Date: 20240513
Docket: CI 19-01-23339
(Winnipeg Centre)
Indexed as: Arnason Industries Ltd. v. Red Sucker Lake First Nation et al
Cited as: 2024 MBKB 69

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

ARNASON INDUSTRIES LTD., Plaintiff,	)	Grant A. Stefanson, K.C. Braeden Cornick for the plaintiff
- and -	)	
RED SUCKER LAKE FIRST NATION also known as RED SUCKER LAKE INDIAN BAND NO. 300 also known as RED SUCKER LAKE BAND NO. 300, BLACKHAWK CONSULTING LTD., INGRAM CONSULTING LTD. and SAMUEL KNOTT also known as SAM KNOTT, Defendants.	)	Abram Saper Silver Avery Sharpe for the Defendants Red Sucker First Nation and Samuel Knott Samantha Gergely Kristine Whittaker for Attorney General of Canada
	)	JUDGMENT DELIVERED: May 13, 2024

McKELVEY J.

INTRODUCTION

[1] The Defendants Red Sucker Lake First Nation and Chief Samuel Knott ("the Defendants") have brought a motion seeking the following relief (Document No. 30):

> 1. An order pursuant to the Court of King's Bench Rules, Manitoba Regulation 553/88, Rule 26, permitting the Defendants in this action to amend their Statement of Defence in the form attached to the

motion as Schedule "A" and referenced as "Fresh as Amended Statement of Defence and Counterclaim";

2. An order pursuant to Court of King's Bench Rules, Manitoba Regulation 553/88, Rule 6, ordering the consolidation and/or the hearing together of this action with the action commenced by Arnason Industries Ltd. against Red Sucker Lake First Nation in Court of King's Bench File No. CI 23-01-41754.

[emphasis in original]

[2] Arnason Industries Ltd. ("the Plaintiff") has also brought a Notice of Motion requesting (Document No. 34):

3. An order compelling the Defendant Red Sucker Lake First Nation provide answers to the undertakings given at the examination for discovery of Samuel Knott on February 6 and 7, 2023, forthwith, or within such other time period as this Honourable Court deems just;

Other relief sought in the Plaintiff's Notice of Motion with respect to a partial summary judgment is not proceeding at this time.

BACKGROUND

[3] The Plaintiff and Defendant Red Sucker Lake First Nation ("Red Sucker Lake") were engaged in long-standing business dealings until a breakdown of the relationship. This breakdown triggered the filing of a Statement of Claim on September 19, 2019, in Court of King's Bench File No. CI 19-01-23339 (The First Arnason Claim). That claim was also brought against additional defendants. The claim has since been discontinued against the Defendant George Ingram Consulting Ltd. (March 31, 2024), while Blackhawk Consulting Ltd. was noted in default (December 13, 2019).

[4] The genesis of the difficulties between the parties occurred in 2017 after the Plaintiff successfully bid on a road contract to reconstruct approximately four

kilometers of gravel community roads within the Red Sucker Lake First Nation Reserve. This work was to be accomplished by August 21, 2017, and be paid for within 30 days. The dispute between the parties arises with respect to that project and as to whether additional works were contracted related to winter roads, cash advances paid to Red Sucker Lake, the re-alignment of the nursing station parking lot, as well as the Plaintiff's contention that it is owed recovery related to its former camp located on the Reserve. The Plaintiff alleges that the Defendants have failed or refused to pay all outstanding amounts owing pursuant to the road and construction contracts, as well as for the value of the camp. The Plaintiff is seeking $2,401,874.12, exclusive of interest.

[5] The Plaintiff filed a second claim against Red Sucker Lake First Nation in Court of King's Bench Suit No. CI 23-01-41754 (the "Rock Crushing Claim"). This claim was filed on June 28, 2023, three months subsequent to examinations for discovery on the First Arnason Claim. Those examinations for discovery of Brett Arnason and Chief Samuel Knott have not as yet been concluded. The Rock Crushing Claim alleges that the Plaintiff and Red Sucker Lake entered into an Agreement that facilitated the Plaintiff sourcing rocks on the Reserve, manufacturing and then crushing those rocks to create granular material. That granular material was to be used by both Red Sucker Lake and the Plaintiff for projects. By April 2018, the total value of the granular material produced by the Plaintiff was $2,793,882, less royalties of $15 per cubic metre of granular material agreed to be paid to Red Sucker Lake. The net amount alleged to be payable to

the Plaintiff is $2,482,930.50. The Plaintiff contends that Red Sucker Lake breached the Granular Material Agreement and, accordingly, the Statement of Claim was filed. A Statement of Defence and Counterclaim was filed on December 6, 2023. The Counterclaim named both the Plaintiff and the Attorney General of Canada ("Canada") alleging that Canada owed a fiduciary duty to Red Sucker Lake and committed breaches of a trust relationship.

