Federal Court  Cour fédérale

Date: 20251205

Docket: T-1937-22

Citation: 2025 FC 1927

Ottawa, Ontario, December 5, 2025

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

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

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

I. Overview

[1] A class proceeding [Action] was commenced on behalf of Shamattawa First Nation [Shamattawa] and Chief Jordna Hill on his own behalf and on behalf of all members of Shamattawa. In his representative capacity, Chief Hill represents Shamattawa members who

have been subjected to long-term drinking water advisories [LTDWA] on-reserve that have lasted one year or more.

[2] On March 14, 2023, with the parties' consent, this Court certified the Class and the common issue questions. The Class is defined as:

> (a) All persons other than Excluded Persons who:
>
> > (i) are members of a band, as defined in subsection 2(1) of the *Indian Act*, R.S.C. 1985, c, I-5 ("**First Nation**"), the disposition of whose lands is subject to that Act, the *First Nations Land Management Act*, S.C. 1999, c. 24, or a Modern Treaty (together, "**First Nations Lands**"), and whose First Nations Lands were subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year and continued or commenced after June 20, 2021 ("**Impacted First Nations**"); and
> >
> > (ii) after June 20, 2020 ordinarily resided on First Nation Lands for a period of at least one year while such First Nation Lands were subject to a drinking water advisory that lasted at least one year; and
>
> (b) Shamattawa First Nation, and any other Impacted First Nation that elects to join this action in a representative capacity ("**Participating Nations**").

[3] The Action is divided into two phases. The Stage I Common Issue question seeks a general determination as follows:

> From June 20, 2020 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 drinking water that is safe for human use?
>
> [Stage I Common Issue]

[4] The Stage II Common Issue question seeks a determination on nine questions, including breaches and remedies.

[5] The Plaintiffs bring this motion seeking summary judgment on the Stage I Common Issue question.

[6] The framing of the Stage I Common Issue question and the parties' positions are virtually identical to those set out in *St. Theresa Point First Nation v Canada (Attorney General)*, 2025 FC 1926 [*St. Theresa Point*], which was released concurrently with this Order and Reasons. Generally, the Plaintiffs submit:

1. The Stage I Common Issue question is appropriate for summary judgment;
2. The Stage I Common Issue question should be answered in the affirmative because:
    a. Canada owes both a *sui generis* and *ad hoc* fiduciary duty to the Class;
    b. Canada owes a common law duty of care to the Class;
    c. Sections 15, 7, and 2(a) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982 (UK)* c 11 [*Charter*] are engaged; and
    d. Section 36 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982 (UK)*, c 11 [*Constitution Act, 1982*] is engaged.

[7] The Plaintiffs' submissions in support of these positions are identical to those set forth in *St. Theresa Point*, except in this matter there is no claim respecting section 2(c) of the *Charter*. In all other respects, the positions of both the Plaintiffs and Defendant are identical, with necessary modification for the different subject matter at the heart of the respective actions.

[8] Generally, the Defendant, also referred to as Canada, submits that:

1. The Stage I Common Issue question is not appropriate for summary judgment as the Plaintiffs seek a guaranteed financial result, or in the alternative, any duties owed must be narrowed to exclude specific Constitutional and *Charter* claims;
2. Though potential duties could be recognized, these duties cannot be determined at the Stage I proceeding. This is because the legal test for finding a duty is inextricably linked to a determination of breaches and any determination of breaches must be determined at Stage II. If there is a common duty owed across the whole class, Canada argues the duty is not as broad as the definition put forth by the Plaintiffs.

[9] For the reasons that follow, I find summary judgment in the present case, based on the extensive record before the Court, is appropriate. Accordingly, the Stage I Common Issue question is answered in the affirmative. I find there are both *sui generis* and *ad hoc* fiduciary duties owed by the Defendant to the Plaintiffs, as well as common law duties owed by Canada to the Class as individuals and as First Nations. I also find that sections 15, 7 and 2(a) of the *Charter* are engaged and that *Charter* duties exist by virtue of section 32(1) of the *Charter*. Lastly, I find that section 36 of the *Constitution Act, 1982* is not engaged.

II. Preliminary Issue – Admissibility of Expert Witness Evidence

[10] As in *St. Theresa Point*, Canada brings a preliminary motion objecting to two of the Plaintiffs' expert witnesses: Brian Dean and Dr. James Reynolds. The challenge in the present

Action relates to the scope of those experts' evidence, as well as the admissibility of their evidence in whole or in part.

[11] At the time of the hearing for this matter, save for the evidence of Mr. Dean and Dr. Reynolds, the parties reached an agreement on the admissibility and scope of eight of the Plaintiffs' ten expert witnesses.

[12] I find the expert witness evidence of Mr. Dean and Dr. Reynolds is admissible. I agree with the Defendant that defining the scope of expertise or qualification helps in framing the admissibility analysis. I also agree with the Defendant that expert evidence can only be qualified and admitted if it falls within the expert's area of expertise.

[13] The Defendant argues that Mr. Dean's scope of expertise is not general, but is limited to his regional knowledge of the Circuit Rider Training Program in British Columbia between 1998 to 2017 and is specific to the First Nations he worked in.

[14] The Plaintiffs agree with the Defendant's characterization of the law but also submit that a flexible approach to the rules of evidence should be employed in Aboriginal cases (*Mitchell v MNR*, 2001 SCC 33 at para 30).

[15] After considering the law and Mr. Dean's evidence, including his scope of expertise, I find that Mr. Dean is an expert for the purposes set forth in his affidavit and report. He has knowledge of water treatment system operations, management, maintenance and repair. Moreover, through the Class period, he advised First Nations on water treatment system matters

and provided water treatment system training for First Nations and for water treatment plant operators. This evidence is also relevant to the Action.

[16] The Defendant's attack on Dr. Reynolds stems from his non-compliance with Rule 52.2(1)(b) of the *Federal Courts Rules*, SOR/98-106 in that Dr. Reynolds has not established that he is either a historian, or more particularly a legal historian, and that his knowledge of historical events is merely ancillary to his legal work.

[17] The Plaintiffs point to Dr. Reynolds' education, including in legal history, his professional work, presentations and publications in Crown-Indigenous history and his previous report used in the settlement approval in *Tataskweyak Cree Nation v Canada*, 2021 FC 1415 [*Tataskweyak*] as proof of his qualification as a historian.

[18] After considering the law and Dr. Reynolds' evidence and his scope of expertise, I find that Dr. Reynolds is an expert for the purposes set forth in his affidavit and report. Dr. Reynolds' evidence is relevant for setting out the context of the relationship between the Crown and Indigenous people, which is a key part of the matter at issue.

[19] The entirety of both Mr. Dean's and Dr. Reynolds' evidence is admissible. Relevance will be assessed accordingly.

III. Background

[20] This Action follows the September 15, 2021, settlement of a previous class proceeding arising from the Defendant's failure to ensure that certain First Nations and their members had

access to drinking water on reserve. The Manitoba Court of King's Bench and this Court approved the settlement of the previous on-reserve drinking water class proceeding in *Tataskweyak.*

[21] The Action deals with essentially the same issues that have occurred or that have been ongoing since the close of the class period discussed in *Tataskweyak* save for the length of the LTDWA and the Class Period. Canada denies that *Tataskweyak* constitutes an admission of liability or a recognition of any legal duty or obligation for the purposes of this Action.

[22] The vast record demonstrates that the nature of the issues in this Action is technical, with many intersecting factors relating to funding policies and practices, water delivery challenges, Canada's historical control over First Nations, and the spiritual and physical harm claimed by the First Nations due to long-term drinking water advisories in their communities.

[23] The history of colonialism, including reserve creation and Canada's control over First Nations people living on reserve pursuant to the *Indian Act* is also at issue in this Action. The evidence regarding these issues has been documented in this case in virtually the same manner as in *St. Theresa Point* (at paras 94-95).

[24] Shamattawa is a Treaty 5 First Nation in northern Manitoba. It is a remote fly-in community with ice-roads resulting in limited access during the winter. Located at the interconnection of Gods River and Echoing River, Shamattawa's members have traditionally lived off the land, drawing water from these nearby rivers. However, in 1908, Shamattawa was

relocated to a reserve which was a fraction in size compared to the First Nation's previous traditional territory. This relocation resulted in Shamattawa's dependence on Canada.

[25] Canada has been responsible for providing water and water infrastructure development to Shamattawa for some time. For example, in the 1980s, Canada drilled wells throughout Shamattawa, which confirmed there were limited water yields in the First Nation. Moreover, the water found in the aquifer below Shamattawa contained methane making it unsuitable for human consumption; the presence of methane also posed a fire risk. Canada then began providing water on reserve in Shamattawa via water trucks, sourcing its water supply from nearby Trout Creek until 1999 when the first water treatment plant opened.

[26] Shamattawa had no running water and no indoor plumbing throughout this period. The water deliveries were limited and were not sufficient to serve Shamattawa's overcrowded population; homes ran out of water long before the next scheduled water delivery. In the early 2000s, Canada slowly began connecting water and sewer infrastructure to on-reserve buildings. Canada started with government buildings – first the RCMP station, followed by the nursing station and school. Gradually, Canada extended water and sewer infrastructure services to the community's homes. However, the water treatment plant was not designed to service the entire community but instead had been designed to treat a specific quantity of water and to operate intermittently. It was not capable of servicing a piped distribution network extending across the reserve. As a result, water services were suspended nearly weekly.

