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Dockets: CI 19-01-24661 & T-1673-19
(Winnipeg Centre)
Indexed as: Tataskweyak Cree Nation et al. v. Canada (A.G.);
Curve Lake First Nation et al. v. Canada (A.G.)
Cited as: 2021 MBQB 275



# COURT OF QUEEN'S BENCH OF MANITOBA

**DOCKET CI 19-01-24661**

| **B E T W E E N:** | **APPEARANCES:** |
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| TATASKWEYAK CREE NATION AND CHIEF DOREEN SPENCE ON HER OWN BEHALF, AND ON BEHALF OF ALL MEMBERS OF TATASKWEYAK CREE NATION, | H. MICHAEL ROSENBERG<br>ERIC S. BLOCK<br>JOHN P. BROWN<br>STEPHANIE WILLSEY<br>ALANA ROBERT |
| plaintiffs, | |
| | HARRY S. LAFORME<br>BRYCE EDWARDS<br>KEVIN HILLE<br>JACLYN McNAMARA<br>for the plaintiffs |
| - and - | |
| ATTORNEY GENERAL OF CANADA, | |
| defendant. | |
| | CATHARINE MOORE<br>SCOTT D. FARLINGER<br>SAMAR MUSALLAM<br>COURTNEY DAVIDSON<br>SHEILA READ<br>for the defendant |

**DOCKET T-1673-19**

| **A N D B E T W E E N:** | **APPEARANCES:** |
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| CURVE LAKE FIRST NATION AND, CHIEF EMILY WHETUNG ON HER OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF CURVE LAKE FIRST NATION AND NESKANTAGA FIRST NATION AND, CHIEF CHRISTOPHER MOONIAS ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF NESKANTAGA FIRST NATION, | H. MICHAEL ROSENBERG<br>ERIC S. BLOCK<br>JOHN P. BROWN<br>STEPHANIE WILLSEY<br>ALANA ROBERT |
| plaintiffs, | |
| | HARRY S. LAFORME<br>BRYCE EDWARDS<br>KEVIN HILLE<br>JACLYN McNAMARA<br>for the plaintiffs |

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| | ) | CHIEF EMILY WHETUNG |
| - and - | ) | for the plaintiffs |
| | ) | Curve Lake First Nation and, |
| ATTORNEY GENERAL OF CANADA, | ) | Chief Emily Whetung on her own |
| | ) | behalf and on behalf of all |
| defendant. | ) | members of Curve Lake |
| | ) | |
| | ) | CATHARINE MOORE |
| | ) | SCOTT D. FARLINGER |
| | ) | SAMAR MUSALLAM |
| | ) | COURTNEY DAVIDSON |
| | ) | SHEILA READ |
| | ) | for the defendant |
| | ) | |
| | ) | JUDGMENT DELIVERED: |
| | ) | DECEMBER 22, 2021 |



# JOYAL, C.J.Q.B.

## I. INTRODUCTION

[1] This is a motion to approve the First Nations Drinking Water Settlement Agreement [Settlement Agreement or Settlement] pursuant to Rule 334.29(1) of the ***Federal Courts Rules***, SOR/98-106 [***Rules***] and section 35(1) of ***The Class Proceedings Act***, C.C.S.M. c. C130 [***The Class Proceedings Act***]. The underlying actions are class proceedings. The Settlement Agreement compensates First Nation individuals who have lived under a drinking water advisory for a year or more. It also provides First Nations with compensation and assistance in securing safe drinking water through future infrastructure funding.

[2] Both the Federal Court and the Manitoba Court of Queen's Bench [Courts] have jurisdiction over this proceeding.

[3] On October 11, 2019, Curve Lake First Nation [Curve Lake], Chief Emily Whetung, Neskantaga First Nation [Neskantaga], and Former Chief Christopher Moonias filed a

statement of claim in the Federal Court [Federal Action]. On November 20, 2019, Tataskweyak Cree Nation [Tataskweyak] and Chief Doreen Spence filed a statement of claim in the Manitoba Court of Queen's Bench [Manitoba Action, and together with the Federal Action, the Actions]. After the Actions were certified, the Courts appointed these individuals and First Nations as the Representative Plaintiffs. The current Chief of Neskantaga, Wayne Moonias, represents the collective interests of Neskantaga. The defendant in both Actions was the Attorney General of Canada [Defendant or Canada]. McCarthy Tétrault LLP [McCarthy Tétrault] and Olthuis Kleer Townshend [OKT] are class counsel [Class Counsel]. The parties finalized the Settlement on September 15, 2021.



[4] The Representative Plaintiffs now bring a motion for an Order seeking:

a. that the proposed Settlement Agreement be approved and its terms given effect;
b. that the Defendant pay the funds contemplated in the proposed Settlement Agreement, and that said funds be distributed in accordance with the proposed Settlement Agreement;
c. that Class Members (defined below) be notified of the approval of the proposed Settlement Agreement as set out in Schedule M and N of the Settlement Agreement; and
d. that the Actions be discontinued on a without costs basis.

[5] The Courts jointly case managed and heard the motion for settlement approval, as contemplated by the Canadian Bar Association's "Canadian Judicial Protocol for the Management of Multi-jurisdictional Class Actions and the Provision of Class Action Notice" (2018), online: *The Canadian Bar Association* <www.cba.org>. The Courts exercised their

jurisdiction to hear this motion jointly pursuant to Rules 3 and 4 of the ***Rules*** and section 12 of ***The Class Proceedings Act*****.**

[6] While the two Courts exercised their respective jurisdiction to jointly hear the motion for the approval of the Settlement Agreement, each Court appropriately, as required, separately and independently addressed the governing legal test as it relates to the issue before the Courts and the Actions that were certified in their respective jurisdictions.

[7] Despite the joint manner in which this motion was argued and heard by the respective Courts, the resulting and accompanying reasons in connection to the motion will be released separately but concurrently by each Court. As explained at the hearing, while the required independent and separate assessment was undertaken by each Court, after a full analysis, the two Courts are in complete agreement with the result and the reasons therefore. Accordingly, the reasons to be released by each Court to a large extent replicate the reasons of the other and should be seen as representative of what the Courts underscore is complete concurrence.

[8] The Settlement Agreement is historic. It is the first Settlement to tackle the problem of drinking water advisories on First Nation reserves. Additionally, this proceeding marks the first time the Federal Court and another Superior Court have sat together. Most importantly, however, the record before the Courts demonstrates that the Settlement Agreement about which we are being asked to provide our approval, represents what many hope will be a turning point for Canada and First Nations.

[9] Both parties acknowledge that an agreement of this nature is long overdue. Although the parties reached the Settlement in just under two years, the Courts acknowledge that Indigenous communities have been advocating for decades to ensure future generations'

access to safe water. Those tireless efforts, the willingness of the government, and the expertise and focus of legal counsel have now brought the parties to this promising and hopeful turning point.



## II. ISSUE

[10] The sole issue on this motion is whether the Courts should approve the Settlement Agreement. Mindful of the governing law and legal test, that issue reduces to the following question: Is the Settlement Agreement fair and reasonable and in the best interests of the Class?

[11] It should be noted that a separate set of reasons, also concurrently released by each Court, will assess the question of whether the Court should approve Class Counsel fees.

[12] For the reasons outlined below, the Courts approve the proposed Settlement Agreement.

## III. BACKGROUND

### A. *Drinking water advisories on First Nation reserves in Canada*

[13] Authorities issue drinking water advisories when testing indicates that the water supply is or may be unsafe. There are three types of drinking water advisories: boil before use, do not consume, and do not use. Long-term drinking water advisories are those that have been in place for more than one year. The Settlement Agreement only applies to individuals residing on First Nations that have been subject to a long-term drinking water advisory and to those First Nation communities.

