Ontario Supreme Court
Chippewas of Sarnia Band v. Canada (Attorney General),
Date: 1996-07-05

The Chippewas of Sarnia Band

and

Attorney General of Canada et al.

Ontario Court (General Division), Adams J. July 5, 1996

Earl A. Cherniak, Q.C., Mary Anne Sanderson, Elizabeth K.P. Grace, Christopher I.R. Morrison and Mark D. Walters, for plaintiff.

Gary N. Penner and Charlotte A. Bell, Q.C., for defendant, Attorney General of Canada.

Kenneth R. Peel, for defendant, Canadian National Railway.

Susan E. Opler and Robert J.M. Janes, for defendants, Dow Chemical Canada Inc., Imperial Oil Ltd. and Brewers Retail Inc.

William G. Woodward, for defendant, Township of Moore.

Ronald G. Van Home, for defendant, County of Lambton.

Valerie McGarry, for defendant, Corporation of the City of Sarnia.

M. Jill Dougherty, for defendants, Amoco Canada Resources Ltd. and Amoco Canada Petroleum Co.

John M. Rattray, for defendant, Ontario Hydro.

Douglas A. Sulman, Q.C., for defendant, Union Gas Ltd.

Brian A. Crane, Q.C., for defendant, Interprovincial Pipe Line Inc.

Paul R. Beaudet, for defendant, Sherwood Village Holdings Inc.

Elizabeth A. Christie, for defendant, the Queen in right of Ontario and Ontario Housing Corp.

Gerard T. Tillmann, for defendants, Bank of Montreal, Canada Trustco Mortgage Co. and Truscan Realty Ltd.

Fern Stark, for defendant, Toronto-Dominion Bank.

[1] ADAMS J.:—This is a motion by the plaintiff, Chippewas of Sarnia Band (the “Band”) for certification of this proceeding as a defendant class proceeding and an appointment of one or more representative defendants to act on behalf of up to six classes of defendants. In the alternative, if the certification order is not granted, the Band seeks an order adding as named defendants approximately 2,200 persons claiming legal interests in the subject lands (the “Cameron Lands”), amending the statement of claim and providing for substituted service of

the amended statement of claim upon all added defendants. The Band asserts rights in relation to roughly four square miles or 2,540 acres located within the boundaries of the City of Sarnia in the Township of Moore. The disputed lands comprise roughly one-quarter of the Band's original reserve which was recognized and guaranteed by Treaties No. 27½ and 29. The Band claims that title to the Cameron Lands was never lawfully surrendered or conveyed. It therefore claims that these lands have been and continue to be unceded aboriginal lands and unsurrendered reserved lands. The Band seeks to assert its claim against everyone claiming interest in the Cameron Lands. Because all competing title and interests to the Band's claim can be traced to the letters patent issued to Malcolm Cameron in 1853, the Band wishes to assert its claim in one proceeding against all affected parties.

[2] The Band points to five potential ways to accomplish its objective of having all necessary parties included in one proceeding and bound by its results:

1. Certification of the proceeding and appointment of representative defendants for the six separate defendant classes proposed by the Band.

2. Certification of the proceeding and appointment of one or more representative defendants for a single defendant class, with a court-ordered review, following anticipated summary judgment motions, in order to determine whether defendant sub-classes should be certified with respect to any remaining and unresolved issues.

3. A representative defendant proceeding pursuant to rule 12.07 of the Rules of Civil Procedure in which certain or all of the named defendants are appointed to act on behalf of all persons who claim interests in the Cameron Lands, with notice of the proceeding to be served on all of those represented pursuant to court order.

4. An order adding approximately 2,200 persons who claim interests in the Cameron Lands, with service of the amended statement of claim pursuant to court order.

5. Separate lawsuits against each of the remaining approximately 2,200 persons who claim interests in the Cameron Lands which would then be consolidated or tried together with this action.

[3] The Band submits that the preferable procedure, in all of the circumstances, is to certify this action as a defendant class proceeding either with a single defendant class of persons claiming interest in the Cameron Lands or with six classes as proposed by the Band. In

response, the defendant landowners oppose the application and submit that the certification of unwilling defendants is not contemplated under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 (the "C.P.A."). In their view, however, the objective of binding all persons claiming an interest in the Cameron Lands may be accomplished by the issuance of a representative order under rule 12.07. Alternatively, the defendants submit the Band should be accorded the alternative relief of amending its statement of claim to add all additional defendants.

[4] The plaintiff is a First Nation Band within the meaning of the *Indian Act,* R.S.C. 1985, c. I-5, as amended, and its members are aboriginal peoples within the meaning of s. 35 of the *Constitution Act, 1982.* Its predecessor-in-title, the Sarnia First Nation, was a signatory to Treaties No. 27½ and 29, dated 1825 and 1827, respectively, in which four reserves, including the Sarnia Reserve, were exempted from a surrender of 2.2 million acres of territory in what is now southwestern Ontario. The Sarnia Reserve, including the Cameron Lands, was guaranteed "at all times hereafter" for the exclusive use and enjoyment of the Band. On October 18, 1995, the Band commenced this action by the issuance of a statement of claim and served it on all the named defendants. Of the 21 existing defendants, seven are named solely in their individual capacities. These parties, whom the Band does not propose serve as representative parties and against whom the Band claims distinctive forms of relief, are the Attorney General of Canada, Her Majesty the Queen in the right of Ontario, Canadian National Railway Company, Dow Chemical Canada Inc., Imperial Oil Limited, The Corporation of the Township of Moore, and The Corporation of the Township of Lambton. The remaining 14 defendants are named both individually and as proposed representatives of six defendant classes:

