficiently satisfied and comfortable with the record to conclude that there is no genuine issue requiring a trial" – in other words, there must be no "real issue" for trial (paras 30-1);

- A summary judgment will not be appropriate if "the record, the facts, or the law preclude a fair disposition", namely that the moving party has not established that there is no genuine issue requiring a trial (para 32);
- Is suitable as a "means to achieve a just result", only if the presiding justice considers that the quality of evidence and legal argument is such "that it is fair to conclusively adjudicate the action summarily" (para 34);
- "The ultimate burden remains on the moving party to establish that there is no genuine issue requiring a trial, and that a fair and just adjudication is possible on a summary basis" (para 35); and
- Is available only if the presiding justice "is <u>confident</u> that [s/he] can fairly resolve the dispute" (para 36 - emphasis in the original – 46 & 48(d)).

[192] The Nation argues that the application for summary judgment (Amended Amended Application of August 23, 2017) is procedurally flawed as some of the affidavit evidence is not based on personal knowledge (NSJRB, paras 3, and, with some detail, 10), some of which the Plaintiff admits in her Reply. Nevertheless, the Plaintiff insists that there is sufficient admissible and direct evidence to justify the relief sought (PSJRB, paras 2-5 & 7-9). I find that the Nation's objection is purely technical and without substantive merit. The Plaintiff has provided information within her knowledge, or based on cases and records that are matters of public record.

[193] The Nation also argues (SNDJRB, paras 5 & 7) that summary judgment should not be granted because to do so would "require a more complete evidentiary record". Beyond that, the actual principles for summary judgment are, generally, agreed between the parties.

a. Common Issue 1

[194] The Plaintiff seeks summary judgment with respect to common issue 1, described above as: "Were the provisions of *An Act to Amend the Indian Act*, RSC 1985, c.32 (1st Suppl.) ("Bill C-31") of no force or effect during the Claim Period?"

[195] The Nation argues that this constitutional issue should be decided in this proceeding – N8 TR 22/23-31. I agree that it should be – indeed, I herein grant summary judgment for this common issue, in favour of the Plaintiff, for reasons including the following.

[196] The Plaintiff's name was added to the Band List for Samson Nation maintained by the Minister on or about June 29, 1987, as admitted by the Amended Statement of Defence, para 13. It is only on the basis of the validity of Bill C-31 that this happened.

[197] The Nation's position is that the provisions of Bill C-31, which obliged it to include in its membership persons who became entitled to Indian status thereunder, contravenes the *Charter* and the *Constitution Act, 1982*, and as such are of no force or effect to the extent that they unjustifiably infringe upon the Samson Nation's aboriginal and treaty right to self-determination and self-government. However, absent a court finding to the contrary, such legislation enjoys the presumption of validity, as the Plaintiff argues (S21 TR 12/35-39) and the Nation effectively agreed (S20 TR 27/1-10).

[198] While the Nation argues that no court has definitively ruled in favour of the constitutionality of Bill C-31 (SNSJRB, para 4), there has been no finding by any court to the contrary, all consistent with the presumption of validity of legislation: see, in this regard, ***Alberta***

Turkey Producers v Leth, [2006] AJ No 455 at paras 33-35; ***Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd.***, [1987] 1 SCR 110 at paras 55-78; and, most directly on point, ***Martel v Samson Band***, [1998] FCJ No 1328 at para 11. Rather, on the very same issue, involving members of the very same Nation, determinations have been made that implicitly or explicitly deny the invalidity of the Bill C-31 amendments, in the context of the very issues now before the Court – see PSJB, paras 71 – 78. Indeed, the findings made by those courts had, as a necessary prerequisite (not merely arising collaterally, incidentally or by inference, as the Nation argues – SNSJSB, paras 25-7) the presumption of validity of Bill C-31, as "fundamental to the decision arrived at" (PSJRB, para 10, relying on Alberta cases referenced in the Plaintiff's initial brief), relative to the principle of merger. The Plaintiff described this (PSJRB, paras 20-1) "as the legal foundation or justification for the conclusion reached by the Court" in each case, and "so fundamental to the substantive decisions ... that they cannot stand without it".