[6] The Defendants contend that the Plaintiff orchestrated a scheme referenced as the "Arnason Aggregate Scheme", wherein it would source aggregate/granular material needed for various projects from Red Sucker Lake lands without securing any of the statutorily required undertakings, permits or approvals from the owner and funder of projects on the Reserve, being Canada. Further, it is alleged that the Plaintiff produced more aggregate than was needed. The details and scope of the Arnason Aggregate Scheme was said to be unknown to the Defendants until the Brett Arnason examination for discovery and after a review of the Rock Crushing Claim. As a consequence, the Defendants contend that amendments are required to the Statement of Defence in the First Arnason Claim which includes a Counterclaim against Canada and the Plaintiff in order to address the consequences and impact on that litigation of the Arnason Aggregate Scheme. The Fresh as Amended Defence and Counterclaim seeks to add the Attorney General of Canada as a party on the basis of a breach of a constructive trust, as well as failing to comply with its fiduciary responsibilities to Red Sucker Lake. The Counterclaim as regards the Plaintiff is for damages related to overpayment on the

road contract, unpaid royalty and rental fees for use of sites on Reserve lands, remediation of the lands because of removal of the aggregate, as well as other relief. The Defendants also wish to consolidate the Rock Crushing Claim with the First Arnason Claim or have the claims heard together or one after the other.

[7] The Plaintiff contends that the amendments and consolidation should be denied. (At this hearing, the Plaintiff acknowledged consent to the amendments proposed at paras. 1, 2, 3, 4, 5(a)-(g), 7, 10, 13, and 14 of the Fresh as Amended Statement of Defence and Counterclaim.) Canada does not oppose the proposed amendments by Red Sucker Lake to add it as a party to the First Arnason Claim by way of Counterclaim on issues not currently raised in the 2023 action, provided no issues are replicated from the Rock Crushing Claim, and:

(a) the amendments adding the Plaintiff as a Defendant by Counterclaim is permitted; and

(b) the significant prejudice Canada would face as a new party to an advanced litigation be addressed through a modified litigation timetable.

ARE THESE DEFENDANTS ENTITLED TO AMEND THE STATEMENT OF DEFENCE AND COUNTERCLAIM?

[8] King's Bench Rule 26 states:

> **General power of court**
> **26.01** On motion at any stage of an action the court may grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
>
> **When amendments may be made**
> **26.02** Generally, a party may amend a pleading,

(a) by requisition before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;

(b) on filing the written consent of all parties and, where a person is to be added or substituted as a party, the person's written consent;

(c) at any time on requisition to correct clerical errors; or

(d) with leave of the court.

Facts generally
26.03(1) The court may in an appropriate case on motion allow a party to amend a pleading to allege a fact that has occurred after the commencement of the proceeding even though the fact gives rise to a new claim or defence.

The onus rests with the plaintiff who is resisting the amendments to demonstrate that, on a balance of probabilities, there will be serious prejudice caused which cannot be compensated by costs or an adjournment. As was stated in ***Manitoba Metis Federation Inc. v. Canada (Attorney General)***, 2002 MBQB 52:

> [23] The law relative to the granting of leave to amend pleadings is clear and succinct. Such amendments are to be allowed at any stage of the proceeding unless the result will be prejudice to the opposing party that cannot be compensated for by costs or an adjournment…
>
> [24] The factors to be considered upon a motion for leave to amend include the following: the seriousness of the prejudice to the other party; whether the prejudice that would result can be compensated for by costs or an adjournment; whether there was a delay on the part of the party moving for the amendment and, if so, whether the delay has been satisfactorily explained; the nature of the proposed amendment and whether it raises a valid, arguable point that has merit...

(See also, ***Winnipeg (City) v. Caspian Projects Inc. et al.***, 2020 MBQB 129 at para. 102.) Without question, the introduction of a counterclaim and an additional party constitutes a significant amendment to the Statement of Defence in the First Arnason Claim.