[14] The affidavit of Peter Gorham, an expert actuary jointly retained by both parties, states that from 1995-2007, there were 713 recorded long-term drinking water advisories that affected some 257 First Nations. Class Counsel submitted a January 28, 2021 report by

Dr. Melanie O'Gorman, a professor of economics and scholar in water infrastructure and long-term drinking water advisories in First Nations. That report states that in comparison to municipal and private water systems, First Nations disproportionately experience long-term drinking water advisories.

[15] As discussed in more detail below, the Actions alleged that Canada is responsible for the establishment of drinking water systems on reserves and that Canada has chronically underfunded First Nations' water needs. As a result, Canada has failed to ensure that Class Members have access to potable water of adequate quality and quantity. Class Counsel pointed out that in a press conference on November 24, 2021, Minister of Indigenous Services, the Honourable Marc Miller, stated that the deficits pertaining to drinking water infrastructure on reserve are a result of systemic racism.

B. *Experiences of Representative Plaintiffs & Class Members*

[16] The Representative Plaintiffs and other Class Members filed affidavits in support of settlement approval, which outlined the status of drinking water on their respective First Nations. All of those affidavits explained the importance of safe water for the physical, spiritual, emotional, psychological, cultural, or economic health of individuals and communities. In particular, many of the affidavits, including the affidavits of Elder Richard Allen Keeper and Anne Taylor, emphasized the role water plays in ceremony and how contaminated water results in the breakdown of knowledge transmission. Class Members also discussed the tragic relationship between poor drinking water, mental health, and youth suicide. Likewise, they noted that contaminated water has forced members to relocate, relocation which perpetuates the history of displacement of Indigenous peoples from their lands and the separation of families. Class Member Roderick Richard Spence explains:

> Now that I live in Winnipeg, I can drink the water that comes out of my tap, just like other Canadians. But I have lost a piece of who I am. It seems like an awful trade to have to make. I certainly hope that my grandchildren get better treatment. I dream for this, pray for this, and cry for this.

[17] The frustration, stress, and loss of dignity that Class Members have experienced is palpable. As detailed in their affidavits as discussed below, members of the Representative First Nations have and continue to suffer unacceptable hardships.

(a) *Curve Lake*

[18] Curve Lake is an Ojibway First Nation located 15 kilometers outside of Peterborough, Ontario. Chief Whetung was elected Chief on June 18, 2019. She is Michi Saagiig of the Anishnaabe nation. She is a 36-year old lawyer and a mother of two. Chief Whetung's affidavit explains that Curve Lake experiences 10 to 15 boil-water advisories every year, some of which have lasted for more than one year. Her affidavit and the affidavit of Shawn Williams, a member of Curve Lake, state that the water treatment plant on Curve Lake inadequately disinfects water and only services 56 of the 550 homes in the community. Canada constructed it in the early 1980s and intended it to be temporary. The remaining homes on the First Nation are not connected to a public water system and rely on private wells. Members of the community, including Chief Whetung's entire family, have contracted E.coli due to the contaminants in their drinking water. Others have become gravely sick, suffered rashes, and more.

[19] Mr. William's affidavit explains that for decades Curve Lake has been negotiating with Indigenous Services Canada [ISC] to get a new water treatment plant. He describes the process as a "hamster wheel": "the First Nation is constantly running, working to provide proposals, obtain necessary studies, seek funding, only to be in the exact same position decades later." He explains that since Canada provides the funding, the federal

government's sign off is needed at every stage of development. He attributes the delay to ISC's habit of providing "funding for studies, small projects, and other lower cost items as a means to appease First Nations while they wait for the big ticket funding to actually address their needs, if that day ever arrives."

[20] The affidavit of Katie Young-Haddlesey, the Economic Development Coordinator of Curve Lake, states that the water crisis has "strangled Curve Lake's economic development." She explains that for every business proposal, Curve Lake must consider whether "there will be enough water and whether the quality will impact the business." Proposals for businesses like laundromats, car washes, restaurants, and hotels are not feasible because there is simply not enough water in the community.

[21] Chief Whetung spoke passionately before both Courts on December 8, 2021. She explained that Curve Lake has been fighting for clean drinking water since before she was born. For her, the Settlement not only means that the First Nation will have clean water in the near future, but that her children will be able to stay and grow up in their community.

(b) *Neskantaga*

[22] Neskantaga is an Oji-Cree remote fly-in community in northern Ontario and is situated along Lake Attawapiskat. Neskantaga is subject to the longest drinking water advisory in Canada — the First Nation has not had safe drinking water for over 26 years. Members of Neskantaga have had to evacuate their community twice in the past three years because of their water.

[23] Christopher Moonias was the Chief of Neskantaga from 2019 to 2021. He now acts as special advisor to Neskantaga and remains a Representative Plaintiff. Chief Wayne Moonias

is the current Chief of Neskantaga. He took office on April 1, 2021 and continues the work of Former Chief Christopher Moonias with respect to these Actions.

[24] The affidavit of Chief Wayne Moonias describes the traumatic effect the drinking water advisory has had on both individuals and the community and emphasizes its adverse effect on community members' mental health. As explained by the Community of Neskantaga in the Joint Press Release dated July 20, 2021, "[o]ur symptoms are real, and result in kids committing suicide, getting rashes, and suffering severe eczema. The skin conditions are particularly awful. They make our people feel like they have to hide themselves, and furthers their loss of dignity, on top of already feeling like maybe they don't deserve clean water."

[25] Class Members from Neskantaga also submitted affidavits supporting the Settlement and detailing their stories. Those Class Members included Former Chief Peter Moonias, Dorothy Sakanee, Maggie Sakanee, Marcus Moonias, and Amy Moonias. Maggie Sakanee's affidavit details the skin rashes and sores that her grandchildren developed due to the water, which only cleared up after being evacuated to Thunder Bay. Amy Moonias' affidavit tells a very similar story. Due to the expense of bottled water (a 4-litre bottle of water in Neskantaga costs 16 dollars), Amy Moonias often had to choose between feeding and bathing her baby. Likewise, Dorothy Sakanee sometimes had to choose between buying bottled water and essentials like food or diapers. When she had to boil water, it came at the expense of spending time with her children. Former Chief Peter Moonias' affidavit states that he declared a State of Emergency in the early 2000s because a cancer-causing chemical was found in the water. Dorothy Sakanee's affidavit explains that her youngest daughter died in 1988 from brain cancer. She states that she suspects that the cancer was caused from the water in Neskantaga.

(c) *Tataskweyak*

[26] Tataskweyak is located in northern Manitoba and has 4,000 members, 2,300 of whom live on the reserve. Chief Spence is Split Lake Cree and is the Chief of Tataskweyak, where she has lived most of her life. She was elected on November 6, 2016 and is the first female Chief. She is a mother of three and a grandmother of one. In her affidavit, Chief Spence states that Tataskweyak has been under a boil water advisory for three years. She explains that the community sources its tap water from Split Lake, which has been contaminated by upstream development and recurring flooding. The affidavit of Tataskweyak member, Robert Spence, further explains that sewage is periodically released into Split Lake. Split Lake is contaminated with E.coli and large-scale blue-green algae blooms known to cause serious illness in humans.