1. The Corporation of the City of Sarnia as representative of an "institutional" class;

2. Amoco Canada Resources Ltd. and Amoco Petroleum Company Ltd., as representatives of an "industrial" class;

3. 828037 Ontario Limited and Brewers Retail Inc. as representatives of a "commercial/retail" class;

4. Ontario Hydro, Union Gas Limited and Interprovincial Pipe Line Inc. as representatives of a "utility" class;

5. Sherwood Village Holdings Ltd. and Ontario Housing Corporation as representatives of a "residential" class;

6. The Bank of Montreal, Truscan Realty Limited, The Toronto-Dominion and Canada Trustco Mortgage Company as representatives of an “encumbrancer class”.

[5] All of the parties named as proposed representatives purport to have derived title to properties within the Cameron Lands, or an interest therein, from letters patent #1216, issued to Malcolm Cameron in 1853. In addition, numerous other individuals, corporations and institutions (“persons”) purport to hold a variety of legal interests in the Cameron Lands. Title searches conducted on behalf of the Band indicate that approximately 2,200 persons claim interest in the Cameron Lands. All these persons will be affected if the court grants the relief which the Band is seeking in its statement of claim.

[6] The Attorney General of Canada and Her Majesty the Queen in the right of Ontario are defendants against whom the plaintiff claims breach of fiduciary duty for having permitted the land in question to be disposed of or used by others contrary to the plaintiff’s entitlement to such lands. The landowner defendants, as well, claim over against the federal and provincial Crowns in the event the plaintiff is successful against them.

[7] The Attorney General of Canada and all other defendants intend to bring motions for summary judgment addressing the following issues:

1. Did the Band (the collective) consent to the alienation of the land to Cameron (agree to give up the right to exclusive use and occupation, or “surrender”) either at the time of sale or surrender or by arrangements which it made, i.e., accepting the decision of the leadership of the Band to sell and by accepting the proceeds?

2. Failing either of the above, was the Band’s right to the land extinguished by the orders-in-council authorizing the sale, and/or by the issuance of a Crown patent?

3. In any event, is the Band’s claim to the land defeated by the doctrines of *laches* and delay, by various statutes including statutes of limitation pleaded by all defendants and by equitable doctrines which preclude remedies against *bona fide* purchasers for value?

[8] The Band intends to bring a cross-motion for summary judgment in respect of at least those parts of the statement of claim which seek declarations that the orders-in-council and letters patent issued in relation to the Cameron Lands are null and void *ab initio* or, in the alternative, succeeded only in conveying the exclusive right to Cameron and his successors in title to acquire the disputed lands or portions of them upon lawful surrender being given by

the Band. On a motion for directions held on May 10, 1996 to determine the order and timing of all anticipated motions, I directed that the Band's certification application should proceed first, followed by all motions for summary judgment. The summary judgment motions have been tentatively scheduled to proceed during the weeks of January 20 and January 27, 1997.

[9] The Band claims the following declaratory relief against all named defendants and all persons claiming an interest in the Cameron Lands:

(a) There was no surrender to the Crown of the Cameron Lands.

(b) The Orders-in-Council of the Province of Upper Canada dated March 19, 1840 and June 18, 1840 purporting to approve the sale of the Cameron Lands to Malcolm Cameron were made without jurisdiction or proprietary rights, are null and void *ab initio,* and of no force and effect.

(c) The Letters Patent #1216 of the Province of Canada dated August 13, 1853 and issued to Malcolm Cameron for the Cameron Lands were issued without jurisdiction or proprietary rights, are null and void *ab initio,* and of no force and effect.

(d) The said Letters Patent failed to comply with the terms of An *Act for the protection of the Indians in Upper Canada,* 13 and 14 Victoria, c. 74 and are null and void *ab initio,* and of no force and effect.

(e) In the alternative to clauses (b) to (d), the said Letters Patent succeeded only in conveying the exclusive right to Malcolm Cameron and his purported successors-in-title to acquire the Cameron Lands, or a portion of them, upon lawful surrender being given by the Band or the Band's predecessor-in-title.

(f) The Band's aboriginal rights and the Band's treaty rights to the Cameron Lands have never been extinguished and that the said lands retain their status as unsurrendered reserve lands and unceded aboriginal lands.

(g) All transfers, conveyances, mortgages or other encumbrances or other interests subsequent to that of Malcolm Cameron in the Cameron Lands are null and void and of no force and effect.

(h) The band and its predecessor-in-title have been wrongfully dispossessed of the Cameron Lands in direct violation of the *Royal Proclamation of 1763,* and of the laws and practices in effect at the material times.

(i) The Cameron Lands, by virtue of their continuing status of reserved lands, are governed by the provisions of the *Indian Act,* R.S.C. 1985, c. I-5, as amended.

[10] The Band submits that the historical factual issues underlying its claims are identical for all persons who assert interests in the Cameron Lands, including each named defendant and each member of the proposed defendant classes. It submits that the common issues relating to liability can be summarized as follows:

(a) Was there a surrender given for the Cameron Lands?