[199] In an action not involving this Class nor this Nation, other Nations have sought a declaration of invalidity like the one proposed by the Samson Nation herein, and in decisions in ***Sawridge Band v The Queen***, 2008 FC 322 [aff'd 2009 FCA 132, leave to the SCC refused December 10, 2009] (***Twinn*** decisions identified below), the application was dismissed.

[200] In ***Martel***, the plaintiffs, who would be members of the class herein, made a claim similar to the present case against the Nation, although it was not a class proceeding. The Nation, in its Amended Statement of Defence of October 1998, and Notice of Constitutional Question of November 1998, sought a declaration substantially identical to the Nation's position above. On June 27, 2002, Justice Hugessen granted summary judgment to the plaintiffs (2002 FCT 729), declaring them members of the Nation by virtue of Bill C-31, and finding that there was "no constitutional question properly before the Court". The issue has been litigated and determined, and I agree with Hugessen J. I further note that on September 30, 2003, the Federal Court of Appeal dismissed the Nation's appeal against the June 27, 2002 Hugessen Order (2003 FCA355). Similar results followed similar pleadings and class members against the Nation: ***Shirley Marie Yellowbird v Samson Nation*** , Docket T-2204-93, with Justice Hugussen, on February 14, 2002, granting an Order declaring Ms. Yellowbird's membership status from June 29, 1987, thus entitling her, by a further Order on June 18, 2002, to PCDs unpaid since June 29, 1987; ***Shinnez-Lee Yellowbird v Samson Nation***, Alberta Action No. 0203-10724 and ***Billie Jean Yellowhead v Samson Nation***, Alberta Action No. 0203-22358, were consolidated, and after trial [2006 ABQB 434], Slatter J. (as he then was), on June 14, 2006, granted the declaratory relief that the plaintiffs sought, appeal dismissed by the Court of Appeal: 2008 ABCA 270.

1. Res Judicata

[201] The Plaintiff relies on the doctrine of *res judicata* to support her summary judgment application, in particular issue estoppel, where the Plaintiff argues (PSJB, para 50 *et seq*), relying on the base text, Lange, *The Doctrine of Res Judicata in Canada*, (3rd ed. 2010) (Lange) and base case of ***Angle v Minister of National Revenue***, [1975] 2 SCR 248 at pp 267-8, that the key issues in the within action are distinctly in issue in the ***Martel*** and ***Yellowhead*** actions, and each cause of action in the respective cases "arise out of the same combination of facts", under the following preconditions: same question has been decided; the earlier decision was final; and the parties or their privies were the same. This is absent an injustice: ***Penner v Niagara Regional Police Service Board***, [1975] 2 SCR 248. The Plaintiff also relies upon Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (4th ed, 2014), at para 19.84-5, to the effect that a

defendant "must put forward all defences which will defeat the plaintiff's action; the defendant who does not will be debarred from raising them subsequently".

[202] The first two preconditions, same question and earlier decision being final, seem relatively easy to accept when all the facts are known, and the Nation as a party, but what about the privity of the various plaintiffs. ***Lange*** is relied upon (at p 79) to the effect that for there to be privity there must be a community, or privity, or unity of interest between the respective parties. See also ***Calgary (City) v Alberta Human Rights and Citizenship Commission***, 2011 ABCA 65 at para 33. As a direct example relevant to this case, the Plaintiff made reference (PSJB, paras 60-62) to ***Poitras v Twinn***, 2013 FC 910, 438 FTR 264, wherein Justice Hugessen held (appeals dismissed in FCA in February 2012 – ***Twinn v Poitras***, 2012 FCA 47, and the Supreme Court in the same year – ***Twinn v Poitras***, 2012 CanLII 41196) for Ms. Poitras, whose action had been stayed, on the basis of the result in the other (***Twinn/Sawridge***) case, ostensibly based on privity of interest between Poitras and Twinn. The Plaintiff argues (para 16) that the presumption of validity applied in that case in this way: "[u]nless and until judgment was rendered in the band's favour, Bill C-31 was presumptively valid and Ms. Poitras, and persons like her, enjoyed the presumption status which they had as registered members of the band". This is entirely consistent with the presumption of validity of legislation and in particular with the decision of Hugessen J. in ***Martel,*** cited above. It is to be noted that Martel, the Kellowbird plaintiffs, and the Plaintiff herein are all members of the Samson Nation, as a result of Bill C-31.