[27] Accordingly, in 2006 and 2019, Tataskweyak sent Canada feasibility studies for a new water intake system, which would draw from Assean Lake. Instead, Canada upgraded the filtration and UV system in the existing water plant, which left the water tasting and smelling like chemicals. Chief Spence explained that occasionally, when the water line breaks, the tap water runs brown. The affidavit of Roderick Richard Spence, another member of Tataskweyak, similarly describes the tap water as smelling like chlorine and looking like "lemonade." Even after Canada's upgrades, the water remains unsafe to drink without boiling. In May 2020, Chief Spence obtained Canada's commitment to pay for bottled water delivery and enhanced water testing. Prior to this, however, community members who could not afford bottled water had to drink tap water or haul buckets of water from Assean Lake. In comparison, residents of the City of Thompson, which is upriver from Tataskweyak, enjoy virtually unlimited potable water.

[28] Similar to Curve Lake and Neskantaga, skin rashes are the norm for members of Tataskweyak. Class Members Lydia Garson and Clara Flett detailed their children's rashes that resulted from bathing in the contaminated water. Lydia Garson's son was covered in scrapes, sores, and scabs. At one point, despite his mother's dedication, his condition got so bad that his face would bleed. Likewise, although she took special care, Clara Flett's son had to be hospitalized due to his rashes. Class Member Elizabeth Keeper similarly contracted H. pylori infection (a stomach infection) from the contaminated water in Tataskweyak. Chief Spence explains that illnesses related to contaminated drinking water have been exacerbated by inadequate access to healthcare, overcrowded housing, and the COVID-19 pandemic.



C. *Nature of the Claims & Defences*

[29] In the statements of claim filed in both Actions, the Representative Plaintiffs submitted that Canada failed to provide Class Members with potable drinking water. Accordingly, they sought orders and declarations that Canada has: breached its duty of care and acted negligently; contravened the honour of the Crown; breached its fiduciary duties; violated section 36 of the ***Constitution Act, 1982***; and committed violations of sections 2(1), 7, and 15 of the ***Charter***, which are not saved by section 1. They submitted that as a result, Class Members are denied adequate access to clean drinking water; unable to adequately wash and care for themselves and their families; and prevented from performing traditional ceremonies and spiritual practices.

[30] The Representative Plaintiffs submitted that Canada has always taken responsibility for water systems on reserves but has never provided adequate funding. Furthermore, Canada knew that its funding was inadequate. The Representative Plaintiffs maintain that for most First Nations, federal funding is the only means of constructing and maintaining water

infrastructure on reserve but Canada has tied funding to compliance with a complex system of specifications. Accordingly, Canada controls what infrastructure is built, where, how, when, and by whom.

[31] The Representative Plaintiffs in the Federal Action requested damages in the amount of 2.1 billion dollars, plus costs. Of particular note, they also sought an interim or interlocutory injunction and a permanent injunction requiring Canada to construct or approve and fund construction of appropriate water systems to ensure Class Members have adequate access to potable water.

[32] The Defendant did not file statements of defence because the Settlement was reached relatively early in the proceeding. Initially, Canada opposed the relief sought by the Class stating that it had no liability to the Class. The affidavit of John P. Brown, a lawyer for Class Counsel, explains that Canada's public position "was that it funded water systems on reserves rather than manage[ing] them, and that it could not be liable for funding decisions that reflected a core policy." On December 7, 2021, during the Motion for Settlement Approval, Class Counsel explained that their team anticipated that Canada's defence would be similar to that in ***Okanagan Indian Band v. Attorney General of Canada***, Vancouver T-1328-19 (FC) [***Okanagan***]. ***Okanagan*** is an ongoing Federal Court case dealing with similar claims.

D. *Procedural History of the Action*

[33] The Manitoba Court of Queen's Bench had certified the Manitoba Action on July 14, 2020. On September 16, 2020, with the consent of the Defendant, the Representative Plaintiffs in the Federal Action brought a motion for certification. The Federal Court certified the Federal Action on October 8, 2020 pursuant to Rules 334.16 and 334.17.

[34] The Courts certified the following common issues:

(a) From November 20, 1995 to the present, did the Defendant owe a duty or an obligation to Class Members to take reasonable measures to provide them with, or ensure they were provided with, or refrain from barring, adequate access to water that is safe for human use?

(b) If the answer to the First Stage common issue is "yes", did Canada breach its duties or obligations to members of the sub-group?

(c) If the answer to common issue (a) is yes, is any breach of the ***Charter*** saved by s. 1 of the ***Charter***?

(d) If the answer to common issue (a) is yes, did the Defendant's breach cause a substantial and unreasonable interference with Class Members' or their First Nations' use and enjoyment of their lands?

(e) If the answer to common issue (a) is "yes" and the answer to common issue (b) is "no", are damages available to members of the sub-group under s. 24(1) of the ***Charter***?

(f) Can the causation of any damages suffered by members of the sub-group be determined as a common issue?

(g) Can the Court make an aggregate assessment of all or part of any damages suffered by members of the sub-group?

(h) Does the Defendant's conduct justify an award of punitive damages, and if so, in what amount?

(i) Should the Court order that the Defendant take measures to provide or ensure that members of the sub-group are provided with, or refrain from barring, adequate access to clean tap water?

(j) If so, what measures should be ordered?

[35] The Courts appointed McCarthy Tétrault and OKT as Class Counsel. CA2 Inc. was appointed as administrator for the purpose of giving notice of certification. CA2 Inc. gave notice in accordance with the certification orders. Individuals were included in the Class unless they opted out. There were no opt-outs within the opt-out period, which ended on March 29, 2021. First Nations were included in the Class if they opted in.

[36] On December 30, 2020, the Representative Plaintiffs brought a motion for summary judgment on behalf of the Class. Summary judgment was set to be heard before both

Courts, sitting together, on October 4 to 7, 2021. In advance of the summary judgment motion, more than 120 First Nations opted into the Actions. The Representative Plaintiffs summonsed witnesses and were prepared to proceed with cross-examinations. However, on June 20, 2021, the Parties reached an Agreement in Principle. The Agreement in Principle was executed on July 29, 2021 and the Settlement was finalized on September 15, 2021.

[37] On October 5, 2021, Class Counsel brought a motion to approve the Short and Long Form Notices of the Settlement Approval Hearing, as well as a plan for the distribution of these notices. By way of Order dated October 8, 2021, the notices and the plan for distribution were approved. CA2 Inc. was appointed as administrator to give notice and it did so in accordance with the Courts' orders. CA2 Inc. gave Notice of the Settlement Approval Hearing on October 16, 2021. That Notice of Settlement contemplated a 45-day late opt-out period for First Nations that first experienced long-term drinking water advisories after the Actions were certified. There were no late opt-outs.

[38] On November 17 and 18, 2021, respectively, the Courts provisionally appointed Deloitte LLP as the Administrator for the Settlement Agreement [Administrator].

E. *Settlement Agreement: Key Provisions*

(1) Basics

[39] Importantly, the Settlement Agreement contemplates and ensures both retrospective and prospective compensation. The Settlement Agreement provides First Nations and individuals resident on those First Nations with compensation for lack of regular access to safe drinking water. The Settlement also commits Canada to work with First Nations to provide access to clean water and requires Canada to construct and fund appropriate water systems for First Nation communities. The key terms and provisions are set out below.

(a) *Class & Class Period*

[40] The Class Period runs from November 20, 1995 to present. The Class includes (a) Individual Class Members and (b) First Nation Class Members [collectively, Class Members]. Mr. Gorham's affidavit states there are approximately 142,300 Individual Class Members, of which more than 60,000 are minors, and 258 eligible First Nation Class Members.