(b) Are the Orders-in-Council which purported to approve the sale of the disputed lands to Cameron invalid?

(c) Are the Letters Patent which purported to convey absolute title to the Cameron Lands to Cameron invalid?

(d) Did the Orders-in-Council and/or the Letters Patent succeed in unilaterally extinguishing the Band's title to the Cameron Lands?

(e) Can the Cameron transaction involving the purported conveyance of title to Cameron be attacked at this time so to give rise to the common declaratory relief sought by the Band?

[11] Against this background, the issues to be determined in this motion are:

[12] 1. Should this action be certified with respect to the common issues as a defendant class proceeding under the C.P.A.? If so, should there be multiple defendant classes or a single defendant class?

[13] 2. If certification is the preferable procedure to ensure all necessary parties have notice of the action and are bound by its results, which named defendant or defendants should be appointed to represent the defendant classes or class?

[14] 3. If certification is not the preferable procedure, what alternative procedure should be used to ensure that all necessary parties have notice of the Band's claim and are bound by legal proceedings brought in respect of that claim?

[15] While this is the first case in Ontario to consider the availability of defendant class certification under the C.P.A., there is considerable experience with defendant class actions in the United States and in England. Interestingly, the plaintiff relies on the American

experience, while the defendant landowners recommend the English approach. Impeding these analogies, however, is the fact that the American and English laws are not expressed in language identical to either the C.P.A. or rule 12.07. This can be seen from the key elements of each provision.

[16] Sections 3 and 4 and section 5(1) of the C.P.A. provide:

> 3. A defendant to two or more proceedings may, at any stage of one of the proceedings, make a motion to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff.
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> 4. Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.
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> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
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> (*a*) the pleadings or the notice of application discloses a cause of action;
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> (*b*) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
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> (*c*) the claims or defences of the class members raise common issues;
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> (*d*) a class proceeding would be the preferable procedure for the resolution of the common issues; and
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> (*e*) there is a representative plaintiff or defendant who,
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> (i) would fairly and adequately represent the interests of the class,
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> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
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> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[17] Rule 12.07 provides:

> 12.07 Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

[18] England's R.S.C., Ord. 15, r. 12 provides:

> 12(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in Rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
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> (2) At any stage of proceedings under this Rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under Rule 6 adding that person as a defendant.
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> (3) A judgment or order given in proceedings under this Rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.
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> (4) An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.
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> (5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.
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> (6) The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question is an action may be tried and determined.

[19] Rule 23 of the U.S. Federal Rules of Civil Procedure, 28 U.S.C.A., in part, provides:

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of ail only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[20] A defendant class action is a civil action brought against one or more persons defending on behalf of a group of persons similarly situated. It provides an efficient procedural mechanism for the determination of common issues in a complex proceeding involving multiple parties. It offers a means of binding all interested parties and, therefore, prevents relitigation of the same issues in a multitude of lawsuits. The advantages of a defending class action include the conservation of judicial resources and private litigation costs, both absolutely, by preventing relitigation of the same issues, and relatively, by spreading expenses and resolving common issues over a large number of defendants. In this sense, greater access to the courts, by plaintiffs and defendants alike, is achieved. See Ontario Law Reform Commission, *Report on Class Actions* (1982) ("O.L.R.C. Report") at pp. 2, 41 and Notes, 91 *Harvard L.R.* 630 (1977-78), at pp. 630-31, 658.

[21] Defendant class actions have a long history in Anglo-American jurisprudence. Their origins are in the English Courts of Equity of the 18th and 19th century. They evolved as a means of providing plaintiffs with an enforceable remedy where it was otherwise impractical to secure the attendance of all potential defendants, while at the same time ensuring that those affected by the outcome of a lawsuit, although absent, were sufficiently protected. Adequate representation of absentee defendants was viewed as a sufficient substitute for the natural justice requirements of individual notice and the opportunity to be heard. See Barry M. Wolfson, "Defendant Class Actions" (1977), 38 *Ohio State L.J.* 459 at pp. 462-65; *Newberg on Class Actions,* 3rd ed. (1992), at pp. 4-181 to 4-183; and *Hansberry v. Lee,* 61 S.Ct. 115 (1940) at pp. 118-19.

[22] *Hansberry v. Lee, supra,* is one of the leading American cases to consider the circumstances in which absent persons will be bound by a judgment. In that case, the United States Supreme Court described the origins of the defendant class action in these terms at p. 118:

> The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impractical. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued debatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interest of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.

[23] Prior to 1992 and the enactment of the C.P.A., the Ontario Rules of Court contained a relatively slight provision, essentially identical to rule 12.07, which allowed a court to authorize a representative to defend a proceeding on behalf of numerous persons who had the same interests. Probably because of its slender nature in comparison to the exceedingly complex implications of representative litigation, the rule was subject to a conservative judicial approach. Mass tort claims did not qualify and defendant classes generally required the existence of a trust fund to which remedies were confined: see *General Motors of Canada Ltd. v. Naken,* [1983] 1 S.C.R. 72 at pp. 78-79, 93, 97-98, and 104-05, 144 D.L.R. (3d) 385; *Canning v. University of Toronto* (1984), 48 O.R. (2d) 360 at p. 362, 46 C.P.C. 165 (H.C.J.); O.L.R.C. Report, *supra,* at p. 76.