[203] In the result, I agree with the Plaintiff specifically and in substance that:

- the Nation's position in its Amended Statement of Defence is essentially the same as in the ***Yellowbird*** and ***Martel*** actions, wherein the Nation was unsuccessful (also PSJRB, paras 26 & 28);

- the plaintiffs in ***Yellowbird*** and ***Martel***, but for those actions (not class actions), and possibly for any remaining lingering claim, would have been and may remain class members in this action, all being members of the Samson Nation as a result of Bill C-31, claiming the same unpaid PCDs and Special Pays, although none of the plaintiffs in the respective issues had a "participatory interest" in the actions of the other; and

- the court in those cases (***Twinn*** and ***Yellowbird***) had to find the legislation valid, implicitly or expressly, to award the relief granted[43].

[204] On this basis, I find that the results in those cases on the validity of Bill C-31 are *res judicata*, by way of issue estoppel, to qualify the Plaintiff for *summary* judgment, which I grant on Common Issue 1.

2. Abuse of Process

[205] Had I not found issue estoppel leading to summary judgment on Common Issue 1, I would have come to the same result by way of abuse of process, by striking the relevant parts of the Nation's Amended Statement of Defence to put an end to the Nation's continuing claim of invalidity, several courts having clearly held to the contrary. Some of the considerations that

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43 Paradoxically, as the Plaintiff points out (PSJRB, para 29), without the validity of Bill c-31, there would be no basis for the Nation asserting that it had control over its membership, because that legislation allowed them to do so, if the Minister approved – but he didn't.

apply to this finding are also the same as those applying to *res judicata*, by way of issue estoppel, which I will touch on at the risk of repetition.

[206] The Plaintiff summarizes her position at N8 TR 8/12-18 & 11/34-36 *et seq,* that there is an abuse of process in the Nation not advancing the constitutional issue over the past 30 years.

[207] The Nation has effectively stonewalled (see comments of Plaintiff's Counsel at S19 TR 58/8-32, and at N8 TR 23/8-24/11, where I raise the issue of the Nation "playing coy" and that it is time to put the issue "to bed") any resolution of the issue of payments allegedly outstanding to class members by claiming that the ***Twinn*** case, in which the constitutional validity of Bill C-31 was challenged, prevented payment. However, ***Twinn***, in fact, upheld the constitutional validity of Bill C-31. The substance of the ***Twinn*** action was dismissed on July 6, 1995, but that decision was quashed by the Federal Court of Appeal and a new trial was ordered. The action was ultimately dismissed by Russell J. on March 7, 2008 (PCB, paras 59, and 74 – 75; para 10 of Bonnick-Kendell Affidavit #1). That decision was appealed, with the appeal dismissed by the Federal Court of Appeal on April 21, 2008 (para 11 of Bonnick-Kendell Affidavit #1), and the further appeal dismissed by the Supreme Court of Canada on December 10, 1999.

