Federal Court Cour fédérale

Date: 20251205

Docket: T-1207-23

Citation: 2025 FC 1926

Ottawa, Ontario, December 5, 2025

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ST. THERESA POINT FIRST NATION and CHIEF ELVIN FLETT and CHIEF RAYMOND FLETT on their own behalf and on behalf of all members of ST. THERESA POINT FIRST NATION and SANDY LAKE FIRST NATION and CHIEF DELORES KAKEGAMIC on her own behalf and on behalf of all members of SANDY LAKE FIRST NATION

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

I. Overview

[1] On April 30, 2024, this Court certified the Class and the following common issue:

> From June 12, 1999, to the present, did the Defendant owe a duty or obligation to class members to take reasonable measures to provide them with, or ensure they were provided with, or refrain from impeding, access to adequate housing on First Nations reserves?
>
> [Stage I Common Issue]

[2] Generally, this class action [Action] seeks to address inadequate access to on-reserve housing and its resultant impacts on Class Members. This Action was divided into two stages. Stage I has a singular Common Issue question, set out above and Stage II has nine Common Issue questions, to be determined if the Stage I Common Issue question is answered in the affirmative.

[3] The Class is comprised of remote First Nations and their members. Class Members' housing is overcrowded and dilapidated which the Plaintiffs claim has caused significant damages to Class Members' health, safety, and ability to practice and share their culture and spirituality.

[4] The Plaintiffs bring a motion for summary judgment that is exclusively focused on the Stage I Common Issue. The motion for summary judgment seeks to determine the nature and content of the duties that the Defendant, also referred to as Canada, owes Class Members in respect of access to adequate and safe housing on their reserves. Stage II will proceed subsequently to establish any breaches of any duties and the damages to the Class Members.

[5] For the following reasons, I find summary judgment is appropriate in the present case. On the facts of this case, I recognize an aboriginal interest in on-reserve housing. Consequently,

Canada owes fiduciary duties to the Class both as individuals and to First Nations communities in a representative capacity. I also find that the application of the *Anns/Cooper* test to the facts in this case results in Canada owing a common law duty of care to the Class Members. I also recognize that special circumstances are present in this case which may result in Canada owing Class Members positive obligations pursuant to section 7 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*]. I further find that sections 15, 2(a) and 2(b) of the *Charter* are engaged by virtue of section 32(1) of the *Charter*. Lastly, I do not find that section 36 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982 (UK)*, c 11 [*Constitution Act, 1982*] is engaged. Accordingly, the Stage I Common Issue is answered in the affirmative for all the issues, save for section 36 of the *Constitution Act, 1982*.

II. Background

[6] On April 30, 2024, this Action was certified on consent. This Action was initiated by Chief Emeritus Elvin Flett and Chief Raymond Flett on their own behalf and on behalf of St. Theresa Point First Nation [St. Theresa Point]. It was also initiated by Sandy Lake First Nation and Chief Delores Kakegamic on her own behalf and on behalf of Sandy Lake First Nation [Sandy Lake]. This Action alleges significant harm to the Class stemming from inadequate access to housing on reserve. The Plaintiffs claim Canada contravened the Honour of the Crown and breached its fiduciary duties to the Class by creating a lack of access to adequate housing on First Nation reserve lands and by failing to remedy that issue.

[7] In the Class Members' communities, it is uncontroverted that it is commonplace for tiny, dilapidated residences to house dozens of people, many of them children. These houses often

have significant structural deficiencies and require significant renovations, as described below. Class Members' reserves are generally short hundreds of houses to adequately shelter their populations. In many cases, families on reserve live in condemned units because they have no other housing options. People are also being displaced from their communities, their families, their culture and traditions by seeking shelter away from their communities. It is very difficult, if not impossible for these displaced members to return to their communities due to the lack of access to safe housing. There is little indication of progress, as these conditions continue to worsen, and housing continues to deteriorate.

[8] Some of the tragedies associated with these conditions have garnered media attention. For example, two fourteen-year-old girls froze to death in St. Theresa Point on March 1, 2023. Another example is when three children in Sandy Lake, aged nine, six and four, died when their poorly built house caught fire in January, 2022.

[9] Canada set aside reserves for First Nations, including the Class, often in remote and inaccessible places within a First Nation's traditional territories. Through the *Indian Act*, RSC 1985, c I-5 [*Indian Act*], Canada maintained and continues to maintain control over all aspects of the daily lives of First Nations and First Nations people living on reserves. Due to the complex history of the colonial relationship between Canada and First Nations, the Class Members in this case are dependent on Canada to provide housing on their reserves. A structural deficit has been created, and it has been virtually impossible to keep up with the housing needs of First Nations.

[10] Canada acknowledges the significant housing gaps that remain on reserve, recognizing there is more to be done so that all First Nations have access to safe and adequate housing.

Canada states its ongoing commitment to funding First Nations housing as a matter of public policy, as it continues to work in collaboration with national and regional First Nations organizations on long-term strategies to address housing challenges and ensure that First Nations have the tools for community-led housing solutions. Canada states that it is committed to working with First Nations to address their immediate and longer-term housing needs.

[11] The Plaintiffs are seeking $5 billion dollars in damages for the Class, and funding to support housing on reserves throughout the country.

[12] These general facts are set out in the vast record before the Court. Thirty-three (33) lay witnesses provided affidavits setting out these conditions and impacts. In addition, the Plaintiffs provided affidavits from twelve (12) expert witnesses, authoring a total of eleven (11) expert reports. The Court previously granted leave for the Plaintiffs to file more than five (5) expert reports by an Order dated February 28, 2025, on the understanding that, at that time, the Court was not addressing the admissibility or relevance of the expert evidence (*St. Theresa Point First Nation v Canada (Attorney General)*, 2025 FC 382).

III. Scope and Admissibility of the Plaintiffs' Expert Witnesses

A. The Plaintiffs' Experts

[13] The Plaintiffs provided the following twelve (12) expert witnesses, with eleven (11) written reports. Briefly, the scopes of expertise and evidence of the twelve (12) expert witnesses are as follows:

(a) *Dr. Kerry Black*

[14] Scope: Civil and environmental engineer and infrastructure advisor with specialized knowledge of Canada's approach to on-reserve infrastructure and operations and maintenance, providing insights on what constitutes adequate housing on First Nations reserves.

[15] Evidence: Dr. Black addresses Canada's approach to on-reserve infrastructure, operations and maintenance, providing insights on what constitutes adequate housing on First Nations reserves. Dr. Black's background equips her to analyze how the federal government has funded housing from 1999 to the present. Her report examines how federal policies, particularly regarding funding, influence the design and construction of housing, focusing on various factors such as structure, ventilation, insulation, electrical systems, sewage, plumbing, materials, design, and access to labor. Additionally, Dr. Black is tasked with defining what constitutes adequate housing on First Nations reserves, estimating the costs associated with building and maintaining such housing, and comparing these costs for 2, 3, and 4-bedroom homes across different Zones as outlined in Canada's Band Classification Manual.

(b) *Dr. Michael Prince*

[16] Scope: Professor of social policy with knowledge of First Nation fiscal capacity, funding mechanisms for on-reserve housing, and the mechanisms for inter-governmental equalization that exist in Canada more broadly.

[17] Evidence: Dr. Prince addresses the issues related to First Nation fiscal capacity, funding mechanisms for on-reserve housing, and the mechanisms for inter-governmental equalization

that exist in Canada more broadly. Dr. Prince's analysis focuses on the Government of Canada's funding mechanisms within the On-Reserve Housing Policy, assessing how these mechanisms act as constraints and controls on First Nations. He addresses the consequences of these funding constraints for First Nations communities and explores the implications of these mechanisms for the principle of equalization and Section 36 of the *Constitution Act, 1982*.

(c) *Dr. Jocelyn Burzuik*

[18] Scope: Construction manager with direct experience working with First Nations in Manitoba, who is able to assess on-reserve housing stock for compliance with building codes and is able to describe the impact of the materials and construction methods used on the longevity and quality of homes in Class Member First Nations.

[19] Evidence: Dr. Burzuik describes the suitability of construction materials used in on-reserve housing and how those materials in conjunction with construction methods used to build homes on reserve impact the longevity and quality of homes for the representative First Nations. She also describes her observations working with First Nations in Manitoba. Dr. Burzuik was retained to provide an expert assessment of housing on First Nations reserves, specifically conducting housing assessments for St. Theresa Point and Sandy Lake. Her expertise includes project management, scheduling, onsite construction management, and coordination of various project aspects such as subcontractors and contract administration. Dr. Burzuik evaluates the suitability of materials used in housing, the quality of construction methods applied, and the appropriateness of building locations selected. She examines how these factors impact both the

living environment of the homes and their longevity. Additionally, she reflects on her observations and experiences working on other First Nations.

(d) *Dr. Hymie Anisman and Dr. Kim Matheson*

[20] Scope: Dr. Anisman and Dr. Matheson are both neuroscience professors with knowledge about the link between inadequate housing, overcrowding, and adverse health outcomes in First Nations communities.

[21] Evidence: Dr. Anisman and Dr. Matheson jointly report about the link between inadequate housing, overcrowding, and adverse health outcomes faced by First Nations.

(e) *Dr. Marleny Bonnycastle*

[22] Scope: Professor of social work and interdisciplinary researcher who describes how housing deficits contribute to homelessness, substance abuse, domestic abuse, mental health problems, and displacement of First Nations peoples.

[23] Evidence: Dr. Bonnycastle was retained to provide an expert report describing the effects that housing deficits have on homelessness, substance abuse, domestic abuse, and mental health issues, particularly among youth, women, and LGBTQ2+ individuals. Dr. Bonnycastle also examines how housing deficits lead to the displacement of First Nations peoples, resulting in cultural degradation and intergenerational impacts. Additionally, her report discusses the relationship between poor housing conditions and health outcomes, particularly in the context of COVID-19 and other illnesses.

(f) *Dr. Shirley Thompson*

[24] Scope: Professor of natural resources, focussing on environmental health and community-led participatory research, with knowledge of the impact of federal policies on on-reserve housing deficits and how these deficits exacerbate the impact of infectious diseases, such as COVID-19.

[25] Evidence: Dr. Thompson's report explains the various impacts of the limits on First Nations' control of on-reserve housing. Dr. Thompson provides evidence explaining how barriers to funding make quality housing material and equipment unaffordable, and how limits imposed by the *Indian Act* on mortgaging land affect homeownership and financing options. Dr. Thompson speaks to how federal policies, in particular the *Indian Act*, contribute to housing deficits, and how these deficits exacerbate the impact of infectious diseases, such as COVID-19, in First Nation communities.

(g) *Dr. Genevieve Painter*

[26] Scope: Legal historian with knowledge of the evolution of the federal government's approach to on-reserve housing and the degree of Canada's control over on-reserve housing from the 1960s through 2017.

[27] Evidence: Dr. Painter examines the longstanding inadequacies in housing conditions, highlighting how federal policy decisions since the 1930s have contributed to this ongoing crisis. Throughout her analysis, Dr. Painter traces the evolution of federal housing policy, noting shifts from direct provision of housing to subsidy-based approaches and the increasing reliance on

private capital for funding. Additionally, she investigates the legal and jurisdictional foundations of Canada's control over on-reserve housing, highlighting the variations in federal responsibilities over time and the underlying objectives that guided policy decisions.

(h) *Dr. Barry Lavallee*

[28] Scope: Physician with knowledge of the impact of overcrowded or inadequate housing on the health and wellbeing of First Nations members.

[29] Evidence: Dr. Lavallee's analysis draws on his extensive experience in providing primary care and researching health outcomes related to housing conditions for First Nations people in Manitoba. His report outlines the ways in which inadequate housing contributes to illness and disease, emphasizing the critical link between housing quality and health outcomes in these communities.

(i) *Professor Brenda Gunn*

[30] Scope: Law professor with knowledge of the international response to housing conditions for First Nations in Canada and Canada's obligations under international law and the United Nations Declaration on the Rights of Indigenous Peoples [*UNDRIP*] to provide adequate housing. Professor Gunn is an expert on *UNDRIP*, with over 20 years of experience in researching the alignment of international and domestic law on Indigenous rights.

[31] Evidence: Professor Gunn describes the international response to housing conditions for First Nations in Canada and Canada's obligations under international law to provide adequate housing.

(j) *Stephen Burnett*

[32] Scope: Professional engineer with knowledge of the quality of band-owned housing, challenges in accessing funding for band-owned housing, and barriers to obtaining and transporting materials to remote First Nations in Ontario.

[33] Evidence: Mr. Burnett has extensive experience in project management, infrastructure planning, and municipal engineering. He has provided engineering services to First Nations clients in Northern Ontario and remote communities, focusing on residential housing design, infrastructure, environmental assessments, and water supply.

(k) *Dr. James Reynolds*

[34] 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.

[35] Evidence: Dr. Reynolds' evidence considers the following topics: (a) the role of the Indian Agent in the history of the Crown's relationship with and treatment of First Nations people; (b) when, why, and how the Crown's relationship with, and treatment of, First Nations peoples evolved from warriors/allies, to "wards", to rights-holders; (c) the historical control that

the Crown exercised over the reserve property of First Nations people, including housing infrastructure, and how the Crown's actions impacted the ability of First Nations peoples to control housing infrastructure on their lands; (d) how the Crown's control over reserve property changed from the 1970s to present, and how that change impacted First Nations' ability to control housing infrastructure on their lands. Dr. Reynolds has chronicled the significant historical developments over multiple centuries which have informed and shaped the relationship between the Crown and First Nations, particularly as it concerns the Crown's approach to First Nations infrastructure on reserve.

B. The Law

[36] A trial judge must determine the nature and scope of proposed expert evidence before applying the expert evidence admissibility test (*R v Bingley*, 2017 SCC 12 at para 17 [*Bingley*]). Then, the discretionary two-step test for admissibility of expert witness evidence, as set out in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 [*White Burgess*], citing *R v Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC) [*Mohan*] involves the judge's consideration of: 1) four threshold requirements – logical relevance, necessity, the absence of an exclusionary rule, and a properly qualified expert; and, 2) a balancing of potential risks and benefits to the trial process in admitting the evidence (*White Burgess* at paras 23-24).

C. The Parties' Positions

(1) Defendant's Position

[37] Generally, Canada opposes the admission of three Plaintiffs' expert reports, either in whole or in part, for containing inadmissible legal opinions interpreting Canadian and

international law and for unnecessarily summarizing various reports: Dr. James Reynolds; Professor Brenda Gunn; and Dr. Shirley Thompson. Portions of the Thompson expert report cannot be admitted as the content is beyond the scope of any expertise that Dr. Thompson has.

[38] While initially challenging the scope of qualifications of the Plaintiffs' expert witnesses, at the hearing, Canada agreed to the scope of all, except that of Dr. Painter. Admissibility remains an issue.

[39] Expert witness scope and evidence admissibility, a question of law, must be decided prior to any determination on summary judgment (*Moffitt v TD Canada Trust*, 2021 ONSC 6133 at paras 61, 64, aff'd 2023 ONCA 349 [*Moffitt*]). An expert's evidence must be narrowed in scope to relate only to their special or peculiar knowledge through study or experience, with anything falling outside that scope being inadmissible (*Bingley* at para 15; *Mohan* at 25).

[40] The party tendering the evidence bears the onus of satisfying the *White Burgess/Mohan* two-step threshold test of admissibility (*Signalta Resources Limited v Canadian Natural Resources Limited*, 2023 ABKB 108 at paras 51-52 [*Signalta*]; *Moffitt* at para 71), to ensure the evidence enhances the fact-finding process and does not distort it (*Bingley* at para 13).

[41] Expert opinion is presumptively inadmissible (*Signalta* at para 50). Opinion offered on domestic law is inadmissible (*R v Comeau*, 2018 SCC 15 at para 40). Evidence providing legal conclusions is inadmissible (*Boily v Canada*, 2017 FC 1021 at para 33 [*Boily*]). Questions of law relating to international law such as the interpretation of international instruments, are within the prerogative of the Court. Expert opinion in international law will therefore not meet the threshold

requirement of necessity (*International Air Transport Association v Canada (Transportation Agency)*, 2024 SCC 30 at paras 65, 73-75, 78 [*IATA*]). Expert evidence in international law may be useful where it relates to questions of fact, such as issues of foreign law or of state practice in treaty application (*IATA* at para 73).

[42] Courts have been critical of experts having simply read literature on a specific area and putting forth an opinion represented as that of an expert (*R v Mathisen*, 2008 ONCA 747 at paras 126-127). Given the potential impacts of expert evidence, trial judges must be vigilant in monitoring and enforcing proper scope (*R v Sekhon*, 2014 SCC 15 at para 46).

[43] Canada suggests there are issues regarding the weight and reliability of the above reports, along with those of Dr. Black and Dr. Prince. Canada states the remaining evidence is generally admissible, subject to any issues arising from determinations on scope. Canada also reserves its right to object further should Stage II proceed to trial.

[44] Canada submits Dr. Painter's curriculum vitae does not support expertise related to reserves and on-reserve housing. The bulk of Dr. Painter's education relates to feminine legal studies and does not lend itself to the experience or knowledge of life on reserve. Canada submits her report is therefore inadmissible.

[45] In the alternative, if Dr. Painter's report is admissible, Canada submits it be given less weight for the following reasons: Dr. Painter's use of subjective language; limitations in data collection, including constraints on important relevant cabinet documents; failure to account for time gaps; reliance on third-party media reporting on government policy; the opinions provided

lacked of a factual basis; and, lack of awareness of the state of housing for individual First Nations like St. Theresa Point.

[46] Canada submits Dr. Reynolds' report is inadmissible in part, insofar as it recites federal legislation and legislative history. Canada says those parts of the report do not satisfy the necessity threshold requirement. Likewise, those areas of Dr. Reynolds' report that summarize political reports detailing findings of a legal nature, such as the Royal Commission on Aboriginal Peoples [RCAP], should be excluded (*Buffalo v Canada*, 2001 CanLII 22131 (FC) at para 23 [*Buffalo*]). The history of domestic law should be explained by counsel, then interpreted and determined by the Court. Likewise, all areas of legal interpretation set out in Dr. Reynolds' report are inadmissible (*Cowichan Tribes v Canada (Attorney General)*, 2020 BCSC 917 at paras 55-56 [*Cowichan*]).

[47] Sections of Dr. Reynolds' report contain unnecessary legal opinion, as legal conclusions are drawn on concepts of Crown control, both historically and presently (*Boily* at paras 38-39). This commentary should likewise be excluded as "argument about the state of the law in the guise of an opinion" (*Mathias v Canada*, 1998 CanLII 7607 (FC) at para 9 [*Mathias*]).

[48] The areas of Dr. Reynolds' report that offer content opinion, rather than historical context, are inadmissible (*Cowichan* at paras 55-56, 60, 76). Though laws of evidence are applied more to flexibly in historical Aboriginal claims, Canada suggests this action is not analogous to those claims.

[49] Canada submits Professor Gunn's report is entirely unnecessary and inadmissible, essentially containing a collection of quotes from United Nations Special Rapporteurs, which are considered secondary authorities (*Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 16 [*FN Children's Act Reference*]).

[50] The majority of Professor Gunn's report provides her opinion on questions of law well within the Court's capability, such as: Canada's international law obligations; the status of *UNDRIP*, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDRIP Act*]; various international treaties; her interpretations of *UNDRIP* and treaty instruments giving rise to the presumption of conformity (*IATA* at paras 75-77).

[51] Even if Professor Gunn's report were admissible, it should be given low weight because of its: reliance on outdated sources; absence of independent analysis; conflation of evidence or unsubstantiated claims; and partisan views. In large, news reports informed Professor Gunn's understanding of federal funding, and she publicly describes herself as an advocate, indicating potential bias and a lack of independent objective analysis.

[52] Canada submits Dr. Thompson's report is inadmissible in part. Impermissible legal opinions and conclusions are offered in the first section of the report at pages 4-12, purporting to interpret: various current or historical *Indian Act* sections, as they relate to the *Constitution Act, 1982*; the historical and current *Indian Act* definition of a person; issues of Crown title; the prohibition against mortgaging of reserve lands; land use; the legal concept of tenure; and, Crown "control" over housing flowing from the *Indian Act*. Even if this evidence were admissible, it falls outside Dr. Thompson's areas of expertise.

