

**FEDERAL COURT**  
**CERTIFIED CLASS ACTION**

**BETWEEN:**

**SHAMATTAWA FIRST NATION and CHIEF JORDNA HILL on his own  
behalf and on behalf of all members of SHAMATTAWA FIRST NATION**

Plaintiffs

-and-

**ATTORNEY GENERAL OF CANADA**

Defendant

**Class Proceeding commenced under Part 5.1 of the  
*Federal Courts Rules, SOR/98-106***

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**STATEMENT OF DEFENCE**

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The Deputy Attorney General of Canada, on behalf of the Attorney General of Canada, in answer to the Statement of Claim filed September 22, 2022 (the “Claim”), states as follows:

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## **I. OVERVIEW**

1. All First Nations communities on reserve should have access to safe drinking water. Canada is committed to supporting efforts by First Nations to have appropriate water systems to deliver safe drinking water in their communities.

2. Canada has taken and continues to take extensive measures, together with First Nations throughout Canada, to support the provision of safe drinking water on reserves. As a result, the number of long term drinking water advisories on reserves has significantly decreased.

3. Most First Nations members resident on reserve have water that is clean and safe to drink. The water is regularly monitored and tested and meets the *Guidelines for Canadian Drinking Water Quality* published by Health Canada. Canada continues to work with First Nations towards ending all drinking water advisories in their communities across the country.

4. Canada and First Nations share roles and responsibility for the provision of water services to on-reserve communities. First Nations own, control, operate and maintain their water systems on reserve. Canada's policies and initiatives support First Nations to provide safe drinking water in their communities, and Canada provides guidelines and funding to support water services.

5. Canada is committed to reconciliation and a renewed relationship with Indigenous peoples based upon recognition of rights, respect, cooperation and partnership. Canada favours resolving claims made by Indigenous peoples through negotiation and settlement. When required to respond to litigation, Canada endeavours to be constructive in assisting the Court in its task of adjudicating the matters before it.

## **II. THE PARTIES**

### **A. The Plaintiffs**

#### *The Shamattawa Plaintiffs*

6. In response to paragraphs 16 through 19 of the Claim and generally, Canada states:

- a) Shamattawa First Nation (“Shamattawa”) is a “band” within the meaning of s. 2 (1) of the *Indian Act*, RSC 1985, c. I-5 (“*Indian Act*”) and is also known as a First Nation.
- b) Historically, Shamattawa community members traded into York Factory at Hudson Bay, using the present site of the community as a summer camp as early as 1915, if not earlier. The community was established as a permanent settlement in approximately 1955, following the closure of the Hudson Bay Company post at York Factory.
- c) The Shamattawa community is located at the confluence of the Gods River and Echoing River, approximately 1,277 air kilometres north of Winnipeg, and approximately 365 air kilometres east of Thompson.
- d) Shamattawa adhered to Treaty 5, also known as the Winnipeg Treaty, in 1908, which treaty was entered into between Canada and the named First Nations, then known as tribes, in 1875 and 1876.
- e) The Shamattawa reserve, known as Shamattawa 1, was created in or about 1975, and is approximately 5,725 acres in size.
- f) Shamattawa’s reserve is a “reserve” within the meaning of the *Indian Act*.
- g) Shamattawa includes members who are Swampy Cree.
- h) Shamattawa includes members who are “Indians” within the meaning of that term in the *Indian Act*.
- i) Shamattawa includes members who reside on Shamattawa’s reserve.
- j) Shamattawa’s current registered membership is approximately 1,638 persons, with approximately 1,443 of those members ordinarily resident on the Shamattawa reserve.

7. In response to paragraphs 20 and 21 of the Claim, Canada agrees Chief Jordna Hill is the current Chief of Shamattawa and was elected Chief as described in 2022. Canada does not dispute his ability to bring suit on behalf of Shamattawa and its members. Canada accepts Chief Hill’s background is as described in paragraph 21.

