Federal Court Cour fédérale

Date: 20220329

Dockets: T-1067-87
T-365-01

Citation: 2022 FC 434

Ottawa, Ontario, March 29, 2022

PRESENT: The Honourable Mr. Justice Favel

Docket: T-1067-87

BETWEEN:

LEO YOUNGMAN, CHIEF OF THE BLACKFOOT INDIAN BAND, ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF THE BLACKFOOT INDIAN BAND, AND ALL DESCENDANTS OF THE BLACKFOOT INDIAN BAND

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

Docket: T-365-01

AND BETWEEN:

ADRIAN STIMSON SR., CHIEF OF THE SIKSIKA NATION, ON BEHALF OF HIMSELF AND ALL MEMBERS OF THE SIKSIKA NATION AND THE SIKSIKA NATION AND FLORENCE BACKFAT

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Nature of the Matter

[1] Siksika Nation [Siksika] and Canada have reached a provisional settlement agreement [Settlement Agreement or Settlement] related to six representative proceedings filed in this Court:

> (a) Adrian Stimson Sr et al v Attorney General of Canada, T-4242-71 [1960 Petition as of Right];
>
> (b) Leo Youngman et al v Her Majesty the Queen, T-1067-87 [1910 Surrender Action];
>
> (c) Adrian Stimson Sr et al v Attorney General of Canada, T-365-01 [Creosote Action];
>
> (d) Adrian Stimson Sr et al v Her Majesty the Queen, T-366-01 [Cluny Action];
>
> (e) Adrian Stimson Sr et al v Attorney General of Canada, T-368-01 [Bow River Irrigation District or BRID Action];
>
> (f) Adrian Stimson Sr et al v Attorney General of Canada, T-370-01 [Canadian Pacific Railway or CPR Action];
>
> [the Actions]

[2] Pursuant to the terms of the Settlement Agreement, Siksika moves for an Order approving the settlement and discontinuing the Actions under Rule 114(4) of the *Federal Courts Rules*, SOR/98-106 [*Rules*]. Siksika seeks this Order on a without costs basis, to come into effect upon the execution of the final Settlement Agreement by the Minister of Crown-Indigenous Relations.

[3] Mildred Three Suns [Ms. Three Suns] is the Administrator of the Estate of Florence Backfat [Estate], a co-plaintiff in the Creosote Action. Ms. Three Suns submits that the discontinuance of the Creosote Action will result in the Estate's claim being dismissed. She also submits that the Court must determine what rules should apply to the Creosote Action, as it was filed in 2001, during the period when Rule 114 was repealed and new class proceeding rules had yet to come into force. Ms. Three Suns submits that the class proceeding rules should apply because the Creosote Action alleges personal injuries. Ms. Three Suns seeks an Order holding Siksika's motion for settlement approval and discontinuance in abeyance pending this determination, stating that the motion is premature. Additionally, Ms. Three Suns asks the Court to direct that Siksika's Band Council disclose forthwith all documents in their possession that were seized by the Land Claims Committee. She also seeks costs.

[4] Mr. Leo Pretty Young Man is a member of Siksika. Similar to Ms. Three Suns, he submits that he would be prejudiced by the discontinuance of the Cluny Action and the CPR Action. Like Ms. Three Suns, Mr. Pretty Young Man submits that the Cluny Action and the CPR Action are primarily based in tort law and concern individual rights. Accordingly, he states that the rules governing class proceedings ought to apply to these actions. On this basis, he submits that he has standing pursuant to Rule 334.23(1). Mr. Pretty Young Man seeks an Order holding Siksika's motion to discontinue in abeyance. He also seeks an Order directing Siksika Band Council to forthwith disclose all documents in their possession concerning the Cluny Action and the CPR Action. Mr. Pretty Young Man states that documentary disclosure is required so that he can assess how to proceed. Finally, Mr. Pretty Young Man seeks costs.

II. Background

[5] Siksika is a signatory to Treaty Seven and a Band within the meaning of the *Indian Act*, RSC, 1985, c I-5 [*Indian Act*]. Pursuant to Treaty Seven, Canada set apart reserve lands for the collective use and benefit of Siksika members [IR 146].

[6] The Actions were brought against Canada between 1960 and 2001 by Siksika as representative proceedings on behalf of its members. In the Actions, Siksika alleged that Canada breached legal obligations to Siksika in connection with the provision and administration of reserve lands for Siksika, and in the administration of proceeds of the disposition of Siksika's reserve lands.

[7] In November 2021, negotiators for Siksika and Canada initialled a provisional Settlement Agreement under which the parties agreed to settle the claims asserted by Siksika in the Actions. The Estate was not a party to the Settlement Agreement.

[8] The key terms of the Settlement Agreement include:

(a) Canada is to pay financial compensation to Siksika in the amount of $1,300,000,000;

(b) Siksika is to surrender all rights and interests in certain lands described in the Settlement in accordance with sections 38 and 39 of the *Indian Act*;

(c) Siksika is entitled to make applications to Canada to add up to 115,000 acres of land to Siksika reserve lands;

(d) Siksika is to release Canada from liability in relation to the Actions and to indemnify Canada from any proceeding brought in relation to the subject matter of the Actions; and

(e) Siksika is to dismiss or discontinue the litigation in relation to the Actions and obtain an Order approving the discontinuance or settlement of the Actions.

