

**FEDERAL COURT**

**B E T W E E N :**

**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**  
Plaintiffs

- and -

**ATTORNEY GENERAL OF CANADA**

Defendant

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

**THIRD FRESH AS FURTHER AMENDED STATEMENT OF CLAIM**

(Amended Pursuant to Rule 200, *Federal Court Rules*, SOR/98-106)

**TO THE DEFENDANT**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you must prepare a statement of defence in Form 171B prescribed by the *Federal Court Rules*, serve it on the plaintiffs' solicitor or, where the plaintiffs do not have a solicitor, serve it on the plaintiffs, and file it, with proof of service, at a local office of this Court, **WITHIN THIRTY DAYS** after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date: October 11, 2019

Issued by "Shirley Aciro"

Registry Officer

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Toronto ON M5V 3L6

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## CLAIM

1. The Plaintiffs, on behalf of the Class described herein, claims: =
  - (a) an order certifying this action as a class proceeding and appointing the Plaintiffs as representative plaintiffs for the Class, as defined below, and if required, a representative order pursuant to Rule 114 of the *Federal Court Rules* SO/98-106 in respect of the Plaintiffs and in respect of other First Nations that elect to join this action;
  - (b) a declaration that Her Majesty the Queen in Right of Canada, as represented by the Defendant (or “Canada”, as defined below), contravened the honour of the Crown and breached its fiduciary duties to the Plaintiffs and the Class members by creating and failing to remedy conditions of inadequate access to potable water;
  - (c) a declaration that Canada is liable to the Plaintiffs and the Class members for damages caused by its negligence in creating and failing to remedy conditions of inadequate access to potable water;
  - (d) a declaration that Canada is liable to the Plaintiffs and the Class members for damages caused by creating and failing to remedy conditions of inadequate access to potable water;
  - (e) a declaration that Canada has violated the rights of the Plaintiffs and the Class members under sections 2(a), 7, and 15 of the *Charter of Rights and Freedoms* (“**Charter**”) by denying adequate access to potable water, and further, that none of these breaches is saved by section 1 of the *Charter*;
  - (f) a declaration that Canada has violated the rights of the Plaintiffs and the Class members under section 36 of the *Constitution Act, 1982* by establishing and maintaining water systems that do not provide adequate access to potable water;

- (g) an interim or interlocutory injunction requiring Canada to immediately construct, or approve and fund the construction of, appropriate water systems for the Plaintiffs and the Class members to ensure that they have adequate access to potable water, including appropriate interim measures, or to pay damages *in lieu* thereof;
- (h) a permanent injunction requiring Canada to immediately construct, or approve and fund the construction of, appropriate water systems for the Plaintiffs and the Class members to ensure that they have adequate access to potable water;
- (i) an order pursuant to section 24(1) of the *Charter* condemning the Defendant to pay damages to the Plaintiffs and the Class members in the amount of \$1 billion or such sum as the Court deems appropriate for the breaches of their *Charter* rights;
- (j) an order condemning Canada to pay damages to the Plaintiffs and the Class members in the amount of \$1 billion or such sum as the Court deems appropriate for breaches of its fiduciary duties, negligence, and nuisance;
- (k) in the alternative, an order condemning Canada to make restitution to the Plaintiffs and the Class members for the savings that it realized by failing to ensure adequate access to potable water;
- (l) an order condemning Canada to pay punitive damages in the amount of \$100 million;
- (m) prejudgment and postjudgment interest pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7;
- (n) costs of the action on a substantial indemnity basis or in an amount that provides full indemnity to the Plaintiffs, together with all applicable taxes;

- (o) costs of notice and of administering the plan of distribution of the Class members damages, together with all applicable taxes; and
- (p) such further and other relief as this Honourable Court deems just.

## **OVERVIEW**

2. The Plaintiffs and Class members are First Nations, and members of First Nations across Canada, who have experienced drinking water advisories. The Defendant has failed to ensure that they have access to potable water of adequate quality and quantity. As a result, Class members have suffered unacceptable hardships.

3. Drinking water advisories are issued where water quality testing indicates that water may be unsafe or is known to be unsafe. There are three types of drinking water advisory: 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.

4. Historically, the Defendant was solely responsible for the establishment and maintenance of systems to deliver potable water to the residents of First Nation reserve communities. Canada jealously guarded its authority to make decisions in this regard and barred First Nations from funding and managing their own water systems.

5. The Defendant received consistent advice, including advice from its own experts, that it was depriving Class members of adequate access to potable water. Again and again, Canada was told that its funding was inadequate, its operational procedures were ill-conceived, and its servants and agents were failing to properly implement its directions. Although Canada was advised of the devastating human consequences of these failures, its response to this human catastrophe was -- and continues to be -- a toxic mixture of inertia and incompetence.

6. More recently, Canada has sought to download to some First Nations partial responsibility for the provision of adequate access to potable water in reserve communities. In doing so, however, the Defendant has failed to provide adequate water systems and failed to ensure that First Nations have sufficient infrastructure, training,

and other resources to provide Class members with adequate access to potable water. Moreover, Canada has retained control over the approval and funding of the construction of water systems in reserve communities, which remain inadequate. Despite any transfer of responsibility to First Nations, the Defendant remains responsible for ensuring that Class members have adequate access to potable water.

7. At all material times, the Defendant owed Class members fiduciary duties, duties consistent with the honour of the Crown, and a duty of care to ensure that they had adequate access to potable water. As a result of the Defendant's failure to discharge these duties, Class members have been denied adequate access to clean drinking water, have been unable to adequately wash and care for themselves and their families, and have been prevented from performing their traditional ceremonies and spiritual practices.

8. In turn, Class members have suffered a variety of illnesses, both from using water, and from being unable to use water. They also suffer inconveniences consistent with life in developing countries. The conditions in which Class members live would shock Canadians who have never visited the affected communities. These conditions constitute nothing less than a national embarrassment.

9. The Defendant's failures have deprived Class members of their right to security of the person in a manner that is arbitrary, and which contravenes the principles of fundamental justice, contrary to section 7 of the *Charter*. They also constitute inequitable treatment on the basis of an analogous ground, namely residence on a reserve, contrary to section 15 of the *Charter*. Finally, they have prevented Class members from performing traditional practices and ceremonies that require potable water, contrary to section 2(a) of the *Charter*.

10. None of these breaches is consistent with a free and democratic society, and none of them represents a reasonable limit on Class members' rights. Therefore, none of the breaches can be justified under section 1 of the *Charter*.

11. Canada's breaches of its duties to Class members and of their *Charter* rights are longstanding and ongoing. These breaches continue despite having been drawn to the Defendant's attention, and despite the Defendant having acknowledged them and pledging to remedy them.

12. In addition to enjoining the Defendant to take the necessary steps to ensure that Class members have adequate access to potable water, this Honourable Court should reprimand the Defendant for its callousness in the face of Class members' suffering. In these circumstances, it is appropriate to award damages to the Class members under section 24(1) of the *Charter* and at common law, and to award punitive damages to condemn the Defendant's high-handed conduct.