*The Classes*

8. Canada accepts the Claim is a class proceeding and agrees the plaintiffs may represent the individual certified class members described at paragraph 9(a) below (the “First Nations Members Class”); and that the Shamattawa First Nation may represent the certified class members consisting of First Nations described at paragraph 9(b) below (the “First Nations Class”). The certified classes are as described in the Court’s certification order issued on March 14, 2023 (the “Certification Order”), and Canada

agrees that the plaintiffs may represent the class members subject to the qualifications in paragraphs 15 through 18 below.

9. As set out in the Certification Order, the class is:

a) All persons other than Excluded Persons who:

i) are members of a band, as defined in subsection 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5 (“**First Nation**”), the disposition of whose lands is subject to that Act, the *First Nations Land Management Act*, S.C. 1999, c. 24, or a Modern Treaty (together, “**First Nations Lands**”), and whose First Nations Lands were subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year and continued or commenced after June 20, 2021 (“**Impacted First Nations**”); and

ii) after June 20, 2020 ordinarily resided on First Nation Lands for a period of at least one year while such First Nation Lands were subject to a drinking water advisory that lasted at least one year; and

b) Shamattawa First Nation, and any other Impacted First Nation that elects to join this action in a representative capacity (“Participating Nations”).

“**Excluded Persons**” are members of Tsuu T’ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, and the Okanagan Indian Band.

“**Modern Treaty**” means a land claims agreement within the meaning of s. 35 of the *Constitution Act, 1982*, entered into on or after January 1, 1973.

## **B. The Defendant**

10. In response to paragraph 22 of the Claim, Canada admits the Attorney General represents Canada in this action.

11. Indigenous Services Canada (“ISC”) currently provides funding, support and resources to First Nations for their on-reserve water systems. Health Canada publishes the *Guidelines for Canadian Drinking Water Quality*, which are voluntary and set out parameters for clean and safe drinking water.

### **III. PROCEDURAL ISSUES**

#### **A. Canada's Consent to Certification**

12. In response to paragraph 1(a) of the Claim, Canada has consented to certification of this action.

#### **B. Settlement Agreement**

13. In response to paragraphs 8 through 10, 26, and 149 through 151 of the Claim, Canada agrees that its settlement of the class proceedings in Manitoba Court of King's Bench File CI-19-01-24661 (*Tataskweyak Cree Nation et al v. Attorney General of Canada*) and Federal Court File T-1673-19 (*Curve Lake First Nation et al v. Attorney General of Canada*) (the "Earlier Actions") addressed claims respecting safe drinking water on reserves in Canada arising on or before June 20, 2021. Canada agrees that, pursuant to the Settlement Agreement in the Earlier Actions, this action may be brought in respect of damages arising after that date.

14. In further response to paragraphs 8 and 10, and the Claim generally, Canada denies that the settlement of the Earlier Actions constituted any admission of liability or recognized any legal duty or obligation, including any duty or obligation owed at common law, including breach of fiduciary duty, under the honour of the Crown, pursuant to the *Constitution Act, 1982*, including the *Canadian Charter of Rights and Freedoms*, or otherwise.

#### **C. Certain Causes of Action Limited**

15. In response to the Claim generally, and as set out below, certain causes of action may be advanced only by First Nations as collectives and Canada does not admit those claims can be advanced by the First Nations Members Class.

16. Canada does not agree the First Nations Members Class may advance any collective claims, including any claims respecting fiduciary duty or honour of the Crown concerning safe drinking water in the circumstances here.

17. In further response to the Claims generally, certain causes of actions may be brought only by First Nations members as individuals and Canada does not admit those claims can be advanced in the First Nations Class.

18. Canada does not agree the First Nations Class may advance any individual claims, including any claims pursuant to sections 7 or 15 of the *Charter of Rights and Freedoms*, in the circumstances here.

#### **IV. LEGISLATIVE FRAMEWORK**

19. In response to paragraph 70 of the Claim, Canada agrees section 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict, c. 3 (“*Constitution Act, 1867*”) provides that Canada has legislative authority in respect of “Indians and lands reserved for the Indians.”

20. The *Constitution Act, 1867* also provides in section 92(13) that the provinces of Canada have legislative authority over “Property and Civil Rights” within a province. Manitoba and other provinces of Canada assert ownership and legislative authority over water in their respective provinces.