[9] In November and December of 2021, Siksika consulted with its members regarding the proposed settlement. Siksika held 23 in-person information meetings that lasted approximately three hours each. Siksika also held three information meetings by video-conference. On December 3, 2021, further information and documents, including the Settlement Agreement, were sent to members who attended an information meeting and provided their email address. Instructions on how to obtain a copy of the Settlement Agreement were also posted on the community website and Facebook page.

[10] On December 13, 2021, Siksika was allegedly prepared to settle the claims of the Backfat Estate for approximately $600,000 - $700,000. Ms. Three Suns did not attend this meeting.

[11] On December 16 and 17, 2021, Siksika held a referendum to ratify the Settlement Agreement under the *Indian Referendum Regulations*, CRC, c 957 [*Indian Referendum Regulations*]. Of all eligible voters, 69% voted in the referendum and of that, 77% voted in favour of the Settlement Agreement.

III. Procedural History Leading to the Motions

[12] On February 27, 2018, this Court issued an Order confirming that the Actions would proceed as specially managed proceedings and that all of the Actions would be case managed together under the 1910 Surrender Action.

[13] On May 8, 2020, a Notice of Change of Solicitor on behalf of Siksika was filed with the Court. On or about December 21, 2021, a Notice of Change of Solicitor was filed on behalf of the Estate, formerly acting on its own behalf.

[14] Initially, Ms. Three Suns sought an urgent hearing for a stay of proceedings in light of Siksika's ratification of the Settlement Agreement. Two siblings of Ms. Three Suns, beneficiaries of the Estate, sought participation. On February 11, 2022, a case management conference was held with Siksika, Canada, the Estate, and counsel for the two siblings in attendance. Thereafter, the Court set out a schedule dealing with the two siblings' intervention and the hearing of Siksika's motions for settlement approval and discontinuance. The hearing of Siksika's motion was scheduled for March 21, 2022. Ultimately, the intervention was abandoned, as the siblings' materials were not submitted to the Court in accordance with the agreed upon scheduling Order.

[15] On March 15, 2022, Mr. Pretty Young Man brought his current motion. The Court agreed to hear his motion and the parties agreed on a schedule to hear Mr. Pretty Young Man's motion along with Siksika's motion.

IV. Parties' Positions

A. *Siksika*

[16] Siksika seeks an Order approving the Settlement and discontinuing the Actions pursuant to Rule 114(4) of the *Rules*. Siksika seeks this Order on a without costs basis, to come into effect upon the execution of the final Settlement Agreement by the Minister of Crown-Indigenous Relations [Minister]. Siksika submits that the threshold for approving settlement and discontinuance in a representative proceeding is lower than the threshold applicable to class proceedings. According to Siksika, the Court must ask "whether it is in the interests of justice to approve the discontinuance and settlement." Siksika emphasizes that its consultation process was extensive; notice was given to members regarding the terms of the Settlement; there was a high voter turn out at the referendum; and a significant majority voted in favour of the Settlement. Further, Siksika notes that the Settlement resolves longstanding grievances; provides significant benefits to Siksika and its members; was negotiated at arms length; and does not make special provision for any individual. Siksika states that the Settlement funds will be paid to Siksika, the bulk of which will be deposited into a trust.

[17] Siksika maintains that the Estate's claim will not be affected by settlement approval and discontinuance and that the Estate will remain free to prosecute its claims against Canada. Siksika disputes that Mr. Pretty Young Man has standing to participate.

[18] Siksika filed an affidavit of Tracy McCugh, a councillor of Siksika, which describes the Actions and some of their procedural history. Her affidavit attaches the statements of claims filed

in the Actions. Siksika also filed an affidavit from Ida Duck Chief, the deputy ratification officer for the Settlement Agreement ratification vote. In her affidavit Ms. Duck Chief describes the ratification process including the information sessions, the information documents, and attaches copies of this information and the results of the ratification vote.

[19] Siksika submits that its motion for settlement approval and discontinuance should be granted.

B. *Canada*

[20] Canada did not file any materials but at the hearing it adopted Siksika's submissions that the Court should approve the Settlement Agreement and discontinue the Actions pursuant to Rule 114(4). Canada also submitted that the Settlement Agreement only requires Siksika to discontinue the Actions that it is a party to. That is, the Estate's continued involvement in the Creosote Action will not be affected if the Court approves the Settlement and discontinues Siksika's involvement in the Actions. Canada further confirmed that all available defences would remain at its disposal should the Estate pursue the Creosote Action.

C. *The Estate*

[21] The Creosote Action relates to the contamination of reserve lands caused by three syphons set up by Canada that were treated with creosote. Creosote is a combination of chemicals that often includes polycyclic aromatic hydrocarbons, a carcinogen. The statement of claim in the Creosote Action alleges, *inter alia*, that Ms. Backfat suffered from medical

difficulties, failed and inconsistent crops, and dramatic livestock morality caused by the contamination. It also alleges that one of Ms. Backfat's daughters, Charlotte, died due to medical difficulties related to the contamination. The relief sought in the Creosote Action includes damages to individual members of Siksika who experienced sickness as a result of the contamination.