[27] The water treatment plant was poorly designed. The plant's water intake location, which was chosen by Canada alone, was catastrophically unsuitable for water intake. The intake drew

water from the height of the current where Gods River and Echoing River meet. Accordingly, the water treatment plant is frequently contaminated and regularly clogs due to an accumulation of silt at the water intake location. The water treatment plant has exceeded its designed capacity and lifespan and there are no plans for its replacement. Its membrane filtration and intensive chlorination cannot address the water turbidity and fails to satisfy the Canadian Drinking Water Guidelines. In addition, spring thaw frequently clogs the intake, and cause taps to run brown with contaminated water, resulting in repetitive annual states of emergency requiring bottled water to be flown into the community. Shamattawa has been under a near constant Drinking Water Advisory [DWA] since December 2018. In 2021, Canada's Annual Performance Inspection confirmed all these longstanding issues, yet these issues have not been remedied.

[28] The other factors related to the Class will be set forth in the next section below.

IV. Summary of Evidence

[29] The record in this case contains more than 10,000 pages of evidence. The following is a very brief summary of that evidence, much of which pertains to the Stage II Common Issue questions. The summary is useful to provide a contextual overview for this Action and the summary judgment motion.

A. *The Plaintiffs' Evidence*

(1) Fact Witnesses

[30] The Plaintiffs provided affidavit evidence from the following ten fact witnesses:

1. Chief Jordna Hill: current Chief of Shamattawa and former Councillor;

2. Sharon Garson: Chief Finance Officer and member of Tataskweyak;

3. David Ward: Licensed Professional Engineer and member of Líl̓wat Nation [Líl̓wat];

4. Sheri Schweder: member of Shamattawa and the director of the women's shelter in Shamattawa;

5. Isaac Mandamin: member of Wabaseemoong Independent Nations [Wabaseemoong] and the Director of Services for Wabaseemoong;

6. Esther Thomas: member of Shamattawa who works as a maintenance worker at the Shamattawa Women's Crisis Centre;

7. Carl Kennedy: member of Little Pine First Nation [Little Pine] and a Councillor since 1993 who is responsible for Little Pine's housing portfolio;

8. Cordell James Pinay: member of Peepeekisis Cree Nation [PCN], Director of Capital & Infrastructure, and a member of PCN's Water Treatment Plant Emergency Repairs Project Team;

9. Jerry Andrew: a certified Civil Engineering Technician, member of the Secwepemc Nation, the Director of Public Works and Infrastructure for Adams Lake Indian Band [ALIB]; and

10. Jennifer Kasper: legal assistant to counsel for the Plaintiffs who provided the Court with a collection of exhibits.

[31] The Defendant conducted cross-examinations of Chief Hill, Ms. Garson, Mr. Ward, Councillor Kennedy, and Mr. Andrew.

(a) *Chief Jordna Hill*

[32] Chief Hill, in addition to his position as Chief, is a 48-year-old father of seven and grandfather of four who has lived in Shamattawa for most of his life.

[33] Chief Hill testified to the history of and deficiencies with the water infrastructure in Shamattawa. He explained that there is insufficient funding for water infrastructure operations and maintenance, and inadequate resources for hiring and retaining qualified water plant operators. Chief Hill stated in his affidavit that:

> The state of crisis experienced by our members living on reserve is one that is unknown to Canada's employees. Instead, Canada provides its employees working in Shamattawa with bottle [*sic*] and jugs of water for their personal use. As a result, the lives of Canada's employees are unaffected by many of the hardships that we are forced to endure, leaving only Shamattawa's members to bear the consequences. It is hard to think of a more apt symbol of Canada's neglect than seeing the pallets of water at our airport, and knowing that Canada has flown them in for its employees, but not for us.

[34] Chief Hill spoke to the experience of First Nations leaders in their dealings with Canada regarding water infrastructure and operations. Chief Hill said that Canada collaborates with Shamattawa during the tendering process when contractors bid on water infrastructure projects. Chief Hill said that Shamattawa's contribution is "superficial" because the First Nation's leadership is required to adhere to Canada's rules, which means they must pick the contractor who makes the lowest bid on the project. He explained that Canada requires First Nations to select the lowest bidder. Chief Hill offered exhibits showing Canada's Circuit Rider Training Program [CRTP] report forms, and the items required when a First Nation is not meeting the standards and Canada must step in.

[35] Chief Hill also testified to the history of Shamattawa's relationship to water. He said that water is at the heart of Shamattawa's way of life. Chief Hill demonstrated that Canada forced

Shamattawa into a position of dependency and that Shamattawa has limited resources. Moreover, he showed that the industry in the area near Shamattawa is controlled by others.

(b) *Sharon Garson*

[36] Ms. Garson testified that Tataskweyak has been under a DWA since May 17, 2017. Ms. Garson stated that Tataskweyak is under a block funding agreement with Indigenous Services Canada [ISC], and that agreement barely provides enough resources to cover one-sixth of Tataskweyak's current community water infrastructure needs. The amount Tataskweyak receives does not adequately provide for living wages for water treatment employees, let alone for any kind of infrastructure improvements or construction. Ms. Garson testified that Tataskweyak's Minor Capital Budget must go to water infrastructure at the expense of other essential areas, such as housing, schools, fire services, band council buildings, emergency services, and cistern cleaning.

(c) *David Ward*

[37] Mr. Ward testified that of the three water systems on Líl̓wat reserve, ISC does not provide funding for the smallest system. This is because ISC policy does not allow funding for water systems serving fewer than five homes. Additionally, ISC refuses funding for individual private wells.

[38] Mr. Ward testified that the small system has been under a continuous water advisory for the past four years and boiling the water is not an available remedy for the consumption advisory issue. Additionally, infants and toddlers cannot bathe in the water due to this advisory. Mr. Ward described how Líl̓wat had to redirect funds from the *Tataskweyak* settlement to construct an

interim solution for the system, even though this was not the intended purpose of the settlement funds. The funding received for the larger systems is deficient, and is subject to significant delays in funding disbursement, inadequate timelines, and restrictions on the number of systems that can receive funding at one time.

[39] Mr. Ward also highlighted issues whereby ISC fails to support Líl̓wat's infrastructure plans according to need and is unwilling to identify interim issues that are certain to negatively impact Líl̓wat for the foreseeable future.

(d) *Sheri Schweder*

[40] Through her work with women in Shamattawa, Ms. Schweder is positioned to see the lesions, stomach illnesses, kidney and liver illnesses, and significant diseases from using the on-reserve water. Ms. Schweder testified that her 5-year-old grandson personally experienced lesions requiring surgical removal of his testicle due to bathing in the treated on-reserve water. Illnesses due to use of contaminated water are common among Shamattawa members.

[41] Ms. Schweder and her family are forced to draw water from a small stream. When they use the stream in the winter, there are obvious safety issues regarding the cold weather. Likewise, when they draw water in the dark, there are further safety issues from lack of visibility. Though the stream water is sometimes discoloured and takes a lot of time and effort to draw, Ms. Schweder finds it necessary to use it because of the issues related to the on-reserve treated tap water. Moreover, Ms. Schweder explained that it is commonplace in Shamattawa for the Red Cross to fly in bottled water for the community during crisis situations when the community's water system is shut down completely.

[42] Like Chief Hill, Ms. Schweder also testified to the significant impact the unsafe water has on the cultural and spiritual practices in Shamattawa. The lack of safe water disrupts not only cultural and spiritual practices in Shamattawa, but it also prevents the education of younger generations who are unable to engage in those practices because of the lack of safe water.

[43] Ms. Schweder testified that Canada's funding model is based on unrealistic basic assumptions that does not adjust for nor meet the actual needs of the community. In addition, this funding does not address significant issues related to waterlines freezing and sewage line leakage both of which directly may result in the contamination of Shamattawa's water source.

(e) *Isaac Mandamin*

[44] Mr. Mandamin explained that Wabaseemoong was under a LTDWA from August 11, 2017 to December 6, 2021. In Wabaseemoong, several water lines had ruptured and a lift pump had failed resulting in that LTDWA.

[45] Wabaseemoong's main water line had to be replaced, which took years to complete. Though Canada took pride in announcing the lifting of that water advisory, the lift lasted only six months before it was re-instated. More burst pipes led to flooding, which resulted in diesel contamination and the shut down of the entire water system. The community was evacuated for over two and a half months while waiting for parts to repair the water system to arrive in the community. Many members returned home prior to the water system fix and Canada provided a small amount of potable bottled water and non-potable water for toilet flushing. Porta potties were also brought in, but they were not regularly changed and ended up overflowing.

[46] Mr. Mandamin testified that the elementary school was closed for the entire period of the evacuation, while the high school re-opened after two months, resulting in significant disruption to the children in the community and their education. Once water was restored, it remained undrinkable and triggered other issues such as frozen pipes and sewer line backups. The work done to date has been temporary in nature and it could take years to restore the water system to a proper state. Until then, the drinking water for Wabaseemoong is delivered by truck.

[47] Mr. Mandamin also testified that these long-term drinking water advisories have severed the community's sacred relationship with water.

(f) *Esther Thomas*

[48] Ms. Thomas testified that the water in Shamattawa does not look like water and does not look like it can safely be consumed. Ms. Thomas testified that when she, or her two-year-old son, drink the water after boiling, it makes them physically sick with upset stomach, diarrhea, and vomiting.

[49] Ms. Thomas also testified to the dangers of retrieving water from the creek in the winter, saying that she had previously fallen through the ice into the cold creek water. Despite these risks, the creek water is safer than drinking the tap water in Shamattawa. With no vehicle, Ms. Thomas is reliant on others to drive her to the creek to collect water. When this is not possible, Ms. Thomas is forced to consume boiled tap water, even though it makes her sick. Ms. Thomas testified that she does not have the funds to purchase bottled water as the prices are exorbitant.