[9] The Defendants submit that there is no prejudice to the Plaintiff that cannot be compensated by costs or by an adjournment. This position is based on the fact that examinations for discovery have not yet been completed and the trial dates are over 17 months away, being October 20 to November 14, 2025. That said, the Defendants recognize and accept that an adjournment may transpire as regards the request for an amendment and/or consolidation. Further, the Plaintiff has been aware of the Defendants' position with respect to the Arnason Aggregate Scheme since being served with the Defence and Counterclaim in the Rock Crushing Claim.

[10] The Plaintiff contends that there are limitation issues raised by the proposed amendments. It is alleged that a new cause of action has been created by the proposed amendments after the expiration of a limitation period. Further, the amendments/counterclaim must be rejected based upon the fact that certain of the allegations are contrary to admissions made during Chief Knott's examination for discovery. Additionally, the Plaintiff submits that the Defendants' request for amendments must be denied on the basis that the proposed amendments are substantially duplicated in the Statement of Defence and Counterclaim filed in the Rock Crushing Claim. Accordingly, they should be regarded as entirely duplicative and rejected as an abuse of process. This includes the fact that the relief claimed in both Counterclaims is identical. The Plaintiff relies upon the decisions in ***EllisDon Corporation v. Winnipeg Airports Authority Inc.***, 2014 MBQB 92 (paras. 30, 43, 51 and 52) and ***Western Industrial Contractors Ltd. v. Sarcee***

Developments Ltd., 1986 CanLII 1754 (AB KB). The Plaintiff further contends that the amendments are an attempt to bypass consolidation or to ensure that it is granted.

[11] The Plaintiff's limitation argument, in part, is based upon the fact that the road contract was entered into on January 17, 2017, and breached by August 31, 2017. As a consequence, a Counterclaim should have been filed within six years of August 2017. The Plaintiff also raised limitation issues flowing from the transitional provisions of ***The Limitations Act***, S.M. 2021, c. 44.

[12] I am satisfied, in reviewing the limitation issue, that triable issues are raised by the Plaintiff. However, those issues are not a bar in and of themselves to an amendment of the pleadings. There are genuine issues with respect to the Plaintiff's limitations contentions (and of the Defendants) that require consideration during the trial process. These include that the proposed amendments allege a breach of trust which is not subject to a limitations defence and that the "new" cause of action was not discovered until subsequent to the March 2023 examination for discovery.

DELAY

[13] The chronology with respect to this matter is as follows:

1. Brett Arnason Examination for Discovery – March 20, 2023. The defence alleges that the nature, scope and extent of the Arnason Aggregate Scheme was not known until the Plaintiff's examination for discovery;

2. The Rock Crushing Claim was filed by the Plaintiff on June 28, 2023, and served on July 14, 2023;

3. The Defendants filed a Statement of Defence and Counterclaim to the Rock Crushing Claim on December 6, 2023;

4. A pre-trial conference was held December 20, 2023, at which time defence counsel advised of its intention to seek consent or leave to amend their Statement of Defence and to bring a counterclaim. The Plaintiff advised that there would be opposition to that request;

5. The Notice of Motion to Amend was filed by the Defendants on January 31, 2024.

It is apparent that examinations for discovery in the First Arnason Claim have not as yet been concluded and the trial is not scheduled to commence until October 2025. The Plaintiff contends that permitting the amendments will delay proceedings and likely cause a re-scheduling of the trial dates.

[14] I do not find that there was delay on the part of the Defendants in proceeding with the motion to amend. The Plaintiff was advised on a timely basis that such a motion would be brought and, indeed, it was filed in January 2024. Delay, if any, has been satisfactorily explained.

VALID, ARGUABLE POINT THAT HAS MERIT

[15] As was stated by Chief Justice Joyal in ***Callinan Mines Limited v. Hudson Bay Mining and Smelting Co., Limited***, 2011 MBQB 159:

> [121] … a motion to amend, the court need only examine whether the proposed amendments, *prima facie*, have merit and are arguable. As Callinan

> has properly submitted, leave to amend should not be refused where, to do so, it first becomes necessary to determine difficult matters of fact and law. Such determinations are for the trial judge.