[22] In her written submissions, Ms. Three Suns submitted that discontinuance and approval of the Settlement will result in the Estate's claim being dismissed. Ms. Three Suns submitted that there is no provision in the Settlement Agreement permitting the unilateral severance of the Estate's claim and that Canada's position on this issue is unclear. At the hearing, however, Canada confirmed that the Estate's claim could be severed. Ms. Three Suns maintains that the Estate was not consulted and that there were various problems with community consultation and the referendum.

[23] Ms. Three Suns submits that Siksika's motion is premature because the Court has not determined what rules govern the Creosote Action. She states that the Creosote Action was filed in 2001, when Rule 114 was repealed and the new class proceeding rules had yet to come into force. Rule 114 was subsequently reinstated in 2007. She submits that the claims in the Creosote Action are concerned with personal injuries and based in tort law. As such, class proceeding rules should govern. The Estate emphasizes that while some of claims in the Creosote Action are collective in nature, the core allegations relate to individuals that were living near the syphons, not Treaty Rights.

[24] Ms. Three Suns' affidavit describes what she was told by certain Siksika members about the Siksika land claims department and the circumstances surrounding the Creosote Action, including the circumstances told to her by other Siksika families living near the lands described in the Creosote Action. Ms. Three Suns also states that she had issues with the scope and sufficiency of the information shared about the Settlement Agreement and the ratification process. Appended to her affidavit is an affidavit of Shirley Spotted Eagle stating her issues with the ratification process and her view that the per capita financial distribution that occurred as part of the ratification process was improper. Shirley Spotted Eagle also states that she has challenged the results of the ratification vote by submitting a dispute with the Minister. As of the date of the hearing of the motions, Canada confirmed that the Minister had not yet communicated any decisions to those Siksika members who challenged the referendum.

[25] Ms. Three Suns also submitted an affidavit from Alfred Yellow Horn. Mr. Yellow Horn describes what it is like to live near the lands described in the Creosote Action. He also described the lack of information or conflicting information that was shared during the ratification process. Though filed late, I have considered this affidavit.

[26] For all of these reasons, Ms. Three Suns submits that granting Siksika's motion would prejudice the Estate and other members of Siksika. Ms. Three Suns asks this Court to hold Siksika's motion for settlement approval and discontinuance in abeyance. Ms. Three Suns' written submissions take no position on Mr. Pretty Young Man's participation, since the Estate's submissions were filed prior to Mr. Pretty Young Man's motion. At the hearing the Estate did

not oppose Mr. Pretty Young Man's submissions. In general, both parties agree that the Settlement Approval should be held in abeyance pending document disclosure.

D. *Mr. Pretty Young Man*

[27] Mr. Pretty Young Man submits that he would be prejudiced by the discontinuance of the Cluny Action and the CPR Action. He states that the Cluny Action and CPR Action are related in their factual context. More specifically, he states that the events giving rise to the CPR Action led to the injuries in the Cluny Action.

[28] The CPR Action contains several allegations against Canada and CPR. It alleges that CPR caused irrigation systems to be built on and around Siksika territory without permission. Those irrigation systems gave rise to flooding of sewage and sewage effluent onto the Siksika reserve. This led to certain claims in the Cluny Action, which alleges that Canada breached its treaty, statutory, and fiduciary obligations by failing to prevent the Hamlet of Cluny, County of Wheatland, and the Province of Alberta from using portions of the Siksika reserve for the secondary containment of sewage effluent that ultimately empties into the Bow River. It also alleges that the Hamlet of Cluny, County of Wheatland, Province of Alberta, and CPR have released and continue to release sewage effluent onto the Siksika reserve via sewer lagoons. This has resulted in injuries including unhealthy reserve lands that cannot be used for commercial or agricultural purposes; contaminated well water; and economic hardship.

[29] Mr. Pretty Young Man has lived close to a certain sewage lagoon since the 1960s. He states that his farmland has deteriorated due to the sewage and sewage effluent. As a result, he

has lost income, livestock, and is unable to lease the land. He states that he and others continue to suffer personal injury and economic loss due to the sewage and that he has not been consulted regarding the discontinuance of any of the Actions. He submits that he will be prejudiced if Siksika's motion is allowed because he will be left without legal recourse. Furthermore, he notes that the Settlement Agreement does not indicate whether any money will go towards cleaning up the land or compensating the individuals affected by the sewage and floods.

[30] Mr. Pretty Young Man submits that both the Cluny Action and the CPR Action are based primarily in tort law and individual rights. Accordingly, he states that the rules governing class proceedings ought to apply to both actions. On this basis, he states that he has standing pursuant to Rule 334.23(1), which allows the Court to permit one or more class members to participate in the class proceeding at any time.

[31] Mr. Pretty Young Man also submits that it was improper for the *Indian Referendum Regulations* to be used to settle tort claims and that doing so had serious consequences for the individuals claiming compensation for their injuries. He also submits that the Court should dismiss Siksika's motion because counsel for Siksika and Siksika Chief and Council are acting in a conflict of interest. Further, he claims that counsel for Siksika is acting in a conflict of interest by representing both Siksika and individual members of the Band. He makes similar claims against the Siksika Council.

[32] Mr. Pretty Young Man submitted his own affidavit describing the matters above. He also submitted an affidavit of Esther Majoros, who makes similar statements about the effects of sewage on the Siksika reserve.