[208] In the ***Martel*** case against the Nation, filed in Federal Court on November 30, 1988, notwithstanding leave to bring a constitutional question, Hugessen J ultimately noted (***Buffalo v Canada (Minister of Indian Affairs and Northern Development***, 2002 FCT 1299 (***Buffalo #1***) that there was no longer any constitutional question properly before the Court[44], and an appeal therefrom was dismissed by the Federal Court of Appeal on September 30, 2003 (PCB, paras 83 – 84). The fact that the Nation did not oppose judgment in ***Buffalo #1*** (SNSJRB, para 29) makes no difference. The fact remains that the validity of the legislation was a prerequisite to the determination and does not take away from the finding of estoppel (PJSRB, paras 13-16, relying on ***Bank of Montreal v Ostapovich***, (1996), 137 DLR (4th) 441 (Sask. CA), ***Escobar v Yacey***, (1998), 66 Alta LR (3d) 344, and ***Re Abacus Cities Ltd.***, (1984), 55 A.R. 258 (Alta QB) at para 24), even though none of the cases specifically dealt with such challenges on the merits. Moreover, the Nation did not attempt to bring or pursue a constitutional challenge in any of the litigation involving PCD and Special Pays. Therefore, the Plaintiff class "enjoy the presumption of validity" of Bill C-31, as stated in Justice Hugessen's Reasons of June 27, 2002 (SNCRB, para 120-2).

[209] The legislation having been passed and not successfully challenged – indeed, not even any complete attempt to do so, in this case or any other - I consider it to be valid legislation applicable to this litigation, as the presumption of validity applies as discussed above. Challenging the constitutionality of legislation, even on appeal, does not prevent it from operating until, if ever, the legislation is found unconstitutional. That has been denied. The result otherwise is an abuse of process.

[210] The law applicable thereto, based on: ***Reece v Edmonton (City)***, 2011 ABCA 238, 513 AR 199 at paras 14, 16 -18, leave to appeal to the SCC refused, 34454 (April 26, 2012); ***British Columbia (Workers' Compensation Board v Figliola*** (PSJB, paras 64-70, and 79-84) justify this result – a finding of an abuse of process, resulting in the striking of the Nation's Amended Statement of Defence in this ineffective challenge, in the alternative to summary judgment.

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44 Nor is there here – see admission at N8 – TR 20/30-21/1-14.

[211] The Plaintiff argues (PSJRB, paras 23-4, based on ***Calgary (City) v Alberta Human Rights and Citizenship Commission***, 2011 ABCA 65 para 33), that, contrary to the Nation's argument (SNSJRB, para 40) regarding the relationship between the parties, insofar as they have some similar interests in "a series of settlement agreements", the doctrine of abuse of process is less interested in the interests or motives of the parties, but more on the integrity of the administration of justice. Those relationships are, however, relevant to determine privies for *res judicata*, as I discussed above.

[212] The Plaintiff ends its reply argument (PSJRB, para 25, footnotes omitted) on abuse of process thus:

> [Samson Nation's] court history demonstrates that there have been *repeated* final judicial decisions pronounced by courts of competent jurisdiction over the [Nation] and over the questions of the constitutional applicability and the constitutional validity of Bill C-31 with respect to the Samson Nation; and yet the [Nation has] persisted in seeking to open fresh litigation of the same subject with a view to disputing the correctness of the earlier decisions and requesting judgments inconsistent with those decisions.[45]

[213] I agree with this submission, and thus, as an alternative to summary judgment rendered above on this issue in the case, I find an abuse of process by the Nation and strike their Amended Statement of Defence on this point.

b. Common Issue 2

[214] Common Issue 2 reads as follows: "Did Samson Nation have control of its own membership during the Claim Period?"

[215] The Plaintiff argues (PSJB, para 85) that:

> If the Court finds that the constitutional validity of Bill C-31 is *res judicata*, or that the allegations in the [now Amended] Statement of Defence alleging that the provisions of Bill C-31 are constitutionally invalid and of no force or effect as an abuse of process and should be struck out or set aside...

which I have done;

> ... it follows that the Samson Nation never assumed control of its own membership. While the Samson Band submitted its proposed membership rules to DIAND in accordance wit the relevant provisions of the Indian Act in June 1987 and applied for control of its band list, the Defendants admit that the application was not successful.