[41] Individual Class Members include individuals, other than Excluded Persons, who are members of a band [First Nation] as defined by the ***Indian Act***, R.S.C. 1985, c. I-5 [***Indian Act***], whose lands are subject to the ***Indian Act*** or the ***First Nations Land Management Act***, S.C. 1999, c. 24, and whose 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 from November 20, 1995 to present [Impacted First Nation]. Those individuals must not have died before November 20, 2017 and must have ordinarily resided in an Impacted First Nation while it was subject to a drinking water advisory that lasted at least one year.

[42] First Nation Class Members include Tataskweyak, Curve Lake, Neskantaga, and any other Impacted First Nation that elects to join this action in a representative capacity.

[43] "Excluded Persons" are members of Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, the Okanagan Indian Band, and Michael Darryl Isnardy. These persons are excluded from the Settlement because they have ongoing actions related to drinking water on reserves. When the Actions were initiated, these persons requested that they be excluded so that their ongoing litigation would not be affected.

(b) *Retrospective Compensation*

[44] Under the Settlement Agreement, Canada has agreed to pay individual Class Members a total of 1.438 billion dollars into a trust fund to be distributed to the Class Members, including by paying individual damages in accordance with Article 8, section 8.01(2)(a). Individual Class Members will be paid:

a) 2000 dollars per year for people in remote First Nations under long-term drinking advisories;

b) 2000 dollars per year for people in non-remote First Nations under do not use advisories;

c) 1650 dollars per year for people in non-remote First Nations under do not consume advisories; and

d) 1300 dollars per year for people in non-remote First Nations under boil water advisories.

[45] Damages for Individual Class Members will be subject to how many individuals make a claim and how many First Nations join the class action. Prorated amounts will be paid for any partial years after the first full year. Furthermore, damages for Individual Class Members are subject to a synthetic federal limitation period. This means that individuals born after 1995 can claim for all the years and portions of the years between November 20, 1995 and June 20, 2021 while they were ordinarily resident on reserve during a drinking water advisory that lasted a year or more. Individuals born before November 20, 1995 can claim for all years and portions of years between November 20, 2013 and June 20, 2021 where they were ordinarily resident on reserve during a drinking water advisory that lasted a year or more.

[46] Individuals who have suffered specified injuries because of drinking water advisories can claim additional compensation from a specified injuries compensation fund totalling 50 million dollars (Article 5). To claim damages for a specified injury a person must have been ordinarily resident on a reserve under a drinking water advisory for at least a year while the advisory was in place. Furthermore, the injury must have occurred during that time. Individuals suffering specified injuries will only be able to claim for injuries that happened or continued during drinking water advisories after November 2013. Individuals born after November 20, 1995 will be able to claim for injuries going back to that date. The person making the claim must show that they suffered the injury and that the injury was caused by using the water in accordance with the drinking water advisory or by restricted access to safe water caused by the advisory.

[47] Finally, 400 million dollars will be used to establish a First Nations Economic and Cultural Restoration Fund. From that fund, First Nation Class Members will receive a base payment of 500,000 dollars and an amount equal to 50 percent of the damages, not including specified injuries, paid to individual Class Members living on that First Nation's reserve. The retrospective compensation received by First Nation Class Members reflects the harms to the community, which are different from the harms to its individual members. First Nations are free to use that money for any purpose.

(c) *Prospective Relief*

[48] In addition to compensating First Nations and their members, Canada has also agreed to provide funding to fix the problem moving forward. The stated intention in this connection is that the future never again resembles the past. Concretely, Canada has committed to taking all reasonable steps to remove long-term drinking water advisories affecting Class

Members, including doing everything set out in their Long-Term Drinking Water Advisory Action Plan [Action Plan], which will be updated on an ongoing basis. Formerly a political promise, Class Counsel submits that the Action Plan becomes a legally enforceable obligation under the Settlement.

[49] Additionally, the Settlement requires Canada to take "all reasonable efforts" to ensure that Class Members have regular access to safe drinking water in their homes [the Commitment]. This water must meet either federal or provincial water quality standards, whichever is stricter. The amount of water must be enough that it allows people to use water for all the usual things people in Canada use water for, like drinking, bathing and showering, making food, washing dishes, and cleaning their home and clothes. In support of the Commitment, Canada is required to spend at least 6 billion dollars through March 31, 2030 at a rate of at least 400 million per year on water and wastewater on First Nation reserves. Class Counsel described this 6 billion as the "floor" rather than the "ceiling." Under the Settlement, Canada must use this money to fund the actual cost of construction, upgrading, operation and maintenance of water infrastructure on First Nation reserves.

[50] Further, Canada has committed to take reasonable efforts to repeal the ***Safe Drinking Water for First Nations Act***, S.C. 2013, c. 21 and replace it with legislation that is developed through consultation with First Nations. The Settlement also requires Canada to spend 20 million dollars in funding through 2025 for a First Nations Advisory Committee on Safe Drinking Water. That Committee will work with ISC to support forward-looking policy initiatives and provide strategic advice. Additionally, Canada will provide 9 million dollars in funding through 2025 for Class Members' water governance initiatives and 50 million for the cost of administering the Settlement Agreement.

(2) Alternative dispute resolution process for Commitment disputes

[51] The Settlement Agreement and Schedule K contemplate different stages of dispute resolution. Any disputes related to the Commitment (i.e., where Canada and a First Nation cannot agree on whether Canada is meeting its Commitment under the Settlement Agreement and about proposed plans for meeting its Commitment) proceed through a specific alternative dispute resolution process [ADR Process]. Class Counsel submitted that the ADR Process integrates Indigenous Legal Traditions. It should be noted that the ADR Process promotes the use of Indigenous language and where necessary, will occur on the First Nations' respective reserves while utilizing certain protocols such as gift giving, Elder participation, and traditional teachings. Engagement with the ADR Process entails the following steps:

1. If a First Nation determines that Canada is not meeting or has ceased meeting the Commitment, the First Nation must let Canada know (section 9.06 (1)).
2. Canada then has an obligation to consult with the First Nation to try to meet the Commitment as soon as possible. Canada must also pay the costs of any technical advice the First Nation needs to determine what Canada must do to meet the Commitment (sections 9.06(2), (3)).
3. Canada must make all reasonable efforts to reach an agreement with the First Nation that identifies the steps Canada will take to fix the issues (section 9.06(4)).
4. If Canada does not comply with the agreement or if the parties do not reach an agreement within three months, the First Nation can start the ADR Process.

> The ADR Process proceeds through negotiations, mediation, and, if no agreement can be reached, arbitration (section 9.07).

[52] In short, on a matter of such great and fundamental importance — the provision of safe drinking water — Canada will not be the final arbiter respecting its own efforts in relation to the Commitment outlined in the Settlement Agreement. Further, all of the phases outlined above must be completed within strict timelines.

[53] Under the Settlement, Canada will pay the reasonable costs of convening the ADR Process, together with the reasonable fees and disbursements of any mediator or arbitrator. Canada will also pay half of the reasonable costs and disbursements of a First Nation's participation in the ADR Process.

(3) Supervisory Role of the Courts

[54] Under Article 1, section 1.16 of the Settlement, the Courts maintain jurisdiction to supervise the implementation of the Agreement in accordance with its terms, including the adoption of protocols and statements of procedure and may give any directions or make any orders that are necessary for those purposes.