21. In response to paragraph 71 of the Claim, Canada agrees it has enacted the *Indian Act*, which includes provision for First Nations roles in providing water services to members. Section 81(1) of the *Indian Act* provides that a band’s council may make bylaws, including with respect to water facilities and drinking water on reserve, in subsections such as (a), (f), (h), and (l).

22. In response to paragraphs 78 through 80 of the Claim, Canada agrees Parliament passed the *Safe Drinking Water for First Nations Act*, SC 2013, c. 21 (“*2013 Safe Drinking Water Act*”) after extensive consultations and the legislation includes the statements quoted.

23. This legislation was repealed in June 2022, in accordance with the terms of the Settlement Agreement of the Earlier Actions and following a lengthy review of the *2013 Safe Drinking Water Act* with First Nations and First Nations organizations, including the Assembly of First Nations (“AFN”). The review culminated in an engagement in March 2022 with key First Nations rights-holders and First Nations organizations where these groups expressed unanimous support for the legislation’s repeal.

24. Since the repeal of the *2013 Safe Drinking Water Act*, Canada has enhanced its engagement with First Nations rights-holders, provinces, and territories to advance the development of replacement legislation, as contemplated in the settlement of the Earlier Actions. In February 2023, Canada shared a consultation draft of proposed replacement legislation with all First Nations in Canada and continues to work with First Nations and First Nations organizations to advance the planned introduction of the proposed replacement legislation.

25. In response to paragraph 81 of the Claim, Canada agrees s. 36(1) of the *Constitution Act, 1982* includes the provisions quoted.

26. In response to paragraphs 85 through 86 of the Claim, Canada admits it is a party to the international human rights treaties listed. Canada takes its international human rights treaty obligations seriously, and relies on a wide range of measures including laws, administrative policies, and programs to implement those obligations domestically.

27. Canada supports the United Nations *Declaration on the Rights of Indigenous Peoples* (“*UNDRIP*”) and is committed to its implementation. In June 2021, Canada enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act*. In June 2023, an Action Plan under the legislation was released. In accordance with the Action Plan, Canada continues to support the lifting of short and long term drinking water advisories in First Nations Communities.

28. Further, Canada acknowledges it acceded to the *International Covenant on Economic, Social and Cultural Rights* in 1976.

## **V. CANADA’S WORK TO SUPPORT THE PROVISION OF SAFE DRINKING WATER TO FIRST NATIONS**

29. In response to the Claim generally, Canada agrees it is important that all persons living in Canada, including First Nations members living on reserves, have access to safe drinking water, having due regard to provincial and territorial jurisdiction.

30. In further response to the Claim generally, First Nations in Canada own, control, operate and maintain drinking water systems on their reserves. Canada’s

policies and initiatives support First Nations to provide safe drinking water in their communities and Canada provides guidelines and funding to support water services.

**A. Recent Measures to address Water Issues on Reserves**

31. Canada has taken extensive measures to address water issues on reserves, including supporting improved access to safe drinking water for First Nations members on their reserves. Canada has provided First Nations with extensive funding and support to operate and maintain their community water systems.

32. Canada has enacted numerous policies, protocols and practices to support improved access to drinking water for on-reserve communities, often in partnership with First Nations and First Nations organizations or following consultation and engagement with First Nations and First Nations organizations. Canada establishes safety and technical guidelines, and provides funding to First Nations for the development and operation of their water systems.

33. For example, Canada provided funding under the *First Nations Water and Wastewater Action Plan* of 2008 (“*2008 First Nations Water Plan*”) for an independent national engineering assessment of all First Nations on-reserve water and waste-water systems in Canada. This report was prepared by Neegan Burnside Ltd. (“Neegan Burnside”) and released in 2011. The Neegan Burnside report categorized First Nations water facilities into low, medium, and high levels of risk, based upon five weighted factors: water source, design, operations, reporting and operators. This information provided First Nations and Canada with reliable standardized information about water treatment facilities across the country. It assisted Canada in allocating resources and support to First Nations communities whose water facilities are at greatest risk.

34. In 2016, when the *2008 First Nations Water Plan* concluded, the predecessor to ISC implemented the *First Nations Water and Wastewater Enhanced Program* (“*2016 First Nations Water Plan*”), which is delivered under ISC’s *Capital Facilities and Maintenance Program* (“*CFMP*”).