[50] Ms. Thomas testified that she and her family members frequently suffer from lesions and boils due to bathing in the tap water, resulting in scarring and widespread skin irritations.

(g) *Councillor Carl Kennedy*

[51] Councillor Kennedy is responsible for the infrastructure portfolio in Little Pine. He worked at Little Pine's original water treatment plant in the 1980s and became one of the first trained operators in the mid-1990s.

[52] Councillor Kennedy says that the Little Pine water treatment facility has been inadequate from its inception, with severe issues beginning in or around 2011. Demand for water from this inadequate system caused two wells to dry up and collapse. The pipes began pumping sand into the water, impacting both the quantity and quality of water. Burst and corroded pipes, major system failures, and water pressure drops resulted in many homes not receiving water at all, with the rest having timed usage. This also caused school closures and resulted in water having to be trucked into the community. Though Canada had already started the work to drill two new wells, it was not willing to fund the connection of those wells or the required urgent repairs for the water network. Little Pine had to take out a loan, paying for this with economic development project and housing funding. One year later, Canada agreed to reimburse them.

[53] Since the collapse repairs were completed, there have been constant issues resulting in continual short-term boil water advisories. Lack of operator salary funding results in a low retention of water treatment operators. Without the ability to retain water treatment operators, and funding that is inadequate to provide 24-hour operations, the system has been in a constant state of advisory since approximately 2018.

[54] While Canada has made some positive progress on the upgrades to the system itself, the system is still inadequate. Approximately 22 homes connected to the system are unable to receive water due to inadequate water pressure. These homes are forced to rely on water delivered to their open-system cisterns, which are largely unable to be kept sanitary. Additionally, the water pipes at the school are contaminated, thus bottled water needs to be shipped to the school.

[55] Underfunding for operator retention and training leaves Little Pine with only one properly certified Level 2 operator who works two days per week. This operator is supported by Level 1 trainees that are not properly qualified to run the facility. ISC letters commit to funding that will:

> …address longstanding concerns raised by First Nations communities, including funding to reflect technological advances, industry best practices, applicable water and wastewater standards, and operator training, certification and retention.

[56] This is not the reality. The funding formula employed by ISC is flawed and inadequate. As a result, Little Pine runs a financial deficit annually just to cover the current inadequate project, maintenance, operations, and training.

(h) *Cordell James Pinay*

[57] Mr. Pinay testified that PCN's original water treatment plant, built in 1988, served the "core area" on reserve. Those living on reserve but outside the core area had cisterns filled by truck or private wells. The water from this system made many community members sick with infections, skin rashes, and other medical issues. The community experienced several long-term

water advisories lasting more than a year prior to the new plant's completion A new water treatment plant was completed in December 2020, servicing only the "core area".

[58] On-going advisories not addressed by the new plant include a February 2015 to present advisory in relation to the majority of the on-reserve homes as they are not located in the "core area" and only have access to contaminated cisterns. Another long-term advisory has been in effect since April 2013 for an open-system well that services 6 on-reserve homes . In these areas, people are commonly forced to ration the water they do have access to as the quantities available are not sufficient to meet all their water needs.

[59] Mr. Pinay stated that issues caused from ISC's deliberate underfunding for the operations and maintenance of PCN's water system have effects that have carried over. ISC has not addressed additional costs borne by the community related to drinking water issues, such as drinking water and storage tank purchases, shipping costs, repairs to shipping trucks and excessive road wear. ISC's attempts to separate necessary infrastructure construction into two distinct projects is not in keeping with PCN's needs nor concerns, which have been communicated to ISC since 2017. PCN's feasibility study for a ten-year life cycle upgrade informs PCN's design choices that would meet the current needs of the First Nation at a lower annual operating cost with reduced health and safety risks. The design work is nearly complete. However, lack of ISC funding has halted the project.

[60] Due to the criteria and minimum requirements set out by ISC, they will only fund a low-pressure system and have financing caps set per home connection. PCN's communications and designs have been in keeping with ISC's requirements. However, after paying to advance the

project to an actionable stage, ISC's construction phase financial contributions amount to only twenty percent of the actual costs. This totals $2.6 million of ISC funding with a remaining $9.6 million to be borne by PCN, who is unable to afford this amount. As a result, nothing has been done to advance the project over the past two years. ISC continues to refuse to properly fund this project. This leaves the LTDWA continually in place.

(i) *Jerry Andrew*

[61] Mr. Andrew was previously part owner and employee of Gentech Engineering Inc., a civil engineering firm servicing ALIB since 1983. He has knowledge of the ALIB water infrastructure and its challenges.

[62] ALIB has several small reserves in close proximity, such as Sahhaltkum 4 reserve (IR 4) and Switsemalph 6 reserve (IR 6), resulting in unique water infrastructure challenges. ALIB has 847 members, 350-400 of which reside on IR 4 and IR 6, each having significant issues with water and wastewater. Mr. Andrew's testimony only pertains to IR 4, a Level 1 system with a combination of private wells, community wells attached to a water treatment plant, three reservoirs and a piped distribution system.

[63] Mr. Andrews testified that there have been DWAs on various parts of the IR 4 community water system for the last 20 years caused by Canada's underfunding. Wells and a pump house, with three concrete reservoirs, built in the 1980s, with an additional well built in 2019, are barely keeping up with the demand for water.

[64] There are 25 homes in one area of IR 4, which were previously serviced via private wells, that are experiencing LTDWAs due to high coliforms, heavy metals, and arsenic in their water supply and because of the generally very poor quality of the water available to them. As of June 2020, 13 of these homes were connected to a new water main through phases one and two of a three phase project. ALIB was required to financially cover around $45,000 of this cost and to fund $376,878.96 for phase three, though three homes in another area remain unconnected and on DWAs. The bottled water required throughout the DWAs amounts to approximately $30,000 per year. These costs are not covered by ISC.

[65] The community well on IR 4 has been under revolving DWAs from 2012 to August 2022 due to problematic levels of iron and manganese. Aligning with provincial standards, ALIB chlorinated the water, creating a reaction that turned the water brown, and producing significant sediment build up in the distribution system. Canada's immediate solution involved cartridge filters which plugged every few days, requiring replacement. Canada would not fund more expensive filters, despite evidence of the failing cartridges. By August 2022, ALIB funded the correct filters and building addition, which cost them more than $130,000.00. Canada did not contribute to this cost.

[66] Canada's funding formula for operations and maintenance does not cover the actual cost to operate and maintain systems. ALIB does not have sufficient resources to create emergency financial reserves for water system emergencies or repairs, as Canada recommends. Even where water system operations are not in crisis, Canada's funding is deficient for ordinary operation, which creates these crisis situations. Canada's incessant funding shortfalls are made up by ALIB's own source revenue required for other departments. This leads to additional emergency

situations in other departments requiring ALIB resource funding. Canada's bureaucracy, longstanding practice of shortchanging First Nations, constantly changing funding programs and delays are unacceptable.

(j) *Jennifer Kasper*

[67] Ms. Kasper provided the Court with a collection of exhibits detailing information retrieved from various sources, including ISC, the Department of Indian Affairs and Northern Development, news media, Human Rights Watch, the Office of the Auditor General, the Parliamentary Budget Officer, Archives Canada, and Aboriginal Infant Development. The collection includes information pertaining to: types, amounts, locations and recurrences of drinking water advisories, including annual and national assessments, indicators, audits, reports, roles and responsibilities, budgeting, and (under)funding reports; historical information detailing causes, colonial impacts, calls to action, action reports, status reports, official programs, plans and strategies, and expert panel reports; human rights covenants and conventions, and resolutions; periodic reports, surveys, budget sufficiency reports, press conferences and official political statements.

[68] Those exhibits dated 2020 or later include:

- Press conferences, public statements, and a statement to the Standing Committee on Indigenous and Northern Affairs, made by the Honourable Marc Miller, then Minister of Indigenous Services;
- A copy of Canada's letter to Neskantaga, dated November 6, 2020;
- The 2021 Office of the Auditor General of Canada report entitled *Access to Safe Drinking Water in First Nations Communities*; Canada's Detailed Action Plan, released April 2021 in response to this report; and the June 14, 2022, Auditor General's update to this report;

- Multiple news media articles, including a Global News article, dated May 18, 2021, regarding Shamattawa's State of Emergency declaration following a series of suicides and attempted suicides among residents;
- Canada's Annual Performance Inspection of Shamattawa's water system, prepared October 6, 2021;
- The Parliamentary Budget Officer's report, entitled *Clean Water for First Nations: Is the Government Spending Enough?*, dated December 1, 2021
- Press conferences, new media, and a CBC News article, dated April 2, 2022, quoting the Honourable Patty Hajdu, Minister of Indigenous Services;
- The Government of Canada's *Guidelines for Canadian Drinking Water Quality*, dated September 2022;
- Human Rights Watch, *World Report 2023, Our Annual Review of Human Rights Around the Globe*; and finally,

(2) Expert Witnesses

[69] The Plaintiffs provided the following ten expert witnesses, whose scopes the parties agreed to save and except for Brian Dean and Dr. James Reynolds. Their evidence is as follows:

(a) *Brian Dean*

[70] Scope: Water operator with over twenty-five years of experience of direct operational support to First Nations for their water and wastewater infrastructure, including through Canada's CRTP, with knowledge of Canada's approach to operations and maintenance of water systems on First Nations.

