

**FEDERAL COURT**

B E T W E E N :

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

Plaintiffs

- and -

**ATTORNEY GENERAL OF CANADA**

Defendant

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



**STATEMENT OF CLAIM**

**TO THE DEFENDANT:**

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

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Courts Rules*, serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

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

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

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

September 22, 2022

Issued by: Kadara Thompson  
Registry Officer

Address of local office: 90 Sparks Street  
Ottawa, ON K1A 0H9

TO: **THE ATTORNEY GENERAL OF CANADA**  
c/o Deputy Attorney General of Canada  
Office of the Deputy Attorney General of Canada  
284 Wellington Street  
Ottawa, ON K1A 0H8

## CLAIM

1. The Plaintiffs, on behalf of the Class described herein, claim:
  - (a) an order certifying this action as a class proceeding and appointing the Plaintiff as representative plaintiff for the Class, as defined below, and if required, a representative order pursuant to Rule 114 of the *Federal Court Rules* SO/98-106 in respect of the Plaintiffs and in respect of other First Nations that elect to join this action;
  - (b) a declaration that His Majesty the King in Right of Canada, as represented by the Defendant (or “**Canada**”), contravened the honour of the Crown and breached its fiduciary duties to the Plaintiffs and the Class members by creating and failing to remedy conditions of inadequate and unreliable access to potable water;
  - (c) a declaration that Canada is liable to the Plaintiff and the Class members for damages caused by its negligence in creating and failing to remedy conditions of inadequate access to potable water;
  - (d) a declaration that Canada is liable to the Plaintiff and the Class members for damages caused by creating and failing to remedy conditions of inadequate access to potable water;
  - (e) a declaration that Canada has violated the rights of the Plaintiff and the Class members under sections 2(a), 7, and 15 of the *Charter of Rights and Freedoms* (“**Charter**”) by denying adequate access to potable water, and further, that none of these breaches is saved by section 1 of the *Charter*;
  - (f) a declaration that Canada has violated the rights of the Plaintiffs and the Class members under section 36 of the *Constitution Act, 1982* by failing to promote equal opportunities for the well-being of the Plaintiffs and the Class members, failing to further economic development to reduce

disparity in opportunities for the Plaintiffs and the Class members, and failing to provide the Plaintiffs and the Class members with adequate access to potable water, which is an essential public service;

- (g) an interim or interlocutory injunction and a permanent injunction requiring Canada to immediately:
  - (i) construct, or approve and provide actual cost funding for the construction of, appropriate water systems to provide the Plaintiffs and the Class with regular access to potable water; and
  - (ii) provide actual cost funding for water operations and maintenance to provide the Plaintiff and the Class members with regular access to potable water,

including appropriate interim measures, or to pay damages *in lieu* of the foregoing;

- (h) an order pursuant to section 24(1) of the *Charter* condemning the Defendant to pay damages to the Plaintiffs and the Class members in the amount of \$500,000,000 or such sum as the Court deems appropriate for the breaches of their *Charter* rights;
- (i) an order condemning Canada to pay damages to the Plaintiffs and the Class members in the amount of \$500,000,000 or such sum as the Court deems appropriate for breaches of its fiduciary duties, negligence, and nuisance;
- (j) in the alternative, an order condemning Canada to make restitution to the Plaintiffs and the Class members for the savings that it realized by failing to ensure adequate access to potable water;
- (k) an order condemning Canada to pay punitive damages in the amount of \$100,000,000;

- (l) prejudgment and postjudgment interest pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7;
- (m) costs of the action on a substantial indemnity basis or in an amount that provides full indemnity to the Plaintiffs, together with all applicable taxes;
- (n) costs of notice and of administering the plan of distribution of the Class members damages, together with all applicable taxes; and
- (o) such further and other relief as this Honourable Court deems just.

## **OVERVIEW**

2. The Plaintiffs and the proposed Class of First Nations and their members across Canada have experienced long-term drinking water advisories. The Defendant has failed to ensure that they have reliable access to potable water of adequate quality and quantity. As a result, Class members have suffered extraordinary hardships.

3. Drinking water advisories are issued where water quality testing indicates that water may be unsafe or is known to be unsafe. There are three types of drinking water advisories: boil before use, do not consume, and do not use. These advisories become long-term advisories after being in effect consecutively for one year.

4. Historically, the Defendant was solely responsible for the establishment, operation, and maintenance of systems to deliver potable water to the residents of First Nation reserves. Canada jealously guarded its sole authority to make decisions in this regard and barred First Nations from having any meaningful role in planning, managing, and funding, their own water systems.

5. The Defendant received consistent advice, including from its own experts, that it was depriving Class members of adequate and reliable access to potable water. Canada was repeatedly informed that Class members' water infrastructure was grossly inadequate, and further, that Canada's grossly inadequate funding for operations and maintenance was aggravating structural deficits. Despite Canada's long knowledge of

these problems, it continued to breach its obligations to Class members, and this breach extends to the present day.