35. The *CFMP* is the primary ISC program for investments in infrastructure on First Nations reserves, with the objective of maintaining physical assets, mitigating health and safety risks, meeting applicable codes and standards, and assisting First Nations to manage assets in a cost-effective and efficient manner. It includes, but is not limited to, water and waste-water treatment facilities.

36. Under *2016 First Nations Water Plan*, First Nations, in consultation with ISC, develop an annual “First Nations Infrastructure Investment Plan,” through which each First Nation outlines its infrastructure needs and priorities and advises ISC’s regional offices of proposed capital projects, including water and waste-water treatment facilities.

37. Once received, capital project proposals are assessed and assigned priority on a national basis. Depending on available sources of funds, the program establishes funding allocations, which form part of ISC’s annual budget allocations, and are subsequently incorporated into First Nations funding agreements.

38. Canada has expended and continues to expend significant resources to support First Nations to provide safe drinking water on reserves.

39. In the 2019 Federal Budget, Canada committed an additional \$739 million over five years, with \$184.9 million per year on-going, to support First Nations community water and wastewater assets funded by Canada; \$133.4 million over two years, starting in 2019-2020, to support urgent repairs to vulnerable water and wastewater systems; and \$605.5 million over four years, starting in 2020-2021, to support the operations and maintenance of water and wastewater infrastructure in First Nations communities.

40. In the 2020 Fall Economic Statement, Canada committed an additional \$1.5 billion in funding to provide and improve clean drinking water in First Nations communities. This funding includes:

- a) \$616.3 million over six years, and \$114.1 million per year thereafter, to increase the support already provided for operations and maintenance of water and wastewater infrastructure on reserves;
- b) \$553.4 million to continue funding water and wastewater infrastructure on reserve to prevent future drinking water advisories from occurring; and

- c) \$309.8 million to support and accelerate ongoing work to lift all long-term drinking water advisories on public systems on reserves by helping to respond to project delays, including those due to COVID-19.

41. In the 2021 Federal Budget, Canada committed an additional \$1.043 billion over 2 years, starting in 2022-23, to support water and wastewater projects. The funding will enable ISC to continue to support First Nations in the planning, procurement, construction, and commissioning of water and wastewater projects for new construction and system repairs and upgrades in existing facilities in First Nations communities.

42. Budget 2021 also announced \$125.2 million over four years, beginning in 2022-23, and \$31.3 million per year thereafter, to continue to support First Nations to provide reliable access to clean water and to help ensure the safe delivery of health and social services on reserve.

43. Between April 1, 2016 and December 31, 2022, Canada funded more than \$3.03 billion to support 1,058 water and wastewater projects on First Nation reserves, of which about 525 are now complete and about 533 are ongoing. These projects will serve about 470,000 people in 589 First Nations communities in Canada.

44. In June 2023, as part of the Action Plan adopted under the *United Nations Declaration on the Rights of Indigenous Peoples Act*, Canada committed to “[c]ontinue to support lifting of short and long term drinking water advisories in First Nations communities” and to “[c]ontinue efforts to advance water and wastewater service transfer to First Nations communities and support self-determined service delivery models in First Nations communities”.

#### **B. Recent Supports to Address Water Issues on Reserves**

45. Canada has established many protocols, guidelines, and resources to assist all First Nations in accessing clean water and operating their water systems. In particular, this includes:

- a) In 2006, Canada produced, in consultation with First Nations representatives as part of the First Nations Water Management Strategy, the *Protocol for Safe Drinking Water in First Nations Communities*, which contains standards intended for the use of First Nations staff

responsible for water systems and for the design, construction, operation, maintenance, and monitoring of drinking water systems in First Nations communities;