(2) Plaintiffs' Position

[53] There is no basis to exclude any expert evidence at this preliminary stage. To the extent that there are any issues, they can be appropriately addressed through weight.

[54] Courts have generally "adopted a flexible approach to the rules of evidence in Aboriginal cases" (*Southwind v Canada*, 2016 FC 890 at para 18). As explained in *Mitchell v Minister of National Revenue*, 2001 SCC 33 at para 30 [*Mitchell*]:

> The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" … Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.
>
> [citations omitted]

[55] Dr. Reynolds is a legal historian with an extensive record of professional work in legal history focused on Crown-First Nations relations, which was thoroughly canvassed in his affidavit, cross-examination, and re-examination. Canada's description distorts Dr. Reynolds' expert evidence, which centers on legal history, and is necessarily informed by the legislative history, secondary reports, and legal developments which shaped the relationship between the Crown and First Nations.

[56] In *Alderville First Nation v Canada*, 2014 FC 747 at para 46 [*Alderville*] this Court expressly recognizes:

> …in the area of Aboriginal law dealing with the history and ethnography of First Nations and their relationship with the Crown, properly qualified experts may be permitted to provide opinion evidence which may relate to legal issues. This is the case when the expert is properly qualified and the expert opinion evidence is necessary to assist the Court.

[57] Though the class period in this case is from 1999 to present, understanding the history between the parties, including the lengthy historical legal matters, and the Crown's historical approach to First Nations people and infrastructure on reserve, is vital (*Saugeen First Nation v The Attorney General of Canada*, 2021 ONSC 4181 at paras 1-7, 9, 13, 23, 64; *R c Montour*, 2023 QCCS 4154 at paras 1-2, 750, 751, 757 [*Montour*]; *Ermineskin v Canada*, 2005 FC 1623; *Buffalo* at paras 24, 31).

[58] Canada also offers *Buffalo* to support the proposition that experts cannot offer "summation of political reports". This is inaccurate. Of the two impugned reports in *Buffalo*, one was inadmissible due to its generally political nature, as it was a summary of a single RCAP document. However, the second report, tendered by a legal historian, referencing cases, legislative instruments, reports, and academic sources, was admitted. The Court rejected Canada's nearly identical submissions, commenting that if Canada's position was accepted, then "Canadian legal history could effectively be barred from ever being an acceptable subject matter of expert testimony" (*Buffalo* at para 24).

[59] Professor Gunn's report addresses two questions: 1) the international response to the state of First Nations housing in Canada; and 2) *UNDRIP* as it pertains to housing. These are precisely the type of contested, emerging, and newly developed subjects on which Professor Gunn's expert opinion can assist the Court, meeting the necessity threshold (*IATA* at para 73). Professor Gunn's analysis goes beyond the normal experience of the trier of fact, meeting the criteria for necessity (*R v F., D.S.*, [1999] OJ No 688, 1999 CanLII 3704 (ONCA) at para 65).

[60] Canada relies on a selective treatment of *IATA* that does not withstand scrutiny. In *IATA*, Rowe J. wrote for a unanimous court that judicial discretion regarding the admissibility of expert evidence on international law must be maintained:

> In applying *Mohan*, the admissibility of expert evidence is within the court's discretion so long as the threshold requirements of admissibility are satisfied. Given the variety of contexts in which expert evidence is sought to be adduced on questions of international law, the admissibility of such evidence is best left as a matter of judicial discretion rather than being subject to a fixed and invariable rule (para 79).

[61] *UNDRIP*'s ongoing, controversial status at international law and in Canadian law, evidenced in the party's divergence here, demonstrates the complexity and unsettled nature of the issue (*Kebaowek First Nation v Canadian Nuclear Laboratories*, 2025 FC 319 at para 229 [*Kebaowek*]; *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 317, Martin and O'Bonsawin J dissenting [*Dickson*]). Professor Gunn's evidence is necessary to assist this Court and the benefits of this evidence to the Court far outweigh the risks of its admission (*Mohan*; *R v V.K.*, 1991 CanLII 5761 (BCCA)).

[62] Dr. Thompson's report discusses the impact of federal policies, and laws such as the *Indian Act,* on housing on First Nations reserves. This is clearly distinct from legal opinion and includes various impacts of the limits on First Nations' control of on-reserve housing, such as barriers to funding, and limits imposed by the *Indian Act* on mortgaging land. To provide evidence of these impacts, Dr. Thompson provides necessary context by discussing the provisions and policies that create those impacts.

[63] In *Cowichan,* certain portions of an expert report written by a historical geographer and cartographer were deemed inadmissible for providing legal opinions. Young J. "dr[e]w the line at legal interpretation" finding the expert "should not be permitted to advise the court on the enforceability of legal documents". However, the expert's discussion of a Proclamation was admissible, with Young J. finding that placing it "in context is of assistance to the court and is not … inadmissible legal analysis" (*Cowichan* at para 64). This is precisely what Dr. Thompson's report provides.

[64] Dr. Thompson is highly qualified to discuss the impacts of federal policies on housing deficits in First Nations communities. She has conducted extensive research including peer-reviewed publications on this very topic. Though not cross-examined on her qualifications, they are set out in her affidavit.

[65] Though Dr. Painter has studied housing on reserve through the context of the reinstatement of First Nations women's status, for the purpose of this hearing, the difference is immaterial. Dr. Painter's task was to review Canada's historical record of evolving policies, which the Defendant accepts she is qualified to do. Dr. Painter is not a fact witness, she is a legal

historian providing background on the history and evolution of the federal government's approach to on-reserve housing. Nothing more is needed from her report other than this.

[66] Canada is concerned with the proposition that its earlier period of involvement in on-reserve housing included a direct role in construction. Dr. Painter's report is very clear where this proposition arises, and the evidence is sourced from the Defendant's own archive of documents. Likewise, the "subjective language" in the report is a recitation of language found in the documents and reports written by sources such as Canada Mortgage and Housing Corporation [CMHC]. These findings were confirmed and supported by Canada's fact witnesses, as well as the Office of the Auditor General of Canada, Reports of the Auditor General of Canada to the Parliament of Canada, *Report 2: Housing in First Nations Communities*, Independent Auditor's Report (2024) [2024 Auditor General Report].

[67] Canada cannot point to the Plaintiffs' evidence as insufficient without leading any evidence of their own. Rule 214 of the *Federal Courts Rules*, SOR/98-106 [Rule, or *Federal Courts Rules*] specifies that the parties cannot rely on what may later be adduced in evidence. Rather, it was incumbent on the Defendant to lead evidence to the contrary and dispute these points with their own evidentiary record. Canada chose not to do so.

[68] Reports not provided by Privy Council Office are subject to a wait period of one to two years. Canada's suggestion that the Plaintiffs wait for a number of years until Canada eventually discloses those records is contrary to *The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples* and fails to recognize the urgency of the situation.

[69] However, all of the Defendant's objections pertain to weight. The Plaintiffs have responded in a practical manner, generally not relying on evidence objected to by Canada.

(3) Conclusion

[70] Litigation involving Indigenous peoples, which relates to historical information and detail, often requires an examination of a lengthy record. The threshold question at Stage I requires an examination of whether certain legal duties exist and whether certain *Charter* rights are engaged. It would be virtually impossible to determine whether such legal duties exist without a more comprehensive record than is typically required in non-Indigenous civil litigation cases. In this case, a more comprehensive record of expert evidence is required due to the impacts or consequences that the long-standing relationship existing between Canada and Indigenous people may have on this Action.

[71] First, I accept the scope of expertise of Dr. Painter as set out above at paragraph 26. Dr. Painter's evidence, which touches directly on First Nations housing issues, provides necessary context to the Court to assist in properly determining the Stage I Common Issue question. As with all evidence, the Court will assess the weight to be given to Dr. Painter's evidence to the extent it is necessary for the determination of the Stage I Common Issue question.

[72] Second, at this early stage and considering the general question sought to be answered, the Court will admit the entirety of the expert reports of Dr. Reynolds, Dr. Thompson and Professor Gunn. I find that these experts and, all of the Plaintiffs' remaining experts, are qualified and meet the *White Burgess/Mohan* eligibility criteria for the following reasons.

[73] The Plaintiffs' experts' evidence is relevant and provides the necessary context to aid the Court in its determination of the Stage I Common Issue question [*Alderville* at para 46]. I agree with the Plaintiffs that Courts have generally adopted a flexible approach to the rules of evidence in Aboriginal cases (*Southwind v Canada*, 2016 FC 890 at para 18). Though the time period of this action does not go as far back as, for example, a historical treaty case, the legal issues in this Action require an examination of the history of relations between Canada and Indigenous people. This includes an examination of the legislative and policy approach of Canada *vis-à-vis* Indigenous people. This evidence will assist the Court in gaining a full appreciation of the context, facilitating the determination of the Stage I Common Issue question.

[74] I am also of the view that Professor Gunn's expertise and evidence on international law will assist the Court. I am exercising the Court's discretion to admit this evidence [*IATA* at para 79].

[75] The Plaintiffs' expert evidence is not excluded by any other exclusionary rules.

[76] Lastly, I find that of the experts are qualified to provide the expert opinion contained in their respective reports.

[77] Overall, I find that the admission of the expert evidence outweighs any prejudicial effect at this early stage of the proceeding. I do note and agree that Canada should have its own evidence to challenge the scope and admissibility pursuant to Rule 214. It chose not to do so.

IV. Overview of the Evidence

[78] The evidence on record in this case is extensive, totalling almost 12,000 pages. Aside from the pages dedicated to their written submissions, the parties' Books of Authorities total 184 pages, with additional authorities offered by each party during oral argument.

[79] Summary judgment motions are to be determined on the record before the Court. An action seeking to establish a historical basis for a current cause of action or duty, as set out in the Stage I Common Issue agreed to by the parties, will invariably require historical and legislative evidence, as is the case here.

A. The Plaintiffs' Evidence

(1) Fact Witnesses

[80] The Plaintiffs provided 35 fact witnesses from the representative plaintiffs, council members and First Nations members from various communities comprising the Class. All of the lay witnesses currently reside on various reserves and described the following common elements of the severe housing crisis:

- The homes are poorly constructed. Inadequate and inappropriate building materials are used in home construction. The homes have inadequate ventilation and insulation. Moreover, the homes do not have adequate running water or sewage systems. All of these inadequacies contribute to the rapid deterioration of the homes, and increased fire risks.
- There is inadequate funding for home maintenance or repairs, resulting in dwellings becoming unrepairable over time.
- Homes are regularly infested with mold, insects, cockroaches and bedbugs. Some infestations are beyond redress, requiring homes to be condemned or burned. Infestations spread to schools forcing students to miss educational time. Mold and rot result in respiratory problems.

- Due to the inadequate home construction, water leaks into electrical panels and wiring, which poses fire and shock risks to occupants of homes.

- The structural deficits cause households to pay electricity bills of approximately $1,000 per month.

- Members commonly wrap their homes in polyethylene tarps to retain heat inside and prevent water from leaking in, resulting in increased humidity.

- Homes are very overcrowded, which is exacerbated by population growth. Homes are typically occupied by 8-32 people at once, sometimes requiring occupants to sleep in shifts.

- Many resort to building shacks, tarp houses, or tents to live in with their families. Others are forced to relocate off reserve with virtually no ability to return due to distance, cost and a lack of available homes.

- Homes that do have running water are subject to frequent water outages. Some members are dependant on cisterns and sewage tanks that cannot accommodate the number of occupants in each home. In winter, poor insulation and heating cause pipes to freeze creating difficulties, particularly for Elders or members that have physical disabilities.

- Households are forced to prioritize water needs, often resulting in washing and cleaning being compromised. Many of the communities' water supplies must be boiled prior to any use, and some cannot be used even after boiling. Illnesses such as eczema and other serious dermatological issues are exacerbated by these conditions.

- Members with medical devices and supplies have no space to store them, in some cases dialysis supplies freeze inside the homes. Members with special needs and disabilities are unable to have accessible homes.

- Public health measures such as social distancing during COVID-19 and H1N1 are simply not possible and these events often cause all household members to become ill at the same time. In some communities with previous tuberculosis outbreaks, illnesses such as COVID-19 result in much stricter health regulations. These types of illnesses ravage these communities, causing significant disproportionate impacts, including the number of lives lost.

- In homes with no furnace that are heated by woodstove, the woodstove needs to continue through the night, which requires diligent attending. Additionally, many of these wood-burning stoves, and their chimneys, have never been replaced. Members who live in homes that are heated by electricity often have to use alternative heating methods their homes are not designed to handle since their electricity supply is not reliable. Likewise, since Class Member First Nations do

not have adequate fire response equipment and running water to combat fires, damage to homes, injury and death are exacerbated when fires occur on reserve.

- Child apprehension occurs at a significantly higher rate due to these housing conditions. Children are unable to regularly bathe, their sleep is disrupted due to overcrowding, they are frequently ill due to cold, damp conditions, and because of severe mold and pest infestations. These conditions impact their mental, emotional, and physical well-being as well as their education. When children become ill and are taken to hospitals in large city centers, they are increasingly becoming apprehended and removed from their families and communities.

- The living conditions impair mental, emotional, physical, relational, and spiritual health. As a result, members experience disproportionately high rates of mental health issues, substance use, suicide rates, and neurological and biological impacts. Overcrowding impacts families and relationships, often leading to increased domestic violence and family disruptions.

- These conditions force displacement from Class Members' reserves and territories, as well as their cultures, languages, teachings, ceremonies, and spirituality. Elders, knowledge keepers and others who stay on reserve do so at great cost to their health and lives. Members who are forced to leave the reserve are disconnected from either giving or receiving these teachings, and participating in the culture, ceremony, and community that is central to their Indigenous identity. Many dislocated members live unhoused in large urban cities, exposed to increased risk of harm such as violence, illness and death. Many will never return.

[81] The Defendant cross-examined the following expert and lay witnesses: Dr. Black; Dr. Reynolds, Dr. Prince, Dr. Painter, Professor Gunn, Chief Emeritus Elvin Flett, Chief Raymond Flett, Chief Kakegamic, Chief Denechezhe, Councillor Kennedy, Mr. Adam Fiddler, Ms. Seetta Roccola, Ms. Valerie Fiddler and Mr. Oscar MacDougall.

[82] The record also describes the conditions at St. Theresa Point, Sandy Lake, Northlands Denesuline First Nation [Northlands Denesuline], Little Pine First Nation [Little Pine], Woodland Cree First Nation, and Tataskweyak Cree Nation [Tataskweyak]. Generally, the common features are:

- Many of the communities have experienced inadequate housing since treaties were entered into and since being forced onto reserves. Many do not have access to resources or other revenue generating opportunities;

- Many of the communities are remote. Many are accessible only by air and/or by ice roads during winter months;

- Many score very low in Canada's Community Well-Being Index;

- All homes in these communities are band-owned and all homes are very overcrowded. There are significant housing deficits for those members wishing to have a home on reserve;

- Members are unable to rent or purchase homes due to socio-economic conditions on the reserves;

- The rate at which Indigenous Services Canada [ISC] and CMHC fund new homes is not capable of keeping up with the demand for housing. Moreover, there is currently no funding available for maintenance of existing homes;

- Many of the homes should be condemned and many members residing off reserve are waiting for a home on reserve;

- It is expensive to access good building materials and there is inadequate storage for materials that do arrive in the winter via the ice roads. These factors result in inferior materials to build/renovate homes;

- ISC funding allocations are never adequate, and First Nations are forced to divert their limited funds from other programs and areas. As a result, community well-being, education, healthcare, and emergency services suffer;

- For those First Nations accessible by ice road in the winter, the timing of ISC's funding occurs after ice-road season, increasing the difficulty and cost to purchase and transport materials;

- Funding received by Canada does not address the housing deficit, in many cases only allowing an insufficient number of homes to be built per year. The funding has not increased to reflect population growth, increased material costs, transportation costs, nor inflation; and

- Significant portions of the band-based capital funding related to the housing budget is required to be spent on insuring these homes, resulting in an insufficient amount remaining to maintain the homes let alone build new ones.

B. The Defendant's Evidence

[83] Canada relies upon two fact witnesses, as follows:

(a) *Paul McKinstry*

[84] Mr. McKinstry has been employed in various capacities by the Government of Canada since January 3, 1994. For the past eight years he has been the Manager, Housing Services, Infrastructure & Housing Directorate for ISC, responsible for the province of Manitoba. Mr. McKinstry is responsible for the following programs: First Nation On-Reserve Housing Program; Ministerial Loan Guarantee Program (sections 10 and 95 of the *National Housing Act*, RSC 1985 c N-11 [*National Housing Act*]); annual targeted housing funding (B-Base); annual core housing allocation for First Nation Communities (A-Base); and the ranking process.

[85] Mr. McKinstry states that all on-reserve housing capital assets are owned by the Bands and that Bands are responsible for their construction and maintenance, including the purchase and delivery of construction materials. ISC, however, assists with funding winter road construction to the 17 communities on winter road systems. Mr. McKinstry explains the 5-year window document that First Nations must use for planning capital housing projects with ISC, including the provision of their 5-year community infrastructure plans each year. ISC then uses the Nation Priority Ranking Framework to direct funding to the highest priorities across each region. The amount of funding available varies due to time-limited, targeted funding programs. He also provides information about minor capital funding for community infrastructure and Targeted Funding and how certain of those funding streams may be allocated for housing.

[86] To qualify for the CMHC Loan Program under section 95 of the *National Housing Act*, the First Nation must maintain their eligibility criteria by: having 100 percent project completion within 24 months of commitment; submitting annual financial audits; and having no subsidy suspensions on any account. ISC provides shelter allowance to those members residing in section 95 units, to assist with CMHC loan repayment. The First Nation is responsible for Minimum Revenue Contributions, establishing a replacement reserve fund, and maintenance of the CMHC housing on reserve.

[87] First Nations that receive Block Funding have the combined funding of 15 program areas, and are able to allocate those funds according to their need, "providing opportunity [sic] to take advantage of efficiencies[.]" All funding is subject to the Protocol for ISC-Funded Infrastructure, which is a list of applicable laws and regulations that eligible recipients must adhere to, including various stages of inspections processes, data collection instruments, certification, and then funding allocation. "Unfortunately, once homes are occupied it may be difficult for the First Nation to determine whether the required inspection was carried out." Mr. McKinstry also discusses the reporting requirements that First Nations must follow.

[88] Mr. McKinstry also describes the draft First Nations National Housing and Related Infrastructure Strategy [2018 Draft NFN Housing Strategy], co-developed between ISC, CMHC and the Assembly of First Nations, endorsed December 5, 2018, by the Special Chiefs Assembly:

> The key pillars of the Strategy include predictable long-term funding for First Nations, support of housing management capacity within First Nations, and support of data collection by First Nations to support development of plans and priorities, as well as institution building. The goals of this Strategy include new construction and repairs and addresses the need for sufficient, predictable, and sustainable funding, identifying short, medium,

> and long-term objectives, so that First Nations can assume care, control and management of housing in their communities.

[89] The 2018 Draft NFN Housing Strategy has not been implemented by Canada.

(b) *Karim Hajiani*

[90] Karim Hajiani has worked for Canada in various capacities since 1999, and with ISC since 2008. Mr. Hajiani was previously Head of Capital Planning in the Community Infrastructure Directorate [CID], and has currently been the Manager of Capital Planning, Allocation, Housing and Fire in the Community Infrastructure Directorate, in the ISC Ontario Region since 2023. Mr. Hajiani is responsible for the following programs: First Nation Housing Program; Ministerial Loan Guarantees for CMHC (sections 10 and 95 of the *National Housing Act*); Annual Community First Nation Infrastructure Investment Plans; Annual Core Capital Allocations for First Nation Communities; and Annual Prioritization Process, as it relates to regional CID budgets.