6. Recently, Canada sought to download partial responsibility to First Nations for the provision of access to potable water on reserve. In doing so, however, the Defendant failed to provide, or approve and fund the provision of, adequate water systems for the Plaintiffs and Class members. The Defendant has also deprived the Plaintiffs and Class members of appropriate resources for proper operation and maintenance of their water systems.

7. Throughout, Canada has maintained responsibility for approving and funding the construction of water systems on reserve, and it has exercised this authority to retain *de facto* control over scope, design, and procurement. Canada has also maintained responsibility for funding the operation and maintenance of water systems on reserve. Despite any effort to transfer or delegate responsibility to First Nations, the Defendant retains an obligation to ensure that Class members have regular access to potable water.

8. The Defendant has repeatedly acknowledged this responsibility. Most notably, on September 15, 2021 Canada settled two class actions arising from its failure to ensure that First Nations and their members had regular access to potable water (the “**Settlement**”). Pursuant to the Settlement, Canada agreed to pay \$1.9 billion in damages and make all reasonable efforts to ensure that First Nations’ members had adequate access to potable water in their homes. However, the Settlement only addressed claims arising on or before June 20, 2021 and it excluded continuing and future claims. Sadly, despite the Settlement, prolonged systemic water failures have continued to affect Class members.

9. Some Class members’ historical claims were resolved in the Settlement, and these Class members already benefit from Canada’s commitment to take all reasonable measures to ensure that they have regular access to potable water in their homes. The within action is not intended to address any breaches of Canada’s obligations under the Settlement, which breaches, if any, are to be resolved pursuant to the terms of the Settlement. However, some Class members were excluded from Canada’s commitments

under the Settlement because the failure of their water systems was recent. Moreover, none of the Class members have received compensation for damages arising from water system failures that began or continued after June 20, 2021.

10. Canada's commitments in the Settlement reflect its legal obligations. At all material times, the Defendant owed Class members fiduciary duties, duties consistent with the honour of the Crown, and a duty of care to ensure that they had adequate access to potable water. As a result of the Defendant's failure to discharge these duties, Class members have been denied reliable access to safe drinking water, have been unable to adequately wash and care for themselves and their families, have suffered stunted economic growth, and have been prevented from engaging in their traditional ceremonies and spiritual practices.

11. In turn, Class members have suffered a variety of illnesses, both from using water, and from being unable to use water. They also suffer hardships consistent with life in developing countries. The conditions in which Class members live would shock Canadians who have never visited the affected communities. These conditions constitute an urgent human rights crisis.

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

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

14. Canada's breaches of its duties to Class members and of their *Charter* rights are longstanding and ongoing. These breaches continue despite having been drawn to the

Defendant's attention, and despite the Defendant having acknowledged them and pledging to remedy them.

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

## **THE PARTIES**

16. "Shamattawa" is Cree for "the meeting of the rivers". Shamattawa First Nation ("Shamattawa") is located at the confluence of the Gods River and the Echoing River. The members of Shamattawa are Swampy Cree. Until the early 20<sup>th</sup> century, Shamattawa controlled more than 30,000 square kilometers of northeastern Manitoba.

17. Water has always been at the heart of life for the members of Shamattawa. Historically they lived off of the lands and water, thriving through hunting, fishing, and trapping. Later, the members of Shamattawa traded their furs at the Hudson's Bay Company fort at York Factory.

18. While the members of Shamattawa historically occupied and cared for a large territory, their way of life was transformed by colonial interference. In 1908, Shamattawa was required to adhere to Treaty 5, and their expansive lands were narrowed to their present reserve, which covers only 22 square kilometers. Shamattawa's reserve is isolated. It is more than 1,000 kilometers north of Winnipeg, and is only accessible by ice road for approximately 4 weeks of the year. For the rest of the year, the reserve can only be reached by airplane. Despite the hardships that they have experienced, the members of Shamattawa have long sought to maintain their traditional practices and way of life.

19. Today, there are approximately 1,700 members of Shamattawa. Approximately 1,600 members of Shamattawa live on reserve, and approximately half of them are 19

years of age or younger. Shamattawa is a First Nation, as defined below, and its lands constitute First Nations Lands, as defined below. Despite its location at a confluence of rivers, Shamattawa suffers from unreliable access to potable water. Shamattawa's water crisis has worsened in recent years, resulting in a community-wide drinking water advisory that began on December 6, 2018 and continues to this day.

20. Chief Jordna Hill is the Chief of Shamattawa. He was elected to this position on May 11, 2022, and previously served as a Band Councillor. Chief Hill brings suit on his own behalf, on behalf of Shamattawa, and on behalf of all the members of Shamattawa with due authorization of the Band Council to act in a representative capacity. Chief Hill seeks authority to represent all members of the Class in a class proceeding.

21. Chief Hill is a 47-year-old father of seven and grandfather of four. He has lived in Shamattawa for most of his life, leaving the community only for a short period to complete high school in Thompson and Winnipeg. Before being elected to Shamattawa's leadership, Chief Hill worked in construction on reserve. Chief Hill resides on Shamattawa's reserve with his children and grandchildren, and has experienced the problems of inadequate access to potable water described below.