## **THE PARTIES**

13. The members of Curve Lake First Nation are Michi Saagiig of the Anishnaabeg nation. They are the traditional people of the north shore of Lake Ontario and its tributaries, which has been Michi Saagiig territory since time immemorial. Historically, the traditional territory of the Michi Saagiig was large and rich in natural resources. The Michi Saagiig thrived on abundant wild rice, fish, birds, and game. The Michi Saagiig took care to live in balance with water, which they used for drinking, transportation, agriculture, and washing. Water provided everything to sustain their people, and they provided it with respect and gratitude.

14. The growing presence of European settlers threatened the Michi Saagiig way of life. In or around 1829 the Crown, by its agent, the New England Company, chose a site on a peninsula along Mud Lake. There the Crown established a settlement for the Michi Saagiig. The Mud Lake settlement became a reserve in 1889, at which time it was home to some 200 people. At that time, and at all times thereafter, Canada promised the reserve would be a place where the Michi Saagiig could maintain their way of life, and it was understood that this this would require adequate potable water and sanitation.

15. In 1964, the Mud Lake community changed its name to Curve Lake First Nation (herein referenced as "**Curve Lake First Nation**"). Today, there are approximately

2,300 members of Curve Lake First Nation, of whom approximately 800 live on the reserve. Curve Lake First Nation is a First Nation, as defined below, and its reserve constitutes First Nations Lands, as defined below. Curve Lake has suffered multiple drinking water advisories, including a recent boil water advisory that lasted nearly two years.

16. Chief Emily Whetung is the Chief of Curve Lake First Nation. She was elected to this position on June 18, 2019 and took office on July 1, 2019. She brings suit on her own behalf, on behalf of Curve Lake First Nation, and on behalf of all of the members of Curve Lake First Nation.

17. Chief Whetung is a 34-year-old lawyer and mother of two sons. Her father was a teacher at the daycare in Curve Lake and her mother was a teacher at the Curve Lake School. Chief Whetung grew up in Curve Lake First Nation, attended Trent University, and graduated with a J.D. from Osgoode Hall Law School in 2010. She was called to the Ontario Bar in 2011. Before becoming Chief, she practiced law in Peterborough while maintaining a residence in Curve Lake. Chief Whetung has experienced the problems of inadequate water described below.

18. Neskantaga First Nation is an Anishinaabemowin-speaking community, which has used and occupied the lands and waters of Northern Ontario since time immemorial. Neskantaga is located in Treaty 9 territory. Treaty 9, also known as the James Bay Treaty, was signed in 1905 and 1906 between the Government of Canada and various First Nations throughout Northern Ontario.

19. Water is integral to Neskantaga's history, its members' worldview and spiritual belief system. It is the lifeblood of Mother Earth from which all other things come and through which they are all connected. Water is honored by the members of Neskantaga in their ceremonies. Some of these include the sweat lodge, the water walk, and the sunrise ceremony. Water is also traditionally recognized as being itself a medicine, and a source of nourishment for other medicines that Neskantaga members use.



20. In the 1950s Canada forced the people of Neskantaga to move from their traditional way of life on the lands and waters of the Attawapiskat River, to a settlement established by Canada at Lansdowne House. This was in order to have their children attend mandatory government-established day schools. Canada withheld annuity payments due under Treaty 9 for those who did not move to Lansdowne House and adopt a sedentary life.

21. In the late 1980s and early 1990s Neskantaga members relocated from Lansdowne House to the current reserve site. Neskantaga's current reserve is located along the shore of Attawapiskat Lake, which feeds into the Attawapiskat River, 271 kilometers north of Thunder Bay. Neskantaga is a remote fly-in community, with only periodic road connections to the South when winter roads and ice roads are functional. Neskantaga currently has 408 registered members, of which 296 live on reserve.

22. Chief Christopher Moonias was elected Chief in 2019. Prior to that he was General Manager for Lands and Resources and a community advisor for previous administrations with respect to the longstanding boil water advisory. He has also served as a Councillor for multiple terms. In these capacities he has been directly involved in issues around Neskantaga's drinking water. He has also lived in Neskantaga for his entire life and experienced the problems with the water firsthand.

23. The Defendant, Her Majesty the Queen in Right of Canada ("**Canada**") is represented in this action by her designated Minister, the Attorney General of Canada.

24. The Plaintiffs bring this action pursuant to the *Federal Courts Act*, RSC, 1985, C. F-7, and the *Federal Court Rules* SO/98-106, including Part 5.1 and Rule 114 on their own behalf and on behalf of all other Class members.

25. The members of the Class are:

(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 (a "**First Nation**"), the disposition of

whose lands is subject to that Act or the *First Nations Land Management Act*, S.C. 1999, c. 24 (“**First Nation Lands**”); and whose First Nation 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 (an “**Impacted First Nation**”); and

(ii) had not died before November 20, 2017; and

(b) Curve Lake First Nation and Neskantaga First Nation, and any other Impacted First Nations that elect to join this action.

26. “Excluded Persons” are members of Tsuu T’ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, and the Blood Tribe, and Michael Daryl Isnardy.

## **THE HISTORY OF INADEQUATE ACCESS TO POTABLE WATER AT CURVE LAKE FIRST NATION**

27. Today, a portion of Curve Lake First Nation is served by a small-scale water treatment plant that was constructed in 1983-84. This water treatment plant was intended as a temporary structure with a 20-year life, which was to service a subdivision at Curve Lake. This water treatment plant was never intended to be a permanent source of water for the entire community.

28. The water treatment plant is supplied by two drilled wells, which provide groundwater under direct influence of the nearby surface water source (“**GUDI**”). The treatment process consists of ultra-violet light, cartridge filters, and sodium hypochlorite. The water treatment plant has a maximum daily capacity of 272 m<sup>3</sup>, and when functioning, it provides water to approximately 140 people in 56 homes on the reserve through approximately 1.45 km of distribution piping. Approximately 550

homes in Curve Lake First Nation are not connected to the water treatment plant and rely on private wells, as described below.

29. Canada is responsible for inspecting, or procuring an appropriate inspection, of Curve Lake First Nation's water treatment plant to ensure that it meets the community's needs and complies with all appropriate standards for safety and security. Canada has repeatedly failed to recognize the significant shortcomings of this facility, which has been unable to provide Curve Lake First Nation with safe and secure access to potable water throughout the Class period.

30. For example, on June 1, 2017, Canada delivered its Annual Performance Inspection for Curve Lake's water treatment plant. On a risk scale of 1 to 10, Canada assigned the Curve Lake First Nation water treatment plant a risk rating of 1.9 and an adjusted risk rating of 0, with no noted design or operational deficiencies. A score below 4 is deemed to be low risk on the basis that there are "minor or no deficiencies". A score above 7 is deemed to be high risk on the basis that "[m]ajor deficiencies exist in most of the components" with "a high probability that any problem could result in unsafe water".