[16] Accordingly, the Fresh as Amended Defence and Counterclaim must be reviewed by virtue of a "cursory" analysis on the face of the pleadings. The substantive amendments relate to an entitlement to a setoff (setoff was also pleaded in the Statement of Defence in the First Arnason Claim) as well as introducing the alleged impact of the Arnason Aggregate Scheme into the First Arnason Claim. The defence alleges, through the amendments, that the necessary undertakings, permits, and approvals required for the production and use of Red Sucker Lake aggregate were not secured from the appropriate authorities. This placed the Plaintiff in contravention of policies, approval requirements, and at common law. Further, Canada, as trustee and/or fiduciary to Red Sucker Lake, and legal owner of the aggregate and funder of the projects, breached its duties as the sales of the aggregate became impressed with a constructive trust in favour of Red Sucker Lake. In essence, the proposed, very significant, amendments to the Statement of Claim raises these issues, as well as including those matters in the Counterclaim as against the Plaintiff and Canada.

[17] It is necessary to consider the appropriateness of such a wide-ranging amendment, albeit recognizing that the Arnason Aggregate Scheme was not likely known to the defence until subsequent to the March 2023 examination for discovery. However, one of the major factors in evaluating the appropriateness of these amendments is that by allowing them, the Defendant's motion to consolidate or join the First Arnason Claim with the Rock Crushing Claim is

bolstered. It is for this reason that the Plaintiff has argued that consolidation should be denied and decided in advance of an analysis of the motion to amend. As indicated, the Plaintiff stipulates that the allegations related to the Arnason Aggregate Scheme are duplicated in the Statement of Defence and Counterclaim to the Rock Crushing Claim. Further, the Plaintiff contends that the construction/road contract claims are separate and distinct from the Rock Crushing Claim. It is submitted that where amendments are duplications of claims made in separate actions, the court should reject them as being an abuse of process (see ***Western Industrial Contractors Ltd.***, at para. 52). That said, I am mindful, firstly, of the order of relief sought in the Defendant's Notice of Motion and the fact the two issues could have been brought before the court by separate Notices of Motion – perhaps months apart. In proceeding as it has done, the Defendants have acted efficiently to avoid a multiplicity of interlocutory matters. Secondly, it is only reasonable to consider the motion to amend first so as to facilitate a fulsome analysis of the entire matter. The Fresh as Amended Defence and Counterclaim, if granted, will lend itself to the second evaluation to be made, being the appropriateness of joining the actions in some manner.

[18] I have concluded the Defendants' motion to amend the Statement of Defence and Counterclaim in the First Arnason Action will be permitted pursuant to Rule 26. It must be remembered that amendments can be ordered up to and through the trial process. These amendments have occurred relatively early in the action as examinations for discovery have not as yet been completed. It is because

of those discoveries that new facts have come to light which ultimately facilitates the Defendants' request to amend and counterclaim in these circumstances. Any prejudice suffered may be compensated by an adjournment of the 2025 trial dates or costs. As previously indicated, I am not satisfied that there was any delay on the part of the Defendants in moving for an amendment. The amendments raise valid, arguable points that have merit. The fact that a defence and counterclaim is being added by virtue of the amendments is not in itself prejudice. It is the result of the learning of new facts during the course of the examination for discovery which, in this case, has led to the requested substantive amendments relating to the Arnason Aggregate Scheme. The amendments raise difficult matters of fact and law that must be left to the trial judge.

[19] As indicated previously, the Plaintiff and Canada have raised concerns with respect to the amendments facilitating duplicative claims when consideration is afforded to the Fresh as Amended Statement of Defence and Counterclaim and the Rock Crushing Claim. The Plaintiff submits that there is duplication, limitations of actions issues, no merit, and pleadings which are contrary to admissions made during the course of Chief Knott's examination for discovery. The allegations between the two actions are contended to be fundamentally different. I acknowledge that the Fresh as Amended Statement of Defence and Counterclaim is duplicative in areas with the pleading filed in the Rock Crushing Claim. This is particularly so as regards the Counterclaim. That said, the Defendants are alleging against both the Plaintiff and Canada non-compliance with the ***Indian Act*** R.S.C.,

1985, c. I-5, with respect to the road/construction claims and the granular material agreement. It is submitted by the defence that the Plaintiff has displayed a habit of non-compliance with the ***Indian Act*** requirements in terms of its failure to secure necessary approvals and other permits, while Canada has not ensured compliance and, thus, has failed in its fiduciary obligations to Red Sucker Lake as owner and funder of the projects on the Reserve. In such circumstances, I am satisfied that defences can be duplicative where the same wrong has been alleged in two different circumstances.