- b) The predecessor to ISC and Health Canada in 2008 developed the *Procedures for Addressing Drinking Water Advisories in First Nations Communities South of 60°* and the First Nations Inuit Health Branch (FNIHB) developed the *Procedure Manual for Safe Drinking Water in First Nations Communities South of 60°* in 2007 and the *Drinking Water Program Manual* in 2014;
- c) ISC provides approximately \$24 million annually in funding to support First Nations water and wastewater operator training, including system operator training courses, annual asset management workshops, operator certification testing and registration costs, and mentorship of water system operators, and funded the *Circuit Rider Training Program* and Ontario Hubs;
- d) Canada, in collaboration with Thompson Rivers University, developed and provides funding for a First Nations-oriented university program for training water system operators;
- e) The *Design Guidelines for First Nations Water Works* provides technical information, advice, and guidelines;
- f) The *Emergency Response Plan for Drinking Water Systems in First Nations Communities – Guide and Template* provides emergency response plans for water emergencies;
- g) The *Protocol for Centralized Drinking Water Systems in First Nations Communities* and the *Protocol for Decentralized Drinking Water Systems in First Nations Communities* set out minimum standards for water systems which are eligible for funding by Canada;
- h) The *Water and Wastewater Policy and Level of Service Standards*;
- i) The *Maintenance Management Plan for Drinking Water and Wastewater Systems in First Nations Communities – Guide and Template*; and
- j) The *First Nations On-Reserve Source Water Protection Plan – Guide and Template*.

46. Canada also assists First Nations with additional funding, including:

- a) ISC provides funding to First Nations for major maintenance projects and upgrades of water systems and new water infrastructure;
- b) ISC provides funding subsidies to communities to operate and maintain, First Nations-owned and ISC-funded, community water systems;
- c) ISC provides funding for annual inspections to evaluate the performance of on-reserve water systems, as well as funding for the

Extended Asset Condition Reporting System program inspections every three years; and

- d) Canada provides funding to BC's First Nations Health Authority ("FNHA") and to FNIHB (formerly part of Health Canada; now part of ISC).

47. Canada has supported the transfer of services relating to drinking water, wastewater and related infrastructure on reserve to First Nations organizations. Canada recently reached an agreement with the Atlantic First Nations Water Authority, as follows:

- a) Canada signed a Service Delivery Transfer Agreement with the Atlantic First Nations Water Authority in November 2022, which initiated the transfer of responsibility for the operation, maintenance, and capital upgrades of all water and wastewater assets in participating First Nations to the First Nations-led Water Authority. The transfer agreement enables First Nations to now officially join the Water Authority.
- b) ISC committed approximately \$257 million in funding for this work, including \$173 million over 10 years from Budget 2022 to provide sustainable funding for operations and capital programs. This long-term, sustainable funding is to support the Atlantic First Nations Water Authority to deliver high-quality water and wastewater services to participating First Nations.

48. Canada provides organizations serving First Nations with supports and capacity building measures, including:

- a) The RES'EAU Hackathon and Walkthrough Lab, an online drinking water systems educational tool;
- b) The Clan Mothers Turtle Lodge, which provides funding for Level 1 Certified Water Operator training;
- c) The Native Women's Association of Canada ("NWAC") Phase 1 & 2 – Women Water Operators Project and Water Carriers Project, which seeks to amplify the voices of Indigenous women and 2SLGBTQIA+ people as water protectors;
- d) The Ontario First Nations Technical Services Corporation for the Technical Youth Career Outreach Program, where ISC has committed \$813,000 in funding from 2022-23 to 2024-25;
- e) Calls for proposals for capacity building for Water and Wastewater Operators on reserve; and
- f) The National First Nations Water Leadership Award.

### **C. Long Term Drinking Water Advisories are Decreasing**

49. Everyone in Canada should have access to safe clean drinking water. Canada continues to work with First Nations to support improved water infrastructure on reserves, end long term drinking water advisories on public systems, and prevent short-term advisories from becoming long term advisories.

50. The number of long term drinking water advisories on public systems on reserves in Canada is decreasing. There are about 619 First Nations in Canada with about 3,394 reserves (as some First Nations have multiple reserves). In November 2015 there were about 105 long term drinking water advisories. By January 2021 the number was down to about 57 long term drinking water advisories in 39 communities.

51. By June 19, 2023, a total of about 142 long term drinking water advisories on First Nation reserves had been lifted, with only 28 advisories remaining in 26 First Nations communities. Environmental public health officers have recommended lifting three of the remaining long term drinking water advisories, which affect two reserves.