V. Issues

[33] Based on the submissions, the issues are best characterized as:

1. What Rules apply?
    a. Are the Actions still representative proceedings?
    b. How should the Actions be characterized?
    c. Does Mr. Pretty Young Man have standing?
2. Should the Court approve the settlement and discontinue the Actions?

VI. Analysis

[34] Upon hearing the motions, I am satisfied that Rule 114 applies to Siksika's motion and the underlying Actions. This Court has noted that the class proceeding rules may not be appropriate for claims involving Aboriginal rights because the certification process is "time consuming, expensive and, regrettably, unnecessary where the plaintiff is the Chief of a Band recognized as such under the Indian Act and the claim is asserted on behalf of all members of that Band" (*Dene Tsaa First Nation v Canada*, 2004 FC 550 at para 3 [*Dene*]). While The Court in *Dene* specifically referred to "Aboriginal rights", the same principle applies to other collective claims such as claims related to Treaty rights and collectively held reserve lands (*Gill v Canada*, 2005 FC 192 at para 12 [*Gill*]). Having looked to the nature of the claims in the Actions, I find

that the class proceeding rules do not apply. As such, Mr. Pretty Young Man does not have standing. I further find that the Settlement Agreement is reasonable. Therefore, the Court approves the Settlement and grants Siksika's motion to discontinue the Actions.

(1) Rule 114 governs the Actions and the motions

(a) *The Actions are representative proceedings*

[35] Rule 114, dealing with representative proceedings, was repealed in November 2002 without any transitionary rules. At the same time, the Rules governing class action proceedings were introduced. Accordingly, parties that initiated proceedings under Rule 114 sought clarification on whether their case would continue as a representative proceeding or a class proceeding. This was the circumstance in *Gill*, which is discussed in more detail below.

[36] At the urging of the Aboriginal litigation law bar, Rule 114 was re-enacted or re-instated in 2007. They submitted that there is no need to certify an Indian Band under the class proceeding rules because it is a recognized entity in law and it represents the interests of a particular group. They also pointed to the *sui generis* rights that are held by a community and must be asserted communally (The Honourable Allan Lutfy & Emily McCarthy, "Rule-Making in a Mixed Jurisdiction: The Federal Court (Canada)" (2010) 49 SCLR (2d) 313 at para 34).

[37] *Gill* was decided after Rule 114 was repealed and when no transitionary rules were in place. The Court considered whether the proceeding could continue as a representative proceeding or a class action. Justice Hargrave outlined two approaches: the proceeding could

proceed as (a) a class proceeding or (b) a representative proceeding, if the Court exercised its jurisdiction under Rule 55 to do away with the class proceeding rules (*Gill* at para 12). Justice Hargrave explained that the later option will be appropriate when the proceeding relates to Aboriginal law and does “not fit conveniently within the new Class Action Rules” (*Gill* at para 12). He held that this is particularly the case “when the claim seeks a determination of collective rights” such as “aboriginal and treaty rights and declaratory relief to that effect” (*Gill* at para 12).

[38] At the hearing, both Ms. Three Suns and Mr. Pretty Young Man submitted that the Actions automatically became class action proceedings upon the repeal of Rule 114 in November 2002, subject to a Rule 55 order dispensing with the class action rules (*Gill* at paras 6-11). Ms. Three Suns and Mr. Pretty Young Man relied on *Gill*, *Dene*, and *Buffalo v Canada (Minister of Indian Affairs and Northern Development)*, 2002 FCT 1299 for this proposition. For the following reasons, I disagree that all proceedings automatically became class actions upon the repeal of former Rule 114.

[39] In *Dene*, the Court stated the following at paragraph 8:

> … I can see no objection to simply dispensing with the application of Rules 299.1-299.42 and leaving the matter there. Former Rule 114 was simply permissive, allowing a representative action to be brought. That was properly done while the Rule was still in force and the action having been validly brought continues in existence. The Federal Court Rules, 1998 contained, and still contain no other rules specifically dealing with the conduct of representative actions and the procedure to be followed is and has always been the same as for any other action. This case, in particular, is specially managed and as Case Management Judge, will be in a position to deal with and to give directions regarding any specific problems which may arise and which may be brought to my attention by the parties. I can see no reason to do anything more.
>
> [Emphasis added.]

[40] In *Gill* the Court considered *Den*e stating, "[i]t is implicit in [Dene], involving a properly initiated representative action, that it must proceed as a class action, subject to a Rule 55 order dispensing with compliance with the new Class Action Rules. Mr. Justice Hugessen took the court order approach, notwithstanding his observation at paragraph 8 that the action, having brought as a representative action, continued to exist." With respect, I find that it was not implicit in *Dene* that the class proceeding rules automatically applied due to the repeal of the representative proceeding rules. For instance, at paragraph 3 of *Dene*, Justice Huggesen noted that "no transitional provisions were adopted regarding the continuation of pending representative actions and <u>it appears to have been assumed</u> that such actions could conveniently go forward as class actions…" (Emphasis added). Justice Huggesen did not specifically pronounce on whether this was the case.

[41] Siksika submits that all Actions remained dormant during the period that the representative proceeding rules were repealed. Further, Siksika points out that no party sought any procedural orders related to the Actions including to the point when Rule 114 was re-enacted. Therefore, with the re-enactment of Rule 114, the Actions all properly remain representative actions and the Court can address the motion to discontinue the Actions in accordance with Rule 114(4).