[24] In the United States, by way of contrast, a defendant class action is commenced by selecting and serving with process a representative or representatives from among the members of the proposed class of affected persons. The plaintiff then moves to have the court certify the proceeding as a defendant class proceeding, to appoint a representative defendant or defendants and to approve a litigation plan which provides for notice to class members of the action: see Wolfson, *supra,* at p. 459; *Cayuga Indian Nation v. Carey,* 89 F.R.D. 629 (N.D.N.Y., 1981); *Oneida Indian Nation of Wisconsin v. New York,* 85 F.R.D. 701 (N.D.N.Y., 1980); *Canadian St. Regis Band of Mohawk Indians v. New York,* 97 F.R.D. 453 (N.D.N.Y., 1983). Under Rule 23 of the U.S. Federal Rules of Civil Procedure, a prerequisite to a class action is that the representative parties “fairly and adequately protect the interests of the class”. It is in the context of construing this phrase that American courts have given the

absence of a willing representative defendant to be named as a representative of a class no more than "token weight": see *Research Corp. v. Pfister Associated Growers Inc.,* 301 F.Supp. 497 (N.D.I.L.L., 1969), appeal dismissed, 425 F.2d 1059 (7th Cir., 1970); *Thompson v. Board of Education,* 71 F.R.D. 398 (W.D. Mich., 1976) at p. 407; and *Marcera v. Chinlund,* 595 F.2d 1231 (1979) at p. 1239. In commenting upon this jurisprudence, *Newberg on Class Action* states at pp. 4-221 to 4-222:

> Unwillingness of a defendant to serve as a representative for a defendant class is, in reality, a positive factor for vigorous defence of the action by the defendant for itself and on behalf of the class. The defendant's personal interest in defending the issue will be decided in a class action assures that such defence will automatically be made on behalf of all class members, because the issue is common to the class. Vigorous prosecution or defence of a class action is judged by an objective standard rather than a subjective one.

[25] In a number of the American cases involving aboriginal land disputes where the plaintiff bands have succeeded in obtaining certification of defendant class proceedings, the courts have refused to enter into a detailed inquiry of the willingness of the proposed representative party to represent the interest of the class members. In dealing with this issue in *Cayuga Indian Nation v. Carey, supra,* at pp. 631-32, McCurran, J. stated:

> Rule 23 also requires the determination that "the representative parties will fairly and adequately protect the interest of the class". As in the *Oneida* case, I find that the "proposed representatives all have property interest to protect in this action, and there is absolutely no indication that they have any intention but to vigorously defend those interests against the plaintiff's claim." (Reference: 85 F.R.D. at p. 706)
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> Moreover, the attorneys for the proposed representatives are fully competent to protect the interest of absent class members. Alan van Gestel, Esq. of Goodwin, Proctor and Hoar, representing Cayuga County, the Miller Brewing Company and certain individual defendants, has litigated numerous Indian land claims in the past; currently, Mr. van Gestel is counsel for representative defendants in the *Oneida* case. Similarly, counsel for the state defendants, for Consolidated Rail Corp., and for New York State Electric and Gas Corp. are involved in the *Oneida* case now pending before this court. Finally, James D. St. Clair, Esq. of Hill and Door, representing Seneca County, several towns

and villages therein and certain individual landowners, has been active in the defence of other Indian lands claims. Accordingly, I conclude that the representative parties and their counsel will provide fair and adequate protection for the interests of the class.

[26] Similarly, in *Marcera v. Chinlund, supra,* at p. 1239, the United States Court of Appeals, 2nd Circuit, concluded that, if the representatives' interests substantially coincide with those of absentee defendants, the representatives will automatically protect others by advancing their own interests:

> It will often be true that, merely by protecting his own interest, a named defendant will be protecting the class. Where, as here, the legal issues as to liability are entirely common to members of the defending class, there is little reason to fear unfairness to absentees.

[27] The most modern application of England's Ord. 15, r. 12 has also been quite robust. The case for a more liberal approach to the rule was first made by Megarry J. in *John v. Rees,* [1969] 2 All E.R. 274, [1970] Ch. 345, where at p. 283, after reviewing the seminal case of *Bedford (Duke) v. Ellis,* [1901] A.C. 1, [1900-3] All E.R. Rep. 694 (H.L.), he stated:

> This seems to me to make it plain that the rule is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice. Such an approach is, I think, at least consistent with cases such as *Bromley v. Smith* (1826), 1 Sim. 8, *Wood v. McCarthy,* [1893] 1 Q.B. 775, and *Wyld v. Silver,* [1962] 3 All E.R. 309; and in *Harrison v. Marquis of Abergavenny* (1887), 3 T.L.R. 324 at p. 325, Kay, J., described the rule as being "a rule of convenience only". The approach also seems to be consistent with the language of R.S.C., Ord. 15 r. 12(1). This provides that
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> > Where numerous persons have the same interest in any proceedings… the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
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> By r. 12(3)-(6), ample provision is made for protecting those who, being bound by a judgment against a person sued on their behalf, nevertheless wish to dispute personal liability. The language is thus wide and permissive in its scope; yet it provides adequate safeguards for the substance. I would therefore be slow to apply the rule in any strict or rigorous sense: and I find nothing in the various passages cited to me from *Daniell's Chancery Practice* (8th Edn., 1914) which makes me modify this view.