[20] I accept that issues such as setoff and estoppel have also been raised. However, those remain genuine trial issues.

[21] I acknowledge that while Canada has indicated it is not opposed to the amendments, the submission is that it will be significantly prejudiced as the First Arnason Claim is in an "advanced state of litigation". While there remains approximately 17 months before trial commencement, I am cognizant of Canada's contention in that regard. There will be "catchup" required, albeit Canada has a perspective on the First Arnason Claim through its involvement in the Rock Crushing Claim. That said, there will be a need to enter pleadings, prepare an affidavit of documents, review the examinations for discovery transcripts and take part in further examinations for discovery. At that point, Canada should be on the same footing as the other parties. The timeline for an adjournment, which I am prepared to grant in the circumstances, will be canvassed later in this decision. It is noteworthy that, in all likelihood, additional trial days will be needed. I

acknowledge that Canada's potential involvement was canvassed at a December 20, 2023 pre-trial conference where additional days were set in anticipation of that possibility. That said, Canada did not take part in those discussions and has now had an opportunity to raise its concerns. I am satisfied that further trial time is required.

[22] As earlier indicated, the ***Callinan Mines Limited*** decision held that the court need only examine whether the proposed amendments, *prima facie*, have merit and are arguable. This is not a situation, therefore, where a deep examination of issues such as credibility or a weighing of evidence is required, as the Plaintiff has requested by virtue of its submissions on limitation of actions, as well as alleged contradictory testimony by Chief Knott during the course of examinations for discovery.

[23] The proposed amendments have arguable merit by virtue of the allegations that the Plaintiff failed to obtain the necessary undertakings, permits, and approvals that are required by Canada to do what was done in terms of the gravel production from Reserve lands and its failure to re-mediate those lands. The aggregate was utilized in the construction projects that are the subject of the First Arnason Claim. There are allegations of a constructive trust that may exist with respect to monies the Plaintiff received, which was alleged to be in contravention of the statutes and policies that were ignored.

[24] With respect to Canada, the amendments allege that it is a trustee and fiduciary for Red Sucker Lake First Nation and owes a duty to protect it where

resources are being bought and sold. There is alleged to be a breach of fiduciary duty as Canada is said to have failed to protect Red Sucker Lake, in part, by not ensuring the Plaintiff complied with the necessary approvals, permits, and other guideline requirements. This is particularly argued to be the case where Canada owns the land and gravel, in trust, as a fiduciary for the beneficiary Red Sucker Lake First Nation.

[25] The relief sought by the Defendants with respect to the filing of a Fresh as Amended Statement of Defence and Counterclaim is permitted.

SHOULD THE FIRST ARNASON CLAIM BE CONSOLIDATED AND/OR HEARD WITH THE ROCK CRUSHING CLAIM?

[26] King's Bench Rule 6.01 states:

> **Order**
> **6.01(1)** Where two or more proceedings are pending in which,
>
> (a) there is a question of law or fact in common;
> (b) the relief claimed arises out of the same transaction or occurrence or series of transactions or occurrences; or
> (c) for any other reason an order ought to be made under this rule;
>
> the court may order that,
>
> (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
> (e) any of the proceedings be,
> (i) stayed until after the determination of any other of them, or
> (ii) asserted by way of counterclaim in any other of them.
>
> **Directions**
> **6.01(2)** In the order, the court may give such directions as are just to avoid unnecessary costs or delay.