[42] I am persuaded by Siksika's submissions. I find that the case law relied on by Ms. Three Suns and Mr. Pretty Young Man can be distinguished on the basis that those proceedings were decided before the re-enactment of Rule 114, when there were no transitionary rules governing how to proceed with matters initiated as representative proceedings. In comparison, the present

matter involves approval of the settlement and discontinuance of the Actions under the re-enacted or re-instituted Rule 114.

[43] On this basis, I find that it is appropriate to depart from the approach described in *Gill*. Instead, I am guided by Rule 114(2) which states that this Court may, at any time, determine whether the conditions in Rule 114(1) are satisfied. I find that for each Action, the conditions of Rule 114(1) are satisfied and that the Actions are in fact representative proceedings.

[44] First, as in *Dene*, Siksika properly commenced representative proceedings for collective interests involving Treaty interests and collectively held reserve lands. The following section analyzes the nature of the individual claims and demonstrates that they are collective in nature. Those proceedings continue in existence as no party sought any orders that required a determination of the proper process for the conduct of the Actions. Further, the representative action rules were re-enacted while the Actions remained dormant and, without any directions or orders in the intervening period, the re-enacted Rules still apply to the Actions. Additionally, I note that an August 31, 2016 Order from this Court approved the settlement and partial discontinuance of the 1960 Petition as of Right pursuant to Rule 114(4). The Court made this Order upon being satisfied of the steps taken to inform the Siksika membership of the settlement and with the ratification and approval of the terms of the settlement by Siksika members.

[45] It is not necessary for the Court to make an Order pursuant to Rule 55, as in *Gill* or *Dene*. Rule 55 was invoked in those cases because there were no rules governing representative proceedings at the time, nor were there any transitionary rules. If Rule 114 had not been re-

enacted, Siksika would likely have sought an Order pursuant to Rule 55. However, that is not the case now. Even if it was, the Court would have nevertheless been satisfied that the Actions should be treated as representative actions.

[46] Accordingly, I find that Actions and the motions currently before the Court are governed by Rule 144. The relevant portions of that Rule include:

> **Representative proceedings**
>
> **114 (1)** Despite rule 302, a proceeding, other than a proceeding referred to in section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that
>
> **(a)** the issues asserted by or against the representative and the represented persons
>
> > **(i)** are common issues of law and fact and there are no issues affecting only some of those persons, or
> >
> > **(ii)** relate to a collective interest shared by those persons;
>
> **(b)** the representative is authorized to act on behalf of the represented persons;
>
> **(c)** the representative can fairly and adequately represent the interests of the represented persons; and
>
> **(d)** the use of a representative proceeding is the just, most efficient and least costly manner of proceeding.
>
> **Powers of the Court**
>
> **114 (2)** At any time, the Court may
>
> **(a)** determine whether the conditions set out in subsection (1) are being satisfied;
>
> **(b)** require that notice be given, in a form and manner directed by it, to the represented persons;

> **(c)** impose any conditions on the settlement process of a representative proceeding that the Court considers appropriate; and
>
> **(d)** provide for the replace3ment of the representative if that person is unable to r4epresent the interests of the represented persons fairly and adequately.
>
> […]
>
> **Approval of discontinuance or settlement**
>
> **(4)** The discontinuance or settlement of a representative proceeding is not effective unless it is approved by the Court.
>
> […]
>
> [Emphasis added.]

(b) *The Actions concern collective rights*

[47] Having reviewed the statements of claim filed in the Actions, I find that they are rooted in collective rights and interests in reserve land and/or the collective Treaty rights or interests shared by Siksika members. As such, Rule 114(1)(a) is satisfied.

[48] The styles of cause and the wording contained in the statements of claim clearly demonstrate that the Actions were commenced as representative proceedings by the elected Chief and/or Band Council of Siksika. The Chief and/or the Band Council, as duly elected by the electors of that First Nation, are authorized representatives and may commence actions on behalf of the collective rights and interests of its membership. Band Councils can also fairly and adequately represent the rights and interests of their membership. Where Chief and Council initiate proceedings on behalf of a Band, a representative action will likely be the just, most efficient, and least costly manner of proceeding. This is particularly so in the Actions which set

out numerous serious claims against Canada for the manner it which it caused or facilitated various wrongs concerning Siksika's reserve lands and Treaty rights over a very long period of time. Siksika's Band Council has worked with various committees, Siksika Elders, and other individuals to resolve these historic wrongs and this work has resulted in a significant settlement in monetary terms. Taking all of the above into account, I find that Rule 114(1)(a), (b) ,(c), and (d) are satisfied.

[49] This conclusion is reinforced by the nature of the individual Actions, which are analyzed in more detail below.

(i) 1960 Petition as of Right

[50] The statement of claim in the 1960 Petition as of Right action captures most if not all of the facts set out in the remaining Actions. Paragraph one states that then Chief McHugh was "duly authorized and instructed by the Blackfoot Band Council to bring this petition on behalf of himself and all other members of said Blackfoot Band of Indians…". The 1960 Petition as of Right action alleges breaches of trust by Canada for improper surrenders of reserve lands, improper uses of reserve land, as well as unlawful or improper use of Siksika's money. The relief sought includes an accounting of all money and transactions involving the various improper uses of reserve land. It also seeks compensation related to non-payment of Treaty benefits, selling of resources from the reserve, and for the surrender of reserve lands. This is clearly a representative proceeding, as the claims are collective in nature.