[71] Evidence: As President of Brian Dean Consulting, Mr. Dean has provided direct water and wastewater support to First Nations in British Columbia for over twenty-five years, twenty

of which included work in the CRTP for ISC, from 1998 to 2017. The CRTP was initiated to provide support to First Nations:

> As a Circuit Rider from 1998-2017 my role focused on training water system operators in First Nations, and I have since continued working with First Nations water systems to present. I quickly realized that these operators had little, if any, supports. I worked closely with Chief and Council and the public works manager (where one existed), to underscore the central role of water systems operators and the importance [*sic*] proper training. Our survival depends on reliable access to safe drinking water, and reliable access depends on water systems operators.

[72] Mr. Dean's continued work with First Nations in water treatment operations includes: advising and training First Nations on water operations, maintenance, and repairs; managing water systems; filling in for and supporting water treatment plant operators; and working with external stakeholders to support a First Nation's water infrastructure needs.

[73] Mr. Dean testified that Canada offloaded its role in building infrastructure in First Nations to the First Nations themselves regardless of those First Nations' capacities or capabilities. Pursuant to the Procurement Protocol and Protocol for ISC-Funded Infrastructure, First Nations are required to select the least expensive Circuit Rider contractors through a bidding process.

[74] During his work as a Circuit Rider, Mr. Dean stated that First Nations were welcoming due to the significant support and training they required. In Mr. Dean's experience, the water system surveillance, supports, and funding increases enjoyed in non-Indigenous cities and municipalities generally fail to reach First Nations communities. Additionally, cultural

challenges, lack of relationships, and lack of training of First Nations operators results in difficulties for First Nations to access the supports of suppliers and stakeholders.

[75] Mr. Dean stated there are little to no other supports available for First Nations and ISC continues to reduce the types and scope of supports that Circuit Riders are permitted to provide regardless of a First Nation's needs; ISC has reduced the number of hours Circuit Riders can exhaust in First Nations and has an extensive list of prohibited Circuit Rider activities. It is rare for First Nations operators to have specialized educational training. Though they are keen operators, eager for training, a lot of their work necessarily involved improvisation.

[76] Rather than having clearly defined standards and regulations typical of provincially run water systems, First Nations are left with the *Guidelines for Canadian Drinking Water Quality*, which are unenforceable technical suggestions and aspirational targets. When Canada changes these guidelines, it does so without considering the water system upgrades required, resulting in LTDWAs while impacted First Nations wait to secure funding from Canada to upgrade or replace their water systems.

[77] In addition, operators and backup operators on reserve are paid significantly less than the market rate, making these positions very difficult to fill. Likewise, operator training stretches on for years, and backup operators must leave the position prior to certification due to financial constraints.

[78] The classification of the water system changes as the population grows and the water system is upgraded. This leaves the First Nation in a position of urgently needing to find a new

water system operator to fulfill their immediate needs, rather than being able to support the development of the existing operator with historical knowledge of the water system.

(b) *Dr. Kerry Black*

[79] Scope: Engineer and infrastructure advisor with specialized knowledge of Canada's approach to on-reserve infrastructure and operations and maintenance, particularly with respect to the impacts of long-term drinking water advisories.

[80] Evidence: Dr. Black demonstrated that Canada's overall water quality is among the best in the world. Yet, the Class Members in this claim have the highest risk water systems, with the most extreme, long-term issues in Canada. Dr. Black showed their water quality is far worse than the rest of Canada. Waterborne disease rates are 26 times higher on reserve, and community members living on reserve are 90 times more likely than their non-Indigenous counterparts to have no access to safe water. Boil water advisories in off-reserve communities impacted approximately 10% of households between 2011 and 2017, however, approximately 65% of First Nations communities were under at least one drinking water advisory between 2004 and 2014. Dr. Black also explained that First Nations communities do not benefit from the same kinds of water testing as off-reserve communities, which suggests the data from on-reserve water tests is likely not entirely accurate. This means that the actual unsafe on-reserve drinking water conditions requiring drinking water advisories are much higher than the data shows. Dr. Black referenced access to water on reserve in these extreme examples showing First Nations people living on reserve are also quantitatively impacted. Where the average residential water use is around 220 litres per person, per day, First Nations people living on reserve in these communities, average less than 15 litres per person, per day. The harsh conditions experienced in

Shamattawa are not unique and echo the experiences of Class Members more broadly and were entirely foreseeable by Canada.

[81] Dr. Black's report presented the current realities of the significant impacts of regulations, protocols and design guidelines imposed by Canada on First Nations as a condition of funding. This "thicket" of guidelines, protocols and policies, together with Canadas unilateral veto power, amounts to Canada's control over infrastructure, including design, planning, upgrading, construction, procurement, commissioning, operation and maintenance, and training and certification of operators, down to the required colour of pipes. This control means water infrastructure on reserve takes longer, costs more, and uses below standard designs and construction. As much as these are guidelines, it is at ISC's discretion whether a First Nation can deviate from these guidelines. Even the selection of a contractor is controlled under policy, with the lowest bidder, who is often not properly qualified, prevailing. These protocols and guidelines "have been developed by Canada to dictate the design and management of water" on First Nations, and include:

a) Protocol for INAC-Funded Infrastructure;

b) Protocol for Centralised Drinking Water Systems in First Nations Communities;

c) Protocol for Decentralized Water and Wastewater Systems in First Nations Communities;

d) Design Guidelines for First Nations Water Works;

e) First Nations On-Reserve Source Water Protection Plan; and,

f) Water and Wastewater Policy and Level of Services Standards (Corporate Manual System).

[82] Additionally, distinctions drawn by Canada, such as "[t]he use of the terminology privately owned, private systems, individually owned, Band managed are all terminologies chosen by the Government of Canada without conversation and consultation with First Nations". However, Canada makes use of these definitions to suggest they give rise to varying circumstances among different First Nations.

[83] Canada has positioned itself as the sole-funder and provisioner of drinking water systems. This funding is crucial. Yet, for decades, Canada funded a maximum of 80% of operations and maintenance costs calculated through an erroneous federally crafted formula, which does not address the actual costs needed for water systems. First Nations are unable to provide safe drinking water to their members without this funding and have no capacity to support the costs related to their water systems from their own source revenues.

[84] Dr. Black states that ISC's funding/need formula is based on "archaic", "inaccurate and grossly under-representative" assumptions, and shows how 100% of ISC's updated calculations represent less than 80% of First Nations' required needs. Even with these less-than-reality projections, First Nations are only given a percentage of their incorrectly calculated total needs and are forced to use funds from other programs.

[85] The Assembly of First Nations [AFN] has repeatedly called on Canada to change its funding formulas. Canada was repeatedly informed that it needed to make major additional investments in water infrastructure on reserve. This included through its own assessments and reports by Canada's Department of Indian Affairs and Northern Development in 2011, acknowledging that most First Nations' water systems are high risk and/or lacking quality in line

with Canada's Guideline for Water Quality, and recommending immediate expenditures of $4.7 billion to address the current water system issues, and $419 million in ongoing annual operating costs. This was not done.

[86] Dr. Black explained that even the current revised funding formula still underfunds the actual costs of operations and maintenance, leaving the Class Members vulnerable to Canada's control.

[87] Canada's 2022 revised formula updated its deficient cost tables, which had not been updated since 1998. The new formula tables are based on data from industry cost studies and inaccurate regional cost data, which means the funding issue continues since "[t]hose estimates are … grossly underestimating the true O&M costs for First Nations costs across Canada even to this current day". For example, ISC funding formulas only cover 30% to 60% of actual costs. Yet, Dr. Black shows that at the end of a fiscal year, ISC has a surplus, since it has not given all of its available resources to First Nations in need.

[88] Even with a 100% funding formula, the inaccuracy and inappropriateness of the estimates do not fund the actual costs nor rectify the impacts of deficits from decades of underfunding. In Dr. Black's opinion, all on-reserve LTDWAs are a direct result of the "lack of access to the capital funding required for large projects, and inadequate funding for regular operation and maintenance from the federal government". The current state of on-reserve drinking water is a national disgrace that is widely politically acknowledged.

(c) *Dr. James Reynolds*

[89] Scope: Legal historian, lawyer and author with knowledge of the history of the relationship between Canada and First Nations, including the ways in which Canada has exercised control over First Nations and their lands, and Canada's impact on the ability of First Nations to control water infrastructure on their lands.

[90] Evidence: Dr. Reynolds' opinion centered on legal history and it is necessarily informed by the legislative history, secondary reports, and legal developments that shaped the relationship between the Crown and First Nations. Dr. Reynolds chronicled the significant legal historical developments that have informed this relationship such as the reserve system and the effect of the *Indian Act*, particularly as it concerns the Crown's approach to First Nations including its approach to infrastructure on reserve.

[91] Canada exerted direct control over every facet of First Nations life through legislation, regulations, policies, and practices since at least the 1880s. This extends to matters such as water infrastructure. Though amendments to the *Indian Act* purportedly delegated powers to Chief and Council, Canada empowered Indian Agents with a ministerial override. Dr. Reynolds describes Indian Agents as often being "petty dictators" whose "powers and influence were formidable" over Chiefs and Councils. Canada retained the power to override Band Council decisions and depose their leadership positions. Even after subsequent amendments, "ultimate control remains with the Crown and not the First Nation". Federal protocols, procedure and practices continue to entrench First Nations' reliance on Canada for the necessities of life, including water.

[92] The *Indian Act* and other federal legislation severely restricted First Nations in giving security to obtain financing for construction projects from any third parties. This makes First Nations overwhelmingly dependent on Canada for financing for such projects.

[93] In 2013, Canada instituted the *Safe Drinking Water for First Nations Act*, conferring "extensive powers on the Crown to specifically govern the provision of drinking water and the disposal of wastewater on First Nations lands". However, no regulations were created under this *Act*, resulting in a lack of operational effectiveness.