[28] A recent illustration of this liberal and flexible approach in the context of a defendant class proceeding under the rule is *Irish Shipping Ltd. v. Commercial Union Assurance Co.,* [1989] 3 All E.R. 853 (C.A.). In that case, the plaintiff ship owners brought an action against the largest single insurer of certain charterers and the leading underwriter, both of which were English companies, suing them on their own behalf and on behalf of all other liability insurers subscribing to the insurances of the charterers and claiming the respective proportions due from them as subscribing underwriters. Even though the ship owners' claim was against each of 77 insurers severally for its portion of the risk, the Court of Appeal concluded the common contractual structure evidenced by the leading underwriter clause demonstrated that, for all practical purposes, there was one claim on one contract which the ship owners had an interest in pursuing. In turn, the insurers all had the same interest in resisting this claim which they would defend on the common ground that the benefit of the insurers' obligations had not been transferred to the ship owners. In this respect, the Court of Appeal stated at pp. 873-74:

> It will be seen that there is nothing in the wording of the rule itself which would restrict the wide ambit in which the rule should operate, in line with the old Chancery practice; but there are now built-in safeguards to protect a member of the class who may have particular defences or may be able to distance himself from the class in other respects. This accords with the concept, as I see it, of the old rule, namely, a broad rule of procedural convenience to be exercised with a wide but carefully used discretion. Apart from a deviation for a short period of time ensuing after the passing of the 1873 Act (see *Temperton v. Russell,* [1893] 1 QB 435) the courts have reverted to a generous interpretation of a rule (see the speeches in *Duke of Bedford v. Ellis,* [1901] A.C. 1, [1900-3] All ER Rep 694 and Lord Lindley himself who was party to the earlier narrower decision, which he criticized in *Taff Vale Rly. Co. v. Amalgamated Society of Railway Servants* [1901] AC 426 at pp. 442-443). It will be necessary to consider shortly some ensuing decisions since the turn of the century; but, in my judgment, the problem is not the width of the operation of the rule but how it shall be applied in the particular circumstances of each case.

[29] At the present time, Ontario is the only jurisdiction in Canada with a comprehensive class proceedings statute which expressly authorizes a defendant's class proceeding in addition to the more common plaintiff class actions. Section 4 of the C.P.A., which authorizes a defendant's class proceeding, provides as follows:

4. Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.

[30] The C.P.A., as remedial legislation, is to be given a purposive interpretation in keeping with its goals of promoting judicial economy and access to our courts: see *Abdool v. Anaheim Management Ltd.* (1993), 15 O.R. (3d) 39 at p. 47, 16 C.P.C. (3d) 142 at p. 150 (Gen. Div.), affirmed (1995), 21 O.R. (3d) 453, 121 D.L.R. (4th) 496 (Div. Ct.), and *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 at p. 744, 106 D.L.R. (4th) 339 (Gen. Div.).

[31] On its face, s. 4 does not require that all potential defendants be named prior to certification of the proceeding nor is the provision expressly confined to willing or consensual representative defendants. While there must be two or more defendants for s. 4 to apply, s. 4 does not limit the membership of the class to the defendants actually named at the time of bringing the motion for certification. Moreover, s. 5 refers to class membership in terms of "persons" and not defendants. In my view, to interpret s. 4 so that it is limited to named defendants would have the effect of preventing the application of this comprehensive statute to circumstances where even rule 12.07 and its predecessor would apply. The result would unduly limit and, I think, undermine the very purpose of s. 4 and its related provisions. Accordingly, I find that s. 4 only requires that the representative defendant or defendants be named as defendants. I will deal with the issue of willingness to act as a representative as that issue arises in the context of s. 5(1).

[32] Again, s. 5(1) of the C.P.A. provides that a court shall certify a class proceeding under s. 4 if:

(a) the pleadings… disclose a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

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

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

A. Do the pleadings disclose a cause of action?

[33] The applicable test in this respect should be “the plain and obvious test” employed under Rule 21 for striking out a pleading which does not disclose a reasonable cause of action. The test was described by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959 at p. 980, 74 D.L.R. (4th) 321, in these terms:

> Thus, the test in Canada governing the application of provisions like rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it “plain and obvious” that the plaintiff’s statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be “driven from the judgment seat”. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Colombia *Rules of Court* should the relevant portions of a plaintiff’s statement of claim be struck out under Rule 19(24)(a).

[34] In short, there is a low threshold to meet in establishing the existence of a cause of action at this stage of a proceeding in order to protect access to our courts: see *Edwards v. Law Society of Upper Canada* (1995), 40 C.P.C. (3d) 316 at p. 318 (Ont. Gen. Div.).