[91] Mr. Hajiani describes the 1996 On-Reserve Housing Policy currently in place, enumerating the eligibility requirements for funding:

> Eligibility for funding requires:
>
> > a. [D]evelopment of community-based housing policies and programs including redress mechanisms and a comprehensive multi-year housing plan;
> >
> > b. [I]nstitution of maintenance regimes, insurance and renovation programs to reduce the rapid deterioration of on-reserve housing stock; and
> >
> > c. [O]utline the linkage between multi-year housing plans and training, job creation and business development plans

> and initiatives that enable the reserve community to take greater advantage of economic development opportunities generated from the local housing market.
>
> Eligible First Nations are also encouraged to:
>
> a. [I]ntroduce shelter charge regimes. Shelter allowance payments would be allowed for eligible income assistance households consistent with provincial policy;
>
> b. [E]xplore creative uses of income assistances through work opportunity or transition to work initiatives in support of housing and job creation; and
>
> c. [C]onsider home ownership options within which individuals can begin to build equity in housing through cash or sweat equity.

[92] Mr. Hajiani describes the funding allocations as being based on population and geographic factors such as proximity to urban centers. There are 127 Nations in the Ontario region receiving housing funding, which ISC invites to submit expressions of interest for A-Base (permanent annual funding) and time-limited, specific purpose Targeted Housing Funding. Mr. Hajiani also shares the 2018 Draft NFN Housing Strategy. Like Mr. McKinstry, Mr. Hajiani points out that First Nations have an opportunity to realize economic benefits arising from local control of their lands under the *Framework Agreement on First Nation Land Management Act*, SC 2022, c 19, s 121.

[93] The Plaintiffs cross-examined Mr. McKinstry and Mr. Hajiani.

C. Legacy of Colonization

[94] The Plaintiffs have placed significant emphasis on the impacts of colonization that is at the root of the current housing crisis. Two passages from the Final Report of the Truth and Reconciliation Commission [TRC] essentially sum up one of the Plaintiffs' main positions:

> "Canada forced First Nations to relocate their reserves from agriculturally valuable or resource-rich land onto remote and economically marginal reserves" (Quote from Dr. Reynolds' Report at page 7)
>
> Formal authority for virtually everything associated with housing and residential development on reserves remains in the hands of either the governor in council or the minister of Indian affairs (RCAP Vol 3 at page 363)

[95] In addition, the *Indian Act* and other government policies and programs placed a huge amount of control in the hands of Canada. Together, the reserve system and the legal and policy framework created what the Plaintiffs refer to as a "pincer" approach in which Canada continues to systematically constrain First Nations' ability to raise capital and earn income while simultaneously restricting capital allocations, with full knowledge that Class Members cannot make up the difference.

[96] Canada's submissions do not address the role it played in the colonial structure. Canada simply states it is not challenging the historical facts. Canada acknowledged that the housing situation and the socio-economic conditions on reserve have led to negative consequences, but it disputes liability or responsibility. Canada continually reiterates that any liability is to be determined at the Stage II Common Issues hearing. Canada suggests that funding it provides to First Nations is not the only mechanism to address the housing situation. Canada proposes that First Nations can use revenue generation options like: charging rents on homes; obtaining

financing from banks; or using their own source revenues from any economic development activities.

V. The Sole Issue

[97] The sole issue for determination in this case is the certified Stage I Common Issue question set forth above.

VI. Analysis

A. Preliminary Issue: Is this Matter Suitable for Summary Judgment?

(1) Legal Principles

[98] Rule 215 of the *Federal Courts Rules* states:

215 (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.	215 (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.
(2) If the Court is satisfied that the only genuine issue is…	(2) Si la Cour est convaincue que la seule véritable question litigieuse est : …
(b) a question of law, the Court may determine the question and grant summary judgment accordingly.	b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.
(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may	(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :

(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or	a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;
(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.	b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

[99] The parties agree on the applicable legal principles concerning the test for summary judgment pursuant to Rule 215: The Court may grant summary judgment if it is satisfied that there is no genuine issue for trial. There is no genuine issue for trial if the Court has all the evidence necessary to adjudicate the Stage I Common Issue fairly and justly, and in a manner that advances the objectives of judicial economy and effectiveness (*Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*]; *Saskatchewan (Attorney General) v Witchekan Lake First Nation*, 2023 FCA 105 leave to appeal ref'd (2023 CarswellNat 5112 (SCC)) [*Witchekan Lake*]).

[100] Summary judgment motions are an important tool for enhancing access to justice and Rule 215 must be interpreted broadly so as to promote affordable, timely and just adjudication of civil claims (*CanMar Foods Ltd v TA Foods Ltd*, 2021 FCA 7 at para 23, citing *Hryniak* at para 5; *Manitoba v Canada*, 2015 FCA 57 at para 15; *Canada (Attorney General) v Koestel*, 2023 FC 1663 at para 29).

[101] The parties disagree as to whether this matter is appropriate for summary judgment and, if the Court determines that it is appropriate, they further disagree as to whether the Plaintiffs have satisfied the test under Rule 215. With this brief context of the parties' positions, I will attempt to summarize the parties' submissions.

(2) The Parties' Positions

[102] The Defendant submits that summary judgment on the Stage 1 Common Issue is not appropriate as the Plaintiffs' claims are premised on the insufficiency of Canada's funding for First Nations' housing. The Plaintiffs are seeking a guaranteed outcome to funding and a positive obligation to the seven causes of action plead: 1) breach of fiduciary duty; 2) negligence; 3) breach of *Charter* section 15; 4) breach of *Charter* section 7; 5) breach of *Charter* section 2(a); 6) breach of *Charter* section 2(c); and 7) breach of section 36 of the *Constitution Act, 1982*. None of these causes of action are supported by the record and none are available for summary judgment.

[103] The scope of *Charter* duties is intertwined with *Charter* breaches: they cannot be determined separately. To attempt to determine the duty alone is to litigate the *Charter* in an impermissible factual vacuum (*Mackay v Manitoba*, [1989] 2 SCR 357 at 361 [*Mackay*]).

[104] Nor would a summary trial assist in an efficient resolution of the action because any breach of any duty would still have to be determined at Stage II. This would result in continued litigation "in slices" (*Wenzel Downhole Tools Ltd v National-Oilwell Canada Ltd*, 2010 FC 966 at para 38). The consequences set out in Appendix 7 of the Plaintiffs' Memorandum of Fact and Law are issues for the Stage II Common Issues determination.

[105] The onus is on the Plaintiffs to meet the high bar of establishing no genuine interest for trial (*Witchekan Lake* at para 22, subpara c). Summary judgment is still the exception, rather than the rule (*Mason v Perras Mongenais*, 2018 ONCA 978 at para 44). However, Courts must not discard procedure for the sake of expediency (*Nafie v Badawy*, 2015 ABCA 36 at para 104).

[106] The Plaintiffs submit that, in addition to the applicable principles, the only remaining critical question is whether the matter presents credibility concerns or complex evidence that can only be adequately appreciated by means of a trial (*Witchekan Lake* at paras 33-34). Neither of these is at issue in this case.

[107] Should the Court determine a genuine issue for trial exists, the Court may "nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial" (Rule 215(3); *Witchekan Lake* at para 32).

[108] Canada consented to the certification of the Stage I Common Issue, this motion was set out in the Plaintiffs' litigation plan, and it is entirely appropriate. The Defendant's procedural objection to the suitability of summary judgment is effectively a challenge to the existence of the Common Issue, a collateral attack on the Certification Order, and a dereliction of Canada's stated commitment to reconciliation with First Nations, which requires the timely resolution of the substance of their claims. There is no merit to Canada's procedural objection.

(3) Conclusion

[109] This matter is suitable for summary judgment. The Stage I Common Issue, while not yet seeking to establish the breach of any legal rights, simply seeks an answer to a general question

of whether certain fiduciary duties or a common law duty of care exist and whether certain *Charter* rights are engaged. I find that the framing of the Stage I Common Issue question and leaving the Stage II Common Issue questions for another day, is in keeping with Rule 213. Rule 213 provides that summary judgment may pertain to "all or some of the issues raised in the pleadings".

[110] At this juncture I find that, based on the enormous record, the Stage I Common Issue question is capable of being adjudicated on this motion. Despite Canada's attempts to raise credibility concerns with some of the Plaintiffs' lay and expert witnesses, I find that there are no issues of credibility arising from the record. The majority of the record consists of reports and documentation. Cross-examinations of some of the witnesses have also occurred. There has been no submission from Canada that *viva voce* evidence is required.

[111] As for Canada's suggestion that this Court should not entertain the motion due to the structure of the Class action and the content or wording of the Stage I Common Issue question, I disagree. First, I find there is nothing impermissible about the structure of the Class action or the manner in which the issues have been bifurcated. Second, I note that Canada had consented to the Certification Order. If Canada had issues with the structure of the Class action, it should not have consented to the Certification Order or, at the very least, it should have raised its issue before the Summary Judgment motion and before the voluminous materials were filed. Third, I find that the Stage I Common Issue question is common to all Class Members. If there are particular issues with the nature and extent of the duties owed to certain Class Members, then that can be determined at Stage II.

B. Does the Honour of the Crown and UNDRIP Apply to the Stage I Common Issue Question?

(a) *Plaintiffs' Position*

(i) Honour of the Crown

[112] The principle of the Honour of the Crown infuses the relationship between the Crown and First Nations. Its central focus is advancing reconciliation, protecting and restoring that relationship. The Honour of the Crown is engaged when: the Crown assumes discretionary control over First Nations lands and interests (*Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 [*Manitoba Métis*] at para 73); in the implementation of its treaty promises or statutory grants *(Manitoba Métis* at para 73; *Ontario (Attorney General) v Restoule*, 2024 SCC 27 at paras 71-74, 104-107, and 219-221 [*Restoule*]); and, in contractual relationships with First Nations (*Quebec (Attorney General) v Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 [*Takuhikan*]). The Honour of the Crown supports recognition of a duty enabling First Nations to hold Canada accountable, and further the objective of reconciliation (*Takuhikan* at para 187). As such the Honour of the Crown helps to inform the common law duty of care analysis.

[113] The Honour of the Crown adds a "reconciliatory justice" approach in which "courts can and must be creative in finding a remedy that advances reconciliation" (*Takuhikan* at paras 203, 148). The principles of the Honour of the Crown ensure standards of conduct and require Canada to engage honourably with First Nations.

[114] Canada's outdated funding and loan agreements and regionally inappropriate funding formulae govern the flow of money for housing on reserves. They have little to do with need or actual cost. There is little to no room for negotiations, with steep conditions imposed in exchange for much needed funds (*Attawapiskat First Nation v Canada*, 2012 FC 948 at para 59 [*Attawapiskat*]; *Thunderchild First Nation v Canada (Indian Affairs and Northern Development)*, 2015 FC 200 at para 29). The Honour of the Crown is engaged when addressing the funding agreements.

(ii) *UNDRIP*

[115] *UNDRIP* "has been incorporated into the country's positive law" (*FN Children's Act Reference* at paras 4, 15, 59, and 85). *UNDRIP* supports recognition of the proposed duties to the Class, and by interpreting the *Charter* in light of *UNDRIP*, acknowledging the right to housing.

[116] *UNDRIP* does not create new rights, but elaborates upon already existing, fundamental human rights of universal application. *UNDRIP*'s Articles constitute "minimum standards" for the survival, dignity and well-being of Indigenous peoples, including a right to adequate housing, as do the binding Conventions that it elaborates on.

[117] As noted by the UN Special Rapporteur on Adequate Housing, Leilani Farha, there is "complementarity between the right to housing as articulated in international human rights law and the principles established under the [*UNDRIP*]." Indeed, Canada's own *National Housing Strategy Act*, SC 2019, c 29, s 313 [*National Housing Strategy Act*] recognizes that "the right to adequate housing is a fundamental human right affirmed in international law" (para 4(a)).

[118] Pursuant to the well-recognized presumption of conformity between domestic law and international law (*R v Hape*, 2007 SCC 26 at para 53 [*Hape*]; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 46, 60-75, 119), the *Charter* must be interpreted considering *UNDRIP*. The presumption of conformity presumes the legislature acts in compliance with Canada's international obligations, and in compliance with the principles of customary and conventional international law, forming the context in which statutes are enacted (*Hape* at para 53). As a result, the presumption attracts to both implemented and unimplemented treaties (*Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at paras 33-35, [*Quebec inc*]).

[119] The *UNDRIP Act* "brought [*UNDRIP*] into Canadian law" (*Dickson* at paras 117, 317; see also, *FN Children's Act Reference* at paras 4, 14-15; *Kebaowek* at paras 79-85, under appeal; *Montour* at paras 1175, 1188-1201), with the majority interpreting the purpose of section 25 of the *Charter* in light of *UNDRIP* (*Dickson* at para 117). The Plaintiffs ask this Court to do the same with respect to sections 15, 7, 2(a) and 2(c) of the *Charter*, and section 36 of the *Constitution Act, 1982*. *Charter* interpretation defines the breadth and scope of a *Charter* right in light of both Canadian jurisprudence and international law (*Quebec inc* at paras 34, 37).

[120] The *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified (*Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 23, citing *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 at para 70).

(b) *Defendant's Position*

(i) Honour of the Crown

[121] There is no authority for the Plaintiffs' proposition that the Honour of the Crown can inform a tort law analysis or permit the finding of a duty of care where one would not otherwise exist. The Plaintiffs cannot leverage the mere existence of Funding Agreements to suggest that the Honour of the Crown is engaged in the duty of care analysis. With only passing mention of these Agreements, the record is wholly inadequate to determine whether the Honour of the Crown is engaged, as set out in the newly-developed *Takuhikan* criteria (*Takuhikan* at paras 161–163).

(ii) *UNDRIP*

[122] The Defendant first says that *UNDRIP*'s Canadian application is as a persuasive source for the interpretation of constitutional law, ordinary legislation, and the common law. *UNDRIP* does not alter the essential *Charter* analysis, nor does it require that the *Charter* impose the obligations described. While *UNDRIP* is a persuasive source to aid in the interpretation of laws, it does not attract a presumption of conformity, nor is it a binding instrument.

[123] Secondly, as an international instrument, *UNDRIP* cannot define the scope of *Charter* rights. The *Charter* is to be interpreted, primarily, by domestic law principles, and its result must be achieved by way of ordinary analysis. Courts are not to allow the consideration of international instruments to displace the ordinary methodology for *Charter* interpretation.

[124] Finally, to the extent that the Plaintiffs rely upon binding international instruments that do attract the presumption of conformity, the presumption is only engaged where at least conceptual similarity exists between the implicated *Charter* provision and the language of the international document. Here, neither the "adequate standard of living" in Article 11 of the International Covenant on Economic, Social and Cultural Rights [ICESCR], nor that of any other binding international instrument, are sufficiently similar to influence the asserted *Charter* rights' interpretation. Even if some conceptual similarity could be ascribed, the *Charter* does not generally impose positive obligations.

(c) *Conclusion*

(i) Honour of the Crown

[125] I agree with the Plaintiffs that the Crown's fiduciary duty is unique to the Crown-Indigenous relationship and flows from the Honour of the Crown (*Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 [*Williams Lake*] at para 44; *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 78 [*Wewaykum*]). The principles of the Honour of the Crown will guide further consideration of the scope, extent and potential breach of the fiduciary duties on a case-by-case basis. I also find that the principles of the Honour of the Crown can assist in providing further context for determining the nature and extent of Canada's duty of care that may be owed to the Class. Determining whether a duty of care exists in a tort analysis involves the examination of the relationship between parties. The Honour of the Crown can assist in informing the parameters of that relationship.

[126] The Honour of the Crown, in its ongoing, mutually respectful long-term relationship with Indigenous peoples, requires that the Crown act diligently to fulfill its constitutional obligations to Aboriginal peoples (*R v Desautel* , 2021 SCC 17 at para 30, citing *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 21; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 25 [*Haida Nation*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24; and *Manitoba Métis* at para 75).

[127] Indigenous interest in land is at the core of the Crown – Indigenous relationship. The Honour of the Crown adds a "reconciliatory justice" approach in which "courts can and must be creative in finding a remedy that advances reconciliation" (*Takuhikan* at paras 203, 148). Such an approach may be required, particularly when it has not been previously legally determined whether on-reserve housing constitutes an aboriginal interest in land.

(ii) *UNDRIP*

[128] *UNDRIP* "has been incorporated into the country's positive law" (*FN Children's Act Reference* at paras 4, 15, 59, 85). The Supreme Court of Canada has determined that, within the context of considering collective rights under section 25 of the *Charter*, protecting collective rights and freedoms in this way is also consonant with the *United Nations Declaration on the Rights of Indigenous Peoples*, as brought into Canadian law by the *UNDRIP* Act (*Dickson* at para 117). Beyond this statement, there is no further elaboration from the Supreme Court of Canada about the extent of *UNDRIP*'s application in *Charter* analysis. Though *UNDRIP* does

not create new rights, it elaborates on those rights already enshrined in the *Charter*, with acknowledgement of the specific cultural, historic, social and economic circumstances of Indigenous peoples.

[129] So, for the purposes of this Stage I Common Issue, at this point it is sufficient to state that *UNDRIP* could serve as an aid in *Charter* interpretation and consideration to the extent presented by the evidence and submissions of the parties. The specific extent of the application will need to be made on a case-by-case basis in relation to the particular *Charter* right engaged by a party and whether the Court determines that there has been a breach of the said right.

C. Does Canada Owe Fiduciary Duties to the Plaintiffs?

(1) *Sui Generis* Fiduciary Principles

[130] The Crown's *sui generis* fiduciary duties are unique to the Crown-Indigenous relationship and flow from the Honour of the Crown (*Williams Lake* at para 44; *Wewaykum* at para 78; *Guerin v The Queen*, [1984] 2 SCR 335, 1984 CanLII 25 (SCC) at 385 [*Guerin*]; *R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104 (SCC) at 1108). Its origins lie in protecting the interests of Indigenous peoples in recognition of the "degree of economic, social and proprietary control and discretion asserted by the Crown" over them, which left Indigenous peoples "vulnerable to the risks of government misconduct or ineptitude" (*Wewaykum* at para 80).

[131] A *sui generis* fiduciary duty arises where there is: (i) a specific or cognizable Aboriginal interest; and (ii) a Crown undertaking of discretionary control over that interest (*Williams Lake* at para 44; *Manitoba Métis* at paras 49-51; *Wewaykum* at paras 79-83).

[132] An "Aboriginal communal interest in land" is a cognizable interest that can ground a *sui generis* fiduciary relationship with the Crown with respect to reserve lands (*Wewaykum* at paras 76, 98-100). A specific cognizable Aboriginal interest is:

i. distinctly Aboriginal;

ii. collective in character; and,

iii. integral to the nature of the Aboriginal distinctive community.

(a) *Plaintiffs' Position*

[133] There is a specific and cognizable Aboriginal communal interest in housing on reserve, specifically, to live on reserves, which requires shelter (*Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at para 84 [*Peter Ballantyne*]; *Guerin* at 379-382; *Wewaykum* at para 98; *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at paras 46, 52, 55, 163 [*Osoyoos*]; *Southwind v Canada*, 2021 SCC 28 at para 63 [*Southwind*]). In setting aside reserve lands for First Nations, the Crown considered First Nations' "habits, wants, pursuits, and the amount of territory available in the region occupied by them" (*Canada v Kitselas First Nation*, 2014 FCA 150 at paras 7, 52 [*Kitselas*]).

[134] Cognizable interest in reserve land where historic villages or Aboriginal dwellings existed highlights this link between housing and reserve land (*Kitselas* at para 54; *Madawaska Maliseet First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 5 at paras 397-401; *We Wai Kai Nation v Her Majesty the Queen in Right of Canada*, 2019 SCTC 4 at para 159). The Crown had set aside lands "to allow for the continued Indian occupation of their village sites in accordance with the colonial policy of locating Indians in their villages" (*Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3 at paras

108-109, 113, 152 [*Williams Lake SCTC*]; *Williams Lake* at para 63). For St. Theresa Point, reserve land was set aside in recognition that many had lost their homes located in traditional territories outside of the reserve area (*Southwind* at para 63). Housing is necessarily central to the existence of the reserve system. It is also central to the continuity of language, cultural and spiritual practices (*Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 (SCC) at paras 62, 83-85, 91 [*Corbiere*]).

[135] Canada's exercise of power and control over First Nations on-reserve lives, including housing, has created conditions of profound poverty, dependence and vulnerability.