52. Canada remains committed to seeing all long term drinking water advisories on First Nations reserves brought to an end.

## **VI. CANADA'S WORK TO SUPPORT THE PROVISION OF SAFE DRINKING WATER TO SHAMATTAWA**

53. Each First Nation in Canada is unique; every First Nation reserve has its own particular location, geology, topography, water supply and water facilities. Canada provides supports across the country, but delivery mechanisms may vary by province or region.

54. Shamattawa and Canada have worked together for many years on safe drinking water for the Shamattawa community and its members. Shamattawa's Water Treatment Plant is owned, operated and maintained by Shamattawa and funded by Canada.

55. In response to paragraphs 27 through 34 of the Claim and generally, some of Canada's information about Shamattawa's water treatment systems and facilities differs from the description provided by Shamattawa. ISC's information is that:

- a) Before 1998 drinking water was supplied to the community by wells and by barrels or cisterns, but in addition community members used the school pump house, which used a basic pressure filter for water treatment.
- b) The new Water Treatment Plant was installed in 1998. Its treatment process was by membrane filtration, such that the plant was capable of treating cryptosporidium and giardia. Associated works included the construction of a new intake with an infiltration gallery, a distribution and collection system running from the new plant to Wolf Street, a decommissioning of the treatment process at the existing (school) pump house and associated conversion of the pump house to a booster and repressurization station, and a decommissioning of the wells where homes were being brought on to piped water from the Water Treatment Plant.
- c) In early 2000, water and sewer services were expanded to include a distribution system and a collection system to the east of the Water Treatment Plant and the rest of the community west of the Water Treatment Plant. A return water main was also installed west of the community such that the west side had a more reliable delivery of water services, as the piping was now looped.
- d) In about 2010 the Water Treatment Plant process was modified as the manufacturer advised the process pumps did not need to be running continuously to provide potable water. Recommended upgrades were implemented, which reduced the community's energy consumption. All process membranes were changed out.
- e) In about 2014 a booster station was installed at the community's new school site, providing the school and nursing station with a reliable fire flow.
- f) In 2022 the Water Treatment Plant was upgraded. The scope of work included a plant expansion intended to serve the community until approximately 2042, replacement of the water main serving the new school and the nursing station with a larger diameter pipe, and replacement of the raw water intake line.
- g) Other work undertaken generally in connection with water services by the First Nation has included repair work such as replacing pumps, updates to the programmable logic controller and human-machine interface controllers at the Water Treatment Plant and replacing the plant's computer system, as well as back washing the raw water line.

56. ISC acknowledges there are practical challenges specific to the Shamattawa community in providing water and wastewater services on reserve, including its remote location, climate, the local terrain, heavy silting in nearby water sources and the presence of methane in groundwater.

57. ISC acknowledges the Shamattawa community is currently experiencing a long term drinking water advisory on its reserve that commenced in or around December 2018. ISC did provide a temporary portable water filtration system to the community, which is still in Shamattawa and has not yet been demobilized.

58. ISC provided funding of about \$25.6 million to Shamattawa to date for the recent improvements to the community's Water Treatment Plant and related services. ISC's information is the upgraded Water Treatment Plant may be back in operation in the summer of 2023.

59. In further response to paragraphs 27 through 68 of the Claim and generally, Canada states Shamattawa and its members who are ordinarily resident on reserve participated in the Earlier Actions and are included within the Settlement Agreement described at paragraphs 8, 9, 26, 145, and 149 through 151 of the Claim and referred to in paragraphs 13 and 14 above. Canada's information is they either have received or will receive the benefits of the Settlement Agreement for losses and harms experienced up to June 21, 2021 and all claims by class members before that date are released, as acknowledged in paragraphs 150 and 151 of the Claim.

## **VII. LEGAL DEFENCES**

60. Canada supports First Nations in providing safe drinking water to First Nations members on reserve as a matter of good governance rather than as a result of a legal duty.

61. In response to paragraph 69 and following of the Claim, and generally, Canada acknowledges there is a special relationship between Canada and First Nations, including Shamattawa and other First Nations, which in certain circumstances may give rise to fiduciary obligations or obligations based upon the honour of the Crown.