(4) Claims Process

(a) *First Nation Class Member Damages*

[55] To participate in the Settlement, First Nation Class Members must give notice of acceptance to the Administrator. The Parties have provided the Administrator with a list [List] identifying, to the best of the Parties' knowledge, the First Nations eligible to become First Nations Class Members. Inclusion on the List is conclusive proof that the First Nation is eligible to be a First Nation Class Member. If the First Nation is not on the List, the Administrator shall consult with the Settlement Implementation Committee before

determining whether the First Nation is eligible to be a First Nation Class Member. The Administrator may request additional information or evidence before making the determination as to whether a First Nation is eligible to be a First Nation Class Member.

(b) *Individual Class Member Damages*

[56] Individual Class Members wishing to make a claim for retrospective compensation (including a claim for a specified injury) must submit a claims form. The claims form is simple and requires the following: identifying and contact information; what First Nations the claimant is a part of; dates of residence on reserves experiencing long-term drinking water advisories; representative information; declaration and consent; and details about a specified claim, if applicable.

[57] Section 17 of Schedule F of the Settlement outlines the Claim Process. Schedule F states that for those making a specified injuries claim, a claimant may submit some or all of the following to the Administrator in support of their claim:

a) Medical records of the injury and its cause;

b) Other records, including written records, photographs, and videos, of the injury and its cause;

c) A written statement; and

d) Oral testimony.

[58] Section 18 of Schedule F states, "the process of claiming compensation for Specified Injuries is intended to be non-traumatizing and section 17 of this Schedule F does not prevent a Claimant from establishing their eligibility for Specified Injuries Compensation on the basis of their Claims Form alone." The burden of proof for establishing a specified injury is on the balance of probabilities.

[59] The claims process will commence within 60 days of settlement approval. The Administrator will promptly review each claims form, band council confirmation, and other relevant information to determine if the claimant is eligible and calculate the claimant's entitlement. When the Administrator pays compensation to the claimant, the Administrator must also explain how the amount was calculated and that the claimant may appeal the Administrator's decision to the Third-Party Assessor.

(c) *Third Party Assessor*

[60] When an individual or First Nation claimant wants to appeal a decision of the Administrator, the claimant must provide a written statement to the Administrator within 60 days of receiving the Administrator's decision. That written statement must explain how the Administrator erred. The Administrator will forward the materials to the Third Party Assessor. When considering an appeal, the Third-Party Assessor may consult the claimant, the Administrator, and the Settlement Implementation Committee. The Third-Party Assessor may also request further evidence to support the claim. The Third Party Assessor's decision is final and not subject to appeal or review.

(5) Counsel Fees

[61] Class Counsel's fees are severable from the rest of the Settlement and subject to a different Order and Reasons issued separately but concurrently by both Courts. In other words, the Courts can approve the Settlement separate from the approval of Class Counsel's fees. The Courts' refusal to approve Class Counsel's fees would have no effect on the implementation of the Settlement Agreement. Additionally, Class Counsel's fees were negotiated after the Settlement was reached and do not take money away from Class Members.

(6) Appeal Period

[62] Following the approval of the Settlement, a Class Member may appeal the Orders of the Courts within 30 days. Under Rule 334.31(2) of the ***Rules*** there is an additional 30 days for a Class Member to apply for leave to appeal to exercise the right of a Representative Plaintiff's right of appeal if no Representative Plaintiff commences an appeal within the first 30 days. This means that the earliest Implementation Date, as defined in the Settlement, is 60 days from the Courts' Orders. Thereafter, the Proposed Settlement Agreement will become binding on all Individual Class Members. The Proposed Settlement Agreement will become binding on First Nations as they formally accept its terms.

(7) Release

[63] Importantly, in exchange for everything discussed above and as set forth in the Settlement, Class Members agree to release Canada in respect of any liability for failing to provide, or fund the provision of safe drinking water on their reserves through the end of the Class Period.

## IV. ANALYSIS

### IS THE SETTLEMENT AGREEMENT FAIR AND REASONABLE AND IN THE BEST INTERESTS OF THE CLASS?

A. *Legal Framework*

[64] Rule 334.29 of the ***Rules*** and section 35(1) of ***The Class Proceedings Act*** state that class proceedings may only be settled with the approval of a judge. The relevant test for approving a settlement is whether the Settlement is "fair and reasonable and in the best interests of the class as a whole" (***Merlo v. Canada***, 2017 FC 533, at paragraph 16; ***Toth v. Canada***, 2019 FC 125, at paragraph 37; ***McLean v. Canada***, 2019 FC 1075, at

paragraph 65 [***McLean***]; ***Tk'emlúps te Secwépemc First Nation v. Canada***, 2021 FC 988, at paragraph 36 [***Tk'emlúps***]; ***Gray v. Great-Wes Lifeco Inc.***, 2011 MBQB 13, at paragraph 58). Recently, in ***Tk'emlúps***, Justice McDonald summarized the appropriate approach which should inform a court's application of the governing legal test:

> [37] The Court considers whether the settlement is reasonable, not whether it is perfect (*Châteauneuf v Canada*, 2006 FC 286 at para 7; *Merlo*, at para 18). Likewise, the Court only has the power to approve or to reject the settlement; it cannot modify or alter the settlement (*Merlo*, at para 17; *Manuge v Canada*, 2013 FC 341 at para 5).
>
> . . .
>
> [39] … as noted in *McLean* (para 68), the proposed settlement must be considered as a whole and it is not open to the Court to rewrite the substantive terms of the settlement or assess the interests of individual class members in isolation from the whole class.

[65] To reject a settlement, the Courts must conclude that the settlement does not fall within a zone or range of reasonable outcomes (***Dabbs v. Sun Life Assurance Company of Canada*** (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44; ***Haney Iron Works v. Manufacturers Life Insurance Co*** (1998), 169 D.L.R. (4th) 565 (S.C.), at paragraph 44). A zone of reasonable outcomes reflects the fact that "settlements rarely give all parties exactly what they want" and are a result of compromise (***Nunes v. Air Transat AT Inc.***, 2005 CanLII 21681 (ON SC), at paragraph 7 [***Nunes***]; **McLean**, at paragraph 9).

[66] The Court should consider the following non-exhaustive factors when assessing if a settlement is fair and reasonable and in the best interests of the class (***Condon v. Canada***, 2018 FC 522, at paragraph 19; ***McLean***, at paragraph 66; ***Tk'emlúps***, at paragraph 38]:

a. The likelihood of recovery or likelihood of success;

b. The amount and nature of discovery, evidence or investigation;

c. The terms and conditions of the Settlement;

d. The number of objectors and nature of objections;

e. The presence of arm's length bargaining and the absence of collusion;

f. The information conveying to the Court the dynamics of, and the positions taken, by the parties during the negotiations;

g. Communications with Class Members during litigation; and

h. The recommendation and experience of counsel.

[67] These factors are to be given varying weight depending on the circumstances (***McLean***, at paragraph 67). The respective factors are addressed below.

B. *Factors*

(1) *Likelihood of recovery or likelihood of success*

[68] The risks associated with litigating the Actions created a high degree of uncertainty, particularly at the beginning of the proceeding. Those risks included but were not limited to the novelty of the claims; delays due to appeals; possible defences raised by Canada; limitation periods; evidentiary issues associated with proving semi-historical wrongs; and the 2021 federal election. As a result, it is fair to say that the likelihood of success was uncertain. Additionally and always, there are and were in the present case, significant human costs associated with litigation. Separate from the inevitable frustrations and stresses attached to any Court process, the Courts cannot ignore as noted by Class Counsel, that, "every day without water compounds the harms Class Members experience."

[69] If Class Counsel successfully established the first common issue, there would be significant evidentiary hurdles to establish that Canada breached their duties. Doing so would require proceeding on a First Nation by First Nation basis, incurring further delay and expense. Furthermore, Class Members would have to testify, which may be re-traumatizing.