[136] In the 2018 Draft NFN Housing Strategy, Canada acknowledged the "legacy of colonization has removed the opportunity for First Nations to meet their housing needs", such that they are "solely dependent on government programs". In the 2018 Draft NFN Housing Strategy, Canada recognized that its "programs and policies have failed to provide sustainable long term positive housing outcomes and have led to persistent substandard living conditions." The 2018 Draft NFN Housing Strategy established a goal of transitioning control over on-reserve housing to First Nations but acknowledges that this is a long-term process that will require dedicated funding and government support. An integral element of this process is "capacity building" for First Nations. But Canada acknowledges that this "capacity building" process is still in its infancy. As the 2024 Auditor General Report observed, Canada does not even have an overarching framework for the transition process.

[137] Canada continues to exert *de facto* control over First Nations housing. Many of the policies and programs that existed in the 1960s effectively operate in the same way today.

Canada continues to systematically constrain First Nations' ability to raise capital and earn income while simultaneously restricting capital allocations and while knowing that Class Members cannot make up the difference. Canada's inadequate funding may constitute all, or substantially all of their housing funding in a given year. As noted by Chief Kakegamic, the way that Canada administers this funding, and the control that it asserts, dictates what they can build, and where, and when they can build. Messrs. Hajiani and McKinstry, Canada's own witnesses, have also acknowledged that many First Nations do not have meaningful control over housing on reserve.

[138] Through Canada's creation and administration of the reserve system, First Nations have experienced the loss of their ability to shelter themselves on their own lands. Canada also remains operationally involved in the design, construction and maintenance of on-reserve houses, as an extension of its control of funding. Funding is proposal-based and relies on First Nations satisfying strict and unnecessary requirements, within impossible construction timelines. It does not reflect the actual costs of homes, nor has it been appropriately adjusted for inflation, and it uses a one-size-fits-all approach that fails to adequately meet the needs of First Nations.

[139] So long as Canada maintains ownership of their reserve lands, Canada must make best efforts to help Class Members find adequate housing on their respective reserves. It is a duty and a standard of conduct, not a guarantee of an outcome.

[140] Canada concedes that there is a collective Aboriginal interest in lands "qua settlement", and an interest "in the land it habitually and historically used and occupied". This is clear from the case law (*Peter Ballantyne* at para 84; *Guerin* at 379-382; *Wewaykum* at para 98; *Osoyoos* at

para 163). Yet Canada twists the Plaintiffs' interest into "the actual construction and funding of housing". This ignores the Plaintiffs' principal submissions which is to assert an interest in the practical means of living on their traditional territory.

[141] The Plaintiffs assert an interest in residing on lands that were: (a) set aside as residential homelands; and (b) held in trust by Canada for their sole benefit. Absent housing, reserve lands cannot be used for their intended purpose and the Aboriginal interest in living on reserves is jeopardized.

[142] While Aboriginal title lands are distinct from *Indian Act* reserve lands, the Supreme Court of Canada has recognized that "[t]he Indian interest in the land is the same in both cases." (*Guerin* at 379; *Osoyoos* at para 163). In the context of Aboriginal title, it can be established through evidence of the construction of dwellings (*Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 542-546, 572, 682 [*Tsilhqot'in BCSC*], citing Lamer CJC in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC) at para 156 [*Delgamuukw*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 38). In *Tsilhqot'in BCSC* Vickers J. made extensive findings about the existence and location of traditional Tsilhqot'in dwellings (*Tsilhqot'in BCSC* at paras 364-397) and relied on those dwelling sites to ground Canada's first recognized Indigenous title claim (*Tsilhqot'in BCSC* at paras 947, 955). Residential dwellings are not only a part of the Indigenous interest in land, they are in many respects constitutive of that interest.

[143] Since dwellings to settle on lands is constitutive of Aboriginal title interests, dwellings are also integral to First Nations' interests in their reserve lands. Canada does not dispute its

discretionary control of that interest, having dictated where First Nations could reside and the type of housing they would live in. This relationship, combined with the discretionary control that Canada still exercises today, gives rise to a *sui generis* fiduciary duty, which includes obligations with respect to housing.

[144] Discretionary control can exist without the Crown directly or fully administering the lands on the First Nations' behalf (*Williams Lake SCTC* at para 168; *Williams Lake* at paras 59-63). For discretionary control to exist, the Crown must simply take on a certain scope of discretion over an Aboriginal interest; there is no case law that suggests the Crown needs to actually exercise that discretion. The Crown will be held to a standard of conduct whether it exercises its discretion or not, and positive steps may be required to meet that standard (*Williams Lake SCTC* at paras 202-210).

[145] The Court must look at the extent to which the interest is vulnerable to the Crown's "misconduct and ineptitude" in its exercise (or non-exercise) of discretion (*Williams Lake* at para 60). Vulnerability can be sufficient to give rise to a fiduciary duty; it does not depend on the presence or absence of First Nations' "hypothetical ability to protect one's self from harm" (*Williams Lake*, citing *Wewaykum*, at para 80; *Galambos v Perez*, 2009 SCC 48 at paras 68-70, 83-84; *Hodgkinson v Simms*, [1994] 3 SCR 377, 1994 CanLII 70 (SCC)). The Court should not, for example, look at possibilities for scrounging together own-source revenue to try to fill gaps as a reason to deny the duty.

[146] First Nations' interests in their reserves are not frozen in time but evolve along with the communities that depend upon them (*R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216

(SCC) at para 132 [*Van der Peet*]). In turn, the Crown's duty evolves (*Kahkewistahaw First Nation v Canada (Crown-Indigenous Relations)*, 2024 FCA 8 at paras 97-101 [*Kahkewistahaw FCA*]). While First Nations have been largely left out of improvements in housing construction and standards, the ability to reside in dwellings is central to the promise of a residential homeland. The duty sought by the Plaintiffs merely seeks to bring that promise into the present day.

(b) *Defendant's Position*

[147] The Plaintiffs fail to establish a cognizable Aboriginal interest in access to housing, and that Canada has undertaken discretionary control of First Nations' housing (*Williams Lake* at para 52).

[148] A cognizable Aboriginal interest must be identified with care, as the scope and extent of a fiduciary duty will vary with respect to the interest asserted *(Williams Lake* at para 52; *Restoule* at para 235). Here, the Plaintiffs identify the interest as "adequate access to housing". This is insufficiently specific and fails to meet the criteria for a cognizable Aboriginal interest, which requires the interest to be: (1) distinctly Indigenous; (2) communal; and (3) integral to the distinctive Indigenous community. The interest must be pre-existing, in the sense that it must be sufficiently independent of the Crown's executive and legislative functions.

[149] To date, judicially-recognized Aboriginal interests relate only to collective interests in the use and enjoyment of reserve land (*Wewaykum* at para 81; with the exception of *Paddy-Cannon v Attorney General (Canada*), 2023 ONSC 6748, currently under appeal; *Osoyoos* at para 52; *Kitselas* at para 54); the Plaintiffs expand the asserted interest far beyond an interest in land *qua*

settlement. Instead, the Plaintiffs assert an Aboriginal interest in the actual construction and funding of housing, and a corresponding positive obligation on the Crown. This exceeds the bounds of a cognizable Aboriginal interest.

[150] An asserted Aboriginal interest must be pre-existing, in that it cannot subsequently arise from the Crown's executive functions or legislation (*Restoule* at para 238). It cannot be expanded to capture contemporary government programming and funding. Canada's modern involvement in supporting First Nations housing plainly arises from acts of the executive, and not a pre-existing Aboriginal interest in the sense of a *sui generis* fiduciary obligation.

[151] Secondly, a pre-existing interest must be specific or cognizable, in that the Crown would be able to identify the specific interest in land "in respect of which its duties as a fiduciary when dealing with that land were owed" at the time colonial officials dealt with the interest (*Williams Lake* at para 67). This definition does not contemplate that an Aboriginal interest can arise from the subsequent creation of government funding programs.

[152] The discretionary control necessary to give rise to a *sui generis* fiduciary duty requires that the Crown, pursuant to statute, agreement, or unilateral undertaking, holds land or property in a trust-like way. The Crown's discretionary control must be such that it invokes responsibility "in the nature of a private law duty" (*Wewaykum* at para 85). This duty can arise where the Crown has control over specific "Indian lands", that is, where the Crown is administering the lands on the First Nations' behalf (*Haida Nation* at para 18; *Wewaykum* at paras 78–79; *Guerin* at 382–87).

[153] Here, the Plaintiffs can only assert a Crown *de facto* control over housing construction and maintenance on reserve, premised on Canada's historical and modern engagement, which falls well short of the direct administration of an interest in land contemplated by the jurisprudence. Canada's past and current involvement in on-reserve housing is only to provide funding, loans, and assistance in attracting capital investment. These may attract public law, but not fiduciary duties. First Nations are not restricted to only using Canada's funding to meet their housing needs and are only subject to the controls implemented in Canada's funding conditions where they do access those funds.

(c) *Conclusion*

[154] I find that, based on the extensive lay witness and expert witness evidence, much of which was tested in cross-examination, Canada owes the Class Members a *sui generis* fiduciary duty regarding on-reserve housing. This means that Canada is required to take reasonable measures to provide Class Members with, or ensure they were provided with, or refrain from impeding, access to adequate housing on First Nations reserves.

[155] Much of the parties' submissions ventured into the realm of breaches, but it is not necessary to address breaches at this stage based on the wording of the Stage I Common Issue.

[156] I note that Canada challenged the admissibility of the expert evidence and attempted to discredit much of the lay witnesses' evidence. However, Canada provided little evidence of its own to set out its position in clear terms. I also note that where a party fails to cross-examine on an affidavit, or fails to file responding or rebuttal evidence, the Court may draw an adverse

inference as specified in Rule 216(4). The Court draws such an adverse inference from Canada's failure to file rebuttal evidence.

[157] A major reason for the difference in the parties' positions stems from how those positions are generally framed: Canada suggests that the Plaintiffs' claim is simply about accessing funding and that they are seeking a guaranteed result over funding, while the Plaintiffs seek to have the Court recognize that Canada owes them a duty or obligation (a) to take reasonable measures to provide them with; or (b) ensure they were provided with; or (c) refrain from impeding access to, adequate housing on First Nation reserves.

[158] There are two elements that must be satisfied to establish a fiduciary duty: (1) there must be cognizable aboriginal interest; and (2) there must be a Crown undertaking of discretionary control over that interest (*Manitoba Métis* at paras 49-51). These elements are satisfied on the record before the Court.

(i) Cognizable Aboriginal Interest in Land

[159] I am persuaded by the submissions of the Plaintiffs. While there has been no explicit jurisprudential statement to confirm that an interest in housing falls within a recognized general category of an interest in reserve land, the facts of this matter are sufficient for the Court to make such an explicit jurisprudential statement. Consequently, based on the facts of this case, the concept of an aboriginal interest in reserve land extends to and includes an aboriginal interest in accessing on-reserve housing.

[160] First, I find Canada's submissions take too narrow a view of an interest in land. Canada correctly states that the interest in land includes the use, enjoyment and protection of reserve land (*Osoyoos* at para 85; *Kitselas* at para 54; *Wewaykum* at paras 86, 98). I find that being provided with access to adequate housing naturally is part of the use and occupation of the collective interest in reserve land which Canada has administrative control over pursuant to the *Indian Act*. Land and housing are inextricably linked. I say this because people live on land and need shelter from elements on land. That shelter is provided through housing. Moreover, housing is how a group can stay on their land and use their land; without shelter, they would have to move to different land. Canada's reliance on the requirement that the right be pre-existing would foreclose many types of uses and occupations of land and would freeze the definition of the term in time. This is not a reconciliatory approach that should be endorsed by the Courts.

[161] In support of this position, counsel for the Plaintiffs also provided an excerpt from *Anger & Honsberger Law of Real Property*, 3rd Ed at 32:28:

> Generally speaking, under the *Indian Act*, the Indian right to use and take benefits from the land includes all the rights and privileges that go with the use and occupation of the land. A band can occupy the land, **build on it**, and derive the benefits of working the land or using it for other purposes. [Emphasis added]

[162] Secondly, and more importantly, Canada's submission that the asserted right must be pre-existing and that it cannot be expanded to capture contemporary government programming and funding mischaracterizes the Plaintiffs' claim. As stated in the general positions of the parties, Canada says that this action is about a guaranteed result to funding. I disagree. I note that the Plaintiffs have provided evidence concerning the inadequate housing and one-sided funding agreements, the evidence also discloses that they seek a determination on whether Canada has a

duty in relation to providing access to adequate housing to First Nations on reserve. I also note that Messrs. McKinstry's and Hajiani's evidence was not, in my view, rebuttal evidence. There were general discussions of policies and programs and observations on what options First Nations may have for funding sources. I am persuaded by the Plaintiffs submissions that the Stage I Common Issue question is not seeking a guaranteed result to funding.

[163] In terms of the asserted right, Canada's position ignores that an aboriginal interest in land is not frozen in time and can mean more than just the reserve land itself (*Williams Lake* at para 66; *Van der Peet* at para 132; *Kahkewistahaw FCA* at paras 97-101).

[164] Canada also claims that the Plaintiffs' claim has shifted over time as the matter has proceeded to the Stage I Common Issue determination. I disagree. I have reviewed the Statement of Claim, Amended Statement of Claim, and the Notice of Motion for Summary Judgment, and I agree with the Plaintiffs that their claim has not shifted over time nor do they seek a guaranteed result in relation to funding.

[165] The Statement of Claim seeks declarations that Canada has "contravened the [H]onour of the Crown and breached its fiduciary duties to the Plaintiffs and the Class by creating and failing to remedy the lack of access to adequate housing on First Nation Lands" and that "Canada is liable to the Plaintiffs and the Class for damages caused by its negligence in creating and failing to remedy the lack of access to adequate housing on First Nations Lands" (paragraphs 1(b), (c)). The facts plead also do not seek a guaranteed result to a level of funding, only that the lack of funding and the control that Canada has exerted (as described above) have contributed to the current housing crisis. I conclude that the same pleadings and basis for the Plaintiffs' claim

remain consistent after also reviewing the Fresh As Amended Statement of Claim (paragraphs 4 and 7 for example) and the Notice of Motion for Summary Judgment (paragraphs 5, 7, 11-16 for example).

(ii) Crown Undertaking of Discretionary Control

[166] The expert evidence demonstrates that Canada has historically exercised power, authority and control over all facets of First Nations' life – including housing. This has created a dependency that persists to this day. Though Canada's approach has shifted over time, it still retains control of access to adequate housing on reserve. Once again, I note Canada has not filed rebuttal evidence.

[167] The Plaintiffs have also submitted evidence from lay witnesses such as Chief Raymond Flett and Chief Kakegamic, which was confirmed by Mr. McKinstry in cross-examination, indicating that Canada still exercises control on a day-to-day basis on how housing and funding is administered on reserve. The Plaintiffs' lay witnesses also provided evidence about the strings that are attached to the housing funding regime, such as reporting requirements, funding conditions and often long waits between the application process and the confirmation of funding. Since Canada's inadequate funding may constitute all, or substantially all, of a First Nation's housing funding each year, the way that Canada administers this funding, and the control that it asserts, dictates what housing can be built, where housing can be built, and when housing can be built.

[168] Canada, on the other hand, submits that the historical evidence is irrelevant and that the Court should focus on the period identified in the Stage I Common Issue question: June 12,

1999, to present. Canada also submits that the Plaintiffs can only point to *de facto* control, which falls short of direct administration. Canada's past and current involvement is only to provide funding, loans, and assistance in attracting capital investment and that this assistance may attract public law duties but not fiduciary duties. Canada also submits that the Plaintiffs are not precluded from seeking additional mechanisms to fund housing on reserves.

[169] Canada submits that the historical development set out by the Plaintiffs is only indicative of control over people generally and not control over housing. Accordingly, a general legal control over members of the Class is insufficient to ground an obligation related to housing. The evidence of Dr. Painter, which Canada has concerns over, only points to a short period and does not provide much detail leading to the present. That said, Canada acknowledges that one cannot state that Canada was not involved in housing but one reference to swinging hammers, from Dr. Painter's evidence, is not specific enough.

[170] With respect, I cannot agree with Canada's submissions. Canada's submissions completely ignore the legacy and harmful impacts of its colonial policies that do, on their face, appear to have impacted the lives of First Nations people living on reserve and have also impacted the ability of First Nations to find viable and realistic sources of alternative funding for their housing needs. The real determination of the impacts will be made during Stage II of this Action.

[171] Canada is correct in stating that it is not presently directly involved in administering housing nor is Canada actually swinging any hammers. However, the record, and the submissions referencing the complex web of policies, funding arrangements and non-ISC

programs such as with CMHC's *National Housing Act* section 95 housing loans, does point to much more control than Canada acknowledges. The complex web, the requirements to submit funding proposals and adhere to any conditions of funding along with waiting for the bureaucracy to determine what amount and when the funding will flow all point to a significant degree of control despite no hammers being presently swung. This is sufficient to establish the discretionary level of control.

[172] It is well known that the *Indian Act* in conjunction with its predecessor legislation has controlled every aspect of lives of First Nations on reserves since its inception. While some modifications and amendments have been made, including with new optional legislation such as the *First Nations Land Management Act*, SC 1999, c 24 [*FNLMA*], there may be other less onerous mechanisms for First Nations' management and development of reserve land that Canada could implement. That said, the fact that many First Nations reserves are isolated and do not have a viable economic base make the reality of on-reserve commercial and residential development impractical if not impossible. Suggesting that Canada is not the sole option for First Nations ignores the legacy of colonization that created the current state of conditions on First Nations including the restrictive provisions of the *Indian Act* and the obstacles to use the reserve land and reserve assets available as collateral for security for loans required to create economic development projects on reserves or near to reserves. This system has placed First Nations communities behind the proverbial "eight ball" and First Nations have not been able to catch up to the rest of Canadian society. This also ignores the secondary impact of the legacy of colonization and the impacts of the *Indian Act* and the ability to generate economic development opportunities that will have to be considered at Stage II: the rampant unemployment,

homelessness, overcrowding, educational outcomes, displacement, and other social conditions that exist for many First Nations members.

[173] The degree of control that Canada had over First Nations on reserve is well documented (RCAP, TRC). These reports, the expert reports and the lay witness evidence all lend support to the Plaintiffs' assertion that Canada exercised discretionary control over First Nations communities and members and that the First Nations and members were vulnerable to Canada's control.

[174] I agree with the Plaintiffs that direct administration or control is not required, particularly where the Crown is involved. What will suffice as evidence of the exercise of discretionary control is the scope of the exercise of discretion and vulnerability, which exists here (*Williams Lake* at paras 59, 60, 76, 77). I find that such evidence, on its face, exists with the evidence of Chief Kakegamic, Chief Raymond Flett, Councillor Spence and Dr. Reynolds' report. In any event, the Plaintiffs have also tendered additional evidence from Dr. Reynolds, quoting from additional sources such as Dr. Olsen and RCAP, that Canada was directly involved in welfare and housing (Tab 33, at 265, 279, 280).

[175] Further, the 2024 Auditor General Report, also confirms the Plaintiffs' position that Canada has been in control of on-reserve housing. Contrary to Canada's assertion that First Nations are in control of on-reserve housing, the 2024 Auditor General Report confirms that Canada is only in the early stages of transferring control to First Nation (at 22). As the Plaintiffs suggest, Canada may still have control, but they are abdicating that control to the detriment of First Nations.

(2) *Ad Hoc* Fiduciary Duty Principles

[176] *Ad hoc* fiduciary duties to First Nations will arise if the government has undertaken to exercise its discretionary control over a legal or substantial practical interest in the best interests of the First Nation (*Williams Lake* at para 44; *Manitoba Métis* at paras 49-51). *Ad hoc* duties arise as a matter of private law and require utmost loyalty to the beneficiary (*Restoule* at para 222).

[177] A fiduciary duty may arise from an undertaking if the following conditions are met: (1) an undertaking by the alleged fiduciary, whether express or implied, to act in the best interests of the alleged beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control; and (3) a legal or substantial practical interest of the beneficiaries stands to be adversely affected by the alleged fiduciary's exercise of discretion or control (*Manitoba Métis* at para 50; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, at para 36 [*Elder Advocates*]).

(a) *Plaintiffs' Position*

[178] All of the foregoing elements are met. First, as the history demonstrates, Canada has undertaken to exercise its discretionary control over housing on First Nations reserves in the best interest of First Nations.