However, Canada does not owe such obligations to the plaintiffs in all of the circumstances here.

62. Canada recognizes the honour of the Crown is engaged in guiding the conduct of the Crown in all of its dealings with Indigenous peoples and it gives rise to different legal duties in different circumstances. However, in the circumstances here, the honour of the Crown does not give rise to fiduciary duties to the plaintiffs. In the alternative, if any such obligations are engaged, they have been, and are being met.

63. Canada works in partnership with First Nations towards the common goal of ending all long term drinking water advisories on reserves in Canada and preventing short term drinking water advisories from becoming long term. Canada and First Nations share the important vision and will continue to work in partnership towards a future without drinking water advisories on reserves. Furthermore, Canada provides by way of program delivery, infrastructure supports which include those related to water and wastewater systems, amongst other infrastructure.

64. Canada does not owe the plaintiffs a general fiduciary duty as asserted to provide or fund water infrastructure on reserve. To the extent that harm is claimed to have arisen from the formulation and implementation of policy, Canada is immune from suit or liability. Canada does not owe any legal obligations or duties to operate and maintain the plaintiffs' water systems.

65. In general response to the assertions respecting comments made in 2005 by the Minister of Indian and Northern Affairs in paragraph 103, Canada states the Minister may have affirmed Canada's commitment to provide safe drinking water to all First Nations members on reserve in stating lack of access to drinking water was unacceptable, but Canada has been unable to confirm that at this time. In any event, any comment made would have been made in a particular context, should not be divorced from such context, and any comments made would not have been intended to and did not provide a legal opinion on any legal issue in the Earlier Actions or this action.

66. In general response to the extensive assertions respecting comments made by the Honourable Marc Miller, the former Minister of Indigenous Services, in paragraphs

45, 111 through 123 and 139 through 147, Canada acknowledges that Minister Miller repeatedly affirmed Canada's commitment to provide safe drinking water to all First Nations members on reserve. Canada further agrees the direct quotes are generally accurate; however, each comment was made in a particular context (for example, in response to a question at a press conference), should not be divorced from such context, and any comments made were not intended to and did not provide a legal opinion on any legal issue in the Earlier Actions or this action.

67. In general response to the assertions respecting comments made by the Honourable Patty Hajdu, the current Minister of Indigenous Services, in paragraph 152, Canada acknowledges that, in stating that lack of access to drinking water was unacceptable, Minister Hajdu also affirmed Canada's commitment to provide safe drinking water to all First Nations members on reserve. Canada further agrees the direct quotes are generally accurate; however, again, the comment was made in a particular context (again, at a press conference), should not be divorced from such context, and any comments made were not intended to and did not provide a legal opinion on any legal issue in the Earlier Actions or this action.

68. In response to paragraphs 84 and 156 and following of the Claim, and generally, Canada denies it has limited any rights of the plaintiffs under the *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 (the "*Charter*").

69. Further, the Claim does not challenge any specific provision of any law or any specific government action with respect to addressing access to safe drinking water. Rather, the Claim is grounded in broad assertions that Canada has generally failed to take sufficient action in relation to the plaintiffs' water infrastructure. The Claims do not fall within the parameters of protection under section 7, section 15 or section 2(a) of the *Charter*.

70. The Claim does not engage the protection of section 7 of the *Charter*, including because the Claim fails to demonstrate any deprivation of the rights to life, liberty, or security of the person that can be attributed to Canada and that is not in accordance with the principles of fundamental justice. As stated above, the great majority of First

Nations have water that is safe to drink and meets the *Guidelines for Canadian Drinking Water Quality*.

71. The Claim also does not engage the protection of section 15 of the *Charter*, as this section does not impose a positive obligation on the part of Canada to legislate in a particular manner. Further, the Claim does not assert that any specific law, measure or government action has denied equal protection or benefit of the law to the plaintiffs as compared to others.

72. Further, the Claim does not assert any conduct by Canada that has infringed the plaintiffs' rights to freedom of conscience or religion. As such, the Claim does not engage the protection of s. 2(a) of the *Charter*. In particular, s. 2(a) does not ground the positive rights and/or duties that are asserted by the plaintiffs.