[70] Novel claims pose a significant challenge for litigants (***Tk'emlúps***, at paragraph 41). At the time of filing, there was uncertainty in the law regarding the ability of collective

entities to assert ***Charter*** claims. Furthermore, there remains uncertainty about the Courts' ability to compel the type of prospective relief contemplated in the Settlement. For example, the Representative Plaintiffs asked the Courts to compel government spending on a go-forward basis to ensure access to safe drinking water.

[71] As time went on, the Representative Plaintiffs' case became stronger and there were some assurances of success. For example, the first class-wide award of aggregate ***Charter*** damages was confirmed by the Court of Appeal for Ontario after the Actions were commenced (***Reddock v. Canada (Attorney General)***, 2019 ONSC 3196; aff'd in ***Brazeau v. Canada (Attorney General)***, 2020 ONCA 184). However, the delays and scope of available remedies still loomed large. In that same Ontario Court of Appeal case, the Court reversed an order directing Canada to spend money on inmate mental health to correct ongoing ***Charter*** violations in its prisons. While this ruling may have posed significant challenges for the plaintiffs, it is well to note Justice Phelan's words in ***McLean***. In the ***McLean*** settlement, there was prospective relief in the form of a 'Legacy Fund' to promote healing for Indian Day School survivors. Justice Phelan wrote, "[t]here is uncertainty that a court could order such a creation but, no doubt for another day, if Aboriginal issues and litigation are *sui generis*, remedies available might likewise be *sui generis"* (***McLean***, at paragraph 103).

[72] Ultimately, in the present case, the Class did not shoulder the risk alone. The outcome was also uncertain for Canada. Canada was required to contemplate an outcome in which the Courts may have settled the law in favour of the Plaintiffs (***McLean***, at paragraphs 94-95). Put simply, uncertainty in the law meant that both parties faced a real and present risk of failure.

[73] In the end, we are of the view that as in many other cases, this too is a "case which cries out for settlement" (***McLean***, at paragraph 79). The Settlement reduces risk and delay. It simplifies the compensation process, enhances access to justice, and most importantly, provides funding to fix an unspeakably tragic problem in respect of which no Canadian should be required to suffer. The settlement now creates a degree of certainty that First Nations will be able to lift water advisories in the near future. That is an assurance that litigation could not promise.



(2) *The amount and nature of discovery, evidence, or investigation*

[74] Over the entire course of the Actions, Class Counsel consulted with 14 experts including First Nation Elders and knowledge keepers, hydrologists, infectious disease experts, aquatic toxicologists, history professors, and more. The parties also jointly retained and instructed an actuary to determine the size and distribution of the Class. In addition to consulting with experts, the affidavit of John P. Brown explains that Class Counsel reviewed thousands of pages of publically available documentation from Canada and extensively researched relevant legal and factual issues, including causes of action and theories of damages.

[75] As stated above, prior to reaching the Settlement, the parties completed the record for a summary judgment motion. Class Counsel did not file their record but it apparently consisted of 2,800 pages, 8 experts, and 24 witnesses. The parties exchanged the evidentiary records for summary judgment and were ready to begin cross-examinations. It was at this point, after both sides put in a high degree of investigation and the strength of the case became apparent, that negotiations began to intensify. The parties reached the Settlement less than a month before the summary judgment motion was scheduled. The

Courts agree with Class Counsel that by that time, a great deal of work had been undertaken to prepare this matter for judgment on the merits.

[76] The Courts are satisfied that Class Counsel put in great effort to gather relevant facts, assess liability and damages, and had a clear understanding of the strengths and weaknesses of the Actions.

(3) *Terms and conditions of the Settlement*

[77] These reasons have already provided an overview of the Settlement's important terms and its provisions. In considering the governing test, it is the view of the two Courts, that some of the more significant features of the Settlement that "underpin its fairness" include:

- The relief contemplated is not just compensatory in nature – it looks forward to actually solving the root causes of drinking water advisories on reserves and is legally enforceable;
- The 6 billion dollars in prospective relief must adhere to a nine-year timeline, thus ensuring expedient resolution of those root causes;
- Compensation for Individual Class Members is relative to the duration of the advisory, type of advisory, and the remoteness of a First Nation. Factoring in remoteness acknowledges the increased cost of living in remote areas, including the price of bottled water, and that remote communities like Neskantaga have had to evacuate;
- With respect to Class Members claiming specified injuries:
    - The paper based claims process is simple;
    - The burden of proof is low;
    - Claims are assessed through a harms grid;

- There is a presumption of truthfulness and good faith;
- All reasonable inferences must be drawn in favour of claimants; and
- There is a low likelihood of re-traumatization.

  (See ***McLean***, at paragraph 107; ***Tk'emlúps***, at paragraph 49; ***Riddle v. Canada***, 2018 FC 641, at paragraph 36).

- Specified injuries include mental health injuries;
- If the specified claims exceed 50 million dollars, the Settlement is structured in such a way that any trust surplus will go toward supplementing specified injuries;
- First Nation Class Members receiving an amount equal to 50 percent of the total damages paid to individual Class Members living on that reserve can use that money for *any* purpose;
- The ADR Process draws on the Indigenous legal traditions specific to and defined by the relevant First Nation;
- Canada is responsible for paying 100 percent of the reasonable costs of convening the ADR process and 50 percent of the reasonable costs of a First Nation's participation in that process;
- The Administrator is "experienced and renowned" (***McLean***, at paragraph 107);
- Legal fees are not payable from the settlement funds, meaning that Class Counsel is not taking money away from Class Members (***Tk'emlúps***, at paragraph 51);
- Legal fees were negotiated after the Settlement was reached, ensuring that "the issue of legal fees did not inform or influence" the terms of the Settlement (***Tk'emlúps***, at paragraph 51);

- The release is proportionate to the claims being resolved in this action. Class members retain their rights for several liability of third parties and claims arising after June 20, 2021.

[78] On balance, the benefits of the Settlement outweigh the concessions that the Class had to make. In their affidavits, the Representative Plaintiffs voiced disappointment that the base rate of compensation for Individual Class Members (ranging between 1,300-2,000 dollars for every year living under a water advisory) was too low. Additionally, the application of a limitations period, significantly curtails the retrospective compensation that community members — particularly elders — will receive. In their Factum, Class Counsel noted that the application of the limitations periods was particularly difficult in light of the Truth and Reconciliation Call to Action #26. However, those same affidavits recognized that the primary objective of the litigation was to ensure future generations' access to safe drinking water. They also state that no amount of money can compensate for the harms experienced while living under drinking water advisories. The Courts agree with the Representative Plaintiffs that these concessions are tough compromises. However, overall, the Settlement offers significant benefits for the Class and certainly falls within the zone of reasonableness.

(4) *Future expense and likely duration of litigation*

[79] Due to the novel claims advanced in the Actions, it is reasonable to expect that if this litigation did not settle, it would be long, involved, and expensive. The issues presented in this case are likely questions of significant and general public importance to the country as a whole. It is not outside the realm of possibility that certain issues could be appealed to the

Supreme Court of Canada, protracting litigation. Furthermore, if litigation ensued, evidence of individual communities would have to be collected and presented.

[80] Class Counsel pointed to the ***Okanagan*** action to support their position that if the Crown aggressively defended the Actions, litigation would be drawn out. That case advances similar claims but did not reach settlement. It has been ongoing for over six years. Likewise, the trial in ***Tk'emlúps***, another recent mega-settlement involving Indigenous class members, was set down for 74 days (***Tk'emlúps***, at paragraph 52).