[179] Second, Class members belong to a defined group that Canada rendered uniquely vulnerable to its control of housing on reserve through legal mechanisms to take ownership of Class Members' lands and deprive them of a resource base with which to raise material revenues (*Stagg v Canada (Attorney General*), 2019 FC 630 at paras 8, 11). At the same time, Canada has

underfunded Class Members' housing for decades, leaving them with an accumulated deficit of hundreds of homes (*Elder Advocates* at para 28).

[180] Third, as with establishing a cognizable Aboriginal interest, Class Members have a legal and substantial practical interest in being able to access adequate housing on reserve. This duty is not "frozen in time" (*Kahkewistahaw FCA* at paras 6, 23, 70-77, 87-88; *Blueberry River Indian Band v Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 SCR 344 at paras 35, 96; *Osoyoos* at paras 53-55; *Semiahmoo Indian Band v Canada* (CA) [1998] 1 FC 3 at para 48). The Crown must adapt to these changing circumstances and adjust legislation and policy to reflect the best interests of those whose lives and wellbeing it has taken such extensive control over (*Ross River Band v HMTQ and Yukon*, 1999 BCCA 750 at para 62, appeal dismissed for other reasons, *Ross River Dena Council Band v Canada*, 2002 SCC 54).

[181] The Class Members' legal and practical interest in living on reserves that were promised as residential homelands does not conflict with Canada's duties to the general public (*Barker v Barker*, 2022 ONCA 567 at paras 82-83, leave to appeal to SCC refused, 2023 CanLII 24517 (SCC)). Canada can either provide Class Members with the resources they need, or it can restore them to a position where they can provide for themselves, but it cannot maintain the status quo.

[182] When the Crown took and maintained such extensive control over such an essential interest as housing on reserve, it assumed duties to act in the best interests of Class Members. In light of the Crown's fiduciary duty, Canada must act with utmost loyalty to the First Nations' interests, so much so that the interests are held paramount to the public interest (*Williams Lake* at para 163).

[183] Canada does not address the commitment in the Draft 2018 NFN Housing Strategy to fund First Nations organizations "to levels comparable to government and other relevant counterparts." Through this, Canada has undertaken to support housing infrastructure on reserve and close the infrastructure gap, a commitment Canada concedes it has not met.

[184] When assessing whether an *ad hoc* duty exists, the test from *Elder Advocates* looks not just at the undertaking itself, but also at the vulnerability of the class of persons to which it was given. The Draft 2018 NFN Housing Strategy considers the issue of vulnerability within its larger historical context, noting "[t]he legacy of colonization has removed the opportunity for First Nations to meet their housing needs… which has left them almost solely dependent on government programs." The vulnerability created by this history still exists, regardless of recent policy changes.

(b) *Defendant's Position*

[185] The *ad hoc* fiduciary duty requires that the alleged fiduciary undertakes to act in the beneficiaries' best interests and forsake the interests of all others. The special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances (*Elder Advocates* at para 37; *Restoule* at para 231). Situations where the federal Crown will be shown to owe a duty of utmost loyalty to a particular person or group will therefore be rare, particularly where an exercise of a government power or discretion is at issue (*Restoule* at para 232).

[186] Canada has not provided an undertaking to act in the Class Members' best interests, "forsaking… the interests of all others". The undertaking component requires an assumption of

"utmost loyalty" to the beneficiary. The undertaking will "typically be lacking" in circumstances where what is at issue is the exercise of a government power or discretion. Such an undertaking would necessarily conflict with the government's duty to act in the best interests of society as a whole and its "obligation to spread limited resources among competing groups with equally valid claims to its assistance" (*Elder Advocates* at paras 31, 42-44, 49; *Sagharian v Ontario (Education)*, 2008 ONCA 411 at paras 47–49 [*Sagharian*]).

[187] Here, the requisite undertaking cannot be found. Canada provides housing infrastructure funding and program support without statutory obligation, and not as would be required to ground a duty in equity. Canada's funding and program support is a matter of public policy and the exercise of the federal spending power. Canada's spending on First Nations' housing must obviously compete with the rest of its budget allocations. As noted by Mr. Hajiani in cross-examination, within the program's own context, budgeting must also be allocated across regions and prioritized among competing First Nations.

[188] In contrast, a fiduciary's "principle [*sic*] function is not to mediate between interests". It is to "secure the paramountcy of *one side's* interests" (*Elder Advocates* at paras 43-44). No such undertaking could be implied by Canada's conduct, notwithstanding the degree of its involvement asserted by the Plaintiffs.

[189] If an undertaking is alleged to flow from a legislative act, the language in the legislation "must clearly support it" (*Elder Advocates* at paras 45, 48). The mere grant to a public authority of discretionary power to affect a person's interest does not suffice. There is no support for the purported undertaking that can be extracted, beyond the general assumption of legislative

jurisdiction over First Nations found in the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 [*Constitution Act, 1867*].

[190] Access to a benefit scheme – or, as here, access to government housing funding programs – without more, will not constitute an interest capable of attracting a fiduciary duty. In addition, the Plaintiffs fail to establish a "legal or substantial practical interest", within its precise meaning, which is impacted by Canada. The interest asserted must equate to a private law interest. It is not sufficient to show an impact generally on a person's well-being, property, security (*Elder Advocates* at paras 51-52), or, as in this case, "adequate access to housing on reserve." For this criterion, the Plaintiffs can only point to the cognizable Aboriginal interest previously asserted. This purported interest cannot amount to a legal interest within the fiduciary context.

[191] In addition, no legal or practical interest has been identified, since access to government funding, without more, will not constitute an interest capable of attracting a fiduciary duty (*Elder Advocates* at para 52). The Plaintiffs' reliance on the Draft 2018 NFN Housing Strategy is misplaced since the parties have not implemented it, though Canada accepts its part in the history of colonization, but those effects will be for a Stage II determination.

[192] The Court does not have a sufficient record to determine whether any housing funding agreement engages the Honour of the Crown. In *Attawapiskat* there is only a one-line reference and in *Takuhikan* there was only a specific type of contract at issue. The test considered in that case considered different circumstances that are not present here.

(c) *Conclusion*

[193] The parties agree on the test outlining the three criteria for determining whether an *ad hoc* fiduciary duty exists (*Manitoba Métis* at para 50; *Elder Advocates* at paras 30-31, 43).

[194] Canada's position focuses on parts 1 and 3 of the test and seems to concede part 2. On its face, with the scale of the potential liability in this matter, it appears that there would be a conflict between Canada's potential loyalty to act in the Class Members' best interest in relation to on-reserve housing with other government priorities. It is not an overriding factor, but it would create an obvious impact on the governmental budget. That said, the relationship between Canada and First Nations is a special one unlike the relationship Canada has with the rest of Canadian society.

[195] As with the *sui generis* fiduciary duty, based on the colonial legacy and current control that Canada has over housing policy and funding, I find that the Plaintiffs have established that Canada owes them an *ad hoc* fiduciary duty.

[196] First, the *Indian Act* and the constellation of programs and policies have established that Canada has both expressly and impliedly undertaken to act in the best interests of First Nations. To find otherwise ignores the legacy of colonization which is a key part of this Action. I agree with the Plaintiffs that this would not fit within the reconciliatory approach that is required to address disputes such as the one before the Court.

[197] Second, it is not disputed that it is First Nations and status Indians resident on reserve who have remained vulnerable to Canada's control over housing policy and control over how

funding is accessed. The vulnerability was created by the well-known and well-studied reserve system, the legacy of the *Indian Act*, and the control that Canada has exerted and continues to exert over how funding is accessed by and distributed to First Nations. As for the reserve system, the creation of reserves in remote areas where there are limited opportunities for economic development created further dependence on Canada, thereby exacerbating the vulnerability of First Nations.

[198] Third, the practical interest in housing on reserve has been affected by the significant exercise of discretion and control by Canada. If First Nations are unable to navigate the complex web of housing related funding processes or to have an economic base upon which to create their own source revenues to help in trying to alleviate the massive housing shortage, they will not have access to a safe supply of housing on reserve nor will they be able to manage the existing stock of homes that require major injections of capital to render them livable and safe.

D. Does Canada Owe a Common Law Duty of Care to the Plaintiffs?

(1) Plaintiffs' Position

[199] Where the Crown already owes a fiduciary duty to the class, there can be no doubt that the relationship is sufficient to establish a *prima facie* duty of care (*Brown v Canada (Attorney General)*, 2017 ONSC 251 at paras 78-79 [*Brown*]; *Paddy-Cannon v Attorney General (Canada)*, 2023 ONSC 6748 at para 125). A fiduciary's obligation to discharge a duty of care is distinct from its obligations as a fiduciary, but the nature of a fiduciary relationship is sufficient to ground a relationship of proximity (*Meng Estate v Liem*, 2019 BCCA 127 at paras 33, 38). In the absence of a fiduciary duty, Canada still owes a common law duty of care to the Class.

[200] The evidence in this case satisfies the well-established two-step *Anns/Cooper* test to extend a novel duty of care. The test asks whether:

1. There is a relationship of proximity in which Canada's failure to take reasonable care might foreseeably cause loss or harm to the class; and
2. Are there any residual policy reasons outside the parties' relationship that should negate the *prima facie* duty of care?

[201] Once a government decides to enter the field and become directly involved in the operation and implementation of a policy, particularly where that policy may impact the health and safety of individuals, a relationship of proximity can be established. That has happened in the case of on-reserve housing. As a result, First Nation communities are forced to make difficult choices about how to distribute their limited capital allocations, resulting in chronic problems across construction, renovation, maintenance and capacity building. Given the impacted First Nation communities' remoteness and acute need for capital investment, they are particularly vulnerable.

[202] As the Plaintiffs' lay witnesses, including Valerie Fiddler, stated, the reality is that Canada's operational policies and protocols leave Class Member First Nations with no reasonable alternative to inadequate housing. This outcome was foreseeable. Canada's own Auditor General has consistently confirmed the relationship between poor federal funding and poor reserve housing. In the circumstances, Canada had an obligation to exercise the standard of care expected of an ordinary, reasonable, and prudent person in the same circumstances, and to takes precautions against risks which are reasonably likely to happen *(Nelson (City) v Marchi*, 2021 SCC 41 at paras 91-92 [*Marchi*]).

[203] Canada's trust-like relationship with First Nations through the ownership of reserve lands and the administration and control over funding leaves no space for policy to negate a duty (*Brown* at paras 78-80). Canada knows that its approach is to blame, and that it has done little to remedy the housing crisis on Class Members' reserves. Class Members' First Nations have little if any ability to change these conditions on their own and need a way to hold Canada accountable.

[204] This is not a case in which there is a prospect of unlimited liability to an unlimited class, differentiating this case from *Attis v Canada (Health),* 2008 ONCA 66 at para 74 [*Attis*]. The duty is limited to remote First Nations and their on-reserve members, and only where Canada's failure to act caused a chronic, widespread and severe infrastructure failure. Nor is this a case in which the Crown owes a statutory duty to the public as a whole (*Eliopoulos Estate v Ontario (Minister of Health and Long-Term Care)* (2006), 82 OR (3d) 321 at para 19 (CA) [*Eliopoulos Estate*]; *R v Imperial Tobacco,* 2011 SCC 42 at paras 99-101 [*Imperial Tobacco*]). Canada has developed a specific policy to construct, maintain and repair housing on reserve. The nexus between Canada's policy for funding housing on reserve and Class Members is based on a long-standing and unique historical relationship, as well as contractual funding agreements germane to that relationship.

[205] The risks that arise from maladministration and inadequate funding are not ones that are faced by the public at large (*Eliopoulos Estate* at para 20). Because Canada has adopted a policy for housing on reserve, the Court may review the scheme for its implementation "to ensure it is reasonable and has been reasonably carried out in light of all the circumstances, including the

availability of funds, to determine whether the government agency has met the requisite standard of care" (*Just v British Columbia*, [1989] CarswellBC 234 [*Just*]).

[206] A duty of care in this case does not challenge Canada's core policy decisions. A core policy decision is not simply an administrative rule or guideline that is referred to as a "policy" (*Marchi* at para 59). Core policy decisions are a narrow subset of discretionary decisions that involve a contextual analysis of competing economic, social and political factors based on value judgements as much as objective considerations. They are usually taken by a deliberative body, not a delegated bureaucrat (*Marchi* at paras 44, 51, 56; *Imperial Tobacco* at para 90). Decisions which are "the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness" are operational in nature and not core policies (*Marchi* at paras 23, 52, citing *Just*).

[207] The proposed duty of care is not a claim of negligence for "underfunding" and Canada's reliance on the Federal Court of Appeal's decision in *Rebello v Canada (Justice)*, 2023 FCA 67 [*Rebello*] is misplaced. *Rebello* stands for the proposition that, on its own, the government's role as a funder to a public agency or service provider does not ground a relationship of proximity to a third party (*Rebello* at para 19). *Rebello* is readily distinguishable here. While Canada has repeatedly attempted to reduce its relationship with First Nations to one of mere "funder" it continues to have myriad direct interactions and involvement in day-to-day First Nation affairs related to on-reserve housing. It has a direct relationship and ongoing involvement with First Nations that, while it may involve funding, is not limited to funding.

[208] Canada is collapsing the Stage I Common Issue question with Stage II. Canada concedes that its decisions and policies regarding housing on reserve may attract liability in negligence. It argues, however, that such liability is limited to the "operational implementation" of those decisions or policies that must "arise from specific interactions… sufficient to create the necessary proximity". But Canada is conflating the relationship of proximity and foreseeability that grounds the duty of care with the Crown's immunity from liability for core policy decisions which might otherwise negate that duty.

[209] On the first issue, it is settled law that public officials can be found to owe a duty at large, independent from the facts alleged to constitute a breach of the duty (*Just* at paras 12-13; *Marchi* at paras 19-36). Such a duty can be based on conduct and a relationship of proximity to a category of people, regardless of the specific decisions or actions relevant to its breach (*Francis v Ontario*, 2021 ONCA 197 at para 102 [*Francis ONCA*] citing *MacLean v Canada*, [1973] SCR 2 at 7; *Martel Building Ltd v Canada*, 2000 SCC 60 at para 53; *Atlantic Leasing Ltd v Newfoundland (1998)*, 164 *Nfld & PEIR* 119 (CA) at paras 13-18, 25-29).

[210] In this case, the relationship derives from Canada's decision to confine First Nations to residential reserves in the 19th century, its assumption of control over housing on reserve, and its repeated assurances over the following century and a half that it would protect that residential interest. Through this course of action, Canada has both created risks for First Nations and their members living on reserve, and represented to Class Members that they will act to avoid that risk.

[211] A duty of care can be owed to a category of people when a public authority creates or controls a risk and/or has direct personal dealings with a clearly defined category of people (*Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5 at paras 42-46, 62 [*Fullowka*]; *Just* at para 12). This is akin to the relationship between Canada and Class Members living on reserve.

[212] As was the case in *Fullowka*, it is open for the Court to find that these officers and their supervisors owe a duty of care to the specific communities within their portfolios. Canada is liable for any breach of that duty.

[213] Whether or not a breach of the duty of care has occurred with respect to a particular First Nation is an issue reserved for Stage II of these proceedings. However, Canada attempts to head-off Stage II by arguing that any breach "on a Class-wide basis" must necessarily be the result of policy rather than operational decisions. Yet Canada's argument ignores the agreed structure of these proceedings and its own concession that its operational decisions about housing may attract liability. What is common to the Class at Stage I is the parties' relationship of proximity, Class Members' resulting vulnerability, and the duty of care that so arises.

[214] For instance, Canada makes numerous operational decisions when implementing its housing programs and policies in individual impacted First Nations. Mr. Hajiani stated during cross-examination that decisions made by a Capital Management Officer in Ontario, for example, are by their very nature meant to "advance those capital projects from an operational standpoint". These decisions are not core policy decisions but are routine or standardized at an operational level. What matters for Stage I is that the nature of Canada's operational involvement

in First Nations' affairs is sufficient to ground a relationship of proximity. That can be decided on a class-wide basis.

[215] Canada owes a higher standard of care in this case. Canada has a duty of care towards the Class, comprising First Nations on remote reserves experiencing a severe housing crisis. The proposed standard of care requiring ISC officials to make "best efforts" is an enhanced standard, reflecting Canada's role in creating the hazards, but it does not seek to guarantee an outcome. It simply places a heightened responsibility on ISC officials when making decisions with such profound impacts on the health and wellbeing of the Class.

[216] While a duty of care is not generally a positive duty to act, in certain circumstances a "special relationship" can require positive steps to avoid foreseeable harm (*Childs v Desormeaux*, 2006 SCC 18 at para 39 [*Childs*]). This can arise, for example, in cases where the defendant is materially implicated in the creation or control of a risk to which others are invited, and where the plaintiff reasonably relied on the defendant to avoid or minimize that risk (*Fullowka* at paras 27, 34-35; *Childs* at para 35). This is particularly so where the plaintiff is vulnerable to the foreseeable harm that befalls them (*Crocker v Sundance Northwest Resorts Ltd.*, 1988 CanLII 45 (SCC) at paras 18-20; *Turcotte v Lewis*, 2018 ONCA 359 at para 56).

[217] A special relationship is made out in this case. The Court has repeatedly recognized the "special relationship" between First Nations and Canada arising from the de facto control it has asserted over their lands and resources (*Takuhikan* at para 147; *Manitoba Métis* at para 67). The Honour of the Crown supports the recognition of the duty to the class through the exercise of discretionary control (*Manitoba Métis* at para 73; *Restoule* at paras 71-74; *Takuhikan* at paras

203, 148). The record amply supports the vulnerability of Class Members to Canada's discretion in the implementation of its housing programs. An enhanced duty is owed to take positive steps to address the crisis but not to guarantee an outcome as Canada characterizes the Plaintiffs' claim.

[218] The types of decisions referenced in Appendix 6 of the Plaintiffs' memorandum are all operational decisions which implement the 1996 On-Reserve Housing Policy and are not covered by core policy immunity. In the alternative, if these impugned decisions rise to the level of core policy decisions, they are irrational (*Francis v Ontario*, 2020 ONSC 1644 at para 422 [*Francis ONSC*]). Canada insists that a key principle of the 1996 Policy was "community control and decision-making". Central to its defence is the claim that "First Nations have discretion to use the funding they receive from ISC as they see fit, based on funding priorities that they determine." But this is irreconcilable, for example, with a policy stated by Mr. McKinstry, to cap the amount of band base capital funding that a First Nation can spend on housing at 25%, even in the face of a crisis.

[219] Canada uses contractual agreements as a condition for First Nations to receive funding. The underfunding pursuant to the contracts, which do not address the need in First Nations communities, create foreseeable outcomes (2024 Auditor General Report).

[220] Simply claiming housing is a policy does not automatically mean it is immune from consideration (*Marchi* at para 22; *Francis ONSC* at paras 422, 426). Canada developed policies to guide the construction, maintenance and repair of housing on reserve. The nexus is based on a long-standing relationship and guided by contractual funding agreements.

[221] *UNDRIP* also supports recognizing the duty owed to the class. *UNDRIP* elaborates on existing fundamental human rights (*FN Children's Act Reference* at paras 4, 15, 59 and 85).

(2) Defendant's Position

[222] The Plaintiffs' key assertions are barred by core policy immunity. Funding and resource allocations do not establish a duty of care, as the relationship that they engage lacks sufficient proximity. They do not provide the basis for an action. There is no cause of action in negligence for "underfunding" (*Rebello* at para 22). Due to policy immunity, a duty of care in negligence cannot be established on a claim of government underfunding (*Rebello* at para 22, leave to appeal ref'd (2023 CanLII 100603 (SCC)). Furthermore, a standard of care must first be established prior to defining that duty's scope (*Ryan v Victoria (City)*, [1999] 1 SCR 201, 1999 CanLII 706 (SCC) [*Victoria*] at para 25).

[223] Nevertheless, the Plaintiffs ask this Court to impose on Canada a private law duty of care in negligence across the Class to "ensure" adequate housing on reserve. The sweeping duty proposed is unprecedented and unsupported by authority. A finding of such a duty would also transgress the core competencies of the legislative and executive branches (*Marchi* at paras 42-44).