[51] As noted above, Canada filed a statement of defence in this action and the parties reached a partial settlement in August 31, 2016, resulting in an amendment to the 1960 Petition as of Right claim.

(ii) 1910 Surrender Action

[52] The statement of claim in the 1910 Surrender Action provides, at paragraph one, that then Chief Leo Youngman was "suing on his own behalf and on behalf of all members of the Band." This action alleges that Canada breached its fiduciary duty owed to Siksika by improperly or unlawfully surrendering 115,000 acres of reserve lands and certain sub-surface interests. The relief sought includes a declaration related to Canada's breach of fiduciary duty and damages. This is clearly a representative proceeding.

[53] There was a partial discontinuance of this action on January 7, 2005 relating to the surrender of approximately 12,500 acres of land.

(iii) Creosote Action

[54] The Creosote Action is unique because it identifies the plaintiffs as then Chief Adrian Stimson "on behalf of himself and all members of the Siksika Nation and the Siksika Nation" as well as "Florence Backfat." At paragraph three the statement of claim further states that then Chief Stimson "sues on behalf of himself and on behalf of all other members of the Siksika Nation including all those having a past or present interest in IR 146…".

[55] While one of the plaintiffs in the Creosote Action is an individual, the statement of claim clearly contemplates collective interests. For example, at paragraph 24 the claim alleges that the affected area is “no longer used to grow vegetables, gather berries or collect edible and medicinal plants.” Further, “Siksika Nation members no longer fish…and no longer hunt animals or migratory birds” in the affected area. It then states that “Siksika Nation members have lost the use and enjoyment of IR 146 lands and waters in the area near the siphons.”

[56] The claims against Canada similarly reflect the loss of collective rights. The Creosote Action claims that Canada was negligent (at para 25) and is strictly liable for all loss, damage, and expense suffered by the “Plaintiffs” (at para 27). It further claims that Canada breached its fiduciary obligation by failing to protect the “Siksika Nation’s interest in IR 146…under the terms of Treaty 7…and to fulfil its treaty and fiduciary obligations by ensuring that IR 146 lands and waters were not contaminated…”. Finally, it claims that Canada has failed to compensate “the Siksika Nation and its members for the interference with the use and enjoyment of IR 146 lands and waters or for the health consequences.”

[57] The relief sought includes a declaration that Canada breached its fiduciary obligations to Siksika and its members by allowing chemicals to be used in the immediate vicinity of Siksika’s reserve. It also seeks compensation owed to the “Plaintiffs” for the use and enjoyment of reserve lands and damages for individual members who have experienced sickness and other losses.

[58] In the statement of claim filed in the Creosote Action, Florence Backfat is identified as a member of Siksika “residing in close proximity to the waters” on the reserve lands. At paragraph

21 the claim alleges that Ms. Backfat suffered from “medical difficulties, failed and inconsistent crops, and dramatic livestock mortality.” As stated in paragraph 57, above, the statement of claim seeks damages for individual Siksika members who have experienced sickness.

[59] Siksika submitted that the statement of claim may suffer from certain deficiencies because it includes Ms. Backfat as a named plaintiff. Siksika submitted that those deficiencies do not change the fact that the Creosote Action is a representative proceeding. In any event, Canada agrees that Ms. Backfat’s claim does not have to be discontinued. I find that the claims and allegations of Siksika in the Creosote Action are clearly collective in nature and are rooted in Siksika’s and Siksika members’ interests in reserve lands set apart for the collective pursuant to Treaty Seven. I find that the nature of the claim in the Creosote Action as it relates to Siksika is clearly a representative action.

(iv) Cluny Action

[60] The Cluny Action identifies the plaintiffs as then Chief Adrian Stimson “on behalf of himself and all members of the Siksika Nation and the Siksika Nation.” Paragraph 3 of the claim also indicates that Chief Stimson brings the claim on behalf of himself and on behalf of all Siksika members. The claim alleges a breach of fiduciary duty against Canada by permitting sewage to flow from the town of Cluny to the Siksika reserve without Siksika’s consent and for the flooding of portions of Siksika reserve. The claim states that Canada’s actions rendered portions of the reserve unhealthy for use and occupation by Siksika members; left the affected area useless for commercial, agricultural, or any other purpose; and negatively affected well

water. The claim alleges that Siksika has suffered economic hardship and losses, damage, and expenses (at para 34).

[61] The relief contemplated in the Cluny Action exclusively relates to Siksika's allegation that Canada breached its fiduciary duties. Unlike the Creosote Action, it does not seek relief for individuals. I find that the Cluny Action was clearly brought as a representative proceeding and that the substance of the statement of claim indicates that the Cluny Action pertains to collective rights stemming from Treaty obligations and circumstances affecting Siksika's reserve lands.