73. In the alternative, any such limits of sections 7, 15 or 2(a) of the *Charter* are justified under section 1 of the *Charter*.

74. In response to paragraphs 81 and 166 of the Claim, and generally, Canada denies it breached any of its commitments pursuant to section 36(1) of the *Constitution Act, 1982*.

75. In response to paragraphs 85 through 87 and 108 of the Claim, to the extent that the *International Covenant on Economic, Social and Cultural Rights* or *UNDRIP*, or any of the international instruments referred to in the Claims may inform the interpretation of domestic law, Canada pleads that at all material times, Canada's conduct has been consistent with the principles in those international instruments.

76. In the alternative, if any of the plaintiffs' claims rest on events that took place many years ago, then any damages or compensation claimed by the plaintiffs arising from those events are out of time and statute-barred pursuant to s. 39(2) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, and s. 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, and the applicable provincial and territorial limitations statutes, including: *Limitation Act*, R.S.B.C. 1996, c. 266, as amended; *Limitation Act*, S.B.C. 2012, c. 13; *Limitation of Actions Act*, R.S.A. 1980, c. L-15; *Limitations Act*, R.S.A. 2000, c. L-12; *The Limitations Act*, S.S. 2004, c. L-16.1; *Limitations of Actions Act*,

C.C.S.M. c. L150; s. 7 of *Ontario's Public Authorities Protections Act*, R.S.O. 1990, Chap. P38 as amended; the *Limitations Act*, R.S.O. 1990, Chap. L. 15, as amended; *Limitations Act*, 2002, S.O. 2002 c. 24; *Civil Code of Quebec*, C.Q.L.R. c. CCQ-1991; *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5; *Limitations of Actions Act*, R.S.N.S. 1989, c 258; *Limitations of Actions Act*, S.N.S. 2014, c. 35; *Statute of Limitations*, R.S.P.E.I. 1988, c. S-7; *Limitation of Actions Act*, R.S.Y. 2002 c. 139; and *Limitations of Actions Act*, R.S.N.W.T. 1988, c. L-8.

### **VIII. RELIEF**

77. In answer to the Claim as a whole, Canada denies it has any legal obligation or duty to the plaintiffs as Canada's supports for First Nations are provided as a matter of good governance rather than legal duty. If any such obligation or duty exists, which is denied, Canada denies breaching any such obligation or duty as it has undertaken extensive measures, together with First Nations across Canada, to support the provision of safe drinking water on reserves.

78. In further response to the Claim, any damages or losses suffered by the plaintiffs are not legally caused by or attributable to acts or omissions of Canada and Canada denies the plaintiffs are entitled to any of the relief sought in the Claims or action.

79. In the alternative, to the extent Canada is liable for any portion of the claimed damage, losses, or injuries, damages should be apportioned accordingly to take into account the fault of other parties and any contributory negligence, for which Canada is not responsible.

80. In the circumstances, the assessment of aggregate damages is not appropriate given the individual experiences of the plaintiff classes and class members. The experience of living on reserve during a drinking water advisory was not universal. The length, breadth, and severity of drinking water advisories across the country have varied significantly. Accordingly, damages, if any, are highly individual and each individual story should be heard.

81. The circumstances, if proven, were not such as to give rise to liability for special, punitive, exemplary or aggravated damages.

82. Canada submits that the claim be dismissed with costs.

**WHEREFORE THIS DEFENDANT**, the Deputy Attorney General of Canada on behalf of the Defendant, His Majesty the King in Right of Canada prays the Claim be dismissed, with costs.

DATE: July 31, 2023

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**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
Prairie Regional Office  
300, 10423 – 101 Street  
Edmonton, Alberta  
T5H 0E7

Fax: (780) 495-2964 / (204) 984-6488

**Per: Sheila M Read, KC / Scott Farlinger**

Tel: (780) 495-4996 / (431) 489-8664

Email: sheila.read@justice.gc.ca  
scott.farlinger@justice.gc.ca

File: LEX - 500107700

**Solicitors/Counsel for the Defendant**