[216] Reference is made to the Nation's Statement of Defence, paras 23-4, wherein the Nation acknowledged that its application for control of its band list in June 1987 was unsuccessful, and reference to supporting affidavit evidence. The PSJB, at paras 16-22, provides an outline of the facts and evidence that supports the proposition that the Minister rejected the Nation's application for control of its band list, that the Minister's decision was challenged by the Nation by way of an application for mandamus, which was rejected, and the subsequent appeal abandoned.

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45 Notably, in the ***Buffalo #2*** action (Bonnick-Kendell Affidavit #1, Exhibit "Y") and in this action.

[217] After an analysis of those facts, and arguments, I agree with the Plaintiff that it is well established that the Nation did not have control of its Band list under the amendments to the Indian Act made by Bill C-31, and therefore summary judgment is issued to the Plaintiff on Common Issue 2.

c. Subclass Common Issues 1 & 2

[218] The third and fourth issues that the Plaintiff raises for summary judgment are (PSJB, para 6) for the Court:

> ...to determine [tying] in directly with the answers to the first two question [Common Issues 1 and 2] whether the Plaintiff is entitled to a declaration that the Master Agreements are illegal, void and otherwise unenforceable (proposed Subclass Common Issue 1) and whether Samson's conduct in entering into the Membership Agreements constituted unconscionable conduct towards the proposed Class Members (proposed Subclass Common Issue [2].

[219] Subclass Common Issue 1 and 2 mirroring this application, read: "1. Are the Membership Agreements illegal, void or otherwise unenforceable?", and "2. Was Samson Nation's conduct in entering into the Membership Agreements unconscionable conduct towards these Class Members?"

[220] The Plaintiff explains her position (PSJB, paras 7 – 9), in essence as follows:

- the Nation purported to offer members of the class membership in the Nation in exchange for some payment regarding future PCD and Special Pays and release of liability of the Nation, when class members already had membership by virtue of Bill C-31, and the Nation had no authority to grant same;

- the Membership Agreements were "predicated" on the Nation's false representation that it controlled its membership[46], which representation doesn't require evidence, but is implicit, because it was only with that prerequisite (not in fact existing) that the Nation could offer membership;

- as the Nation could not offer actual membership, there was no consideration by the Nation for the release of liability, and, moreover, the pittance of any monetary consideration offered by the Nation was not true value for the PCD or Special Pays due, but not paid (in Ms. Bruno's case from May 1, 1988 to June 1, 1995); and

- the actions of the Nation were a breach of their fiduciary duty and unconscionable – while the Nation admits its fiduciary duty, it denies that it breached it and/or it was

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46 See the third "AND WHERAS" recital in Exhibits A and B of the Bonnie Bruno Affidavit, which I have found herein was never the case. Moreover, an examination of these two Membership Agreements have the following further flaws, including, *inter alia*: as to the first WHERAS recital, if the Plaintiff was a member of the Nation she was, *prima facie*, entitled to all PCDs; the waiver and release of any past PCD, mentioned in the first "AND WHEREAS recital, and in paras 1 and 2, the quantum of funds waived and releasee is neither quantified nor is the reason for the waiver and release explained, nor is any consideration identified; while the 4th AND WHEREAS has the claimant acknowledging advice of "respective rights', there is, in fact, no evidence of that; and, in relation to the 5th and 6th AND WHERAS recitals, the Nation has control over its revenue fund and the right to determine benefits, it cannot discriminate between band members; while the "NOW THEREFORE" recital talks about mutual promises, there is no evidence of any consideration being paid by the Nation; and the agreement is expressed (para 3) to be confidential, for no expressed or known reason.

unconscionable (see PSJB, para 87-92 and discussion at S21 TR 21/35-22/12, 22/28-23/10 & 23/29-24/6) or that it was unconscionable.

[221] I agree with all of these submissions, except for consideration of breach of fiduciary duty and unconscionability, to which I will return, such that I find, later in this section, that summary judgment is appropriate relating to the validity of the Membership Agreement on subclass common issue 1.