[224] The Plaintiffs cannot redefine the duty of care issue to include a finding of an expansive obligation to ensure access to housing. This type of argument conflates the duty of care analysis with the standard of care and is not permitted by the duty of care analysis set out in *Anns/Cooper*. The *Anns/Cooper* test is not concerned with defining, or designed to, define the conduct required to meet an existing duty (*Victoria* at para 27).

[225] Put differently, “the question of whether a duty of care exists is a question of the relationship between the parties, not a question of conduct.” Finding a duty of care does not define “a duty to do anything specific; it is a duty to take reasonable care to avoid causing foreseeable harm….” (*Rauch v Pickering (City)*, 2013 ONCA 740 at paras 38-39).

[226] Absent a pre-established category of duty of care, the two-part *Anns/Cooper* test must be applied to establish a duty of care. Proximity arises where the parties are in such a “close and direct” relationship that it would be “just and fair having regard to that relationship to impose a duty of care in law upon the defendant” (*Marchi* at para 17; *Cooper v Hobart*, 2001 SCC 79 at paras 32, 34 [*Cooper*]).

[227] While Canada agrees that duties of care could arise in specific circumstances, proximity cannot merely be presumed to arise; findings of proximity based on interactions between government and a plaintiff are necessarily fact-specific (*Wu v Vancouver*, 2019 BCCA 23 at para 70 [*Wu*]; *Taylor v Canada (Attorney General)*, 2012 ONCA 479 at para 80 [*Taylor*]; *Marchi* at para 17).

[228] Instead, the Plaintiffs’ argument for proximity rests primarily on the historical relationship between Canada and First Nations, relying on cases such as *Brown.* That case, however, arose in the context a specific contractual obligation (*Brown* at paras 73-74, 81). While the Plaintiffs point generally to First Nations’ Funding Agreements, these instruments exist as generic frameworks to flow various funding streams to First Nations. The record is inadequate to determine if the funding agreements engage the Honour of the Crown in light of the new criteria

in *Takuhikan* (at paras 161-163). There is no allegation that these agreements' terms have actually been breached, as was the case in *Brown*.

[229] Broad statutory public powers or duties do not, in and of themselves, give rise to private law duties of care (*Eliopoulos Estate* at para 17; and *River Valley Poultry Farm Ltd v Canada (Attorney General)*, 2009 ONCA 326 at para 57 [*River Valley Poultry*]). While statutory provisions may be relevant to assessing proximity, very rarely will a statute be the source of a private law duty of care to particular individuals (*Taylor* at paras 77–78). It is not possible to convert public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals (*Imperial Tobacco* at para 50, citing *Eliopoulos Estate*).

[230] If a *prima facie* duty is found under step 1 of the *Anns/Cooper* test, the court must still determine whether residual policy considerations should negate its imposition. Relevant policy questions include whether the law already provides a remedy; whether recognition of the duty of care would create the spectre of unlimited liability to an unlimited class; and the effect of recognizing a duty on other legal obligations (*Marchi* at paras 18, 22; *Cooper* at para 37). In the creation of a new duty, a court should be mindful of the potential breadth of its application and the range of circumstances in which it might apply (*Wu* at paras 74-78).

[231] A government or public authority will be exempt from the imposition of a duty of care where the government activity at issue constitutes a pure or core policy decision (Marchi at para 33). The rationale for this "core policy immunity" is to "allow governments ample scope to make decisions based upon social, political and economic factors, without being exposed to tort

liability for those decisions" (*Francis ONCA* at para 134; *Imperial Tobacco* at para 63 citing *Just* at 1240). Governments must be allowed to make difficult choices between different policy outcomes and "adversely affect the interests of individuals" without fear of incurring liability (*Marchi* at para 46, citing *Laurentide Motels Ltd v Beauport (City)*, 1989 CanLII 81 (SCC), [1989] 1 SCR 705). The law of negligence must also account for the unique role of public authorities in governing society in the public interest. Even where an established category of duty applies, a court may nevertheless weigh residual policy considerations not taken into account when the duty was first established, and whether such a duty should not be imposed because the specific decision at issue constitutes core policy (*Marchi* at paras 1, 19, 28, 30, 34; *Brown v British Columbia (Minister of Transportation and Highways)*, 1994 CanLII 121 (SCC), [1994] 1 SCR 420; *Swinamer v Nova Scotia (Attorney General)*, 1994 CanLII 122 (SCC), [1994] 1 SCR 445).

[232] The duty of care analysis must consider specific government decisions at issue. The Plaintiffs' argument includes only a superficial duty of care analysis, applied globally to all government activity related to housing on reserve, ostensibly flowing from its on-reserve housing policy and its Funding Agreements with First Nations. They suggest that a singular duty therefore applies, as Canada has decided to "enter the field" of housing. However, it is impossible to attach a duty of care to government activity without examining the nature of that activity: "In ascertaining whether a decision is one of core policy, the key focus is always on the nature of the decision" (*Marchi* at para 2 [emphasis added]).

[233] Government activity is core policy. In *Marchi*, the Supreme Court of Canada commented on "core policy immunity" as follows:

> [T]he law of negligence must account for the unique role of public authorities in governing society in the public interest. Public bodies set priorities and balance competing interests with finite resources. They make difficult public policy choices that impact people differently and sometimes cause harm to private parties…
>
> Courts are not institutionally designed to review polycentric government decisions, and public bodies must be shielded to some extent from the chilling effect of the threat of private lawsuits (para 1).

[234] While the Plaintiffs' plead a claim in relation to Canada's "operational negligence", their main arguments flow from assertions of underfunding, or unreasonable funding conditions and processes, and not from specific acts involving individual government employees implementing any of those policies or programs or contracts. Any operational duties must be examined on their specific facts. While core policy decisions or actions benefit from immunity, Canada agrees that the *operational implementation* of such decisions or policies may attract liability in negligence (*Chung v British Columbia (Minister of Health)*, 2023 BCCA 294 at paras 92, 99 [*Chung*]). In *Wu*, the court commented that typically any private law duty attaching to the government will arise from *specific interactions*, or from a statutory scheme, between the public authority and the claimant sufficient to create the necessary proximity (*Wu* at para 59; *Imperial Tobacco* at para 43).

[235] The Plaintiffs' examples bear the essential hallmarks of core government policy: these are functions that balance public policy considerations; or exist for the "planning and predetermining the boundaries of [a government's] undertakin[g]" (*Marchi* at para 54); or, in the case of allocations to First Nations, are functionally equivalent to the budgetary allotment

process (*Marchi* at para 54; *Umlauf v Halton Healthcare Services et al*, 2017 ONSC 4240 at paras 19, 22 [*Umlauf*]).

[236] These examples ignore that duties of care will not arise from how government programs are designed (*Wareham v Ontario (Community and Social Services*), 2008 CanLII 1179 (ON SC) at para 25 [*Wareham*]; *Leroux v Ontario*, 2023 ONCA 314 at para 58); their general supervision (*Barker v Barker*, 2020 ONSC 3746 at para 1264, rev'd on other grounds, 2022 ONCA 567); the resources allocated to their operation (*Wareham* at para 25); or their eligibility criteria (*Wynberg v Ontario*, 2006 CanLII 22919 (ONCA) at paras 252–254 [*Wynberg*]).

[237] As in *Cirillo v Ontario*, 2021 ONCA 353 [*Cirillo*], the claims in this case seize on government determinations of the adequacy and allocation of resources devoted to an important government program. Asserted government underfunding alone cannot create a civil cause of action (*Rebello* at para 22; *Cirillo* at para 13; *Phaneuf v Ontario,* 2010 ONCA 901).

[238] Core policy immunity, once established, can only be overridden by proof that the relevant decision or government action was irrational or done in bad faith. The Plaintiffs have tendered no evidence that supports such a finding.

[239] General policy considerations also negate the proposed duty. The Plaintiffs' proposed duty would impose a positive duty to provide, or ensure the adequacy of, a public service. Such a duty would conflict with, or fetter, Canada's policy discretion over funding decisions, and could put it in conflict with other public interests requiring public funds as well as Canada's overarching responsibility to act in the public interest and for the public at large (*Fullowka*).

Recognizing a duty of care premised on a general claim of underfunding would also have far-reaching impacts, and could create indeterminate liability for every level of government that provides any level of housing assistance in their communities (*Elder Advocates* at para 74; *Wu* at paras 73-75, and *Deloitte & Touche v Livent Inc. (Receiver of)*, 2017 SCC 63, at paras 42-44).

[240] There is no statute that creates a positive duty on Canada to provide or ensure housing on reserve (*Imperial Tobacco* at paras 43-44). The Plaintiffs' examples to the contrary, such as the *National Housing Strategy Act*, plainly contain only obligations owed to the general public (*Eliopoulos Estate* at para 17; *River Valley Poultry* at para 57).

[241] Any private law duties that may arise on this record, must necessarily arise from *interactions* between Canada and the Class Members. The Plaintiffs have failed to provide evidence of interactions sufficient to find the existence of a private law duty, and certainly not one that could be found on a Class-wide basis.

[242] The Honour of the Crown cannot inform a negligence or duty of care assessment.

[243] Core policy decisions or actions benefit from immunity; however, Canada acknowledges that the operational implementation of such decisions or policies may attract liability in negligence (*Chung* at para 92).

[244] Imposing a positive duty to guarantee a level of service or benefit would conflict with or fetter Canada's discretion over funding and put it in conflict with other interests respecting allocation of public funds (*Elder Advocates* at para 74; *Wu* at paras 73-75).

(3) Conclusion

[245] I am persuaded by the Plaintiffs' submissions and find that Canada owes a common law duty of care to the Plaintiffs. I make this determination for several reasons.

[246] First, I find the reasoning of the Ontario Court of Justice in *Brown* persuasive. If Canada owes the Plaintiffs a *sui generis* or *ad hoc* fiduciary duty, that relationship is an important factor to consider in the proximate relationship component of the *Anns/Cooper* test. Since I have found that a fiduciary duty is owed to the Plaintiffs in relation to on-reserve housing, I find that duty weighs in favour of a finding of a proximate relationship between Canada and the Plaintiffs for the purpose of the *Anns/Cooper* test. However, while a finding of a fiduciary duty of care does not automatically ground a finding of a common law duty of care, I find that there is a common law duty of care independent of the fiduciary duty.

[247] Second, I disagree with Canada that a historical view of the relationship between Canada and First Nations is not relevant. A review of the historical relationship clearly establishes that Canada, through the *Indian Act*, establishment of reserves, and development of policies, has had, and continues to have a significant degree of control over First Nations and, by implication, First Nations members residing on reserves. To start the assessment from June 12, 1999, would ignore the long history of colonialism that has created the current housing crisis along with other harmful socio-economic conditions facing First Nations.

[248] As for the first part of the *Anns/Cooper* test, I find that this historical relationship clearly creates a relationship of proximity in which Canada's failure to exercise reasonable care may

foreseeably cause loss or harm to the Class. It also demonstrates that Canada's control continues during the Class Period.

[249] The evidence establishes, over a lengthy period of time, that Canada's policies, funding processes and *Indian Act* limitations created a relationship of proximity and vulnerability and that Canada's positive or negative decisions or actions could reasonably have been foreseen to cause harm or loss to the Class or potentially cause harm or loss to the Class. The insufficiency of funding, lack of funding, and delays in providing funding to affect the ability of the Class to access safe or adequate housing was foreseeable.

[250] Third, and for the same reasons as I have found regarding the fiduciary duty, Canada takes a very narrow and distorted view of the Plaintiffs' claim. The Plaintiffs are not seeking a positive obligation or a pre-determined outcome about funding. The claim is about how the colonial impacts of legislation, reserve creation, funding and policy have severely impacted the ability of once self-sufficient communities to provide their own access to safe housing, which has consequently caused them to become reliant on Canada for access to safe housing, to their detriment.

[251] Fourth, I find that Canada has directly entered the field in relation to many aspects of First Nations, and in particular, on-reserve housing. I agree with Canada that it may not be actually swinging hammers, but the constellation of laws, policies and funding agreements have created so much control that there are next to no options for housing development for the Class. I also acknowledge that, in theory, there are additional mechanism for First Nations to seek funding to assist with constructing houses, however, the reality is that the legacy of colonialism

has impacted the Class' ability to do so. The Class Members are isolated from commercial centres and they face hurdles to gaining benefits from industries operating in their traditional territories. There really is no practical alternative open to the Class to find alternative sources of funding to address the on-reserve housing crisis.

[252] As for policy considerations, I am not persuaded by Canada's assertions of public policy immunity. Canada's historical relationship with First Nations people leaves no room to negate a duty. The finding of a duty of care in this case does not challenge Canada's core policy decisions. I disagree with the Defendant that finding such a duty would create a situation of indeterminate liability to an indeterminate class, which differentiates this from *Attis* (at para 74), *Eliopoulos Estate, and Imperial Tobacco* (at paras 99-101). First Nations and First Nation members on reserve have a significantly different relationship with Canada as do other members of Canadian society. As such the Class is finite and clear. It is based on the historical relationship as demonstrated through the expert evidence.

[253] I also do not find that, should there a be a breach, that it would create indeterminate liability on the part of Canada. While that is a matter for the Stage II Common Issue determination, suffice to say that if there is a breach of the duty that it would be within a Court's competence, with witness testimony, to determine the nature and scope of any liability.

[254] The duty of care is made out on the record and in accordance with the law. I also find that the duty of care is informed by the Honour of the Crown. I agree with counsel for the Plaintiffs that the essence and implications of the Honour of the Crown would be rendered meaningless if it is to have no application to the common law duty of care. The historical relationship has

triggered the Honour of the Crown and has similarly established that a common law private duty of care exists between First Nations and Canada, insofar as on-reserve housing is concerned.

E. Are Sections 15, 7 and 2 of the Charter and Section 36 of the Constitution Act, 1982 Engaged?

(1) Standing

(a) *Defendant's Position*

[255] *Charter* subsection 15(1) is intended to apply to individuals, and not all legal personalities (*Canada (Attorney General) v Hislop*, 2007 SCC 10 at paras 72-73 [*Hislop*]). As a result, the section can only be asserted by the individual members of the Class, and not the First Nations Class Members. The Plaintiffs incorrectly rely upon the dissent in *Ermineskin Indian Band & Nation v Canada*, 2006 FCA 415 [*Ermineskin FCA*] in order to assert section 15 standing for the First Nations Class (*Ermineskin FCA* at paras 300-303). While First Nations may be able to advance a section 15 claim in a representative capacity, on behalf of their members, such a claim can only pertain to individual rights (*Ermineskin FCA* at paras 132-34). There is no authority permitting First Nations to claim a section 15 remedy for themselves.

[256] Section 7 generally applies only to individual human beings (*Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 1004). As with section 15, only the individual, and not First Nations Class Members can assert a claim under section 7.

[257] The Plaintiffs' claim under sections 2(a) and 2(c) of the *Charter* also fail, insofar as it pertains to the First Nation Class, for the same reasons as with Sections 15 and 7.

(b) *Plaintiffs' Position*

[258] First Nations have standing to advance section 15(1) claims. When rights are asserted on behalf of individuals by a representative, "relief under section 15 is available provided the factual elements of discrimination are present." (*Ermineskin FCA* at paras 300-303).

[259] The Defendant's submission that the *Ermineskin FCA* case does not permit First Nations to advance a section 15 claim takes to narrow a view of the majority decision. This case does not reject section 15 claims by First Nations asserting the collective rights of their members.

[260] In any event, the Defendant misapprehends the nature of the Plaintiffs' claim under section 15. The Plaintiffs, as First Nations, are asserting their community's interest in equality, which on this motion can be framed as one on behalf of the Plaintiffs' members or citizens. Canada concedes that First Nations have standing to bring representative claims on behalf of their members.

[261] There is doubtless overlap between the First Nation Class Members' claims under section 15 of the *Charter* and the claims of the individual Class Members. However, the standing of the collective is important because the First Nation Class Members represent Band members who are not themselves individual Class Members. For example, some members of First Nations were displaced from their reserves prior to the commencement of the Class Period because they could not continue to live without adequate housing on reserve.

(c) *Conclusion*

[262] I agree with the Plaintiffs that, in addition to the Individual Class, the First Nations Class Members have standing to seek *Charter* relief. However, the precise nature of the potential breach of section 15 of the *Charter*, as it pertains to both the individual Class Members and the First Nations Class Members, will be properly and fully considered at the Stage II proceeding.

[263] As to standing, the majority of the Federal Court of Appeal in *Ermineskin FCA* did not foreclose the possibility of non-individuals seeking *Charter* relief. The majority determined that a remedy under section 15 could be obtained only where a personal right was infringed but that the claim in that case was in relation to the management of band property under the *Indian Act* and not in relation to a personal right (*Ermineskin FCA* at para 133). The Court further determined that "the fact that the claims in each of these cases have been asserted by band members through representatives does not convert what is essentially a claim relating to band property into a claim relating to the personal rights of the members of the bands. We conclude that subsection 15(1) of the *Charter* is of no assistance to Samson or Ermineskin in advancing any claims made in the money management phase of their actions" (*Ermineskin FCA* at para 134).

[264] The claim at issue in this case is not a claim in relation to the management of Band property. Rather, it is based on a personal right, and it is also brought individually and in a representative capacity.

[265] I agree with the minority reasoning in *Ermineskin FCA*, relying on Justice Kelen's reasoning in *Métis National Council of Women v Canada (Attorney General)*, 2005 FC 230,

[2005] 4 FCR 272 (FC) at paragraph 50, aff'd 2006 FCA 77 (CanLII), [2006] 2 CNLR 99 (FCA), that when rights are asserted on behalf of individuals by a representative, relief under section 15 is available provided the factual elements of discrimination are present (*Ermineskin FCA* at para 303). As stated at the outset of this conclusion, the full factual elements of discrimination will need to be canvassed at Stage II.

(2) Background to *Charter* Submissions

[266] As noted above, the determinations of whether any legal duties or rights are breached or infringed will be made at the Stage II Common Issue question proceeding. This summary judgment motion seeks an answer to a general question as to whether certain legal duties exist or whether certain *Charter* rights are engaged.

[267] The parties devoted a substantial amount of their written and oral submissions delving into breaches of duties and *Charter* rights and impacts related those breaches. The Court posed the question as to "where the line was" in relation to what the parties were seeking bearing in mind the Stage I Common Issue question. It was acknowledged that it is a grey line at best and that it was very difficult to discuss *Charter* rights without delving into a consideration of breaches of those rights.

[268] It is sufficient to say that, at this Stage I Common Issue question determination, I conclude that the *Charter* is engaged. Section 32(1) of the *Charter* provides as follows:

32 (1) This Charter applies	32 (1) La présente charte s'applique :
(a) to the Parliament and government of Canada in respect of all matters within the	a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du

authority of parliament including all matters relating to the Yukon Territory and Northwest territories; and	Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;
(b) to the legislature and government of each province in respect of all matters within the authority of each province.	b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

[269] The *Charter* applies broadly to the legislative, executive, and administrative branches of government in respect of all matters within their authority (*Dickson* at para 41, citing *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] S.C.R. 295 at para 14; *RWDSU v Dolphin Delivery Ltd*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573 at 598). As a result, all exercises of governmental authority by Parliament are subject to the *Charter* (*Dickson* at para 43).

[270] In summary, and in light of section 32(1) of the *Charter*, I conclude that at this stage it is sufficient for me to conclude that the *Charter* applies to the circumstances of this case. I will outline the parties' submissions on the *Charter* issues simply to highlight that, in my view, the parties were asking the Court to delve dangerously close to a determination of the Stage II Common Issue questions.

(3) *Charter* Section 15

[271] The parties correctly state the law regarding what a claimant must establish to prove a *prima facie* violation of section 15. As stated, at this stage it is unnecessary to engage with the specific test.

(a) *Plaintiffs' Position*

[272] The Plaintiffs' submissions are quite extensive. Below is my attempt to summarize these submissions:

A. Class Members have undoubtedly been discriminated against historically as a group on the basis of First Nation membership and their residency on reserves (*Corbiere* at para 19-21).