[81] The expected future expenses and likely duration of the litigation weigh in favour of approving the Settlement.

(5) *Recommendations of neutral third parties*

[82] For the purposes of settlement approval, the following experts submitted affidavits and reports:

a. Kerry Black, Assistant Professor and Canada Research Chair in the Department of Civil Engineering and the Centre of Environmental Research and Education at the University of Calgary;

b. Ian Halket, President of Halket Environmental Consultants Inc.;

c. Peter Gorham, President and Actuary of JDM Actuarial Expert Services Inc. and Fellow of Canadian Institute of Actuaries and the Society of Actuaries;

d. Jillian Campbell, toxicologist and senior project manager with over 15 years of experience in human health and ecological risk assessment, toxicology, and contaminated site investigation;

e. Gary Chaimowitz, Head of Service at the Forensic Psychiatry Program at St. Joseph's Healthcare Hamilton, a Professor of Psychiatry at McMaster University, and the President of the Canadian Academy of Psychiatry and the Law;

f. James Reynolds, historian and author on the relationship between the Crown and Indigenous Peoples in Canada;

g. Adele Perry, Distinguished Professor of History and the Director of the Centre for Human Rights Research at the University of Manitoba; and

h. Brittany Luby, Assistant Professor of History in the College of Arts at the University of Guelph.



[83] Some of these reports did not offer opinions about the Settlement Agreement itself. Rather, they provided valuable information describing the history, causes, and current state of drinking water advisories on First Nation reserves.

[84] Jillian Campbell's affidavit, however, confirmed that Article 8, section 8.02 and Schedule H of the Settlement Agreement adequately incorporates the types of injuries that result from drinking contaminated or untreated water, the symptoms of those injuries, and the likely effect on Class Members if they suffered those injuries. Gary Chaimowitz similarly confirmed in his affidavit that the 'Mental Health' row in Schedule H and Appendix H-1 to the Settlement accurately identifies the types of mental health injuries Class Members may have suffered and the primary symptoms of those injuries.

[85] Further, Kerry Black submitted an affidavit dated November 21, 2021 expressing her support for settlement approval. For over a decade, Dr. Black has worked with Indigenous groups to understand their water infrastructure needs. In her opinion, the Settlement adequately addresses the objectives of First Nations.

[86] After canvassing some of the key provisions of the Settlement, Dr. Black stated that in her opinion, the Settlement will "address the water crisis in Canada in an historic, comprehensive and meaningful way." Further, it will "have an immeasurable and in many cases life-changing impact on the lives of First Nations members and their communities across Canada." In particular, Dr. Black confirmed that the minimum spend of 6 billion dollars over the next nine years in prospective relief is a reasonable amount to remedy water systems on First Nations. Furthermore, she noted the significance of including private water systems in the Commitment because Canada has historically excluded the cost of that type of infrastructure when providing funding to First Nations. Finally, she notes that it is significant that Canada has committed to funding the actual cost of construction, upgrading, operation, and maintenance of water infrastructure on reserves for First Nations because Canada has chronically underfunded these aspects of water infrastructure for decades.

[87] In our opinion, these objective third-party opinions reinforce the fairness of the Settlement.

(6) *Number of objectors and nature of objections*

[88] Eric Khan, the Director of CA2 Inc., swore an affidavit on December 6, 2021 that CA2 Inc. had not received any opt-out coupons or notices of objections. At the Settlement Approval Hearing, throughout the day, potential Class Members had the opportunity voice their objections but no one came forward.

[89] While there were no formal objections raised, Class Counsel submitted correspondence and newspaper articles to alert the Courts to potential criticisms of the Settlement. In that regard, Class Counsel submitted a letter dated November 23, 2021 from counsel of a First Nation that intended to object to the Settlement. That letter expressed two concerns: (a) the Settlement relies on Canada's list of drinking water advisories and (b) the Settlement excludes First Nations with short-term drinking water advisories. After speaking

with Class Counsel about these concerns, the First Nation withdrew their objection. Similarly, another lawyer voiced his concerns to the media. Those concerns related to (a) uncertainty about who is included in the Class; (b) the exclusion of First Nations with short-term drinking water advisories; and (c) ambiguity about what advisories are counted and what authorities get to declare those advisories.

[90] At the Settlement Approval hearing on December 7, 2021, Class Counsel addressed each of these criticisms.

[91] First, it is untrue that the Settlement only relies on Canada's records to determine what First Nations have been subject to a drinking water advisory. Sections 10-12 of Schedule F of the Settlement state that if a Class Member makes a claim and their First Nation is not included on the existing List of Eligible First Nations, the Settlement Implementation Committee shall determine if that First Nation should be added to the List and may request further information or evidence before making their decision. Class Counsel explained that the intent of this provision to ensure inclusivity and that the List is, in fact, subject to change.

[92] Second, Class Counsel acknowledged that there is a prevalence of short-term drinking water advisories on First Nations, some of which have occurred on and off for long periods of time. With that said however, it need also be acknowledged that in class proceedings, class members must suffer a common harm. When determining that commonality, Class Counsel's opinion was that long-term advisories were more clearly linked to government underfunding that resulted in an infrastructure gap. This class proceeding does not affect the ability of First Nations experiencing short-term drinking water advisories to commence their own actions.

[93] Finally, with respect to the criticisms voiced in the media, Article 1, Section 1.01 of the Settlement Agreement clearly defines who is included in the Class and who constitutes "Excluded Persons." These definitions were also included in the Short and Long Form Notices. Additionally, the same section defines an "Advisory Body" as "provincial, territorial, regional, municipal, or First Nation government or governmental authority, chief, band council, health authority, or any executive, judicial, regulatory or administrative body or similar body or its delegate, in each case that issues Drinking Water Advisories." Any of these bodies may issue any one of the three types of drinking water advisories that may bring a First Nation or Individual Class Member into the Settlement Agreement. Again, this definition is intended to foster inclusion and ensure that First Nations are not dependent on government definitions or data in order to benefit from the Settlement.

[94] It should be noted that the law firm representing the "Excluded Persons" in the Settlement inquired with Class Counsel about how the Settlement will affect their clients and whether the 6 billion dollars in prospective relief will apply to all First Nations or only those who opt into the Settlement. Class Counsel replied indicating that the Settlement does not apply to the "Excluded Persons" and that as a result, they are free to continue pursuing their own actions related to drinking water.

[95] In airing all of these concerns as noted above, Class Counsel fulfilled its obligation to provide the Courts with full and frank disclosure relevant to the settlement approval. In our view, in the absence of any formal objections, the support of the Representative Plaintiffs and other Class Members need be seen as unchallenged. Numerous affidavits included in the Motion Record expressed support for the Settlement, including community members of Curve Lake, Neskantaga, and Tataskweyak. The Representative Plaintiffs all expressed their

support for the Settlement and unanimously voiced their opinion that the Settlement Agreement achieves their litigation objectives.

(7) *Presence of arm's length bargaining, absence of collusion, and the positions taken by the parties during negotiation*

[96] It is appropriate to address these factors together because in this case, the positions taken by the parties during the negotiation, constitute evidence demonstrating the presence of arm's length bargaining and absence of collusion.

[97] Class Counsel's strategy in this proceeding was to pursue a "two track approach" where they aggressively pursued litigation and negotiation simultaneously. In our opinion, this approach demonstrates that the proceeding was always adversarial in nature and that Class Counsel's primary goal was to advance the Class' interests. Clearly, such a historic Settlement would be impossible without cooperation on both sides. Although the parties cooperated wherever possible, both parties were prepared to proceed to litigation. The parties consented to an expedited litigation timeline and the Representative Plaintiffs aggressively advanced motions for summary judgment.