[222] As to subclass common issue 2, while judgment therefor may be relatively achievable, I find that it requires further findings of fact and analysis that is not within the reasonable range of summary judgment. Here, to use the language of ***Weir Jones*** (para 45), "[w]hile the law does not have to be beyond doubt before summary judgment can be granted, there are occasions when the law is so unsettled or complex that it is not possible to apply the law to the facts without a full trial record". Thus, for determining breaches of fiduciary duty or unconscionability – and later for constructive trust. I am "not confident" to grant summary judgment on these issues, and here, in particular, subclass common issue 2, and will leave these latter elements for finding at the common issues trial.

[223] Otherwise, I agree with the Plaintiff on subclass issue 1. Put another way, I find that it follows from the Courts summary judgment/abuse of process decisions above that, Bill-C31 granting membership to the Plaintiff class, and the failure of the Nation to control its own membership, for lack of compliance with Bill C-31, that the Nation had no ability to enter into any agreements with the class – in effect, DIAND controlled that right. Thus, simply put, the Nation had no authority or ability to enter into the Membership Agreements, the details of which they won't disclose[47], and had no authority to grant membership to the class – that was already accomplished by the provisions of Bill C-31. Thus, it follows that those Membership Agreements are illegal, void and otherwise enforceable, with one exception, due to the lack of authority and effective consideration (none other than the membership was disclosed in the Agreement) by the Nation. The one exception is that the class members will have to account for PCD and Special Pays actually received in the process, but not required to account for the cash consideration allegedly paid (represented as $1,000) for class members signing the Membership Agreements.

[224] There are, however, a couple of arguments to consider before finalizing this consideration. The Nation argues (SNSJRB, paras 53-9, *inter alia*, that the Membership Agreements were merely a settlement of a dispute. However, at the Plaintiff notes (PSJRB, paras 60-3 & 83), "there is no evidence before the Court on this application of any action, threatened or actual, by or between any parties to the Membership Agreements at the time the agreements were entered into". It follows, I find, that the Nation wasn't settling a dispute but attempting to be pre-emptive in seeking an unfair advantage over members of its Nation, recognized by Bill C-31. This is especially so, when the Nation did not compromise or give up anything and the class members compromised years of PCD and Special Pays – the alleged consideration of $1,000, even if true, is not fair compensation for the members compromise. Finally, as referenced above, the Nation had no right to compromise membership issues (PSJRB, paras 84-5).

[225] Other arguments by the Plaintiff refer to breaches of fiduciary duties, unconscionability and fraud, which I will leave for the common issues trial, if there is need to resort to them.

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[47] Para 40 of Watson Affidavit #1.

[226] Alternatively, the Nation argues (N8 TR 32/1-22) that there is no evidence from Ms Rowen about the information that was provided to her at the time she executed the Membership Agreement for her family, and Ms. Bruno was a minor at the time. The Plaintiff responds to this at N8 TR 40/36-41/13, saying that the Membership Agreement is evidence itself of breach of a fiduciary duty and the onus is on the Nation. However, I find that this is an attempt by the Nation to get mired in individual determinations of the Membership Agreements (see the Nation's position at N8 TR33/3-5), when the evidence supports my findings that: the process was, on its face, relatively the same for all signatories (see acknowledgement by the Nation and the finding of Slatter J, discussed at N8 TR 35/40); and the Nation, as stated above, had no dispute to resolve by settlement (for which, the case of ***Radhakrishnan v The University of Calgary***, [2002] ABCA 182 might have had some relevance – see discussion at N8 TR 33/14 – 35/25); the Nation had no right to grant membership (Bill C-31 had already given that); and, thus, there was nothing for individual signatories to waive or release, regardless of the representations. Accordingly, I find that summary judgment to declare the Membership Agreements illegal, void or otherwise unenforceable is available, as a matter of law, based on the broad evidence in this case, without looking into individual considerations. All that remains, is an accounting of any monies actually received applicable to capital distributions, during the effective term of this class proceeding.

[227] Accordingly, I find that summary judgment be granted on subclass common issue 1.