31. Canada's Annual Performance Inspection was intended to give members of Curve Lake First Nation comfort about the safety and security of the water treatment plant. The Inspection was either conducted negligently or with a willful intent to mislead the members of Curve Lake First Nation. As Canada knew or should have known, the water treatment plant was wholly deficient, fell far below the provincial standards applicable to non-reserve communities, and on Canada's own standards, it posed a high risk to the health and safety of the members of Curve Lake First Nation.

32. The provincial Ministry of the Environment and Climate Change ("MOECC") inspected Curve Lake First Nation's water treatment plant on September 19, 2017. On October 13, 2017 the MOECC communicated serious concerns about the safety of the water treatment plant. The MOECC found that the cartridge filter system could not sufficiently remove pathogens, nor could it meet Provincial turbidity requirements. In fact, the observed conditions were several times the allowable Nephelometric Turbidity

Units. Additionally, the ultra-violet light treatment was not working. The Ministry also found that the chlorination pump did not provide adequate disinfection. In fact, no chlorine was being added to water from one of the wells, and three chlorine analyzers were not functioning. Canada has consistently underfunded the capital budget of Curve Lake First Nation, including the budget allocated to the water system.

33. The MOECC found that Curve Lake First Nation's water treatment plant did not conform with the provincial standards applicable to non-reserve communities, being the *Drinking Water Systems Regulation*, O. Reg. 170/03, under the *Safe Drinking Water Act*, 2002, S.O. 2002, c. 32. By way of immediate action, the MOECC recommended that the primary treatment equipment be repaired or replaced, the treatment system be reconfigured, appropriate monitoring and recording equipment be installed, more frequent monitoring and calibration be conducted, and the water treatment plant operator obtain appropriate certification, among many other items. Ultimately, the MOECC recommended that Curve Lake First Nation investigate a new drinking water system to service the entire community.

34. Rather than mandate urgent changes, however, the MOECC noted that "[d]rinking water and wastewater systems that service residents of First Nations reserves fall under the jurisdiction of the Federal Government and this site assessment does not in any way suggest that there is a requirement for these systems to adhere to Ontario's regulatory framework".

35. Approximately 550 homes in Curve Lake First Nation do not have access to water from the water treatment plant and rely instead on approximately 700 private wells. These wells suffer from frequent deficiencies in both water quality and quantity. Because they are GUDI wells, they are susceptible to surface contamination. This is an increasing problem due to high population density, which causes contamination from nearby septic systems and fertilizer use, among other sources, especially during periods of significant runoff.

36. Testing shows that private well water contains unacceptable levels of turbidity and E. coli, coliform, sodium, nitrates, phosphates, manganese, and aluminum, among

other contaminants. However, private wells are tested only at the request of their owners, and because many wells are not tested, the true extent of the problems is unknown. Private wells at Curve Lake First Nation are also susceptible to any decline in the water table, which regularly limits supply, and wells regularly run dry.

37. When clean water is unavailable in adequate quantities, Curve Lake First Nation is forced to truck in water from neighbouring communities. This occurs regularly, especially in the fall when the supply of well water declines. The trucked water is used to either fill reservoirs or provide bottled water to homes. Curve Lake First Nation's members feel the limits of a finite supply of water.

38. Curve Lake First Nation has been subject to regular boil water advisories for decades, with the consequences described below. On average, approximately 10-15 such advisories are issued each year. A portion of Curve Lake First Nation was most recently subject to a long-term boil water advisory that ran from July 20, 2016 to June 6, 2018. Additionally, the beaches of the Curve Lake First Nation are regularly closed due to E. coli contamination, which interferes with both recreational and spiritual use of water, as described below.

39. On January 27, 2018 the Honourable Maryam Monsef, Minister of International Development and Minister for Women and Gender Equality, and the Member of Parliament for Curve Lake First Nation, promised to ensure clean drinking water for the community within three years. Minister Monsef promised that Canada would strive to provide Curve Lake First Nation with a reliable water system, and she committed to working with its Chief and council "as they negotiate for the best and most appropriate water system for their community".

40. However Curve Lake First Nation has been calling for an adequate water treatment plant to service the entire community for more than thirty years. The new plant would replace the existing plant and the private wells, providing dependable access to water. The intake for such a plant would be located in nearby Buckhorn Lake, which would ensure adequate supply. Curve Lake First Nation recently updated its feasibility study and determined that it requires a membrane filtration system with an

elevated storage reservoir. The total cost of designing and constructing an appropriate water treatment plant for the community would be approximately \$50 million.

41. Despite recognizing the need for a full-scale water treatment plant for decades, Canada failed to advance any design beyond the feasibility stage, or provide the necessary funding for capital investments. Canada has also failed to implement appropriate interim measures to ensure adequate water for members of Curve Lake First Nation, including small-scale ultra-violet light treatment systems.

42. The tragedy is that so much of the suffering of the members of Curve Lake First Nation, like the suffering of other Class members, described below, would have been unnecessary if Canada had simply complied with its obligations and discharged its duties, as described below.

#### **THE HISTORY OF INADEQUATE ACCESS TO POTABLE WATER AT NESKANTAGA FIRST NATION**

43. When the people of Neskantaga were forced to settle at Lansdowne House, there was no running water or clean drinking water available for them. However, there was clean drinking water available to federal personnel at the Indian Affairs office and the Health Canada nursing station at Lansdowne House. Neskantaga's people were not allowed to use this water.

44. In 1990 the people of Neskantaga took the initiative and moved from the settlement site at Lansdowne House to their current reserve site. Thereafter, homes at the Lansdowne House reserve site were demolished by Canada, sometimes without their owners' knowledge, and the Lansdowne House settlement was made uninhabitable. By 1999, no one was left in the settlement at Lansdowne House and most of the buildings had been torn down.

45. Canada promised Neskantaga that Canada would provide for all of the necessities of life at the new reserve, including safe drinking water. During the relocation, Canada took control over the infrastructure development for the new

reserve site. Canada managed how infrastructure funds could be spent and assumed responsibility for constructing Neskantaga's new water infrastructure and water treatment plant.

46. In 1993 Indian Affairs contracted for the construction of an experimental, untested water treatment plant system for the community's use. Meanwhile, federal personnel stationed in Neskantaga were provided with a separate, fully functional clean water system.

47. Immediately after the experimental water treatment plant intended for the community's use was completed, the Health Canada nurse stationed in Neskantaga advised the community that the water coming from the plant was not safe unless boiled.

48. A boil water advisory for Neskantaga was imposed on February 1, 1995, when the experimental water treatment plant stopped functioning. The boil water advisory has remained in place for 25 years and is the longest running advisory in Canada.

49. The water in Neskantaga is highly unsafe even to touch, causing significant skin rashes, sores, and permanent physical scarring. The unsafe condition of the water has also exacerbated existing health issues of Neskantaga's members. It has interfered with everything from basic hygiene to Neskantaga's traditional cultural and spiritual practices, which revolve around water.