Additionally, s. 94 of ***The Court of King's Bench Act***, C.C.S.M. c. C280, provides that, as far as possible, multiplicity of proceedings is to be avoided. The case

referenced with respect to this matter is ***eMindbiz Inc. et al. v. Levene***, 2005 MBQB 252:

> [8] In the case of *Thames Steel Construction Ltd. v. Portman* (1980), 1980 CanLII 1670 (ON SC), 111 D.L.R.(3d) 460, Griffiths J. discussed the modern approach to the rules relating to joinder of actions. At pp. 467-68, he stated: On the authorities, the principles which should be considered in determining whether the joinder of defendants in one action is appropriate are these:
>
> (1) Whether the claims of the plaintiff arise out of the same transaction or series of transactions as required by Rule 67.
>
> (2) Whether or not there is a common issue of law or fact of sufficient importance to render it desirable that the claims against the proposed defendant be tried together.
>
> (3) Whether the expense and delay that would be caused by compelling the plaintiff to bring separate actions against the proposed defendant would be greatly out of proportion to the inconvenience, expense or embarrassment which that defendant would be put if the actions were tried together.
>
> (4) On the basis of *Klein*, if the liability of the proposed defendant is contingent upon the plaintiff first establishing that he suffered a loss in respect of the transaction with the named defendant, then the application to join the proposed defendant may be considered premature.
>
> In my view, where the alternative claims arise out of the same transaction or series of transactions and involve a common question of fact or law, then the governing principle in determining whether joinder should be allowed is the third principle set out above, namely, the balance of convenience. The fact that the alternative claim against the defendants may be unnecessary, if the plaintiff succeeds against the main defendants, is only one consideration to be weighed and should not, by itself, be considered a conclusive reason for refusing the joinder. It must not be overlooked that by the concluding words of Rule 67 the Court is given a discretion where defendants have been added, to order separate trials, or make such other order as is deemed expedient if the joinder then appears oppressive or unfair.

(See also ***EllisDon Corporation*** at paras. 26 and 27.) There are exceptions to when consolidation should be ordered such as when plaintiffs are represented by different counsel, or if a trial of the claims together would prove to be inconvenient.

However, where a court refuses to consolidate two actions, an option remains of directing that the actions be tried together or one after the other. When tried together, both actions are tried at the same time (before the same judge) while retaining separate identities. The purpose of trying actions together is the same as the purpose of consolidation. Consolidation is an example of a procedural law reflecting judicial economy and fairness to the parties. As was stated in ***Lafreniere v. Bulloch***, 2015 MBQB 10:

> [13] The caselaw from our court confirms that there is a strong presumption in favour of permitting the joinder of related claims. The court has always sought to avoid a multiplicity of actions relating to the same cause. The goal is to adjudicate effectively and completely…

[27] The Defendants contend that the balance of convenience strongly favours consolidation in these circumstances. This is based upon the First Arnason Claim and the Rock Crushing Claim arising from the same series of transactions in that the road construction utilized the granular material that is the subject of the Rock Crushing Claim. Further, access to that material was governed by the Plaintiff's requirement to secure the necessary approvals and permits from Canada, who is alleged to have been aware of the contractual relationship between the parties, and is the owner of the lands and funder of the projects. Accordingly, the Defendants maintain that:

(i) there are common questions of fact and law surrounding the contractual breakdown in the relationship between the parties;

(ii) there are breaches of trust;

(iii) there are common parties;

(iv) Canada is a defendant by Counterclaim in the Rock Crushing Claim and the Fresh as Amended Defence to Counterclaim with Canada added as a defendant by Counterclaim to the First Arnason Claim;

(v) the same legal counsel have been retained;

(vi) examinations for discovery have not yet been concluded in the First Arnason Claim;

(vii) the issues in each action are inter-woven by facts and legal issues;

(viii) there is a risk of inconsistent findings if the actions are not joined in some manner;

(ix) there is no prejudice in allowing consolidation as the actions involve the same parties and counsel;

(x) the administration of justice would best be served by a consolidation in promoting the just, expeditious and least expensive determination of all issues between the parties;

(xi) consolidation creates efficiencies rather than the matters proceeding separately, which would then involve duplicative arguments being advanced, the risk of inconsistent findings, and more time in total being utilized;

(xii) overlapping timeframes.

[28] The Defendants further submit that the amendments sought in this matter have not been an attempt to bypass consolidation. What is being sought is a more proportionate and effective manner of resolving both pieces of litigation.