[228] The aspect of unconscionability in subclass common issue 2 requires some ability for the Nation (and Plaintiff) to provide evidence in relation thereto (see N8 TR 32/12-15), and is thus, I find, not suitable for summary judgment and is left for the common issues trial.

d. Common Issues 3, 4, 5 and 10

[229] The Plaintiff seeks a summary judgment with respect to Common Issues 3, 4, 5 and 10. For the reasons that follow, summary judgment is denied for each of these claims, and thus I do not need to consider the Nation's response brief or the Plaintiff's reply brief to this result, although there may be some basis reflected therein for agreement leading to or at the common issues trial.

[230] Common Issue 3 deals with capital and revenue accounts between DIAND and the Nation, and, as alluded to above, the details – and indeed, the significance of the different accounts - are not too clear. This would merit evidence at a common issues trial, if it is judged to be important to the result. A full accounting of the funds by an independent forensic accountant, with full access to all records, is likely necessary, for which production of records and an accounting reference (as sought by the Plaintiff, in PSJB, paras 99(4) and (5)) can be ordered as necessary within case management, or at the common issues trial. Thus, I find that the Plaintiff has not established that summary judgment is appropriate for Common Issue 3.

[231] Common Issues 4 and 5 again deal with fiduciary "and other obligations" in relation to PCDs and Special Pays, some of which the Nation has broadly admitted in its Amended Statement of Defence, without particulars, but for which breaches are denied. This may be an area where some further agreement can be had on the obligation and the common issues trial focus on the facts related to the alleged breaches. It is not an area that is precise enough, in my view, for summary judgment.

[232] Common Issue 10 deals with the whole area of constructive trust (addressed by the Nation at N8 TR36/24-37/9, in the context of summary judgment), which I have found meets the

cause of action test, but, as determined with breaches of fiduciary duty and unconscionability discussed a few paragraphs ago, needs some analysis in relation to the issues herein, that will also have the benefit of the Supplemental Submissions, discussed above, but is not appropriate in my view for summary judgment.

e. Conclusion: Summary Judgment

[233] In conclusion on the summary judgment application, summary judgment is granted on common issues 1 (or striking of the Nation's Defence for abuse of process, in the alternative) and 2, and subclass common issue 1, but denied on subclass common issue 2, and common issues 3 – 5, and 10.

f. Costs: Summary Judgment

[234] Success has been divided on the issue of Summary Judgment. The parties may wish to have costs set off as between the parties, leave costs to the conclusion of the common issues trial, or, alternatively, make application now. As this litigation has dragged on for over 6 years, and shows no signs of any early resolution, any application before me will have to be made before my statutory retirement in 2½ years.

VI. CONCLUSION

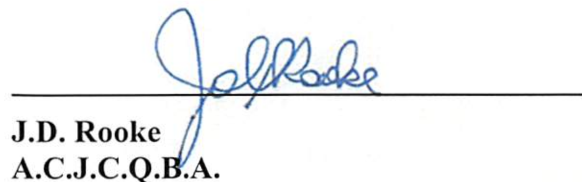
[235] On all of the evidence and submissions before me, I decide that this is an appropriate case to proceed by way of class proceedings, and the majority of 16 common issues, and 4 subclass common issues, have been approved as sought, or, in some cases, with modification in these Reasons, or by subsequent agreement of the wording by Counsel, before the Certification Order is finalized.

[236] Summary judgment is granted on common issues 1 (or striking of the Nation's Defence for abuse of process, in the alternative) and 2, and subclass common issue 1, but denied on subclass common issue 2, and common issues 3 – 5, and 10.

[237] Costs of the certification application and summary judgment have been dealt with above. Interest thereon may be agreed, directed by the Assessment Officer, or spoken to.

Heard on the 19th – 21st days of September, and the 8th day of November, 2018, and supplemental material filed (without hearing) on the 16th and 31st days of October, the 12th and 15th days of November, 2019, 3rd day of March, and the 9th day of June 2020.

Dated at the City of Edmonton, Alberta this 31st day of August, 2020.



J.D. Rooke
A.C.J.C.Q.B.A.

Appearances:

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