50. In 2005 Canada funded a temporary Reverse Osmosis treatment unit to be installed in Neskantaga to provide a minor water source for the community. This Reverse Osmosis unit is slow and unreliable, and does not have sufficient capacity to reliably provide clean drinking water to the entire community. The Reverse Osmosis unit has broken down several times and is not a lasting solution.

51. However, because the Reverse Osmosis unit was installed, Canada placed Neskantaga lower on the priority list for water system upgrades. In 2006 Canada abandoned its water system upgrade plans for Neskantaga, leaving its members with only the low capacity and unreliable Reverse Osmosis unit. This decision prolonged Neskantaga's boil water advisory for nearly fifteen years.

52. During this time Canada did nothing to address the situation despite Neskantaga's sustained pleas for assistance.

53. In 2015 Canada finally promised to lift Neskantaga's boil water advisory by spring 2018 and pledged \$8.8 million to fund the construction of a new treatment plant. However, Canada outsourced the construction to a private company which failed to meet the deadline. Then Canada contracted with another private company to complete the construction.

54. In 2019 the new treatment plant failed after being in operation for only a few months. As a result, Neskantaga was forced to evacuate nearly 200 residents to Thunder Bay in September 2019, while the necessary repairs were completed. Neskantaga's boil water advisory was changed to a do not consume advisory at that time.

55. The new treatment plant is still not fully operational and the drinking water in Neskantaga remains unsafe. Beyond the water treatment plant itself, there are other unaddressed issues in Neskantaga contributing to unsafe drinking water. These include problems with the intake site and its proximity to effluent outflows, as well as the distribution system in the community, which contains mold and other contaminants.

56. Neskantaga's members have been, and continue to be, deeply traumatized by the lack of access to clean, safe water. Neskantaga's members suffer acute and chronic physical disorders as well as psychological distress from this constant exposure to unsafe water. Neskantaga members have never had access to clean, safe water. Unsafe water has undermined their sense of individual and collective identity, and limited their freedom to choose where and how they will live their lives. As a result, many Neskantaga members have been forced to leave the community.



**CANADA OWED CLASS MEMBERS NON-DELEGABLE FIDUCIARY  
DUTIES, A DUTY OF CARE, AND A DUTY TO ACT IN ACCORDANCE  
WITH THE HONOUR OF THE CROWN**

57. Canada has consistently assumed responsibility for the provision of potable water to Class members, while barring Class members and others from fulfilling this obligation. In the circumstances, Canada owes fiduciary duties and a duty of care to the Class, and it was bound to act in accordance with the honour of the Crown.

58. Under section 91(24) of the *Constitution Act, 1867*, Canada is responsible for “Indians and Lands reserved for Indians”. Only Canada may legislate in respect of First Nations reserve lands. As a result, Canada has exclusive jurisdiction to ensure that on-reserve water systems provide First Nations communities with adequate access to potable water.

59. Since 1876, Canada has asserted its jurisdiction over First Nations pursuant to the *Indian Act* (now R.S.C. 1985, c. I-5) and related statutes and regulations. Through the *Indian Act*, Canada restricted the ability of First Nations to exercise jurisdiction over drinking water on reserves. Canada has insisted on playing an active and central role in the design, implementation, and delivery of drinking water on reserves and to Class members, often to the exclusion of Class members’ First Nations.

60. Over time, Canada has also applied pressure to members of First Nations to live on First Nations Lands, often denying program funding for those who are not resident on First Nations Lands. To fulfill the promise that those lands would be a place for Indigenous peoples to carry on their way of life, Canada began to construct drinking water and sanitation systems for their use.

61. In the 1970s, the Department of Indian Affairs and Northern Development (“INAC”, later Aboriginal Affairs and Northern Development Canada, Indigenous and Northern Affairs Canada, and Indigenous Services Canada, among others), Canada formally took discretionary control over drinking water systems on First Nations Lands.

INAC assumed far-reaching responsibilities for the provision of drinking water, which included:

- (a) Planning and implementing water systems;
- (b) designing and constructing water infrastructure;
- (c) operating and maintaining water systems;
- (d) training and employing water system operators; and
- (e) performing feasibility studies and conducting water needs analyses.

62. In 1977 the federal Cabinet adopted a strategy to develop infrastructure for First Nations that would “provide Indian homes and communities with the physical infrastructure that meets commonly accepted health and safety standards, is similar to that available in neighbouring, non-Indian communities or comparable locations, and is operated and maintained according to sound management practices”.

63. The Defendant repeatedly renewed this commitment to ensure adequate access to potable water on First Nations Lands.

64. For example, in 1991 the Defendant pledged to assist First Nations communities in achieving basic living conditions, including access to water, that were comparable to the rest of Canada by 2001. This promise was set out in Treasury Board submissions and INAC’s own Long-Term Capital Plan.

65. Similarly, in 2006, the Defendant’s First Nations Water Management Strategy stated that it intended to address by 2008 the 29 percent of all First Nations water systems that were at high risk of producing unsafe drinking water.

66. In 2013 Canada introduced the *Safe Drinking Water for First Nations Act*, S.C. 2013, c. 21 (the “*SDWFNA*”). The preamble to the *SDWFNA* recognizes that “it is important for residents of First Nations lands to have access to safe drinking water”.

67. Section 4(1) of the *SDWFNA* provides that Canada may “make regulations governing the provision of drinking water on First Nation lands and the disposal of waste water on First Nation lands”, including regulations respecting:

- (a) the training and certification of operators of drinking water systems and waste water systems;
- (b) the protection of sources of drinking water from contamination;
- (c) the location, design, construction, modification, maintenance, operation and decommissioning of drinking water systems;
- (d) the distribution of drinking water by truck;
- (e) the location, design, construction, modification, maintenance, operation and decommissioning of waste water systems;
- (f) the collection and treatment of waste water;
- (g) the monitoring, sampling and testing of waste water and the reporting of test results; and
- (h) the handling, use and disposal of products of waste water treatment.

68. Sections 4(2) and (3) of the *SDWFNA* provide that Canada may also make regulations “respecting standards for the quality of drinking water on First Nation lands”, “the monitoring, sampling and testing of drinking water on ~~First Nation~~ Nations lands and the reporting of test results”, and “emergency measures in response to the contamination of drinking water on First Nation lands”.

69. Additionally, Canada’s commitments under section 36(1) of the *Constitution Act, 1982* require it to “promot[e] equal opportunities for the well-being of Canadians”, “further economic development to reduce disparity in opportunities”, and “provid[e] essential public services of reasonable quality to all Canadians”. This commitment requires Canada to ensure that Class members have adequate access to safe, clean, and

reliable water, and that they benefit from effective treatment of wastewater and the protection of source water on and off First Nation Lands.

70. Canada is also bound by the honour of the Crown and, in particular, the promise to set aside the reserves for the use and benefit of First Nations members. The honour of the Crown requires Canada to ensure that Class members residing on First Nations Lands set aside for them have adequate access to safe, clean, and reliable water, and that they benefit from effective treatment of wastewater and the protection of source water.