(v) CPR Action

[62] The CPR Action identifies the plaintiff as then Chief Adrien Stimson "on behalf of himself and all other members of the Siksika Nation" (at para 3). The statement of claim filed in the CPR Action alleges that Canada breached its fiduciary obligations owed to Siksika. It states that Canada improperly transferred or expropriated reserve lands and minerals to CPR. As a result, Siksika was deprived of the use and benefit of these lands and minerals and Siksika's Treaty entitlement was reduced. The relief sought relates to these particular lands and includes a declaration that Canada breached its fiduciary obligations to Siksika. The CPR Action clearly contemplates collective interests in reserve land and minerals. It is a representative proceeding.

(vi) BRID Action

[63] The BRID Action also identifies the plaintiff as then Chief Adrien Stimson "on behalf of himself and all other members of the Siksika Nation" (at para 3). The claim alleges that Canada

breached its fiduciary duty because it approved certain irrigation and dam works without consulting Siksika and consented to the sale of certain reserve lands for dam and canal purposes. Siksika sought damages for these breaches, loss of access, and environmental damage. The collective interests in reserve land renders the BRID Action a representative proceeding.

[64] On March 28, 2011, the BRID Action was partially discontinued in relation to the sale of approximately 1,335 acres of land.

(c) *Mr. Pretty Young Man does not have standing*

[65] Mr. Pretty Young Man submits that he has standing because the Cluny Action and CPR Action are class proceedings and Rule 334.23(1) allows the Court to permit one or more class members to participate in the class proceeding at any time. Having found that all of the Actions were initiated as representative proceedings and remain representative proceedings, it follows that Mr. Pretty Young Man does not have standing. His motion is dismissed.

(2) Should the Court approve the Settlement and discontinue the Actions?

[66] Siksika correctly points out that there is little guidance on the standard or considerations the Court must take into account when determining whether to discontinue an action or approve a settlement. Siksika submitted that the appropriate standard is whether the settlement and the discontinuance of the Actions is in the interests of justice.

[67] On one hand, the Court has considered whether a settlement is reasonable (*Hagwilget Indian Band v Canada (Minister of Indian Affairs & Northern Development*, 2009 FC 900 (*sub nom Joseph v Canada)* at para 4 [*Hagwilget*]). On another occasion, the Court asked whether "the interests of the members that the Plaintiffs claim to represent will not be prejudiced by the discontinuance" (*Yahey v Canada,* 2010 FC 1205 at para 3 [*Yahey*]).

[68] Ms. Three Suns and Mr. Pretty Young Man urged the Court to apply the principles applicable to settlement approval and discontinuance in class proceedings. Mr. Pretty Young Man submitted that there is no information as to how much of the $1.3 billion is apportioned between each action and there are no reports of any kind related to this global settlement amount. He points to Siksika's Presentation Slide where Siksika proposed, in 2017, a breakdown of the various Actions. That same slide confirms that Canada did not accept those values and in some cases applied "zero" to some of the claims. He says this is not sufficient.

[69] As already discussed above, I disagree that the Actions were automatically converted to class proceedings when Rule 114 was repealed. It follows that I am not bound by the jurisprudence governing the approval of settlements in class proceedings. Ms. Three Suns and Mr. Pretty Young Man have not submitted an authority stating otherwise. Therefore, in accordance with *Hagwilget*, I will assess whether the settlement agreement is reasonable.

[70] *Yahey* is of limited help because that case dealt with a discontinuance of an action in the absence of a settlement agreement. It is, however, still authority for the proposition that in order

to approve a discontinuance, the Court must be satisfied that appropriate notice has been given to the members (at para 26).

[71] Based on the limited facts contained in *Hagwilget* and *Yahey*, I find that the main factors the Court should consider when approving a settlement and discontinuing an action are: the scope or extent of the information; the notice provided to the membership; and members' ability to participate and vote in a process that expresses their approval or disapproval of the settlement. In assessing the reasonableness of the Settlement Agreement, the Court may also consider the main features of the Settlement Agreement.

[72] The general terms of the Settlement Agreement are as follows: Canada will pay Siksika a global settlement amount of $1.3 billion dollars; in exchange, Siksika must discontinue the Actions and release Canada from any liability owed to Siksika arising from the Actions; and Siksika must indemnify Canada for any proceedings brought against Canada by Siksika or any Siksika member arising from the subject matter of the Actions. Other new or different actions can still be brought against Canada by Siksika so long as those actions do not deal with the same subject matter of the Actions.

[73] Based on the evidence of Tracy McCugh and Ida Duckchief, I find that the general terms of the Settlement Agreement were sufficiently set forth in the information provided to Siksika membership during the ratification process and that significant notice was provided to the membership. This is evidenced not only by the large number of information sessions but, more importantly, by the large percentage of elector participation (out of 5,041 eligible electors, 3,484

electors voted) and the very high percentage of elector approval of the Settlement Agreement. Information provided to members of Siksika contained summaries of the Actions and one of the ballot questions referred to the settlement and releases of the "claims" as defined in the Settlement Agreement (the Actions). Page one of the "Information Notice" dated November 2021 referred to settling "several historical claims" and page two provided a summary of the claims, which were described as the "1910 Surrender and 1960 Petition of Right Claims", "CPR", "Cluny" and "BRID and Creosote" claims. Page two also had a point form section titled "Settlement Overview" where the first three points were:

> The proposed settlement is a global settlement that will cover all the claims identified above.
>
> A one-time payment of $1,300,000,000 (one billion and three hundred million dollars) will be made to the Nation in 2022.
>
> In exchange for compensation, Siksika will discontinue all filed court actions related to the claims and release Canada from all liability related to the claims.