[35] In the context of this test, I am satisfied the statement of claim discloses various causes of action against the defendants. The Band claims legally enforceable aboriginal and treaty rights to reserve lands located in Sarnia. It alleges these rights were unlawfully violated by the Crown when it purported to grant to Cameron one-quarter of the Band’s original reserve without first obtaining, it is alleged, a surrender of the lands from the Sarnia First

Nation. It is pleaded that the Crown had no authority to grant unsurrendered reserved lands. The Band disputes the validity, *ab initio,* of the orders in council purporting to approve the sale and the letters patent issued by the Crown to Cameron by which title was conveyed to him. Thus, the Band seeks declarations that neither Cameron nor his purported successors-in-title, including those persons who claim to have legal interests in the land today, acquired title to the lands. The Band also claims against the Crown defendants, both in their own right and as alleged successors to the liabilities of the Imperial Crown and/or the Crown acting in the right of the Provinces of Upper Canada and Canada, in respect of claimed breaches of the treaties said to guarantee to the Band and the Sarnia First Nation their reserved lands and in respect of alleged breaches of fiduciary duties said to be owed to the Band and the Sarnia First Nation, including the duty to protect the rights of the Band and the Sarnia First Nations to exclusive possession of the reserve. While the parties have joined issue on all of these allegations and claims, it is not for a motions judge to attempt to resolve them in the context of an application for certification. Assuming the facts as stated in the statement of claim can be proved, the statement of claim discloses various causes of action.

[36] All of the defendant landowners have raised defences based on delay and acquiescence. The possible availability of these defences, however, cannot alter the conclusion, at this stage of the proceedings, that the pleadings disclose a cause of action. Statutes of limitations merely bar a plaintiff's remedy and not the cause of action. Moreover, because a limitations defence when pleaded might be subject to exceptions, a defendant is not entitled to strike out a claim as disclosing no reasonable cause of action merely because a good limitations defence may exist. The defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, the defendant can seek to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the court and support its application in this respect with evidence. But in no circumstances can the defendant seek to strike out on the ground that no cause of action is disclosed: see *Ronex Properties Ltd. v. John Laing Construction Ltd.,* [1982] 3 All E.R. 961, [1982] 3 W.L.R. 875 (C.A.); *Bloomfield v. Rosthern Union Hospital Ambulance Board* (1990), 40 C.P.C. (2d) 38, 82 Sask. R. 310 (C.A.); and *Pollakis v. Corner* (1975), 9 O.R. (2d) 691 (H.C.J.). In the matter at hand, the plaintiff has responded to the various defences by pleading exceptions and facts and by asserting various constitutional immunities from the various statutory and equitable defences asserted by the defendants. Once again, assuming the facts as stated in the

statement of claim and the replies can be proved, it is not “plain and obvious” that the pleadings disclose no reasonable cause of action.

B. *Is there an identifiable class of two or more persons that will be represented by the representative defendant?*

[37] In my view, at this stage of the litigation, there is a single identifiable class of two or more persons to be represented. They are all persons claiming a legal interest in the Cameron Lands. With a few possible exceptions arising out of the sheer number of purported property holders, class members have been identified and listed in the motion materials filed with the court. If and when the interests of the members of a single defendant class diverge, the creation of sub-classes can be considered.

C. *Do the claims or defences of the class members raise common issues?*

[38] “Common issues” are defined by the C.P.A. in s. 1 to mean common, but not necessarily identical, issues of fact or law. The Band’s claims arise out of a series of historical transactions and occurrences which are common to all persons who claim interests in the Cameron Lands. As a result, the question of liability and whether there are valid defences to the Band’s claims raise the common factual and legal issues previously described.

D. *Is a class proceeding the preferable procedure for the resolution of the common issues?*

[39] The defendant landowners submit that this is not a “mass wrong” case; that the objectives of improved access to the courts or behaviour modification do not apply; and that the named defendants are not amenable to certification because they are not voluntarily putting forward a representative defendant. They also point out that members of the defendant class may opt out of the proceedings following the certification thereby defeating the intent of this motion and that, after the summary-judgment motions, there is the possibility that all the defendant landowners will be out of the action and, if so, certification will be inappropriate. It is their submission that, given the considerable uncertainty over the application of the C.P.A. to unwilling defendants, the preferable procedure to bind class members is that of a representation order. Relying on the admonition of Megarry J. in *John v. Rees, supra,* at pp. 282-83 that a representation order is a “flexible tool of convenience in the administration of justice”, they submit a representation order could provide for the following terms:

(1) The style of cause would be amended to provide that the defendants other than the Attorney General of Canada and Her Majesty the Queen in the right of Ontario would defend the action individually and in representative capacity as representing all persons who have interests in the land within the Cameron Lands.

(2) The order would be in effect for the purpose of the summary judgment proceedings without prejudice to the plaintiff's right to renew the application for certification at a later stage, should that be necessary.

(3) The order would provide for notice by newspaper publication and by registered mail.

[40] In reply, the Band points to the comprehensive features of the C.P.A. in contrast to the skeletal structure of rule 12.07. The Band submits that certification of a proceeding under the C.P.A. ensures that all parties affected by the Band's claims, including those with limited financial resources, have access to this court. It also provides them with an opportunity to obtain stronger legal representation than they might otherwise have secured if sued individually in mass non-class actions involving complex legal and factual issues. The Band points out that certification achieves certainty and finality in this litigation because it allows for the common issues affecting all interested parties to be determined. It argues that certification is fluid and flexible in nature and will accommodate entry and exit from a class. The Band relies on *Peppiatt v. Nicol* (1993), 16 O.R. (3d) 133 at p. 141, 20 C.P.C. (3d) 272 (Gen. Div.), where Chilcott J. described two of the goals of the C.P.A. in the following terms:

(a) To create an economy of scale to permit the advancement of claims that would otherwise be uneconomical to pursue by individuals, and

(b) To avoid multiplicity of proceedings and the detrimental effect that those proceedings may have on the administration of justice.