71. In these circumstances, Canada has assumed non-delegable fiduciary duties to the Class members to ensure that Class members have adequate access to safe, clean, and reliable water, and that they benefit from effective treatment of wastewater and the protection of source water on and off First Nation Lands. Furthermore, there is a relationship of proximity between Canada and the Class members that gives rise to foreseeability of harm and Canada owes the Class members a private law duty of care to ensure that Class members have adequate access to safe, clean, and reliable water, and that they benefit from effective treatment of wastewater and the protection of source water on First Nation Lands.

72. Class members' right to adequate access to potable water is also protected by the *Charter*, as described below.

73. Canada has ratified many treaties that contain obligations relating to the provision of clean drinking water to Class members, including, without limitation, the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the International Covenant on Civil and Political Rights.

74. These instruments, together with resolutions of the United Nations General Assembly and the United Nations Human Rights Council, guarantee a right to sufficient, safe, physically accessible and affordable water for personal and domestic use.

75. Canada's international commitments inform its fiduciary duties, duty of care, the honour of the Crown, and Class members' *Charter* rights.

#### **CANADA'S DUTIES TO CLASS MEMBERS ARE NOT ABATED BY ITS EFFORTS TO DOWNLOAD ITS RESPONSIBILITIES**

76. Beginning in the 1980s, Canada sought to download to various First Nations some of its responsibilities for the provision of adequate access to potable water. Although the *SDWFNA* maintains, and in some regards enhances, Canada's control over the provision of drinking water on First Nations Lands, it also reflects a long-term shift in Canada's approach to the discharge of its responsibilities. Section 5(1) of the *SDWFNA* provides Canada with broad authority to:

- (a) "confer on any person or body any legislative, administrative, judicial or other power that the Governor in Council considers necessary to effectively regulate drinking water systems and waste water systems",
- (b) "deem a First Nation or any person or body, for the purposes of this Act, to be the owner of a drinking water system or waste water system of a prescribed class, and prescribe classes of drinking water systems and waste water systems for that purpose"; and
- (c) "confer on any person or body the power, exercisable in specified circumstances and subject to specified conditions... to appoint a manager independent of the First Nation to operate a drinking water system or waste water system on its First Nation lands".

77. Pursuant to the *SDWFNA* and otherwise, Canada purports to have downloaded additional responsibility for some aspects of the provision of drinking water to some First Nations. However, Canada consistently failed to fix the unsafe water systems that it designed, implemented, and constructed on First Nations Lands, and it did not provide adequate funds or training for First Nations to do so.

78. Canada knew, or should have known, that First Nations lacked the resources to maintain, let alone remedy, their deficient water systems. Canada further undermined First Nations by consistently underfunding the maintenance and operation of water systems on First Nations Lands, despite the fact that the First Nations were unable to meet the shortfall. In short, Canada knew, or should have known, that its program of downloading responsibility for water systems to First Nations was doomed to fail, with the attendant consequences described below.

79. Despite its efforts to download its responsibilities to First Nations, Canada continues to fund the provision of drinking water on First Nations Lands in two ways. First, Canada makes an annual transfer payment to Band Councils or First Nations communities, which is intended to fund a portion of the operation and maintenance of existing infrastructure. Second, Canada selectively funds the construction of new infrastructure in accordance with its assessment of risk and need. In either case, the amount of funding is determined by Canada in its sole discretion.

80. Canada has consistently failed to provide First Nations with adequate funds to ensure that the operation and maintenance of their water systems meet appropriate standards for safety and security. At all material times, Canada has been, or ought to have been, aware of this chronic underfunding of First Nations communities, and the fact that First Nations were unable to make up the shortfall.

81. Furthermore, in all cases the construction of a centralized or municipal system to supply water to a First Nation constitutes a major infrastructure project, and it requires a discretionary, specific-purpose grant from Canada. All such grants are contingent on Canada's approval of the design of the water system. Canada has consistently underfunded major infrastructure projects for the construction of adequate water infrastructure on First Nations Lands, and it has been, or ought to have been, aware of this deficiency at all material times, as well as First Nations' inability to make up the shortfall.

82. Ultimately, at all material times it has been Canada's responsibility to approve, fund, and monitor the water systems that provide, or ought to provide, Class members

with water. It remains Canada's responsibility to perform the tasks set out in section 4(1) of the *SDWFNA*. Where Canada purports to delegate any responsibility for the provision of potable water, including to a First Nation Band Council, Canada remains responsible to Class members, and it must ensure that its delegate has sufficient resources, training, and experience to adequately and appropriately deliver the service.

**CANADA BREACHED ITS FIDUCIARY DUTIES AND ITS DUTY OF CARE TO CLASS MEMBERS, BREACHED THEIR RIGHTS UNDER THE CHARTER AND THE CONSTITUTION, AND FAILED TO UPHOLD THE HONOUR OF THE CROWN**

83. In exercising discretionary control over reserve water systems, Canada has, with foreknowledge, systematically breached its duties to Class members, including by failing to:

- (a) honour its promise to provide reserves with access to potable water of adequate quality and quantity to permit Class members to maintain their Indigenous way of life on First Nations Lands;
- (b) fund, allocate funds, mandate, procure, and supervise the design and construction of water systems to an appropriate standard;
- (c) ensure that water systems were built in appropriate locations, away from potential sources of contamination;
- (d) ensure adequate protections for the source waters that supply First Nations Lands, whether the source waters are located on or off First Nations Lands;
- (e) ensure adequate sanitation and wastewater treatment systems;
- (f) properly operate and maintain, or ensure the operation and maintenance of, water systems, including failing to provide appropriate training and certification;

- (g) ensure that all homes, schools, recreational, and community centres on First Nations Lands have adequate access to water distribution facilities and sanitation;
- (h) assess and remedy the causes of water advisories;
- (i) adopt operational protocols and directives for the construction, operation, maintenance, and safety of water systems on First Nations lands akin to the protections under provincial and territorial law; and
- (j) adequately enforce standards to ensure that Class members have adequate access to potable water and are protected from contaminated water.

84. In addition, where Canada has purported to download responsibility for the provision of water to First Nations, Canada has systematically failed to remedy defects, or put in place measures to remedy defects, in water systems before purporting to download responsibility for them to First Nations. It has also, with foreknowledge, systematically breached its duties to Class members, including by failing to provide:

- (a) adequate training and technical expertise to properly operate water systems;
- (b) adequate funding to appropriately construct, operate, and maintain water systems;
- (c) appropriate and enforceable standards for water systems, together with appropriate accountability to ensure compliance; and
- (d) appropriate directives for the provision of water to Class members, to be promulgated following proper consultation with First Nations.

85. Canada's breaches of its duties have denied Class members adequate access to potable water. Class members face drinking water advisories that persist for months, often years, and



even decades. This crisis has been systemic and prolonged. Although Canada has repeatedly recognized the breach of its duties, it has failed to correct these deficiencies.