B. Under Step 1 of the analysis, Canada's enactment of the *Indian Act*, *FNLMA*, and *National Housing Act*, have restricted First Nations' ability to build their own homes and imposed a series of operational policies on the way that First Nations can design, construct, and maintain their homes on reserve. Combined with knowingly inadequate funding, this regime has operated to deprive Class Members of adequate access to appropriate housing in their reserve communities and it has prevented them from taking appropriate measures to correct the deficiencies. Other groups in Canada do not have these limitations or restrictions placed on them.

C. The extensive evidence in this case demonstrates that Canada's approach creates, and contributes to, a disproportionate impact on Class Members compared to other Canadians and even First Nations living off reserve (*R v Sharma*, 2022 SCC 39 at para 42 [*Sharma*]). The impugned state action need not be the "only or the dominant cause of the disproportionate impact" – it need only be a cause (*Sharma* at paras 45-49).

D. Canada's own witness, Mr. McKinstry, has noted that the Draft 2018 NFN Housing Strategy indicates that the legacy of colonization and Canada's approach to on-reserve housing has created and contributed to the disproportionate impact that Class Members face and that Canada "needs to do better".

E. For the second step of the section 15 analysis, the Court must look at the harm that has been caused to the affected group, which may include: economic exclusion or disadvantage, social exclusion, psychological harms, physical harms, or political exclusion, viewed in light of any historical or systemic disadvantages faced by the claimant group (*Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 76).

F. Canada has imposed restrictions on Class Members' First Nations that force them to depend on federal funding to build and maintain housing on reserve, while also deliberately underfunding on-reserve housing, with the result that First Nations are subject to a well-known and understood structural housing deficit. This perpetuates and exacerbates disadvantage against First Nations peoples on reserve.

G. Canada has a duty to ensure that the effect of its laws, operational policies, and protocols promote substantive equality. This is both a matter of a negative right, and also a positive right, insofar as Canada must make reasonable efforts to ensure that Class Members have access to adequate housing on reserve.

H. In reply to Canada's submission that the assessment is "highly contextual" and cannot be resolved until Stage II, there is extensive evidence, including expert

evidence, to ground a Class-wide section 15 claim in the common impact of Canada's approach to on-reserve housing. The Court can find that Canada's conduct is discriminatory to the Class without further inquiry. Specific circumstances are appropriately addressed at Stage II.

(b) *Defendant's Position*

[273] The Defendant's extensive submissions are summarized as follows:

A. The scope of *Charter* duties is inextricably intertwined with asserted *Charter* breaches; therefore the *Charter* cannot be litigated in an impermissible factual vacuum (*Mackay* at 361). Specific *Charter* obligations plead here, sections 15, 7, 2(a) and 2(c), require fact-specific contextual analyses that pertain to Stage II. There is no evidence on the record to support these causes of action. Moreover, the *Charter* does not establish a positive right.

B. Section 15 does not impose a freestanding positive obligation on the government to remedy social inequality (*Sharma* at para 63). Canada is able to extend or curtail programs or benefits, or the scope of its funding programs, to meet public needs and priorities, as long as it does not do so in a discriminatory manner (*La Rose v Canada*, 2023 FCA 241 at para 80; *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 at para 41 [*Auton*]).

C. Policy decisions determining the scope of Canada's housing support for First Nations will not engage a section 15 obligation. Canada's policy choices to provide any particular level of funding will not offend section 15, absent a further

showing of a discriminatory effect caused by that specific policy choice (*Auton* at para 41).

D. The analysis is highly contextual (*Withler v Canada (Attorney General)*, 2011 SCC 12 at para 43 [*Withler*]), is grounded in the actual situation of a claimant group (*Withler* at para 37) and cannot be determined on this motion. The section 15 analysis requires both proof of causation of a disproportionate impact, on a recognized ground of discrimination, with an emphasis on actual outcomes and results as well as a full contextual analysis. This could only be conducted at Stage II of this proceeding, and then only on a community-specific basis.

E. Regarding step 1 of the analysis, Canada acknowledges that the individual Class Members can demonstrate membership in a protected group, as contemplated by section 15(1). As Canada's relevant housing policies only implicate persons living on reserve, they will, generally, only impact individuals of a specific race or national/ethnic origin (*First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada*), 2016 CHRT 2 at paras 395-96). The analogous ground of "Aboriginality-residence", in respect of First Nations members choosing to live on or off reserve, may also conceivably apply (*Dickson*).

F. *Sharma*, in particular, confirms the need to demonstrate, through evidence, a "nexus between a particular action of the state" and the infringement (*Sharma* at para 43).

G. The section 15 analysis also remains inherently comparative. While more recent cases no longer require claimants to identify a "mirror" comparator group for the purposes of the analysis (*Withler* at paras 40, 58-60; *Sharma* at para 41), the disproportionate impact requirement necessarily introduces comparison into the first step of the test. Comparison is engaged "in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not," on the basis of a protected ground (*Withler* at para 62; *Sharma* at para 41).

H. The Plaintiffs cannot establish a disproportionate impact. The Plaintiffs allege a distinction between Class Members "and almost all other Canadians", but this assertion is wholly unsupported on the record. There is no other group in Canada that receives the benefit of community-wide funding for housing construction and maintenance in the manner claimed by the Class, or even as presently provided to First Nations by Canada. The result is that the present claim will fail on the same basis as in *Auton*. There, the benefit sought – "funding for all medically required services" — was not provided to anyone under the legislative scheme, and was therefore not provided for by the law. As stated by the Supreme Court: "the benefit claimed…is not a benefit provided by law. This is sufficient to end the inquiry" (*Auton* at paras 31, 35, 47).

I. There can be no viable discrimination claim premised on the adequacy, or limitations, of the housing assistance that Canada *does* provide. Governments are entitled to considerable leeway in addressing social issues; they may address inequality "one step at a time" (*Sharma* at paras 63-65).

J. Equally, it does not assist the Plaintiffs to suggest, without evidence, that other, more limited, groups of persons receive housing assistance from Canada (new immigrants and refugees, low-income families, veterans, individuals suffering from homelessness and seniors). There is no evidence respecting similar allegations referred to in the Statement of Claim.

K. Legislative measures, unparticularized and only mentioned in passing in the Notice of Motion, are not alleged to infringe the *Charter per se*. There is no suggestion that sections of the *Indian Act*, or other measures, are unconstitutional. Nor is a *Constitution Act, 1982* section 52 declaration of invalidity sought. The discrimination claim turns on Canada's funding at its core.

L. The situation of First Nations is unique, and the Class cannot simply point to isolated legislative components, taken out of their entire context, in order to establish the requisite distinction. While reserve lands may be subject to some legislative restrictions, notably the prohibition on mortgaging or the granting of other security interests, First Nations also have access to policy and legislative measures pursuant to the *Indian Act*, *FNLMA*, CMHC programs, to name a few, some unique to First Nations, that facilitate access to on-reserve housing.

M. Finally, the generally-asserted impacts of Canada's funding, or other housing-related legislation and policy, does not relieve the Plaintiffs from their obligation to prove causation on a First Nation-by-First Nation basis at Stage II. The Plaintiffs point only to Canada's "regime", without reference to a discriminatory

impact caused by a specific legislative provision, or policy requirement, as they relate to individual First Nations.

N. If this matter proceeds to Stage II, the individual claimants will still be required to demonstrate causation of any disproportionate impact based upon the specific provisions that affect them (*Sharma* at para 73). Canada's ability to respond to these allegations will depend on the specific policy provisions impugned, as well as the full context and evidence of impacts, on a community-by-community basis. Nonetheless, the Plaintiffs' failure to establish a threshold distinction – that is, unequal access to a benefit provided by law – is fatal to the discrimination claim. Section 15 is not engaged.

O. The step 2 analysis of the section 15 test must remain distinct from the step 1 analysis (*Sharma* at para 30).

P. Community-specific considerations will also apply for step 2 of the equality analysis, which requires an examination of the "actual impact of the law on that situation" (*Fraser* at para 42). Step 2 of the section 15 test requires a claimant to establish that the impugned law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the group's disadvantage (*Fraser* at para 27).

Q. The contextual analysis at step 2 requires an examination of "all context relevant to the claim at hand", and of the "claimant group's situation and the actual impact of the law on that situation" (*Withler* at para 43). This would require examination of Canada's funding for a given First Nation's housing.

R. This inquiry is fact-specific (*Dickson* at para 190). The Plaintiffs are still required to prove discrimination for individuals in specific communities. There remains the possibility that, in a given community within the Class – or for given individuals within a community – any distinction "may well not be discriminatory" (*Corbiere* at para 8; *Dickson* at para 190). The issue of actual discrimination, and the precise scope of Canada's *Charter* obligation, would depend on a full contextual analysis, with reference to the specific circumstances for the individuals in a given community. Such an analysis cannot be conducted Class-wide, but only for specific communities at Stage II of this Action.

(c) *Conclusion*

[274] While I have determined that the *Charter* is engaged on the circumstances of this case, I am in agreement with the Defendant's submission that the specific *Charter* obligations plead here, sections 15, 7, 2(a) and 2(c), require fact-specific contextual analyses that pertain to Stage II. This includes a determination as to whether any duties owing to the Class Members have been breached.

[275] The record before this Court overwhelmingly demonstrates that section 15 of the *Charter* is engaged. Here we have federal laws, policies and administrative action being employed in relation to First Nations housing on reserve. The Plaintiffs' lay and expert witnesses, along with Canada's own witnesses and auditor general reports, provide evidence of interactions between the federal government and First Nations on the issue of on-reserve housing. I agree with Canada

that the full analysis of whether there has been a section 15 breach requires a contextual analysis and proof of causation with a disproportionate impact on a recognized group.

[276] While much of the Plaintiffs' evidence addressed social harms, the Court does not need to assess that harm at this stage. Suffice to say, there may be some variation of harms within the Class but that can also be determined at Stage II.

[277] As for the Plaintiffs' evidence regarding the history of colonialism, I find this information is useful for the purposes of determining the fiduciary duties and common law duty of care owed. Such evidence may also be relevant to establishing the full scope and extent of any section 15 rights and whether such rights have been breached, which are issues for the Stage II Common Issue question determination.

[278] At this stage, there is no need for the Court to go further. As stated, the Stage II Common Issue will look into whether any breaches of section 15 have actually occurred and whether any such breaches are justified in accordance with section 1 of the *Charter*.

(4) Section 7 *Charter* Rights

[279] The parties written and oral submissions regarding section 7 of the *Charter* were also extensive.

(a) *Plaintiffs' Position*

A. Courts must evaluate section 7 claims "in the light, not just of common sense or theory, but of the evidence" (*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 150 [*Chaoulli*]).

B. The evidence makes out both a negative and a positive claim under section 7. Inadequate access to housing on First Nations Lands can infringe Class Members' rights to life and security of the person by compromising their physical and mental health, exposing them to a host of serious illnesses, and endangering their safety and security. By the same token, these highly restrictive conditions give rise to a positive obligation precisely because Canada has prevented Class Members from helping themselves.

C. Canada's comprehensive housing regime for on-reserve housing deprives Class Members of adequate access to housing, infringing Class Members' rights to life and security of the person by endangering their physical and mental health. A long-term deprivation of adequate housing cannot be in accordance with the principles of fundamental justice. This treatment is arbitrary, overbroad, and grossly disproportionate to any objective Canada was trying to achieve.

D. Section 7 of the *Charter* restricts Canada's ability to deprive First Nations peoples of these interests. A deprivation is made out where Canada creates a risk to safety by preventing access to safety-enhancing measures (*Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 93 [*PHS*]). A risk of harm is sufficient to engage the right to security of the person and an increased risk of

death, either directly or indirectly imposed by government action, engages the right to life *(R v Morgentaler*, [1988] 1 SCR 30; *Bedford v Canada*, 2013 SCC 72 at paras 18, 59, 60-65 [*Bedford*]).

E. The overwhelming evidence is that Canada has exercised a significant degree of control over housing infrastructure which, on its face, has exposed Class Members to severe harms.

F. It is a violation of *Charter* section 7 to create by-laws which interfere with homeless people's ability to shelter themselves (*Victoria (City) v Adams*, 2009 BCCA 563 at paras 90-97 [*Victoria (City)*]). This situation is akin to the interference that Canada's implementation of the reserve system has subjected First Nations to, thereby preventing their ability to secure adequate housing.

G. Canada's comprehensive on-reserve housing regime is arbitrary, overbroad and grossly disproportionate. These principles speak to "failures of instrumental rationality" that reflect a legislative provision that is unconnected from or grossly disproportionate with its purpose (*Bedford* at para 107).

H. The analysis of arbitrariness, overbreadth and gross disproportionality is "qualitative not quantitative", meaning its impact on one person is sufficient to establish a breach (*Bedford* at para 123). "If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective" (*Bedford* at para 107; *Ewert v Canada*, 2018 SCC 30 at para 71).

I. A law is arbitrary if it limits life, liberty, or security of the person in a way that "bears no connection to its objective" (*Bedford* at para 111).

J. Gross disproportionality arises when a law's effect on life, liberty or security of the person are so grossly disproportionate to its purposes that it cannot rationally be supported (*Bedford* at para 120; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 89 [*Carter*]; *PHS* at para 133). The analysis draws a comparison between the law's purpose, taken at face value, with its negative effects on the individual claimant, and asks whether its impact is "completely out of sync" with the object of the law (*Bedford* at para 125; *Carter* at para 89). It does not consider the beneficial effects of the law for society (*Bedford* at para 121).

K. The evidence on this motion demonstrates that Canada's legislative and policy regime prevents First Nations from constructing, developing, and maintaining an adequate housing supply on reserve. When Canada maintains these restrictions in the face of inadequate federal funding, Class Members suffer a deprivation of life and security of the person. This deprivation bears no relation to Canada's objective of closing the infrastructure gap on reserve rendering the regime arbitrary and grossly disproportionate.

L. Although positive obligations will be rare under section 7 of the *Charter*, they can arise where the state sufficiently restricts claimants' ability to take steps to protect their life, liberty, and security of the person (*Umlauf* at para 41, aff'd 2018 ONCA 265; *Gosselin c Quebec (Procureur general)*, 2002 SCC 84 at para 82 [*Gosselin*]; *Scott v Canada (Attorney General)*, 2017 BCCA 422 at para 88, leave to appeal

ref'd, [2018] S.C.C.A. No. 25). In these circumstances, Canada can incur positive obligations under section 7 to protect life, liberty, and security of the person.

M. Canada argues that the Plaintiffs' claim is premised on "funding" and that "Class Members are not prevented from developing or maintaining housing infrastructure by Canada's policies, but rather by their community's economic circumstances." These arguments fundamentally misapprehend: (1) its own role in creating the circumstances in which Class Members live (the reserve system under the *Indian Act*); and (2) the Plaintiffs' submissions.

N. In addition to being located in economically marginal locations, the *Indian Act* inhibits bands from raising funds for on-reserve housing projects because creditors cannot take effective security over reserve lands. Even if Class Members could conceivably repay loans from own-source revenue, which will be rare, Canada has created a situation where Class Members must depend on Ministerial Loan Guarantees to fund on-reserve housing needs.

O. The Plaintiffs' claim is not about access to funding, it is about the web of control that Canada exerts over on-reserve housing, which prevents Class Members from extricating themselves from dangerous housing conditions. The *Victoria (City)* case is directly applicable because Canada has created and maintained conditions that prevent Class Members from escaping the on-reserve housing crisis.

P. Canada's characterization that the Plaintiffs are seeking a positive right is untenable in light of the fact that, throughout the Class Period, Canada has extended funding, passed legislation, implemented regulations, and developed and

propagated standards. Canada has voluntarily entered the field and in doing so has opened itself to *Charter* scrutiny (*Mathur v Ontario*, 2024 ONCA 762 at paras 5, 37, 56-57).

Q. The 2024 Auditor General Report observes how the failures of ISC and CMHC result in poor and unsafe housing, which "significantly affect the health and well-being of individuals and families". Canada's witness, Mr. Hajiani, acknowledges that poor housing conditions result in life-threatening circumstances, including family violence, substance abuse, suicide, poor physical and mental health, and transmission of communicable diseases.

(b) *Defendant's Position*

A. Section 7 of the *Charter* is not engaged on these facts nor is a positive right made out on the record. Section 7 targets only *deprivations* of life, liberty, and security of the person and has not been found to ground a right to access funding for housing. Section 7 has not been interpreted as imposing a positive obligation on governments. Nor does it protect economic interests (*Gosselin* at para 81; *AC and JF v Alberta*, 2021 ABCA 24 at para 127).

B. To establish a limitation of section 7, the Plaintiffs must demonstrate that: (a) the state has deprived them of their life, liberty or security of the person; and (b) the deprivation is not in accordance with the principles of fundamental justice (*Carter* at para 55). While the challenged law or governmental act need not be the sole or

dominant cause of the alleged deprivation, there must be a real, as opposed to speculative, link (*Bedford* at para 76).

C. Class Members are not prevented from developing or maintaining housing infrastructure by Canada's policies, but rather by their community's economic circumstances. Canada acknowledges the seriousness of the economic reality for these Class Members, and their reliance on Canada's housing funding. However, section 7 does not protect the economic rights asserted by the Plaintiffs.

D. It is well settled that claimants cannot establish a section 7 right to a specified level of financial assistance, or a specific level of government program funding (*Gosselin*; *Deskin v Ontario*, 2023 ONSC 5584 at paras 10, 94-95 [*Deskin*], *citing Masse v Ontario (Ministry of Community and Social Services)*, 1996 CanLII 12491 (ON SCDC) at para 73 [*Masse*]; *Barbra Schlifer Commemorative Clinic v Canada*, 2014 ONSC 5140 at paras 32-33 [*Schlifer*]; *Wynberg* at paras 218-20.)

E. The jurisprudence has been persistently clear that section 7 does not support a positive right (*Chaoullii* at para 104; *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 136, leave to SCC ref'd). A claimant must establish, at a minimum, a deprivation caused by state action (*Bedford* at paras 58-60; *PHS* at paras 92-93). The SCC has cautioned that any evolution of section 7 into the realm of positive rights must be incremental and reserved for special circumstances (*Gosselin* at paras 80-83).

F. Courts have dismissed claims for positive rights in a vast array of contexts, including claims relating to social assistance benefits (*Masse* at paras 73, 172;

McMeekin v Government of the Northwest Territories, 2010 NWTSC 27 at paras 27-31; *Lacey v British Columbia*, 1999 CanLII 7023 (BC SC) at paras 4-6; *Conrad (Guardian ad litem of) v Halifax*, [1993] NSJ No 342 (Westlaw) at paras 70-71), health care (*Chaoulli* at para 104; *Toussaint v Canada*, 2011 FCA 213 at para 77) to name a few.

G. In particular, courts have consistently rejected claims under section 7 for more or different government-provided funding, or for social or health services. Where the state chooses to provide such a service, section 7 does not impose a required level (*Deskin* at para 97, citing *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651).

H. In this sense, the Class Members' claim does not present the special circumstances contemplated in *Gosselin*, which could extend the section's reach into the realm of positive rights.

I. The Plaintiffs cannot sidestep this line of authority by characterizing the *Indian Act*, Canada's On-Reserve Housing Policy, or its funding conditions, as state action causing a deprivation, in reliance on *Chaoulli*, *PHS*, *Bedford*, *Morgentaler*, and *Carter*. In those cases, deprivations were established by actual state prohibitions, generally in the form of criminal statutes, which prevented individuals from seeking alternate means of protecting their section 7 interests. That is, the criminal law, or another legislative prohibition, was the animating cause of the deprivation (*Deskin* at para 114).

J. The *Victoria (City)* decision, relied upon by the Class, falls within that line of cases, as it deals with an actual legislative prohibition: a bylaw prohibiting homeless persons from erecting temporary shelter. Canada does not prohibit the Class from constructing housing on their own initiative, or from seeking alternate sources of financing to do so. The Plaintiffs' argument also ignores Canada's policy measures that are unique to First Nations housing, including those specifically designed to facilitate access to private financing.

K. Even if a deprivation could be established, the Plaintiffs cannot assert that a section 7 infringement does not accord with the principles of fundamental justice solely by reference to a "comprehensive regime" respecting First Nations' access to federal housing funding. Their fundamental justice argument raises issues of arbitrariness, overbreadth, and gross disproportionality, but without reference to any particular policy measure. This superficial approach is entirely inadequate, as it fails to consider whether any given policy is "inadequately connected to its objective or in some sense goes too far in seeking to attain it", as is required by the three doctrines, where applicable (*Bedford* at para 107, see generally paras 108-23). The Plaintiffs point to no particular aspects of the "regime", and conduct no specific comparison of a rights infringement caused by a policy against that policy's objective, as is required (*Bedford* at para 123).