[41] The Band is very concerned that rule 12.07 may not meet the requirements of participation by interested parties in an *in rem* judgment as provided for by the Ontario Court of Appeal in *Coulson v. Secure Holdings* (1976), 1 C.P.C. 168 (Ont. C.A.) at pp. 173 and 175. They also emphasize the determination of the Supreme Court of Canada in *R v. Kruger,* [1978] 1 S.C.R. 104 at pp. 108-09, 75 D.L.R. (3d) 434, that parties should be afforded an opportunity to adduce evidence in detail bearing upon the resolution of claims to aboriginal title because they are woven with history, legend, politics and moral obligations. The Band fears that a representation order under rule 12.07 might promote judicial economy at too high

a price, unless notice and opting-out features were crafted into the representation order. And in this latter regard, the Band points to the ruling of the Supreme Court of Canada in *G.M. (Canada) v. Naken, supra,* at pp. 97 and 104-05 which held that Rule 75 of the Ontario Rules of Practice (the predecessor to current rule 12.07) was not intended to impose a new and distinct method of proceeding upon a generally established pattern of procedure. If it had been so intended, the court believed extensive provisions would have been added to Rule 75 to support the innovation. Thus, there being no common trust fund to, in effect, compensate for the lack of notice and the opportunity to opt out, the Band submits that the representation procedure is not appropriate.

[42] Clearly, if it applies, the C.P.A. is the most comprehensive regulatory vehicle for this type of litigation. While I accept that a representation order could be crafted to achieve many of the advantages of the C.P.A., it seems preferable to at least first use the C.P.A. with its available procedures and policy balances, if at all possible. Because of the great uncertainty which can arise in the administration of proceedings involving a multiplicity of parties, a court should prefer the most comprehensive regulatory regime reasonably available to it. This approach will promote economy, efficiency and expedition. These goals are of interest to all affected parties and the public at large. I would say, however, that the issuance of a rule 12.07 representation order may be revisited should opting out be so extensive that a supplementary representative structure is called for in the interests of justice. I therefore conclude that, at this time, a class proceeding is the preferable procedure for the resolution of the common issues.

E. (i) *Is there a representative defendant who would fairly and adequately represent the interests of the class?*

[43] The defendant landowners point out that there is no defendant willing to assume the role of representative defendant and, therefore, question whether there is a defendant who would fairly and adequately represent the interests of the class. In fact, it is their submission that the C.P.A. is limited to certifying a defendant class proceeding only where there exists a willing representative defendant. In reply, the Band relies on the jurisprudence in the United States reviewed earlier in these reasons which accords the willingness of a proposed representative defendant to serve as representative no more than “token” weight. The Band points out that all of the proposed representative defendants have delivered a statement of

defence and evidenced an intention to vigorously defend the Band's claim. No one has indicated a lack of resources to defend this action. Counsel experienced in actions involving aboriginal land disputes have been retained. For example, Amoco Canada Resources Ltd. and Amoco Canada Petroleum Company Ltd. have retained Jeff G. Cowan of the firm of Weir and Foulds. Mr. Cowan is a civil litigator who has represented parties in actions involving aboriginal land disputes. He appeared on behalf of several cottage owners in *Chippewas of Kettle & Stony Point v. Canada (Attorney General)* (1995), 24 O.R. (3d) 654 (Gen. Div.). Brewers Retail Inc. has retained Messrs. Ian Binnie, Q.C., and Mr. Robert J.M. Janes, of the firm McCarthy Tétrault, in connection with this action. Mr. Binnie represented the Attorney General of Canada in *Ontario (Attorney General) v. Bear Island Foundation,* [1991] 2 S.C.R. 570, 83 D.L.R. (4th) 381. Mr. Binnie also represents Dow Chemical Canada Inc. and Imperial Oil in this action. Interprovincial Pipe Line Inc. has retained Brian Crane of the firm of Gowling, Strathy & Henderson. Mr. Crane represented the Association of Iroquois and Allied Indians in *Ontario (Attorney General) v. Bear Island Foundation, supra.* Mr. Crane has also been authorized by the other defendants to put forward their position with respect to the Band's proposed certification application. Ontario Housing Corporation is represented in these proceedings by the Attorney General of Ontario and, specifically, Mr. J.T.S. McCabe. Mr. McCabe represented Ontario in *Ontario (Attorney General) v. Bear Island Foundation, supra.* Mr. McCabe also represents Her Majesty in the right of Ontario in this action. The Bank of Montreal, Truscan Realty and Canada Trustco Mortgage Company are represented in these proceedings by G.T. Tillmann of the firm of Pensa & Associates. Mr. Tillmann represented several mortgage companies in *Chippewas of Kettle & Stony Point v. Canada (Attorney General), supra.*

[44] I am satisfied that any and all of the named defendants who have a property interest to protect in this action will fairly and adequately represent the entire class of persons interested in the lands in question. Indeed, because most of the defendants have indicated a willingness to stand as representatives pursuant to a rule 12.07 order, I would be inclined to name them all under the C.P.A. as representative defendants of a single class of persons having an interest to protect in the Cameron Lands. However, I wish to leave the precise identity of the representative parties to be finally determined at a case management conference scheduled for July 9, 1996 in Toronto. Alternatively, an order might be fashioned pursuant to s. 14. It provides:

> 14(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.
>
> (2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

[45] I would be willing to consider naming one representative defendant and then exercising the court's power under s. 14 to permit all other named defendant class members to participate in the proceeding on whatever terms, including terms as to costs, the court considers appropriate after conferring with the parties at the case management conference scheduled for July 9, 1996.