[94] The *Act* faced considerable opposition from First Nations and the chiefs of the AFN passed a resolution calling for its repeal in 2015. The *Act* was finally repealed in 2022 as a term of the *Tataskweyak* settlement.

(d) *Professor Adele Perry*

[95] Scope: Distinguished history professor with specialized knowledge of the history of the reserve system and the *Indian Act*, the history of the federal government and domestic water on reserves from the 1880s onward, and the ways in which Canada took control over on-reserve drinking water.

[96] Evidence: Professor Perry's report demonstrated the history of disenfranchisement, showing how the parties' relationship is rooted in colonization, with less than 1% of lands set aside for the original Indigenous inhabitants. Professor Perry showed how First Nations were relegated to a patchwork of reserves, placing previously self-sufficient First Nations into a position of poverty, oppression and ultimate dependence on the Crown.

[97] Despite the promises of the Treaty of Niagara and the *Royal Proclamation of 1763*, the relationship shifted from the British holding obligations to their First Nations military allies, to one of paternalistic oversight. In 1867, the *British North America Act, 1867*, 30-31 Vict., c. 3 (U.K.) transformed British colonies into what is today known as Canada, with enormous implications for the relationship between the Crown and First Nations peoples, primarily via the division of powers between the provincial and federal governments. This "jurisdiction" effectively erased Indigenous law and authority. The amount of reserve lands set aside varied by location across Canada. Some reserves were relocated, and others were decreased in size over time with the major governmental preoccupation to induce and facilitate the surrender and sale of reserve lands in the 1880s. When a reserve's location became inconvenient or worrisome for the Crown, it was relocated. Thousands of acres of reserve lands have been taken by governments expropriating lands to put the interests of settlers above First Nations. Some of those lands were taken for water works, parks, railroads, etc. Some First Nations lost almost 90% or the entirety of their reserve lands in surrenders, which have repeatedly been found to have been illegal, that occurred during two particular surrender phases: twentieth century settler growth, and the end of World War I.

[98] The interconnection of reserve lands to poverty and repression were solidified through the creation of the *Indian Act*, placing control of lands, resources, finances, and decision making into the hands of Canada. Further iterations of the *Indian Act* entrenched federal authority over "Indians" and "lands reserved for Indians", delineating how those lands could be allocated, used or alienated.

[99] The Department of Indian Affairs thoroughly understood that reserves could not adequately sustain the lives or economies of First Nations communities. Rather than address these poverty issues, Canada relocated First Nations peoples to urban centers, or relocated entire communities away from their traditional territories, and hunting and fishing grounds. The Hawthorn Report, released in 1966, assessed 35 reserves, finding that, in contrast to the rest of Canada which was increasing in prosperity after World War I, these reserves were impoverished and dependant. The Hawthorn Report also found this contrast between on-reserve and non-Indigenous communities after World War II, with the majority of reserves lacking electricity, indoor plumbing, and running water.

[100] The DIA dug wells on reserves, provided funding to bring clean drinking water to reserves, and provided or repaired water dugouts, wells, and water systems on reserves between 1896 and 1969.

[101] Then, after the failed White Paper, and increased media attention to reserve poverty, the DIA's 1970 annual report declared it merely assists "Indian people in planning their communities and in the construction of living accommodation, including water and sanitary services, electrification and improved roads." However, government practices were always variable and shifting, along with legislation such as the *Indian Act*, whose 1985 amendment conferred by-law making powers to band councils, subject to the minister's un-appealable disallowance. Canada began negotiating contracts that designated First Nations as responsible for on-reserve water infrastructure.

[102] Centuries of colonization have resulted in today's enduring and intractable problems, in which First Nations are left to deal with the impacts of poverty created by the state. Reserves with continuing inadequate water, sewer, and power also house federal government buildings, employing largely non-Indigenous federal employees, with their own small-scale water treatment plants. Health Canada, compelled by labour laws, provided water treatment units for on-reserve nursing clinics. All federal jurisdiction populations, other than First Nations, have their water protected by law.

(e) *Dr. Melanie O'Gorman*

[103] Scope: Economics professor with knowledge of the provision of water infrastructure and resolving long-term on-reserve drinking water advisories, as well as the relationship between water infrastructure and long-term drinking water advisories, and the associated impacts.

[104] Evidence: Dr. O'Gorman's report canvassed Canada's shift in action from swinging hammers, up to and including the 1970s, to becoming a funding agency, leaving a vacuum of unfulfilled need. This "hands-on service delivery" included actually building the on-reserve water infrastructure. Until the 1980s First Nations had no role in the provision of their water services and infrastructure. Canada was the overseer of the entire delivery of on-reserve water services, in contrast to off-reserve water delivery.

[105] By the 1990s, while many or most First Nations still did not have access to clean, safe drinking water, Canada transitioned to a "funding agency" with the stated goal of increasing First Nations involvement. However, Canada retains the ultimate power and control over infrastructure, offloading the operational burdens to First Nations, while First Nations have a

corresponding lack of control. Canada stopped building the infrastructure itself, shifting these responsibilities to First Nations regardless of their capacity or capabilities. Canada implemented the CRTP to provide support to First Nations, which it funds and deploys to this day.

[106] Dr. O'Gorman provided a qualitative and quantitative comparison between on-reserve indigenous communities and off-reserve non-indigenous communities. While the challenges for on-reserve water systems are similar to the challenges faced by small, rural off-reserve towns, the LTDWAs are more frequent on reserve and last much longer. Moreover, authorities respond more quickly to drinking water advisories in non-Indigenous communities.

[107] Dr. O'Gorman assessed the quality of water on reserve and concluded bad infrastructure, especially distribution and treatment infrastructure, is the result of Canada's *de facto* control and its creation of First Nation dependence on it, which results in drinking water advisories. Canada imposes a series of operational protocols and policies on the ways that First Nations must design, construct, operate, and maintain their on-reserve water systems, and Canada knowingly provides inadequate funds to First Nations.

[108] Dr. O'Gorman likened the conditions of on-reserve water infrastructure and the resulting on-reserve water quality from those infrastructure conditions to the conditions found in refugee camps. On-reserve residential community members have access to less than 15 litres per day, and some have no access to running water. By contrast, Canadians who do not live on reserve consume an average of 220 litres of water per person, per day. On-reserve is the only place in all of Canada with homes that have no running water.

[109] The condition of on-reserve water infrastructure results in the poorest quality of water in Canada. On-reserve homes that have water trucked in are associated with increased risks of contamination. Nationally, two-thirds of the reserves in Canada are experiencing advisories and face more frequent long-term advisories that take longer to resolve. By contrast, the water and wastewater infrastructure off reserve that is regulated by provincial and territorial governments is "well-capitalized and operated", is consistent, considered to be "aesthetically pleasing", and provides some of the safest drinking water in the world.

[110] The impacts on the community members forced to endure these conditions results in widespread and significant effects to their physical, mental, emotional, and spiritual health.

[111] Dr. O'Gorman demonstrated that there is ample evidence of changing conditions, specifically to access and availability. Since the reserve was established, standards for clean water have changed as well. These evolving understandings relate to safety, cleanliness, and risk. Improper water sanitation facilities lead to a range of issues, including physical illnesses, which lead to millions of preventable deaths around the world. Despite Canada's knowledge of these facts, it continues to underfund operations, maintenance, and infrastructure.

[112] Dr. O'Gorman found that money matters a lot in relation to the vulnerability of First Nations peoples on reserve. For example, a systemic survey, which took place in 2011, showed that a capital portion of $4.7 billion was needed. However, Canada only spent 54% of what was required. Canada's underspending on capital, operations and maintenance, with Canada providing only 80 % of known costs by its own deficient formula, requires First Nations to make up the deficit on their own.

(f) *Dr. Ian Halket*

[113] Scope: Civil Engineer and environmental consultant with over 40 years of expertise advising on technical matters dealing with hydrologic and water quality assessment, environmental monitoring and impact assessments. Dr. Halket also has knowledge of the hazards of inadequate water treatment in First Nations.

[114] Evidence: Dr. Halket is the President of Halket Environmental Consultants Inc. He was retained by Tataskweyak in 2018 to test its water supply. When Tataskweyak had access to the full extent of their traditional territories, it was possible to draw water from naturally occurring sources. The evidence of Tataskweyak shows their members are no longer able to drink from their nearby water sources and they require water infrastructure to provide safe drinking water for their large community. Dr. Halket performed a study on the water quality of Split Lake, Tataskweyak's on-reserve water source. Dr. Halket's report showed the water quality in Split Lake is very poor, as the water in all samples failed to meet the *Canadian Drinking Water Guidelines* and contained toxin producing cyanobacteria known to cause serious illnesses in humans and animals, including gastroenteritis and neurological disorders. Dr. Halket affirms:

> In 2018, I completed a study of the water in Split Lake ("2018 Study"). I found that the water in all samples failed to meet the Canadian Drinking Water Guidelines and the Manitoba Water Stewardship Tier II Water Quality Objectives in all samples for total coliforms, and in the majority of samples for *Escherichia coli*.
>
> I also identified six genera of cyanobacteria in the samples collected from the Split Lake, of which three, *Anabaena*, *Aphanizomenon*, and *Oscillatoria*, are known to produce toxins that can cause serious illnesses in humans and animals, including gastroenteritis and neurological disorders.
>
> These findings reflect dangerous levels of water-borne pathogens. I concluded that it would be unsafe to drink untreated water from

> Split Lake. I also concluded that it would be unsafe to swim in Split Lake.