L. As framed, the Plaintiffs' fundamental justice argument is conducted in an impermissible factual vacuum (*Mackay* at 361), as it relies only upon an abstract legislative or policy regime to ground the analysis. It ignores the basic requirements of factual context, precise definitions of legislative purpose, and

specific evidence of the impacts of the state measure at issue. This superficial approach cannot properly find the necessary fundamental justice analysis.

M. Finally, the Plaintiffs cannot establish either an actual deprivation, or a violation of the principles of fundamental justice, at Stage I of this proceeding. These questions are explicitly reserved for Stage II, where the Plaintiffs may demonstrate the asserted deprivation on a community-specific basis and conduct the fundamental justice analysis with precise reference to the specific legislation or policies that apply to a given First Nation's circumstances.

(c) *Conclusion*

[280] Section 7 of the *Charter* contains three distinct rights – to life, to liberty and to the security of the person – and the claimant need only show one of the three has been infringed (Constitutional Crossroads: Reflections on Charter Rights, Reconciliation, and Change, 2022 UBC Press at 161). For the same reasons as set out above relating to section 15, I find that section 7 is engaged by virtue of section 32(1) of the *Charter*.

[281] I agree with Canada that, to date, section 7 has not been interpreted to impose positive obligations on governments, nor does it protect economic interests (*Gosselin* at para 81). The jurisprudence has only considered section 7 in relation to deprivations of those rights. Any evolution of section 7 into the realm of positive rights must be incremental and reserved for special circumstances (*Gosselin* at paras 80-83). At this early stage of the proceeding, I also find that the evidence presents the special circumstances suggested by *Gosselin* for a positive obligation on the part of Canada to protect the section 7 rights of Class Members. Once again, by

making this finding I am not suggesting that any positive obligation has been breached. I only state that there are special circumstances that arise on the record which indicate that a positive obligation would appear to exist. The full scope and extent of such a positive obligation, and any breaches of such a right, are reserved for the Stage II Common Issue determination.

[282] The Court can go no further at this time.

(5) Section 2 of the *Charter*

[283] Once again, the parties' submissions respecting section 2 of the *Charter* were extensive.

(a) *Plaintiffs' Position*

A. Section 2(a): Class Members have sincere spiritual beliefs and practices that rely on access to adequate housing on First Nation lands. Section 2(a) of the *Charter* protects Class Members' ability to act in accordance with those beliefs and practices.

B. The British Columbia Court of Appeal recognized the "communal aspect of religious belief" that is protected under section 2(a) of the *Charter* and accepted the ability of the First Nation to bring a collective claim based on religious belief *(Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 352 at paras 57, 64, 67, 73 [*Ktunaxa*]).

C. Canada's failure to either make reasonable efforts to ensure that Class Members have access to adequate housing, or to restore Class Members to self sufficiency,

interferes with Class Members' ability to practice their cultural and spiritual traditions. This includes the ability to practice ceremony, such as sweat lodges (*R v Murdock*, 1996 NSCA 153; *R v Dickson*, 2017 ABPC 315 at para 150).

D. In the extreme, the loss of community materializes in the exodus of Class Members who are driven off reserve to find adequate housing to care for vulnerable family members, often children or the infirm, who cannot endure the hardships of such crowded and deficient homes. This causes a further burden for Class Members because children are traditionally cared for and guided by family members, as confirmed by several witnesses such as Chief Kakegamic, Councillor Vernon Monias and Chief Denechezhe.

E. Those leaving their communities face barriers to maintain their sacred relationship to family, community, land, culture, spirituality, and nation. As stated by Monias and Chief Denechezhe, those staying on reserve are unable to pass down their culture, spiritual practices and traditions, such as drying and tanning hides and making clothing tools and crafts, to a new generation (Monias Affidavit).

F. As stated by Chief Emeritus Flett and Chief Denechezhe, because so many community members are in survival mode due to their dire housing circumstances, they do not have the time and capacity to dedicate to transferring knowledge and engaging in traditional practices.

G. Canada suggests that the impact of its restrictions on Class Members' freedom of religion are "trivial or insubstantial". Canada's characterization minimizes the evidence, which demonstrates that its conduct threatens the destruction of First

Nations communities and religious belief. This threat is anything but trivial or insubstantial.

H. Canada also argues that there is no "homogeneous evidence of an impacted religious practice or belief" across the Class. Canada's suggestion that the Plaintiffs must identify a "homogenous religious practice" across a large group of First Nations with dozens of distinct languages is absurd. There is no need for the Court to find a specific "homogenous" religious practice in every First Nation across the country to ground a section 2(a) claim. Regardless of Class Members' specific practices, the lack of adequate housing and the hollowing out of their communities undermines their ability to observe and teach their sincerely held spiritual beliefs.

I. The Supreme Court of Canada has repeatedly acknowledged common features in First Nations' practice, including the importance of oral histories and land-based practices, which are directly impacted by inadequate housing on reserve (*Van der Peet*; *Delgamuukw*; *Mitchell* at para 27; *Southwind* at para 63; *Osoyoos* at para 46). Canada itself recognizes how "migration from the community lead[s] to cultural loss" (Canada's Response to Request to Admit, at pdf page 727).

J. Peaceful Assembly. Section 2(c) of the *Charter* protects the Class Members' right to freedom of assembly. The poor state of housing on reserve displaces Class Members to urban centers and towns, which prevents them from assembling on their territory for traditional community and cultural activities such as ceremonies, harvesting, medicine picking, feasts, and governance meetings. Class Members

have also deposed that they cannot hosts feasts or other cultural activities in their homes because they lack space.

K. This is not a "positive" rights claim and the threshold for interference is met on the evidence, which shows that dire housing shortages on reserve are displacing members and eroding communities.

(b) *Defendant's Position*

A. Section 2(a) of the *Charter* does not apply in this case. Section 2 broadly guarantees fundamental freedoms and creates a "negative obligation on government rather than a positive obligation of protection or assistance" (*Baier v Alberta*, 2007 SCC 31 at paras 20-21 [*Baier*]). Section 2 only requires positive government action to make the right meaningful in exceptional circumstances *(Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at paras 16-17, 25 [*Toronto (City)*]).

B. More specifically, section 2(a) provides individuals with the right to freedom of conscience and religion. It protects the exercise of these fundamental freedoms by protecting against non-trivial state interference with sincerely held religious beliefs, but it does not require governments to actively support or facilitate religious practice or worship (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 76 [*Congrégation*]). Section 2(a) does not normally impose any duty on the state to eliminate the natural costs of religious practices, or to otherwise provide positive

assistance such as public funding. The *Charter* guarantees freedom of religion but does not indemnify practitioners against all costs incidental to the practice of religion (*R v Edwards Books and Art Ltd*, 1986 CanLII 12 (SCC), [1986] 2 SCR 713 at paras 97, 114 [*R v Edwards*]; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 95 [*Hutterian Brethren*]).

C. The subsection 2(a) test for an infringement requires a demonstration that:

   i. the s. 2(a) claimant sincerely believes in a practice or belief that has a nexus with religion; and,

   ii. the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with the claimant's ability to act in accordance with that practice or belief (*Ktunaxa* at para 68).

D. "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct (*Hutterian Brethren* at para 32). It protects religious freedom, but only to the extent that religious beliefs or conduct might reasonably or actually be threatened (*Hutterian Bretheren* at para 32, citing *R v Edwards* at para 97). The term "substantial interference" has been defined as radically frustrating the section 2 right to the extent that it is "effectively preclude[d]" (*Toronto (City)* at para 27, citing *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 33). In the Court's words, "effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases" (*Toronto (City)* at para 27, citing *Baier* at para 27, and *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 25). The Plaintiffs' examples of interference fall well short of this standard.

E. The Class also asserts interference with their religious freedoms, but in circumstances that necessarily vary from First Nation to First Nation. There is only a bare assertion of Class-wide commonality to generalized traditions, without homogeneous evidence of an impacted religious practice or belief that exists across the Class. Given the Plaintiffs' shortfall on this threshold issue, there can be no finding that section 2(a) is engaged Class-wide.

F. Finally, the evidence on cross-examination suggests that while some religious practice could be impacted by limited access to housing, Class Members can still pursue their chosen practices in other spaces on their reserve (Chief Denechezhe Transcript). Again, this type of impact on religious freedoms caused by Canada's housing policies cannot meet the "substantial interference" standard. Such a determination, however, can only be made at Stage II of this action.

G. As with the other *Charter* causes of action, the Plaintiffs are, effectively, asserting a positive right to housing funding here, in order to guarantee access to their preferred places of worship or religious exercise. Section 2(a) does not create such an obligation, except in the most exceptional circumstances – such as where the construction of a place of worship has been made impossible by the state (*Congrégation* at paras 72-79).

H. Beyond those exceptional circumstances, there can be no positive obligation for Canada to provide housing, or other locations, for the Class to exercise various spiritual traditions. There is no right to public funding for places of worship, or

other religious institutions (*Adler v Ontario*, [1996] 3 SCR 609 at 703-704). Given the limits of section 2(a) protections, this claim cannot succeed.

I. Section 2(c) of the *Charter* does not apply in this case. The analysis of the freedom of assembly right under section 2(c) obtains the same result (*Ontario (Attorney General) v Trinity Bible Chapel*, 2023 ONCA 134 at para 18). The Class cannot establish a positive right to housing under the section 2(c) guarantee, as section 2 positive rights claims satisfy a high threshold of "radically frustrating" the exercise of the freedom in question. The Supreme Court has described this standard as "an exceedingly high bar that would be met only in extreme and rare cases" (*Toronto (City)* at para 27). There is no suggestion of evidence to meet this high threshold. The Class cannot establish even a threshold infringement of the subsection, premised upon an asserted lack of space in their homes. Section 2(c) only protects the right to assembly (*Ontario (Attorney-General) v Dieleman*, 1994 CanLII 7509 (ONSC) at para 700), but not any particular venue for doing so (*Mills v Corporation of the City of Calgary*, 2024 ABKB 256 at para 137; See also *Koehler v Newfoundland and Labrador*, 2021 NLSC 95 at para 47).

(c) *Conclusion*

[284] As with my findings on the general applicability of the *Charter*, I conclude that sections 2(a) and (c) are engaged by virtue of section 32(1) of the *Charter*. To ascertain the scope and extent of such rights and any breaches is a matter for the Stage II Common Issue determination.

[285] I find that the Court does not need to go further at this time, in light of the general nature of the Stage I Common Issue question. Considering whether Canada's actions or constellation of laws and policies interfere with the Plaintiffs' religious or spiritual beliefs or their freedom to manifest those beliefs is a matter for Stage II.

(6) Section 36 of the Constitution Act, 1982

(a) *Plaintiffs' Position*

[286] The Plaintiffs assert that section 36(1)(c) of the *Constitution Act, 1982* requires Canada to provide Class Members with adequate housing. Section 36(1)(c) requires Canada and the provinces to provide "essential public services of reasonable quality to all Canadians". Section 36 falls under the general heading "Equalization and Regional Disparities" and states:

> Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to:
>
> 1. promoting equal opportunities for the well-being of Canadians;
>
> 2. furthering economic development to reduce disparity in opportunities; and
>
> 3. providing essential public services of reasonable quality to all Canadians.

[287] There is a dearth of jurisprudence on section 36. However, in *Cape Breton (Regional Municipality) v Nova Scotia (Attorney General)*, 2009 NSCA 44 [*Cape Breton*], the Nova Scotia Court of Appeal held that section 36 "could, in appropriate circumstances" connote a justiciable obligation by the federal and provincial governments (as opposed to being an unenforceable statement of aspiration).

[288] The case at bar is one such context. Section 36(1)(c) gives rise to a justiciable obligation for Canada to provide access to adequate housing on reserve, the absence of which inhibits the Plaintiffs and Class Members from achieving equal opportunities as prescribed by this section.

[289] Section 36(1)(c) imposes a substantive obligation on Canada to provide access to adequate housing on reserve. First, the use of the word "provide" in section 36(1)(c) sets out a substantive obligation by Canada to provide essential public services of reasonable quality. By contrast, sections 36(1)(a) and (b) use the less active and less immediate terms "promote" and "further" when outlining Parliament's commitment to "equal opportunities" and "economic development", respectively. The use of the stronger verb "provide" denotes a substantive undertaking. Section 36(1)(c) provides an unqualified commitment, not merely a goal or objective. Moreover, section 36(1)(c) specifically sets out a minimum floor of "essential public services". This also distinguishes the provision from sections 36(1)(a) and (b), which have no minimum floor and are more aspirational in nature.

[290] Canada's obligation extends to adequate housing on reserve because it falls within "essential public services". Section 36(1)(c) was originally created in order to advance Canada's international obligations for the protection of economic, social and cultural rights under the ICESCR.

[291] Since the *Constitution Act, 1867* provides that the federal government has exclusive jurisdiction over "Indians, and Lands reserved for the Indians", it can only be Canada that owes the obligation under section 36(1)(c) (*Constitution Act, 1867*, s 91(24)). Moreover, the very fact

that the commitment is constitutionalized, rather than contained in a federal-provincial agreement or memorandum of understanding, lends the obligation further legal potency.

[292] The Plaintiffs also have standing under section 36(1)(c). Section 36(1) clearly names a beneficiary: “all Canadians”. There can be no doubt that the individual Class Members are Canadian citizens and the beneficiaries referred to in section 36(1)(c).

[293] Canada fails to appreciate that a claim under section 36 by a First Nations is a claim by one level of government against another. If this Court were to interpret section 36 as a bar to claims by First Nations, then it would exclude them from a system of guarantees because they are neither provinces (or delegates) nor the federal government, leaving them in a legal no-man’s land.

[294] Canada relies on the *obiter* portion of *Cape Breton* where the Court stated that section 36 relates to an agreement between the provinces and the federal government. Canada attempts to extrapolate from this *obiter* that section 36(1)(c) does not apply to First Nations. However, this is unpersuasive.

[295] The present case is distinguishable from *Cape Breton*. First Nations governments are not municipalities (which are creatures of statute that are legally subordinate to, and created by, provincial governments) but arise from Indigenous governments that pre-date the *Indian Act* *(Canada (Attorney General) v Munsee-Deleware Nation*, 2015 FC 366 at para 51).

[296] In the context of section 32 of the *Charter*, which sets out the *Charter*'s scope of applicability, the Supreme Court has consistently determined that it applies to First Nation governments exercising governmental powers under the *Indian Act*, even though it only references the government of Canada and the governments of each province (*Dickson* at para 54). As found by the Royal Commission of Aboriginal Peoples and adopted by the Supreme Court of Canada in *Dickson*, "Indigenous governments occupy the same basic position relative to the *Charter* as the federal and provincial governments" (*Dickson* at para 57; *Bellegarde v Carry the Kettle First Nation*, 2024 FC 699 at para 54).

[297] Just as the *Charter* has been held to apply to First Nation governments under section 32 of the *Constitution Act, 1982*, section 36 ought to apply as well (*Taypotat v Taypotat*, 2013 FCA 192 at para 39; *Dickson* at paras 52-58). Like provincial and federal governments, First Nation governments ought to be considered a government subject to the agreement respecting principles of "redress of regional disparities" under section 36 (*Cape Breton* at para 62). To the extent that the federal government does not meet its end of the bargain in providing essential services in accordance with section 36(1)(c), First Nations may assert a claim for Canada's breach of duty.

(b) *Defendant's Position*

[298] Subsection 36(1)(c) of the *Constitution Act, 1982* has no application to this case. Properly construed, section 36 deals only with a constitutional commitment, as between Canada and the provinces, to the principle of equalization payments to the provinces. The section, in its entirety, provides:

36 (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to	**36 (1)** Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à :
(a) promoting equal opportunities for the well-being of Canadians;	**a)** promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être;
(b) furthering economic development to reduce disparity in opportunities; and	**b)** favoriser le développement économique pour réduire l'inégalité des chances;
(c) providing essential public services of reasonable quality to all Canadians.	**c)** fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.
(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.	**(2)** Le Parlement et le gouvernement du Canada prennent l'engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des revenus suffisants pour les mettre en mesure d'assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables.

[299] There is no interpretation of section 36 available that could construe the section as creating a substantive obligation to make equalization payments to individuals, municipal units, or other levels of government, or government-like entities. The Nova Scotia Court of Appeal encapsulated the issue as follows:

> Thus, when it comes to legislative intent, it appears that s. 36 represents a legislative compromise with commitments *by and for only the negotiating parties - namely the federal government and the provinces* (*Cape Breton* at para 80). [Emphasis added]

[300] The section's text, context, and legislative intent speak only to a commitment between the federal and provincial governments (*Cape Breton* at paras 36-45, 56, 59, 62). The section's legislative history confirms this intent: the constitutional commitment to equalization, as intended, only engages political undertakings as between Canada and the provinces. Even the endnotes related to the section serve to confirm the limited federal-provincial context of the section's application.

[301] Moreover, the courts to date have at most indicated, in *obiter*, the potential for argument that section 36 was intended to create rights between Canada and the provinces (*Cape Breton* at para 62; *Regional District of East Kootenay v Augustine*, 2017 BCSC 322 at paras 34-35; *Langlois v Canada (Attorney General)*, 2018 FC 1108 at para 19). Here, as in *Cape Breton* (para 62), justiciability as between the federal and provincial governments is not before the Court.

[302] Finally, the Plaintiffs' assertion of standing misses the point: what is clear is that there is no substantive right to receive equalization payments created for parties external to the section 36 commitment, and no possible interpretation of the section that could permit one. Section 36 reflects an agreement between two specific levels of government, and no more.

(c) *Conclusion*

[303] I am unconvinced that section 36 of the *Constitution Act, 1982* applies to this matter. I make this finding on a plain reading of the text and by using ordinary statutory interpretation, which is the same interpretive method used by the Nova Scotia Court of Appeal in *Cape Breton*. The wording of section 36 clearly shows that it relates to equalization between the federal and provincial levels of government. The Plaintiffs have not pointed to any evidence that section 36

was intended to apply to First Nations, such as section 35, which is also included in the *Constitution Act*, 1982. The Plaintiffs point to section 32, setting out the scope of the *Charter*'s applicability. The SCC consistently finds that section 32 applies to First Nation governments exercising governmental powers under the *Indian Act*, even though it only references the government of Canada and the governments of each province (*Dickson* at para 54). I am not convinced by the Plaintiffs' submissions that this reasoning should apply to section 36. The Plaintiffs' evidence is insufficient to resolve this claim. Furthermore, as echoed by the Supreme Court in *Dickson* (at para 91), restraint should be used in situations like this:

> As this Court has often noted, a "policy [of] restraint in constitutional cases is sound" as it is "based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen" (*Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at para. 9; see also *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, at para. 181; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 301, per La Forest J., dissenting in part). This Court in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference*"), at para. 105, referred to this as "the usual rule of prudence in constitutional cases". The rule of prudence is especially salutary in this appeal, which in our view can be decided without addressing whether an inherent Indigenous right of self-government operating outside a statutory framework would be subject to the *Charter*.

VII. Conclusion

[304] 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 housing on reserve.

[305] Summary judgment is appropriate on the facts of this case. Since I have found that on-reserve housing is an aboriginal interest, Canada consequently owes both a *sui generis* and *ad hoc* fiduciary duty to the Class Members both as individuals and to First Nations communities in a representative capacity.

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

[307] Moreover, I find that sections 15, 7 and 2(a) and 2(c) of the *Charter* are engaged. I have done so without delving into a consideration of the tests applicable to each section and I have done so only on the basis of section 32(1) of the *Charter*. To engage more deeply with the legal tests would require me to 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 a positive right and negative right.

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

JUDGMENT IN T-1207-23

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 12, 1999, to the present, the Defendant owed a duty or obligation to Class Members to take reasonable measures to provide them with, or ensure they were provided with, or refrain from impeding, access to adequate housing on First Nations reserves.

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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ORAL SUBMISSIONS BY:

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