86. Since at least 1991, Canada has promised to provide Class members with adequate access to potable water. However, Canada has systemically underfunded the construction, operation and maintenance of water systems in First Nations, without regard, or with reckless disregard, to the ability of any First Nation to fund the difference from limited community resources. Canada did so even though INAC consistently underspent its budget from 1996 to 2015, returning some \$1 billion to the Treasury Board.

87. By 1995, the Report of the Auditor General of Canada to the House of Commons noted that the Defendant had significantly underfunded its planned investments in capital facilities and maintenance for First Nations. The Auditor General also found that the Defendant had failed to establish benchmarks to compare First Nations communities with the rest of Canada, noting that “[w]ithout establishing a basis for comparison, [INAC] will not be in a position to report whether conditions in First Nation communities are becoming comparable with other Canadian communities”.

88. In 1996 the Royal Commission on Aboriginal Peoples found that “[a]ccess to potable water, adequate sanitation and waste disposal services has been routine for so long in this country that most Canadians take them for granted. The same access is not guaranteed for Aboriginal people, however, and their health suffers as a result”. The Royal Commission noted that in 1991 Aboriginal households were nearly one hundred times more likely to live without piped water than non-indigenous households.

89. With specific reference to the First Nations water systems, the Royal Commission found that “[w]hile the most common problem is the absence of adequate systems, a significant problem in small communities is a lack of adequate training for the systems operators of water treatment and sewage treatment facilities”. The Royal Commission concluded that “[w]hat is needed is a capital construction program such that Aboriginal people can have what most Canadians take for granted: safe and adequate supplies of water, effective sanitation systems, and safe and adequate housing”. The Royal Commission called on Canada to remedy these deficiencies by 2001.

90. Nevertheless, on September 29, 2005, then Minister of Indian and Northern Affairs under the new government of Prime Minister Harper, acknowledged Canada's continued failure to ensure adequate access to potable water for Class members, stating "the federal government has failed to ensure that this basic right is provided to all Aboriginal Canadians. The health and safety of up to half a million Canadians in 600 First Nations communities has been threatened. That is not acceptable". Both prior and subsequent to the Minister's admission, under the governments of Prime Ministers Chretien, Martin, Harper, and Trudeau, Canada systematically failed to discharge its duties to ensure that Class members have adequate access to potable water.

91. On March 21, 2006 Canada announced a Plan of Action for Drinking Water in First Nations, in which it committed to "issuing a clear protocol on water standards"; "ensuring mandatory training and oversight of water systems by certified operators"; and "address the drinking water concerns of all high risk systems". As before, Canada failed to satisfy these commitments.

92. On November 15, 2006, Canada's own Expert Panel on Safe Drinking Water for First Nations called on Canada to provide "a regulatory regime and the funding needed to close the resource gap". The Expert Panel noted that "[i]n the area of water and wastewater systems, resources have not been adequate, and the resources made available have not always been used as effectively as they could be". The Expert Panel found that despite Canada's policy -- in place since at least 1977 -- it "has never provided enough funding to First Nations to ensure that the quantity and quality of their water systems was comparable to that of off-reserve communities".

93. The Expert Panel found that Canada's estimates for the capital cost of water and wastewater systems were not based on detailed engineering analysis, and were one-third to one-half of the amount that was actually needed. The Expert Panel cautioned that "[t]he result, going into the next planning cycle, is a known gap between what was spent and what was needed", and that going forward "several risks and cost pressures are

already known”. Canada did not take appropriate measures to avoid a known catastrophe, and it continued to turn a blind eye to the delivery of potable water to Class members.

94. Despite the introduction of the *SDWFNA* in 2013, Canada has promulgated no regulations under the *SDWFNA*, and there are no binding standards for water safety on First Nations Lands, for construction, operation, and maintenance of water systems, or for the training and certification of water system operators.

95. Following its February 2016 review, the United Nations Committee on Economic, Social and Cultural Rights (“**CESCR**”), which monitors compliance with the ICESCR, urged Canada to “live up to its commitment to ensure access to safe drinking water and to sanitation for the First Nations while ensuring their active participation in water planning and management” and to “bear in mind not only indigenous peoples’ economic right to water but also the cultural significance of water to indigenous peoples”. Nevertheless, Canada’s systematic failure to provide Class members with adequate access to potable water has continued.

96. In November 2015, Canada committed to ending all long-term drinking water advisories within five years. Despite ending some long-term drinking water advisories, new long-term drinking water advisories continue to be imposed, as do short-term drinking water advisories. Unfortunately, the Office of the Parliamentary Budget Officer’s December 7, 2017 report titled *Budget Sufficiency for First Nations Water and Wastewater Infrastructure* found that Canada’s promised investments in waste and water infrastructure only represent 70 per cent of what is needed to meet its commitment to end long-term drinking water advisories. Disappointingly, Canada has also failed to implement any enforceable regulations that hold it accountable to First Nations for adequate access to potable water. In the final arithmetic, Canada’s average risk rating of water systems on First Nations across the country has barely declined since 2015, meaning that Class members remain in unacceptable peril.

97. On October 21, 2020, the Honourable Marc Miller, Canada's Minister of Indigenous Services, acknowledged that "[s]afe, clean and reliable drinking water is an essential service", and one that has been denied to Class members.

98. On October 30, 2020 Minister Miller conceded that deficient water infrastructure in First Nations is a "product of systemic discrimination [and] systemic racism that plagues all our institutions...across government". Minister Miller recognized Canada's responsibility to make "consistent investment in Indigenous infrastructure". Minister Miller also admitted that the water crisis in Neskantaga and other First Nations is the consequence of "two decades of under-capitalization".

99. On November 2, 2020 Minister Miller stated "I will reiterate the fact that it is unacceptable that Neskantaga has been without clean water for over 25 years". Minister Miller commented that "look[ing] at the 10 years of investment of the Conservatives, in Neskantaga in particular, they only put \$300,000 in per year, which is just a tragedy and something that we have committed to fix. We will fix it and we will fix it with financial resources in partnership with First Nations".

100. On November 6, 2020, Minister Miller wrote to Chief Moonias to confirm that Canada "has made a commitment to clean drinking water for all First Nations on reserve, and this commitment remains as strong today as the day it was made". Minister Miller further wrote "I confirm, unreservedly, our commitment to the work and funding required to bring clean water to Neskantaga First Nation".

101. On December 2, 2020, Minister Miller again acknowledged "the right for individuals to have access to potable water". He confirmed that Canada was "determined to ensure that this right is upheld for everyone including all First Nations living on reserves". On behalf of Canada, Minister Miller committed to "build and maintain sustainable systems that will provide First Nations communities with safe drinking water for the long term – forever".

102. Minister Miller acknowledged Canada's responsibility to fund the construction of water infrastructure, together with operations and maintenance, noting that

“[p]roviding First Nations communities with the resources they need to run and maintain their water and waste water systems, is essential for long lasting solutions”. Minister Miller admitted that “in our current policies the communities were only getting, I believe, 80% and had to come up with the next 20%”. Minister Miller acknowledged that “that was a legitimate criticism as to how we deployed our support, our wrap around support for water... my full expectation is that’ll move to 100%”.