[74] Page five of the same "Information Notice" provided a more detailed description of the Actions. Siksika's materials also included a Presentation Slide and a presentation dealing with Frequently Asked Questions [FAQ slide]. The Presentation Slide contains more background about the history of the discussions with Canada and reiterates the need for discontinuance of the Actions and the granting of a release in favour of Canada. The FAQ slide confirms that Siksika and Canada have different views on the values of the Claims. As pointed out by Mr. Pretty Young Man, the FAQ slide states that Canada valued the 1910 Surrender Action at $1.3 billion and the CPR Action at $8 million, while Canada did not disclose any values for the BRID or Creosote claims.

[75] The Court was never privy to any detailed discussions related to litigation strategy or negotiation mandates, so the Court is unable to comment on the reasonableness of the specific dollar amount reached as part of the settlement. However, the settlement amount and the requirement for the Actions to be discontinued, as pointed out above, were featured prominently in the Referendum Information Package, the Presentation Slides, and the FAQ slide.

[76] The parties have successfully negotiated and settled historic grievances related to reserve lands and other collective claims. Siksika and Canada are sophisticated and as in all settlements, there has been give and take. The Court hesitates to weigh in on the specifics of the terms of the Settlement Agreement or second guess the rationale for the specific terms of the Settlement. Instead, I note that the main features of the Settlement Agreement were communicated widely to the Siksika membership. In a representative proceeding such as this, where a settlement has been reached, the Settlement must be approved by the individuals the parties claim to represent. In this case, Siksika had the Settlement Agreement ratified by its membership who are voting age. In comparison, when class proceedings are approved, the Court is required to consider the specific "terms and conditions of the proposed settlement" and determine whether those terms promote the "fairness, reasonableness and best interests of the class" (*McLean v Canada*, 2019 FC 1075 at paras 66, 107). There is no ratification process. Siksika electors have had an opportunity to assess the reasonableness of the Settlement Agreement for themselves through the ratification process. Therefore, there is less Court oversight required.

[77] The Court notes that Siksika members were able to voice their disapproval of the Settlement Agreement and, according to the Statement of Referendum Results, 802 of 3484

electors voted against the Settlement Agreement. I am cognizant of the fact that the Settlement Agreement was not approved unanimously or by consensus. Not every Siksika member sees the Settlement Agreement as a positive thing. With that said, a significant majority of the voting membership participated in the information meetings where they were able to have any questions answered. More over, a significant majority of electors approved the Settlement Agreement (2,682 out of 3,484 electors who voted), which authorized the discontinuance of the Actions. There was also widespread dissemination of information and numerous information meetings (a total of 23). The Court defers to the approval by the Siksika membership and approves of the Settlement Agreement and the discontinuance of the Actions, save for the claim of the Estate. Pursuant to Rule 114(2)(c), the Court orders that, as a condition to settlement approval, the Estate is free to continue with its action against Canada.

[78] For all of these reasons, the Court grants Siksika's motion to discontinue the Actions in so far that it is a plaintiff in those actions. The Estate's claim is not affected by the Order approving the discontinuance.

ORDER in T-1067-87 and T-365-01

THIS COURT ORDERS that:

1. Siksika's motion for approval of the Settlement Agreement is granted. The Settlement Agreement is approved.
2. The following actions, as they concern Siksika, are discontinued:
   (a) Adrian Stimson Sr et al v Attorney General of Canada, T-4242-71;
   (b) Leo Youngman et al v Her Majesty the Queen, T-1067-87;
   (c) Adrian Stimson Sr et al v Attorney General of Canada, T-365-01;
   (d) Adrian Stimson Sr et al v Her Majesty the Queen, T-366-01;
   (e) Adrian Stimson Sr et al v Attorney General of Canada, T-368-01;
   (f) Adrian Stimson Sr et al v Attorney General of Canada, T-370-01;
3. The action brought by the Estate of Florence Backfat in T-365-01 is not discontinued.
4. The motions of the Estate of Florence Backfat and Mr. Pretty Young Man are dismissed.
5. There is no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1067-87
STYLE OF CAUSE:	LEO YOUNGMAN, CHIEF OF THE BLACKFOOT INDIAN BAND, ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF THE BLACKFOOT INDIAN BAND, AND ALL DESCENDANTS OF THE BLACKFOOT INDIAN BAND v HER MAJESTY THE QUEEN
AND DOCKET:	T-365-01
STYLE OF CAUSE:	ADRIAN STIMSON SR., CHIEF OF THE SIKSIKA NATION, ON BEHALF OF HIMSELF AND ALL MEMBERS OF THE SIKSIKA NATION AND THE SIKSIKA NATION AND FLORENCE BACKFAT v HER MAJESTY THE QUEEN
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 21, 2022
ORDER AND REASONS:	FAVEL J.
DATED:	MARCH 29, 2022

APPEARANCES:

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Erin Haupt Jai Sheikhupura	FOR THE PLAINTIFFS (ESTATE OF FLORENCE BACKFAT)
Shane Martin	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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Attorney General of Canada Vancouver, British Columbia	FOR THE DEFENDANT