[98] It is also significant to note that negotiations lasted for just under a year. In our view, this timeline evidences what John P. Brown referred to as "hard bargaining sessions" where counsel advanced their respective clients' positions. Indeed, the affidavit of Chief Whetung stated that at times, negotiations broke down and she felt ready to "walk away" and push forward with litigation.

[99] We have no concerns that the Settlement Agreement was anything other than the result of good strategy, dedication, and compromise. We are satisfied that the parties always engaged in good faith negotiations and that there has been no collusion in reaching

the Settlement. We note that there is a strong presumption of fairness when a proposed settlement was negotiated at arm's-length by Class Counsel (***Nunes***, at paragraph 7*)*.

(8) *Communication with Class Members*

[100] In advance of the summary judgment motions, Class Counsel reached out to various First Nations to have them opt-in in support of the Actions. Clearly, these efforts were effective as more than 120 First Nations joined the Representative Plaintiffs in seeking judgment. Furthermore, Class Counsel created a dedicated webpage to provide Class Members with access to information and documents related to the Actions. The webpages included a case description, new developments, news releases and reports, case documents, FAQs, and contact details. They also promoted the Actions to the media as a way of communicating with Class Members.

[101] Similarly, throughout settlement negotiations, Class Counsel stayed in close contact with the Representative Plaintiffs and Class Members. The affidavit of Christopher Moonias confirms that Class Counsel worked closely with the Representative Plaintiffs, who, in turn, consulted with their respective band councils and/or community members regarding the Agreement in Principle and the Settlement Agreement. Likewise, Class Counsel engaged directly with Class Members by visiting communities, answering Class Members' questions, listening to their stories, and "socializing" the Agreement.

[102] The Courts approved the Settlement Notice Plan on October 8, 2021. CA2 Inc. published the Short Form Notice in 15 daily newspapers and *The First Nation Drum*. Similarly, on or about October 16, 2021, CA2 Inc. distributed legal notices of settlement approval to Curve Lake, Neskantaga, Tataskweyak, the Assembly of First Nations, and 713 Chiefs and Band Offices that have been affected by drinking water advisories. Finally,

the October 8, 2021 Order required CA2 Inc. to set up a toll-free support line to answer Class Members' questions and to provide the Short and Long Form Notice to any member that requested it. These materials were provided in both English and French.

[103] Statements of support and objection can indicate that Class Counsel sufficiently communicated with the Class (***McLean***, at paragraph 116). While no objections were made at the Settlement Approval Hearing, the Motion Record demonstrates that various First Nations and/or their legal counsel reached out to Class Counsel to ask questions about the Settlement. Additionally, it is clear that Representative Plaintiffs and Class Counsel spoke with other First Nations and Indigenous governance organizations. We are satisfied that in this circumstance the absence of objections indicates that potential Class Members understand and support the Agreement. It is also telling that 18 Class Members submitted affidavits indicating their support for the Agreement.

[104] Overall, we are satisfied that Class Counsel provided a "robust, clear and accessible" notice of the Settlement to potential Class Members (***Tk'emlúps***, at paragraph 72).

(9) *Recommendations and experience of counsel*

[105] Both Class Counsel and counsel for the Defendant recommend settling. In Class Counsel's view, continued negotiation would not have led to a better result for the Class, particularly with respect to retrospective compensation. Further, Class Counsel stated that compensation was within the range expected on judgment, without the uncertainty of outcome or delay. Class Counsel similarly felt that litigation would not have achieved a better result for the Class. As already discussed, it is uncertain whether courts would be able to order the same type of prospective relief reached in the Settlement Agreement.

[106] Overall, Class Counsel felt that the Settlement addressed the Representative Plaintiffs' litigation objectives (***Tk'emlúps***, at paragraph 73). Indeed, the affidavits of the Representative Plaintiffs confirmed as much, placing particular emphasis on the prospective relief guaranteed in the Settlement.

[107] Class Counsel states that its recommendation is based on its experience in class actions, Indigenous rights, and Aboriginal law. McCarthy Tétrault is recognized nationally as having one of Canada's leading and largest class actions team. McCarthy Tétrault also enlisted the assistance of lawyers at their firm who specialize in contract drafting, tax, trusts, and estate law matters. OKT is Canada's largest law firm specializing in Aboriginal law and Indigenous rights. It serves northern and Indigenous clients in every territory and most provinces in Canada. Class Counsel also collaborated with First Peoples Law and Erickson's LLP, Both firms have close connections with various First Nation communities.

[108] Notably, members of Class Counsel at both firms included Indigenous lawyers and students at law. In our view, these team members, in addition to their professional expertise, provide valuable lived experience that uniquely enables them to understand the needs and objectives of Class Members.

[109] For all the reasons already discussed, the record demonstrates that Class Counsel has been alert and alive to the needs of the Class and the risk reward-balance unique to this proceeding. The simplified claims process, which has a low burden of proof in an effort to avoid re-traumatization, demonstrates that Class Counsel has applied the lessons from past class actions involving Indigenous Class Members. Overall, the large, diverse, and competent team constructed by Class Counsel demonstrates a commitment to carry out the Settlement

in a good way using the necessary infrastructure and personnel to do so (***McLean***, at paragraph 113).

## V. CONCLUSION

[110] For decades, members of First Nations have endured harm while living under drinking water advisories. Canada's failure to provide safe drinking water has resulted in deep frustration and relationships being tainted by mistrust. We share Chief Whetung's hope that the Settlement will result in Indigenous communities being able "to turn their taps on just like non-Indigenous communities in Canada and drink and bathe in the water without fear for our health." It is also our hope that this Settlement symbolizes a step down the long trail towards healing the relationship between Canada and First Nations.

[111] The Courts agree that the Settlement is fair and reasonable and in the best interests of the Class as a whole. In the form of the attached Order, the Courts approve the Settlement Agreement and order that the Actions against the Defendant be discontinued.

[112] The Courts retain jurisdiction over this case and specifically, over the Order and Settlement. The Order specifies the retention of jurisdiction and it may be amended as circumstances dictate.

## ORDER in CI-19-01-24661

Without any admission of wrongdoing or liability by the Defendant, which denies any wrongdoing and disclaims any liability to the Class, this Court orders:

1. That the Parties' settlement agreement dated September 15, 2021, including the first addendum dated October 8, 2021 (together, the "Proposed Settlement Agreement"), is fair, reasonable, and in the best interests of the Class.

2. That the Proposed Settlement Agreement, attached hereto as Appendix "1" in English and "Appendix "2" in French, is approved and its terms shall be given effect.

3. That the Defendant shall pay the funds set out in the Proposed Settlement Agreement, and that said funds be distributed in accordance with the Proposed Settlement Agreement.

4. That Class Members, as defined in the Proposed Settlement Agreement, be notified of the approval of the Proposed Settlement Agreement substantially as set out in Schedule M and N of the Proposed Settlement Agreement, and in accordance with the Notice Plan attached hereto as Appendix "3", with such modifications as the Parties may agree, and with the Defendant to pay the cost.

5. That, without affecting the finality of this Order or the dismissal of these Actions, the Court retains continuing jurisdiction as set out in the Proposed Settlement Agreement to interpret, supervise, construe, and enforce the Proposed Settlement Agreement, as applicable, for the mutual benefit of the Parties.

6. That the within Action be discontinued on a without costs basis.

Chief Justice Glenn D. Joyal

_____ C.J.Q.B.