E. (ii) *Is there a representative defendant who has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding?*

[46] The defendants stress that no proposed representative defendant has produced a plan, be it workable or unworkable. They submit that this provision most clearly illustrates that the C.P.A. requires a volunteer representative defendant. In support, they also point to s. 5(2) where, in the context of possible subclasses, it is provided that "the court *shall not* certify the class proceeding unless there is a representative defendant who*…* (*b*) has produced a plan…" (emphasis added). Thus, the defendants submit that the production of a plan for the proceeding by a representative defendant is a mandatory condition precedent to any certification order pursuant to s. 5(1). The plaintiff responds that s. 5(1) merely directs a court to act when certain requirements are met. It does not preclude a court from certifying when the specified conditions are not present. While counsel appears to concede that this construction is seriously challenged by the language of s. 5(2), he submits that s. 5(1) is not burdened by this language should the court certify for only a single class.

[47] In construing s. 5(1), the court must have regard to the statute as a whole, including the language employed in s. 5(2) which is a provision having a very similar, if not identical, purpose to the immediately preceding subsection. Similarly, however, a court must also have regard to s. 4 which empowers the bringing of this motion. Section 4 is not confined to motions brought by willing defendants which would have been the most direct manner to express such a fundamental structural feature. Moreover, there are other provisions of the

C.P.A. which have caused me to conclude that s. 5(l)(*e*)(ii) does not defeat the plaintiff's application. While there must be a workable method of advancing a proceeding on behalf of a class and of notifying class members of the proceeding, a court is accorded the ultimate responsibility of determining what is workable in this respect and, prior to certification, may issue any order it considers appropriate pursuant to s. 12 to ensure that the representative defendant has produced a plan acceptable to the court. Section 12 of the C.P.A. provides:

> 12. The court, on the motion of a party or class member, may make an order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[48] Accordingly, before a certification order is granted in this matter, there will be a representative defendant who has produced a plan for the proceeding (by court order or otherwise) that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding. This intended comprehensive authority in the court is recognized by several other provisions of the C.P.A., including ss. 10, 17, and 19 to 22.

[49] In particular, section 10 empowers a court to amend a certification order or make any other order it considers appropriate where it appears that the conditions mentioned in s. 5(1) and (2) are not satisfied. Section 10 states:

> 10(1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5(1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.

[50] It would be anomalous to hold that an initial unwillingness of a defendant under s. 5(1)(*e*)(ii) is a complete barrier to an applicant's application for certification, when a subsequent discovery that a plan has proved inadequate may not be determinative even when the representative defendant is unwilling to rectify that inadequacy. I note also that in the more typical plaintiff class cases, the development of a plan has, in practice, been a collaborative effort between the representative plaintiff and the defendants, with the court playing a supervisory role.

[51] The narrow interpretation of the C.P.A. advocated by the defendants is in stark contrast to the much more liberal approach to rule 12.07 recommended by them. While I have not found the “legislative history” to the C.P.A. very helpful, I doubt the consent of a proposed representative defendant was intended. In my opinion, had the legislature intended such a fundamental threshold requirement, it would have said so in the clearest of terms. It did not. Instead, it enacted a general framework and, through a variety of provisions, provided the court with an overall responsibility for the administration of a class proceeding. This has caused me, in the context of s. 4, to conclude that the required plans referred to in s. 5(1)(*e*)(ii) and (2)(*b*) may be workable plans produced by a representative defendant on order of the court, if need be.

E. (iii) *Is there a representative defendant who does not have, on the common issues for the class, an interest in conflict with the interest of other class members?*

[52] All the proposed class members and the proposed representatives have the same interest in putting forward the arguments that the Band’s rights to the Cameron Lands have been extinguished and/or that the Band is now barred from attacking the transaction giving rise to the purported conveyance in 1853 of title to the Cameron Lands. A disqualifying conflict of interest for a proposed representative defendant is one which relates to the common issues for the defending class. In the United States, it has been held that the possibility of antagonistic interests only prevents certification if the antagonism goes to the subject-matter of the litigation: see *Oneida Indian Nation of Wisconsin v. New York, supra,* at p. 702. I am satisfied that none of the possible defendant representatives has an interest in conflict with the interests of other class members on the common issues for the class.

Notice

[53] The Band will assume the costs of giving notice. The details of the appropriate notice mechanisms will be reviewed with the parties at the case management meeting of July 9, 1996, as will all other details in respect of the litigation plan. A final certification order will await that conference.

[54] With respect to the costs of this motion, I find this to be an appropriate case for no award of costs. The matters at issue have been novel and in the nature of a test case. However, I am specifically not indicating how costs will be dealt with in the future.

Motion granted.