[115] Dr. Halket conducted another study of Split Lake in 2019, confirming the presence of bacteria again, and the absence of plant-available nitrogen and nutrient levels, which may facilitate cyanobacteria growth. In addition, Dr. Halket stated:

> The existence of *Escherichia coli* strongly suggests that the water was contaminated with sewage or animal waste.
>
> …
>
> On the basis of the 2018 Study and the 2019 Study, I concluded that there are two primary sources of contaminants in the water at Split Lake: bacteria and cyanobacteria. The academic literature suggests that these contaminants can cause the gastrointestinal disorders and skin rashes that are reported by members of TCN.

[116] Tataskweyak's water treatment plant is not designed to remove these toxins, and boiling water does not address these toxins. Dr. Halket advised Canada of the findings from the 2018 and 2019 studies and proposed a testing protocol to monitor and investigate algal toxicity in Split Lake and in the treated water from the water treatment plant. However, Dr. Halket stated that Canada has no such equivalent testing:

> Canada's own *Guidelines for Canadian Drinking Water Quality: Guideline Technical Document – Cyanobacterial Toxins*, a copy of which is attached as **Exhibit "I"**, notes that "it can be very difficult to treat source water that is significantly impacted by cyanobacteria (large bloom)", and recommends a range of corrective actions, including "switching to a alternative water supply" [*sic*]

[117] Despite Dr. Halket's willingness to perform the testing, Canada declined to provide funding to do so. "As a result, [Tataskweyak] continues to lack the data required to better

understand community members' inability to rely on water drawn from Split Lake", nor the abilities and inabilities of their present water system given these conditions.

(g) *Professor Aimée Craft*

[118] Scope: Professor Craft is a law professor with knowledge of the sacred significance of water to First Nations and the consequences of a lack of clean water for First Nations cultural and spiritual practices.

[119] Evidence: Professor Craft showed that the impacts of long-term drinking water advisories on Class Members and First Nations are widespread, and attack the physical, emotional, mental, and spiritual health of Class Members. Inadequate access to safe water perpetuates and exacerbates disadvantage against Indigenous on-reserve residents, including by reducing their economic opportunities, causing them physical harms, psychological harms, and by diminishing their spiritual practices.

[120] Professor Craft showed that Class Members have sincere spiritual beliefs and practices that rely on adequate access to clean water. First Nations people have a profound spiritual relationship with water. Water carries sacred significance to First Nations' identities, ways of life, and cultural and spiritual practices:

> Many Indigenous peoples refer to water as kin. "[W]ater is seen as an ancestor and as a relative with agency within this network of life, one who deserves respect, care, and protection."
>
> Indigenous laws are based in complex systems of relationship and/or kinship. These systems of relationship extend to both human kinship and non-human kinship.

[121] The lack of clean water interferes with the Class Members' ability to practice their cultural and spiritual traditions. This includes the ability to practice ceremony, such as sweat lodges. Boiling contaminated water does not alleviate that harm.

[122] Professor Craft also described the sacred relationship that Indigenous women share with water through their roles as mothers. First Nations women's powerful spiritual connection to water and the significant responsibilities of guarding and managing water sources also go beyond the relationship of giving life: "Our relationship with water is not just about our relationship with giving life; it's a relationship based in thinking about how we live on the earth. That's really a lifelong learning."

[123] This relationship extends to future generations, as well as the legal, ethical, and moral obligations of Indigenous peoples to other beings in Creation that also rely on water for their life. Such beings include fish, turtles, beavers, ducks, geese, loons, and all creatures who come to water as a drinking and bathing source:

> First Nations people have a responsibility to ensure clean water for not only for themselves but for all of creation. This is a longstanding responsibility that has been interrupted by capitalism, assimilation, extractivism and pollution, amongst many other factors. "First Nations have exercised inherent responsibilities to fulfill obligations to the Creator to ensure clean water for all living things since time immemorial."

[124] These obligations, including their connected practices, ceremonies, and traditions, are expressed as Indigenous laws by Indigenous people in Canada, with many First Nations having confirmed this through written laws and written declarations.

[125] Ultimately, Professor Craft explained that a lack of access to safe and reliable water causes territorial, cultural, ceremonial, social dislocation and disassociation, which directly manifests as spiritual dislocation. This spiritual dislocation has immediate and intergenerational impacts on Class Members and First Nations, with potentially irreversible consequences to Class Members and future generations. Professor Craft noted that the Truth and Reconciliation Commission of Canada adopted the United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP] as the framework for reconciliation in Canada. She notes that UNDRIP Article 25, provides protection for the special relationship Indigenous peoples have with water.

(h) *Elder Dorothy Taylor*

[126] Scope: Traditional knowledge keeper with knowledge of the sacred role of water for First Nations.

[127] Evidence: Elder Taylor, from Curve Lake First Nation [Curve Lake], has been identified as a person that can speak with authority and knowledge about the traditional perspective on water. She has been actively working for the past twelve years on educating people on and promoting the sacredness of water. She is an Elder and Knowledge Keeper, a hand drummer, and Water Walker. Elder Taylor described the Water Walk ceremony:

> Grandmother Josephine Mandamin…known for her commitment and initiating the Water Walks…recognized the poor condition of the waters, especially water quality on reserves across Ontario. She took it upon herself to bring greater awareness about just how precious, just how sacred water is to indigenous people and to us all. She walked the perimeter of every great lake, starting with Lake Superior in 2003. It is estimated that she has walked a total of 25000 kilometers for the water. She passed away at the age of 71 in 2018.

> The Water Walk is a ceremony in action. It is led by a woman carrying a copper pail of the lake water, and a man walking beside her carrying an eagle staff. The water walkers participate by walking and praying from sunrise to sunset. Curve Lake First Nation sponsored a community Water Walk in May of 2015. We walked Upper Chemong Lake praying for the water in ceremony and prayer. The local Water Walkers are named Nibi Emosaawdamajig and have walked for the water since 2009.

[128] Elder Taylor identified water as the vital center of life itself both coming from and flowing to the Creator. She described that the 2014 Sacred Water Circle organized an international gathering, which hosted many Elders from many Nations across Turtle Island to share their teachings about the significance and healing power of water.

[129] Elder Taylor shared the first part of the Ojibwe Creation story originating from the Midewin Lodge ceremonial teachings. While it is not customary for the re-telling to be done in written form, Elder Taylor did so for the benefit of the Court's understanding and for the benefit of her people and her beloved community. Out of respect for this tradition, the story will not be reproduced here by the Court, except to say that this creation story explains that water was created first, was created in four forms (one of which is Mide Waabo, the water of the spirit), and flows throughout all of creation. Elder Taylor explained that sources of water coming from outside the traditional territory of the Nation do not meet the traditional obligations for Mide Waabo, compromising the sacredness of ceremony.

[130] Elder Taylor states that water, created before us, is sacred. It should be treated with a kind and esteemed attitude. The quality of, and access to, safe water is of great concern to the Elders and Knowledge Keepers that are responsible to the community to perform ceremony.

Ceremony water must be sourced from the traditional territory in which you pray. The spiritual essence and energy of the water is compromised when it is bottled and sourced from outside the traditional territory.

(i) *Jillian Campbell*

[131] Scope: Toxicologist with knowledge of injuries caused by long-term drinking water advisories in general.

[132] Evidence: Ms. Campbell is a toxicologist and senior project manager with over 15 years of experience in human health and ecological risk assessment, toxicology, and contaminated site investigation. Ms. Campbell was relied upon for her opinion and analysis in the Previous Litigation Settlement agreement on the following:

a) injuries class members were at risk of by using treated or tap water in accordance with a long-term drinking water advisory or by restricted access to treated or tap water caused by a long-term drinking water advisory;

b) the symptoms of those injuries;

c) the risk that class members would suffer those injuries; and,

d) the likely impact of [*sic*] on class members if they suffered those injuries.

[133] Ms. Campbell provided her views on Article 8.02 and Schedule H of the Previous Litigation Settlement agreement, identifying the range of injuries that Class Members might plausibly have suffered by using treated or tap water in accordance with a LTDWA, or as a result of restricted access to treated or tap water caused by a LTDWA, and the primary symptoms of those injuries.

(j) *Dr. Gary Chaimowitz*

[134] Scope: Psychiatrist with knowledge of the types of mental health impacts caused by long-term drinking water advisories.

[135] Evidence: Dr. Chaimowitz is 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. Dr. Chaimowitz consulted with counsel for the Previous Litigation Settlement agreement on the following:

a) mental health injuries class members were at risk of by using treated or tap water in accordance with a long-term drinking water advisory or by restricted access to treated or tap water caused by a long-term drinking water advisory;

b) the symptoms of those injuries;

c) the risk that class members would suffer those injuries; and

d) the likely impact of [*sic*] on class members if they suffered those injuries.

[136] Dr. Chaimowitz provided his views on Article 8.02 and Schedule H "Mental Health" row, identifying the range of mental health injuries that Class Members might plausibly have suffered by using treated or tap water in accordance with a LTDWA, or as a result of restricted access to treated or tap water caused by a LTDWA, and the primary symptoms of those injuries.

[137] Canada cross-examined Mr. Dean, Dr. Black, Dr. Reynolds and Dr. O'Gorman.

(3) The Defendant's Evidence

[138] Canada calls and relies upon three fact witnesses.

(a) *Ian Corbin*

[139] Mr. Corbin was employed by Indian and Northern Affairs Canada [INAC] in various positions related to on-reserve infrastructure between 1978 and 2006. Mr. Corbin's affidavit evidence presented his knowledge of Canada's policies, supports, and efforts regarding safe drinking water during the 1980s to 2006.

[140] Mr. Corbin reiterated Canada's commitment to supporting First Nations to have appropriate water systems to deliver safe drinking water in their communities. Mr Corbin shared guidelines of water testing and monitoring, including a brief history of the 1980s to 2006, beginning with a review of section 35 of the *Constitution Act, 1982.* Mr. Corbin related a number of Canada's general efforts in that time period towards funding and trainer programs, Canada's action plans, commissioned reports, and funding amounts provided.