103. Minister Miller affirmed that Canada must “build a sustainable system that ensures that First Nation communities have access to safe drinking water now and for generations to come...I want to state as clearly as possible that ultimately, I bear the responsibility for this and I have the responsibility and the duty to get this done”.

104. Minister Miller stated that “the challenge is making sure that we provide the financial backing of the Government of Canada [...] that support and public backing of the Government of Canada, now I can guarantee that”. Minister Miller committed that “we are going to be there every step of the way”. Mr. Miller admitted that “the Prime Minister wrote in my mandate letter that I needed to get it done, and that is where I stand in front of Canadians today and say we will get clean water to Indigenous communities”.

105. Minister Miller admitted that prolonged drinking water advisories in Class members’ communities are attributable to systemic discrimination:

The problem is they occur in a disproportionate incidence in Indigenous communities, and then they go on far too long. So, it’s the result of under capitalization in essential infrastructure, namely water infrastructure...People have lived their whole lives without access to clean water. It’s totally unacceptable. What the Prime Minister acknowledged during the 2015 election, and we continue to acknowledge it is that, one, this is unacceptable, that it requires sustained investment.

106. Minister Miller acknowledged “the disastrous infrastructure, undercapitalization of infrastructure in Indigenous communities and some essential services like water provision”. Minister Miller admitted that Canada’s commitment to end drinking water advisories in Class members’ communities was a matter of equality:

...it was an expression that all Canadians could relate to because no person should go...without clean water, it was very much one that was, that was informed by that expression of fairness that Canadians expect everyone to be treated equally in this country. Indigenous peoples aren't treated equally in this country, and it goes from their infrastructure investments to how they're treated by the medical system or the police forces.

107. Minister Miller acknowledged that deficiencies in Class members' water infrastructure resulted from "a massive undercapitalization in the communities for some time". Minister Miller characterized the current state of affairs as "entirely unacceptable in one of the most developed countries in the world" and admitted that "[i]t's [up to] Canada to get it done".

108. All of the foregoing statements by representatives of Canada constitute admissions against interest on behalf of Canada.

*Breach of fiduciary duties, duty of care, and honour of the Crown*

109. Through its systemic conduct Canada has created, contributed to, and sustained unsafe drinking water conditions for Class members. As set out above, Canada breached its fiduciary duty, duty of care, and its duty to uphold the honour of the Crown, all of which caused damages to Class members, as set out below. In particular, given Canada's efforts to divest First Nations of their traditional territories and congregate their members on First Nations Lands, the honour of the Crown required Canada to ensure adequate access to potable water in First Nations communities.

110. The Class expressly limits its claim in negligence to Canada's operational negligence in the implementation of its core-policies, including its policy of ensuring that First Nations communities enjoy access to potable water that is comparable to non-Indigenous communities, and the making of non-core policies.

*Charter breaches*

111. Additionally, Canada has breached Class members' rights under sections 15, 7, and 2(a) of the *Charter*.

*Canada breaches Section 15*

112. Canada has breached Class members' equality rights. Class members are a recognized analogous group identified by their Indigeneity and their residency on First Nations Lands. The decision to live on First Nations Lands is personal characteristic essential to Class members' identities, and it can only be changed at great cost, if at all.

113. Canada's failure to provide Class members with adequate access to potable water, and to protect them from contaminated water, places them at a disadvantage relative to similarly-situated Canadians (both Indigenous and non-Indigenous) who do not share their Indigeneity-residence status and who enjoy adequate access to potable water. Class members suffer this disadvantage even when compared to members of First Nations who do not reside on First Nations Lands, and compared to other groups for whom Canada has assumed responsibility for the supply of potable water, including military bases and Canada's own employees who reside on First Nations Lands. The sole basis for the disadvantage of Class members is their Indigeneity-residence status, and this disadvantage serves to undermine their dignity and reinforce longstanding prejudice, contrary to section 15 of the *Charter*.

114. Furthermore, Canada's discrimination against Class members has caused them to suffer the adverse health effects described below. It has also barred them from developing First Nations Lands to realize economic prosperity. Canada's mistreatment of Class members has left too many of them sick and living in poverty, and left too many First Nations communities without an economic future.

115. The deprivation of substantive equality for Class members is particularly serious for minors. In accordance with Jordan's Principle, Canada has an obligation under section 15 of the *Charter*, and pursuant to the honour of the Crown, to take the necessary steps to ensure that First Nations children on reserves have an equal chance to thrive. Without adequate access to potable water to drink and attend to their personal hygiene, minor Class members begin life at a distinct disadvantage. Canada's failure to discharge its obligations to these Class members constitutes a further breach of section 15 of the *Charter*.

*Canada breaches Section 7*

116. Canada has also breached Class members' rights to life and security of the person. By choosing the location of First Nations Lands and limiting the authority and ability of First Nations to manage their own infrastructure needs, Canada rendered First Nations unable to provide potable water to Class members. Canada further restricted Class members' ability to obtain potable water for themselves. In turn, Class members were and are dependent on Canada for access to potable water, and for protection from contaminated water.

117. By denying Class members adequate access to potable water and failing to protect them from contaminated water, Canada exposed Class members, and continues to expose them, to a host of serious illnesses, as well as serious psychological harm, including severe emotional distress, some of which is caused by fear and uncertainty about the safety and security of Class members' water supply. This deprivation of security of the person, and in some cases life, has not been in accordance with the principles of fundamental justice because it is arbitrary, overbroad, and grossly disproportionate. Canada's actions in depriving Class members of adequate access to potable water constitute a breach of section 7 of the *Charter*.

*Canada breaches Section 2(a)*

118. Additionally, by denying Class members adequate access to potable water, Canada has breached their right to freedom of religion, which includes traditional ceremonies and spiritual practices. This breach is compounded by the provision of inadequate sanitation and wastewater treatment, which contributes to the contamination of waters that are venerated by Class members. Water, and particularly clean, potable water, is sacred in the Class members' Indigenous cultures. It is a critical aspect of Class members' spirituality and it has a strong nexus with their traditional spiritual practices. Class members believe that water is life, and water is sacred.

119. The lack of adequate access to clean water has precluded Class members from exercising their traditional religious practices and from passing on those sacred practices



from one generation to another. Canada has also deprived Class members of their ability to effectively discharge their culturally significant obligation to protect water. These are serious interferences with Class members' ability to act in accordance with their freedom of religion, and they constitute a breach of Class members' rights under section 2(a) of the *Charter*.

*Canada's breaches are not saved by Section 1*

120. None of the *Charter* breaches set out above can be justified in a free and democratic society. On the contrary, they are a stain on the conscience of this nation, and they cannot be saved by section 1.

*Canada breaches Section 36*

121. Furthermore, Canada has breached section 36 of the *Constitution Act, 1982*, which requires it to provide essential public services of reasonable quality to all Canadians. These essential public services include adequate access to potable drinking water on reserves.