[29] The Plaintiff asserts that consolidation should not be granted as:

(i) there are clear limitations of actions arguments available along with the possibility of the Plaintiff seeking partial summary judgment;

(ii) the amendments are an attempt to bypass consolidation;

(iii) the allegations of the Arnason Aggregate Scheme in the Rock Crushing Claim Defence and Counterclaim are duplicated in the proposed amendments of the Defendants' Statement of Defence and Counterclaim in the First Arnason Claim;

(iv) the actions are distinct with the amendments creating a duplication of claims in separate actions, which must be regarded as an abuse of process;

(v) the proceedings are in different stages and consolidation would serve to delay and prejudice the proceedings;

(vi) the pleadings in the Rock Crushing Claim have not yet closed while pleadings are closed in the First Arnason Claim, affidavits of documents have been exchanged, examinations for discovery have transpired, there are interlocutory motions, pre-trial conferences, and the setting of trial dates in late 2025;

(vii) consolidation would delay the proceedings and put Canada at a distinct disadvantage, as it was not a party to the examinations for discovery, nor has there been documentary exchange;

(viii) the matters are separate and distinct, albeit recognizing there is some overlap in timelines.

[30] Canada argues that it would suffer serious prejudice if added to the First Arnason Claim. That claim is submitted to be at an advanced state of litigation and, accordingly, potential time and costs savings would not be realized. The balance of convenience is argued against granting consolidation in this action. Canada relies on the decision ***All Points Electric Ltd. v. Wright***, 2021 MBQB 129, where consolidation was declined after a finding by Leven J. that factors against consolidation were stronger than those in favour. Canada submits that it has limited knowledge as to the relevant facts of the First Arnason Claim, was not present during examinations for discovery, does not have transcripts of the examinations for discovery and has not received document production. Further, the Rock Crushing Claim is at a stage where pleadings remain open, there has been no document disclosure, nor have examinations for discovery occurred. Without the amendments, the actions relate to separate and distinct contractual agreements and the alleged breaches of those agreements. That said, in the event the amendments are allowed, Canada concedes that it is arguable that ***Indian Act***, provisions apply with respect to the securing of permits for gravel, Canada's fiduciary duties, and evaluations of the legality of agreements entered. It is possible that common issues of law may arise in the event the amendments are permitted. If the amendments are allowed, Canada maintains that consolidation should still be denied. Prejudice, inconvenience, and expense to both the Plaintiff

and Canada outweighs the expense and delay caused by compelling the Defendants to defend the two actions separately. The actions are at different stages of litigation which would require Canada to expend significant resources to catch up. Further, the two actions concern fundamentally different legal issues and prejudice would be caused by granting a consolidation order.

DO THE CLAIMS OF THE PLAINTIFF ARISE OUT OF THE SAME TRANSACTION OR SERIES OF TRANSACTIONS?

[31] As I have granted the Defendants' proposed amendments to the First Arnason Claim, I am satisfied that it and the Rock Crushing Claim are inextricably intertwined. The granular material, the subject of the Rock Crushing Claim, was used with respect to various projects that are related to the road/construction contracts in the First Arnason Claim. On the face of the pleadings, Canada has involvement because of issues surrounding ownership of the lands, funding, policies, necessary permits, approvals, constructive trusts, and fiduciary responsibilities. The implications of the ***Indian Act*** and adherence to it and other polices become relevant in endeavouring to determine the issues before the court.

[32] Both counterclaims allege that by virtue of the Arnason Aggregate Scheme, all proceeds received by the Plaintiff became impressed with a constructive trust. This substantially relates to whether Canada breached its fiduciary duty to Red Sucker Lake, along with its duties as a trustee.

IS THERE A COMMON ISSUE OF LAW OR FACT OF SUFFICIENT IMPORTANCE TO RENDER IT DESIRABLE THAT THE CLAIMS AGAINST THE PROPOSED DEFENDANTS BE TRIED TOGETHER?

[33] The amendments facilitate the existence of common issues of law and/or fact which are sufficiently important so as to avoid a multiplicity of proceedings in this case. Therefore, it is appropriate that they be tried together. The amendments result in issues surrounding the ***Indian Act*** and the provisions that required adherence for the application of permits, along with Canada's related fiduciary duties, trust issues, and the legality of the agreements that have allegedly been undertaken by the Plaintiff. The defence contends by virtue of both Statements of Defences and Counterclaims that the contracts the Plaintiff seeks to enforce are statutorily illegal and illegal at common law. These invoke common issues of both fact and law and are of sufficient importance to render the desirability that the claims be joined.