[141] Mr. Corbin stated that nationally, most First Nations have on-reserve water that is clean and safe to drink. Mr. Corbin disagreed that Canada held responsibility for on-reserve water infrastructure prior to the 1980s. Although Canada was involved with and had built or funded much of the on-reserve water infrastructure, Canada's responsibility was not exclusive. Canada provided financial and advisory support for the operation and maintenance of the infrastructure it funded, overseeing capital projects, but it was First Nations who were directly involved in the daily operation and maintenance of the systems. Over time, management and planning of infrastructure development was devolved to First Nations leadership in a "deliberate effort to involve the community" in response to First Nations' requests.

[142] By the mid-1990s, Canada had shifted towards a devolution of direct responsibility for capital projects to First Nations, offering “greater responsibilities and greater involvement” consistent with Canada’s support of the inherent right to Aboriginal self-government. Canada created “funding arrangements with First Nations that provided them greater flexibility, [and] greater decision-making powers … all developed in consultation with First Nations.” Part of this operation and maintenance funding included the national CRTP to train and mentor operators of First Nations drinking water and wastewater systems.

[143] In 2003, INAC and Health Canada developed the First Nations Water Management Strategy, including: comprehensive water quality standards and protocols; an effective water quality monitoring program; plans to examine existing policies and regulations; and assessing and developing new regulations and compliance policies. Various procedures and policies were developed in the mid-2000s, including ISC’s Community-Based Water Monitor Program, for which ISC provided funding and training to community-based drinking water quality monitors.

[144] To support First Nations in identifying upgrades and new development needs, Canada implemented the Asset Condition Reporting System program [ACRS Program]. In this program, third-party consultants perform inspections every three years, assessing the condition of the assets, adequacy of maintenance efforts, and additional required maintenance. The resulting inspection report is shared and discussed with the Band Council and ISC regional office.

[145] Between 1995 and 2003 Canada spent approximately $1.9 billion to support First Nations to provide safe drinking water and wastewater services. Then between 2003 to 2016 Canada

provided $4.6 billion in addition to its annual funding allocation of approximately $189.1 million. Since at least the 1990s Canada has funded capital water projects at 100% of costs.

(b) *Karl Carisse*

[146] Mr. Carisse was employed by the Government of Canada as Director General of the Service Policy and Strategy Directorate, within the Strategic and Service Policy Branch of Employment and Social Development Canada from 2006 to 2017.

[147] Mr. Carisse also reiterated Canada's commitment to First Nations on reserve and stated that most First Nations on reserve have water that is clean and safe to drink. Mr. Carisse cited the shared responsibility and roles for provision of water services to reserve communities. He cited that First Nations own, control, operate and maintain their own water systems, coupled with Canada's policies, initiatives, and guidelines for funding to provide support for water services.

[148] Mr. Carisse provided an overview of the history of programs, funding, projects, and First Nations Infrastructure Investment plans available from 2006 to 2017. Mr. Carisse pointed to Canada's general budget and policy decisions in relation to on-reserve drinking water.

[149] Mr. Carisse stated in the mid-2010s there were approximately 100 LTDWAs in effect at any given time. In May 2006, INAC, Health Canada, Environment Canada and AFN created the "Expert Panel on Safe Drinking Water for First Nations to provide advice on options for an appropriate regulatory framework, including new legislation for drinking water and wastewater treatment for First Nations communities." The panel's research resulted in the November 2006 *Report of the Expert Panel on Safe Drinking Water for First Nations*, Volumes I and II.

[150] In 2013, Canada enacted the *Safe Drinking Water for First Nations Act*, SC 2013, c. 21, launching an engagement process with First Nations and other stakeholders in the fall of 2014 to begin developing regulations under the act. However, following the 2015 federal election, Canada renewed its commitment to improve safe drinking water for First Nations, with a priority to end the LTDWAs. This paused the regulations development engagement process.

[151] Each First Nation in Canada is unique. Every First Nation reserve has its own particular location, geology, topography, water supply, and water facilities, creating unique needs for each First Nation. Funding for operations, maintenance, and construction of on-reserve water infrastructure is primarily administered through the ISC Capital Facilities and Maintenance Program, which also includes other capital asset categories such as schools, housing, roads, and waste management. From 2008 to 2016 the First Nations Water and Wastewater Action Plan was initiated to focus funding on infrastructure, operations and maintenance training, water quality monitoring, and technical standards. This was followed by the First Nations Water and Wastewater Enhanced Program, initiated in 2016, which is subject to priority ranking programs under formula-based (operations and maintenance) or proposal-based (capital projects) funding. However, funding must be allocated across regions and prioritized among competing First Nations. The National Priority Ranking Framework and criteria ensure "factors of highest priority (such as health and safety) maximally influence on [*sic*] the overall ranking score."

[152] The initiation of any new capital project is a First Nation's responsibility. To be eligible for funding, First Nations, in consultation with ISC, are required to develop an annual "First Nations Infrastructure Investment Plan" to identify funding priorities. Feasibility studies then evaluate the cost considerations and compare the proposed options to determine what will be the

most cost-effective in the short-term to the long-term. As with all government services, not all infrastructure projects will receive the level of intended funding identified, and adjustments occur as community, project, and financial circumstances change. Annual Performance Inspections are carried out each year on reserve, conducted by third parties, and funded by ISC.

(c) *Curtis Bergeron*

[153] Mr. Bergeron has worked for Canada since 2000 and has been employed by ISC since its creation in late 2017. Currently employed as the Acting Director of the Strategic Water Management Directorate within ISC, Mr. Bergeron's duties include:

> Supporting the administration of the Directorate's national funding allocation; reviewing and approving large water infrastructure projects; overseeing long-term drinking water advisory reporting and briefing products, public reporting and information requests; the development of policies and advice on water and wastewater programs and services on reserve; and providing briefings to senior officials, Ministers, and committees regarding clean water drinking [*sic*] issues.

[154] Mr. Bergeron picked up where Mr. Carisse left off, citing the current state of the safe drinking water for First Nations communities, the monitoring of those locations, and the drinking water advisories. Mr. Bergeron generally commented on funding since 2016, Canada's commitment to end long-term drinking water advisories, and its current efforts to effect legislative change. Mr. Bergeron also detailed the *Tataskweyak* settlement, noting Canada's ongoing obligations, and Departmental Plan. The testimony provided speaks to First Nations generally and does not address any specific First Nation nor its circumstances.

[155] Mr. Bergeron stated most First Nations have clean on-reserve water that is safe to drink. In 2018, Canada expanded its LTDWA initiative, adding 250 on-reserve public systems to its commitment. In 2021, there were 53 LTDWAs among 34 communities, with only a small percentage of those communities impacted. As of December 2023, 143 LTDWAs had been lifted since 2015, with only 29 LTDWAs remaining in 27 First Nations communities. Each system is unique, has unique needs, and the ways that Canada supports these water systems varies by province or region.

[156] ISC employs a variety of funding models and types of funding agreements, with varying specific capital funding. The Water and Wastewater Policy and Level of Service Standards define which water systems are not funded by ISC, setting out the conditions for funding that is "subject to the availability of funds and departmental priorities." For First Nations that require more funding than provided for in this policy, they are free to source these funds themselves.

[157] However, if funding is allocated, various protocols with standards for the design, construction and operational maintenance apply depending on the number of connections. The responsibility for bringing non-funded systems into ISC's purview falls to the First Nation.

[158] First Nations are responsible for entering into and overseeing the contracts with third parties for the design and construction aspects of the project. In addition, Asset Condition Reporting System inspections are carried out every three years, and Annual Performance Inspections are carried out yearly, both are shared with the First Nation. First Nations control, operate, and maintain their on-reserve water systems.

[159] Operations and maintenance funding is generally directed at covering the cost components required to operate and maintain water systems and associated equipment, including: operator salaries, benefits and training; supplies and materials, including process chemicals and fuel; the parts, tools, and equipment required for everyday operations and maintenance activities; electricity and other utilities; and contracted repair and maintenance services. Prior to 2019, an 80% subsidy was provided to First Nations, increasing to 100% as of 2020, with updated regional data and more recent industry costing studies. Additionally, the city centre and remoteness indices were modernized to include funding to reflect technological advances, industry best practices, applicable water standards, and operator training, certification and retention.

[160] The Plaintiffs cross-examined Mr. Corbin, Mr. Carisse, and Mr. Bergeron.

V. The Availability of Summary Judgment

[161] As stated in the Overview, Canada opposed the suitability of the Stage I Common Issue question for summary judgment. I disagree with Canada's arguments. I find the Stage I Common Issue question is suitable for summary judgment for the same reasons as found in *St. Theresa Point* at paras 109-111.

VI. The Sole Issue In This Case

[162] The sole issue for determination in this case is the certified Stage I Common Issue question:

> From June 20, 2020 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 drinking water that is safe for human use?

VII. The Parties' Positions

A. *Plaintiffs*

[163] On a virtually identical basis as was argued by the plaintiffs in *St. Theresa Point*, the Plaintiffs in this case submit that Canada owes the Class Members the duties of a fiduciary, both *sui generis* and *ad hoc*, as well as duties of care at common law. The Plaintiffs also submit that Canada owes the Class Members certain protections pursuant to sections 15, 7, and 2(a) of the *Charter*, or at minimum, facilitation of and non-interference with those rights as well as rights pursuant to section 36 of the *Constitution Act, 1982*.