*Nuisance*

122. Additionally, Canada's breaches of its duties, as set out above, by commission and omission, have caused a substantial and unreasonable interference with Class members' use and enjoyment of their property and the lands they occupy. Canada is liable to Class members for this nuisance.

## **RESTITUTIONARY RELIEF**

123. In the alternative, Canada realized cost savings from the breaches of its duties described above (the "**Unjust Gains**"). Canada was unjustly enriched to the extent of the Unjust Gains. The Unjust Gains resulted from expenditures that Canada was

obligated to make on behalf of Class members, and these cost savings were realized only through Canada's unlawful conduct.

124. Class members suffered a corresponding deprivation when they were denied adequate access to potable water. There is no juristic reason that Canada should be entitled to retain the Unjust Gains, and they must be disgorged to the Class. The Class members are entitled to a constructive trust over these monies.

125. In the further alternative, the Class members are entitled to waive the torts of negligence and nuisance. The Class members suffered the consequences of Canada's breaches of its duties, which produced the Unjust Gains. As an alternative remedy, the Class members are entitled to a disgorgement of Canada's gains from its wrongful conduct, namely, the Unjust Gains. The Class members are entitled to a constructive trust over these monies.

## **VICARIOUS LIABILITY**

126. Canada's breaches of its duties were perpetrated by its servants and agents, for whom Canada is responsible. These individuals made, and continue to make, decisions with respect to the provision of water to Class members. Canada's delicts were the misconduct of its servants and agents, each of whom breached duties owed to Class members. The identities of the particular servants and agents who perpetrated Canada's breaches of its duties are known only to Canada.

127. Canada is vicariously liable for the impugned acts of its servants and agents. There is a sufficiently close relationship between Canada and its servants and agents that it would be fair and just to hold Canada vicariously liable for their tortious conduct. Further, the wrongs of Canada's servants, officers, employees, and agents were perpetrated in the course of their employment by Canada, such that Canada introduced the risk of the wrong.

128. To the extent that relief is sought in tort, as set out below, it is expressly limited to relief for the vicarious liability of Canada's servants and agents. The Plaintiffs pleads and rely on section 3 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

129. Canada and its servants and agents knew or ought to have known that their breaches of its duties were unlawful and contrary to the *Charter* rights of Class members. In the alternative, the conduct at issue constitutes operational decisions by Canada, rather than core policy decisions, or was irrational, and Canada is not immune from suit in this regard.

#### **CLASS MEMBERS SUFFERED DAMAGES**

130. As a result of Canada's breaches of its duties to Class members, its breaches of their *Charter* and Constitutional rights, its failure to uphold the honour of the Crown, and its nuisance, Class members have faced and continue to face:

- (a) a lack of adequate access to potable water in terms of both quality and quantity, including for food preparation;
- (b) a lack of adequate access to water suitable for non-drinking purposes, such as showering, washing clothes, and personal hygiene;
- (c) reliance on untreated or improperly treated water;
- (d) sustained water shortages and rationing; and
- (e) exposure to contaminated water.

131. As a result of the foregoing, Class members suffered and continue to suffer severe adverse effects, including:

- (a) adverse health effects, including influenza, pneumonia, gastrointestinal infections and disease, skin infections and disease, whooping cough and other respiratory infections, shigellosis, diarrhea, cancer, hepatitis, and impetigo;
- (b) adverse psychological effects including severe anxiety and severe depression, which effects are caused by fear of consuming contaminated

water, lack of a safe and secure supply of water, foul tastes and odours, and the presence of chemicals and pollutants in the water;

- (c) adverse health effects, particular to infants, including lower respiratory tract infections and respiratory syncytial virus;
- (d) higher suicide rates;
- (e) preclusion from engaging in traditional spiritual practices;
- (f) poor hygiene, including an inability to comply with public health directives requiring hand washing and other measures to prevent the spread of COVID-19 and other infectious diseases;
- (g) preclusion from obtaining medical care in their communities;
- (h) higher obesity, alcoholism, and drug addiction rates; and
- (i) substantial inconvenience and cost in obtaining safe water for drinking, food preparation, bathing, and personal hygiene, as well as diminished economic opportunities.

132. As a consequence, Class members suffered injury and damages including:

- (a) serious physical and psychological harm;
- (b) loss of income and loss of advantage;
- (c) significant out-of-pocket expenses to obtain potable water, where possible, or to travel to communities with access to potable water;
- (d) inability to practice their traditional ceremonies and spiritual beliefs, with intergenerational effects;

- (e) loss of opportunity to live on First Nations Lands, some Class members having left First Nations Lands to live in places with adequate access to potable water;
- (f) loss of opportunity to develop First Nations Lands for economic benefit; and
- (g) pain and suffering.

### **PUNITIVE AND EXEMPLARY DAMAGES**

133. Canada, including its ministers, senior officers, directors, and senior staff, had, or should have had, specific and complete knowledge of the widespread damage to the Class members that resulted from the breaches set out above. Despite this knowledge, Canada continued to and continues to breach its duties to Class members, who were profoundly vulnerable to its delicts, with devastating consequences.

134. The high-handed and callous conduct of Canada warrants the condemnation of this Honourable Court. At all material times, Canada asserted direct or *de facto* control over Class members' access to potable water, and it conducted its affairs with wanton and callous disregard for their interests, safety and well-being.

135. Over a lengthy period, the Plaintiffs and the Class members were treated in a manner that could only result in aggravated and increased mental and physical suffering for a vulnerable population. Canada's violations of Class members' rights have irreparably damaged their lives.

### **MISCELLANEOUS**

136. Full particulars respecting Canada's breaches of its duties are within Canada's knowledge, control and possession.

137. This Action does not seek any order, fine, or monetary penalty, as against Canada or any other person, for any breach of regulations promulgated under the *SDWFNA*.

138. This action is commenced pursuant to the *Federal Courts Act*, RSC, 1985. C. F-7, and the *Federal Court Rules* SO/98-106, including Part 5.1 and Rule 114.


139. The Plaintiffs plead and rely upon the:

- (a) *Federal Courts Rules*, SOR/98-106, including Part 5.1 and Rule 114;
- (b) *Indian Act*, R.S.C. 1985, c. I-5
- (c) *First Nations Land Management Act*, S.C. 1999, c. 24.
- (d) *Federal Courts Act*, RSC., 1985, c. F-7;
- (e) *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.);
- (f) Common law; and,
- (g) Such other legislation or regulation as may apply.

140. The Plaintiffs propose that this Action be tried at Toronto.

**DATED** at Toronto, Ontario, this 11 day of October, 2019.

(Amended this day of February, 2021)

  
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NATION and NESKANTAGA FIRST NATION and CHIEF  
CHRISTOPHER MOONIAS on his own behalf and on  
behalf of all members of NESKANTAGA FIRST NATION  
Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

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

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**THIRD FRESH AS FURTHER AMENDED  
STATEMENT OF CLAIM**

(Filed on this     day of February, 2021)

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