ISSUES OF EXPENSE AND DELAY THAT WOULD BE CAUSED BY COMPELLING THE PLAINTIFF TO BRING SEPARATE ACTIONS AGAINST THE PROPOSED DEFENDANTS WOULD BE GREATLY OUT OF PROPORTION TO THE INCONVENIENCE, EXPENSE OR EMBARASSEMENT WHICH THOSE DEFENDANTS WOULD BE PUT TO IF THE ACTIONS WERE TRIED TOGETHER

[34] Without question, there is inconvenience and expense created to both the Plaintiff and Canada if the actions are consolidated or heard together or one after the other. Does that inconvenience and expense outweigh the expense and delay that would be caused by compelling the defence of two separate actions? A joinder, in some manner, does enhance the complexity of the litigation. However, I am satisfied that issues of delay can be dealt with in terms of an adjournment.

It will be necessary to adjourn the trial as presently set – both for reasons of the amendments and of the joinder. Canada will need to take procedural steps to catch up to the First Arnason Claim, as well as all parties reaching preparedness in the Rock Crushing Claim.

[35] The First Arnason Claim and the Rock Crushing Claim, as earlier indicated, have inter-woven issues of facts and law. While, at first blush, the First Arnason Claim is much closer to trial, it does not seem reasonable with a long-term goal of judicial economy to have the two matters heard separately. There are efficiencies in proceeding with only one matter, heard together or one after the other. It is necessary to avoid a multiplicity of proceedings in circumstances where there are common issues and, as was said in ***Lafreniere***, a strong presumption exists in favour of granting a joinder. I am satisfied that, after the amendments to the First Arnason Claim, a joinder is a reasonable conclusion. The balance of convenience favours a consolidation or the matters being heard one after the other or together.

[36] I have evaluated the considerations of ordering that a trial be heard together or in some manner joined as follows:

(a) the issues in each action are inter-woven;

(b) there will be a significant overlap of evidence and/or witnesses between the actions;

(c) the parties are the same;

(d) the lawyers are the same;

(e) there is a risk of inconsistent findings if the actions are not joined;

(f) the issues in both actions have a level of complexity, albeit the addition of the Rock Crushing Claim does add to the complexity of the litigation;

(g) a decision in one action, if kept separate and tried first, would not likely put an end to the other action or significantly narrow the issues for the other action, or significantly increase the likelihood of settlement;

(h) the litigation status of each action demonstrates that the Rock Crushing Claim is in its early stages, the First Arnason Claim is not significantly developed as 17 months remain until the presently set trial dates;

(i) there are possible costs saving;

(j) there is likely to be delay in that the trial will need re-scheduling.

The balance of convenience favours joining these claims by virtue of being heard together. A consolidation would serve to add a complication related to the redoing of pleadings. I am hopeful that the two claims being heard together will simplify the process and facilitate agreements by the parties.

COMPELLING ANSWERS TO UNDERTAKINGS

[37] King's Bench Rule 34.14 deals with the issue of production of documents required for the purposes of honouring discovery undertakings. The evidence demonstrates that the Defendants have honoured some undertakings, while others remain outstanding from Chief Knott's February 2023 examination for discovery. The Defendants say that many of the outstanding answers are in the possession of third parties. To address that concern, an order was requested and entered on April 10, 2024, to compel third party production of the required answers. Without question, Red Sucker Lake must make all reasonable efforts to respond to undertakings provided at an examination for discovery. Accordingly, a substantial amount of the documentation should have been provided by this late date.

[38] The Plaintiff argues that a review of the outstanding answers to undertakings include documents in the possession of Red Sucker Lake, such as its own bank records. While there may be some difficulty in procuring documents from a third party, even after service of an order, clearly, documents within the possession of Red Sucker Lake, such as banking records, should be produced immediately. The Defendants are ordered to comply with the answers to undertakings on or before July 30, 2024.

CONCLUSION

[39] I am satisfied that:

(i) The Defendants are permitted to file a Fresh as Amended Statement of Defence and Counterclaim;

(ii) Actions CI 19-01-23339 and CI 23-01-41754 are to be heard together;

(iii) The Plaintiff and Canada must file all necessary pleadings on or before August 30, 2024;

(iv) The trial dates of October 20 to November 14, 2025, will be released upon securing new dates;

(v) The parties are requested to explore new trial dates no earlier than the spring of 2026 with an extra week to be added, resulting in 25 days to be set for trial purposes;

(vi) The Defendants are to comply with the undertakings given at Chief Knott's examination for discovery on or before July 30, 2024.

_____J.