[164] The Plaintiffs say that the underlying basis of these duties and rights arise from: 1) Class Members' dependency on Canada, which was directly or indirectly created by Canada, as illustrated by the evidence of Professor Perry, Dr. Reynolds, Dr. O'Gorman and Canada's witness, Mr. Corbin; 2) Canada's *de facto* control as discussed in the evidence of Dr. Black, and Canada's witness, Mr. Bergeron; and 3) Canada's repeated assurances that the Plaintiffs can rely upon Canada for the resolution of these issues as set out in the evidence of its witness, Mr. Bergeron, outlining statements from various Ministers of the Crown.

B. *Defendant*

[165] The Defendant also makes virtually identical submissions as it did, as defendant, in *St. Theresa Point*. In short, the Defendant disagrees that it owes any of the legal duties to the

Plaintiffs. The Defendant also disagrees that *Charter* duties are owed to the Plaintiffs. Alternatively, they say it is more appropriate to deal with the existence, scope and any breaches of such *Charter* duties during the Stage II proceeding. Lastly, the Defendant submits that section 36 of the *Constitution Act, 1982* has no application to this Action.

(1) The Duties Owed

(a) *Sui Generis Fiduciary Duty*

[166] The Plaintiffs make similar submissions as was argued by the plaintiffs in *St. Theresa Point* for the existence of a *sui generis* fiduciary duty, an *ad hoc* fiduciary duty, and a common law duty of care (at paras 133-146, 178-184, 199-221). The Defendant also makes essentially identical submissions as in *St. Theresa Point* on these matters (at paras 147-153, 185-192, 222-244).

[167] Though *St. Theresa Point* addresses an asserted right to access to on-reserve housing, the Plaintiffs submit that water on reserve, like the reserve land itself, is a non-fungible Aboriginal interest, not only for the purposes of habitation of reserve lands, but also for inextricable cultural purposes. This aspect of water on reserve reflects the important relationship of Aboriginal communities to the land. The interest, like the land, is unmistakably exclusively Indigenous.

[168] This interest in access to drinking water is similar. Drinking water ties to prior use and occupation. Access to drinking water made reserve settlement possible. In establishing reserves, First Nations could not live on the land at any point in time without access to drinking water. Accordingly, the Crown was aware and took steps to locate reserves where there was water.

[169] Since the establishment of reserves, standards for clean water have changed, along with access and availability. Changing circumstances compel changes in fiduciary practice. The content of the duty shifts. The duty itself does not.

[170] In terms of discretionary control required for a *sui generis* fiduciary duty, the Plaintiffs point to the "thicket" of required guidelines, protocols and policies that are a condition of funding. The scope of discretionary control, and the ability to exert that control demonstrates the existence of a fiduciary duty. How that control is exercised goes to the breach of the fiduciary duty, which is dealt with in Stage II.

[171] Discretionary control is not about the form or extent of the power to affect the interest, but it is precisely the vulnerability of the interest to the risk of fiduciary misconduct or ineptitude that demonstrates a fiduciary duty is owed. The fact that there may exist some shared control does not negate the existence of a fiduciary duty. This subset of First Nations is uniquely vulnerable to Canada's failure to discharge its obligations, as evidenced by the fact that they went more than a year under a LTDWA during the Class period.

[172] In terms of conflicting priorities, Canada led no evidence that there are concrete priority conflicts. Even when there are competing priorities, these priorities do not negate the *sui generis* fiduciary duty.

[173] The Defendant takes contrary positions on these submissions.

(b) *Ad Hoc Fiduciary Duty*

[174] Though many of the elements for this test overlap with the *sui generis* test to establish a fiduciary duty, the key distinguishing element is the undertaking to act in the best interest of the First Nation. As stated, the parties' submissions are virtually identical to those made by the parties in *St. Theresa Point*.

(c) *Common Law Duty of Care*

[175] The parties agree on the framing of the *Anns-Cooper* test for the establishment of a common law duty of care: (i) there is a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff, giving rise to a prima facie duty of care; and (ii) there are no residual policy reasons as to why this prima facie duty of care should not be recognized.

[176] The parties disagree whether a common law duty of care is established on the facts of this matter. Their respective submissions are virtually identical to those made in *St. Theresa Point* (at paras 199-221, 222-244).

(d) *Conclusions on the Fiduciary Duties and the Common Law Duty of Care*

[177] I find that the Plaintiffs have established the existence of a *sui generis* fiduciary duty concerning on-reserve access to safe drinking water. This relationship to water on reserve reflects and is part of the important relationship that Aboriginal communities have both to water and to the land. It relates to the Aboriginal peoples' prior use and occupation of the traditional territories and now the respective reserve lands set apart under the *Indian Act*. This interest, like

the land, is unmistakably Indigenous. There is also ample lay and expert evidence of discretionary control being exercised by Canada over the access to safe drinking water by vulnerable on-reserve First Nations. There is also no clear evidence from Canada about conflicting priorities when it comes to access to safe drinking water.

[178] I arrive at this finding for the same legal basis as set out in *St. Theresa Point* at paras 154-175.

[179] I find that the Plaintiffs have established the existence of an *ad hoc* fiduciary duty. I agree with the Plaintiffs that there is considerable overlap with the existence of a *sui generis* fiduciary duty and an *ad hoc* fiduciary duty, and I am persuaded by both the lay and expert evidence that there exists an undertaking on the part of Canada to act in the best interest of First Nations. I arrive at this finding for the same legal basis as set out in *St. Theresa Point* at paras 193-198.

[180] I find that the Plaintiffs have established the existence of a common law duty of care. Specifically, there is a relationship of proximity between Canada and the Class in which the failure to take reasonable care might foreseeably cause loss or harm to the Class, giving rise to a prima facie duty of care. On the evidence before the Court, there are no residual policy reasons as to why this prima facie duty of care should not be recognized. I arrive at this finding for the same legal basis as set out in *St. Theresa Point* at paras 245-254.

(2) Analysis of *Charter* and Constitutional Rights

(a) *Section 36 of the Constitution Act, 1982*

[181] Save for the subject matter of clean drinking water, as opposed to the right to access safe housing, the parties' submissions are identical to those set out by the parties in *St. Theresa Point*, except that the Plaintiffs in this case did not advance arguments regarding UNDRIP and its effect on the *Charter*. For the same reasons as in *St. Theresa Point*, I find that section 36 is not engaged (at para 303).

(b) *Section 15 Charter Protections*

[182] Like the parties did in *St. Theresa Point*, here the parties agreed on the two-part test for determining a section 15 *Charter* infringement. As in *St. Theresa Point*, I find it unnecessary to engage with those submissions.

[183] I find that at this stage of the proceeding, I need only determine whether section 32 of the *Charter* is engaged. I find that it is. Accordingly, I adopt the reasoning set forth in *St. Theresa Point* at paragraphs 268-270.

(c) *Section 7 Charter Protections*

[184] The parties have correctly set out the test for determining an infringement of section 7 of the *Charter* and their submissions are identical to the positions advanced by the parties in *St. Theresa Point*.

[185] As with my finding concerning section 15, I also find that section 7 of the *Charter* is engaged by virtue of section 32(1) of the *Charter*.

[186] Furthermore, I also find, as I did in *St. Theresa Point*, that special circumstances exist showing that Canada may have a positive obligation under section 7 of the *Charter* to provide protections for clean on-reserve drinking water (at paras 280-282). This is in addition to the established obligation to prevent any deprivations of any section 7 rights. I make this finding on the understanding that the full scope and extent of the section 7 *Charter* rights will be considered at Stage II, including whether any such rights have been breached.

(d) *Section 2(a) Charter Protections*

[187] The parties' positions on this issue are identical to the submissions advanced by the parties in *St. Theresa Point* (at para 283).

[188] I also find that, at this stage of the proceeding, that section 2(a) of the *Charter* is engaged. I do so for the same reasons as set forth in *St. Theresa Point* (at para 284).

VIII. Conclusion

[189] The Stage I Common Issue question is the focus of the Plaintiffs' motion for summary judgment. The Plaintiffs ask this Court to determine the nature and content of duties that Canada owes Class Members in respect of on-reserve water and water related infrastructure.

[190] Summary Judgment is appropriate on the facts of this case. As I have found that access to clean, safe drinking water on reserve is an aboriginal interest, consequently Canada owes a *sui generis* and *ad hoc* fiduciary duty to the Class both as individuals and to First Nations communities in a representative capacity.

[191] I have also concluded that Canada owes a common law duty of care to the Class Members.

[192] Moreover, I conclude that sections 15, 7 and 2(a) of the *Charter* are engaged. I have done so without delving into a consideration of the tests applicable to each and have done so only on the basis of section 32(1) of the *Charter*. To do more would delve into the determination of the scope and extent of such rights, and any breaches of such rights, which is a matter for the Stage II Common Issue determination. Moreover, with respect to section 7, I have found that there are special circumstances giving rise to both positive and negative protections.

[193] Lastly, I find that section 36 of the *Constitution Act, 1982* has no application to this matter.

ORDER in T-1937-22

THIS COURT ORDERS that:

1. The Plaintiffs' motion for summary judgment is allowed.

2. The Stage I Common Issue question is answered in the affirmative. From June 20, 2020 to the present, the Defendant owed 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 drinking water that is safe for human use.

3. Since the Plaintiffs have been overwhelmingly successful on this motion, save for their argument that section 36 of the *Constitution Act, 1982* is applicable in this case, they are entitled to costs based on the applicable tariff.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATE OF HEARING:	HEARING IN PERSON HELD ON OCTOBER 7 TO 9, 2024
ORDER AND REASONS:	FAVEL J.
DATED:	DECEMBER 5, 2025

ORAL SUBMISSIONS BY:

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