22. The Defendant, Canada is represented in this action by his designated Minister, the Attorney General of Canada.

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

24. The proposed members of the Class are:

- (a) All persons who, except Excluded Persons, as defined below, who are members of a band, as defined in subsection 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5 ("**First Nation**"), the disposition of whose lands is subject to that Act or the *First Nations Land Management Act*, S.C. 1999, c. 24 ("**First Nations Lands**"), and whose First Nations Lands were subject to a drinking water advisory (whether a boil water, do not

consume, or do not use advisory, or the like) that lasted at least one year from June 20, 2021 to present; and

- (b) Shamattawa First Nation and any other First Nation that elects to join this action in a representative capacity;

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

26. Class members eligible to participate in the Settlement seek only damages that arose after June 20, 2021. Class members who are not eligible to participate in the Settlement seek damages that arose after June 20, 2020, including damages arising from water system failures that had not yet reached one year in length on June 20, 2021.

#### **THE HISTORY OF SHAMATTAWA’S DRINKING WATER CRISIS**

27. Traditionally, members of Shamattawa lived off of the land and retrieved water from Gods River and other nearby rivers and creeks. The community depended on the Defendant for resources to develop their settlement. Progress was slow, and the settlement was composed of wooden homes and dirt paths through the 1970s.

28. In 1976, Mr. Tim Maloney, a community development specialist who had responsibility for Shamattawa in the Department of Indian Affairs, informed the Winnipeg Tribune that “[t]here’s water in Shamattawa, but only for white people – in the teacherages, nursing stations, and at the Hudson’s Bay store”. Unfortunately, this remains true today; the Defendant’s employees working on reserve at the nursing station and detachment for the Royal Canadian Mounted Police fly in jugs of water for drinking and sanitation, including for personal use, even when there is no drinking water advisory in effect.

29. Mr. Maloney further expressed that Canada spent money “unwisely, without any planning or forethought” in Shamattawa. He observed that “only a mere pittance” of the Defendant’s funding for Shamattawa goes to the Band Council to administer, while the vast majority is directed by the Defendant.

30. Canada has consistently determined the direction and scope of the development of Shamattawa's water infrastructure. In the early 1980s, the Defendant directed the drilling of wells throughout Shamattawa. These wells confirmed that the aquifer was lined with methane, and presented a fire risk. Water from the wells was unsuitable for human consumption, and yields were limited in any event.

31. Members of Shamattawa continued to obtain their water by bucket from Gods River and other local water sources through the late 1980s. Because there was no running water in members' homes, they hauled water as needed for drinking, cooking, cleaning, and bathing. The water was potable, and it was consumed and used directly from the source, without requiring treatment.

32. Starting in the late 1980s or early 1990s, Canada began to provide water trucks to Shamattawa. The trucks filled portable tanks with water from Trot Creek and delivered them to members' homes. There was no water treatment plant, but members consumed and used the untreated water.

33. The members of Shamattawa continued to live without running water and indoor plumbing through the 1990s. Shamattawa's first water treatment plant was constructed in 1999. The water treatment plant was designed to produce water for distribution to 1,000 liter cisterns at members' homes. Homes without cisterns continued to be served by portable tanks that were delivered by truck. The combination of the limited number of water delivery trucks and over-crowded housing meant that members usually ran out of water.

34. Following the construction of Shamattawa's water treatment plant, Canada gradually connected housing and community infrastructure to a water distribution system. Buildings for federal services were first, starting with the detachment for the Royal Canadian Mounted Police, and then later the nursing station and the school. Later still, the water distribution system was gradually extended to sections of homes in the community. Today, all 160 homes and 14 buildings in Shamattawa are connected to the water and sewer lines.

35. Problematically, however, Shamattawa's water treatment plant was never intended to be in constant operation, nor was it intended to service a piped distribution system that extended across the reserve. As a result, unreliable water services have become commonplace in Shamattawa, as water services are suspended on nearly a weekly basis to allow the reservoirs to replenish when the water pressure is too low or when contamination occurs. When this happens, residents of Shamattawa are left to fill pales of water to use for their regular daily activities. These problems worsened as the water treatment plant exceeded its useful lifespan without any plan for a replacement. Today, Shamattawa is forced to make do with an inadequate water treatment plant that has for years been working far beyond its intended scope for far longer than its intended service life.

36. Shamattawa's water treatment plant has long suffered from poor design. It draws water from the point where the Gods River meets the Echoing River meet, right at the height of the current. The location of the water intake was a catastrophic miscalculation. Silt regularly accumulates, frequently causing the intake to clog and the plant's reservoir to run dry. Furthermore, while the water treatment plant incorporates membrane filtration followed by chlorination, even intensive chlorination cannot address the turbidity of the water, which does not satisfy the *Canadian Drinking Water Guidelines*.

37. In December 2018, silt accumulation at the water treatment plant intake caused Shamattawa's water system to fail. Shamattawa was forced to declare a boil water advisory for the entire community. Thereafter, additional accumulated defects, as described below, required Shamattawa to maintain the boil water advisory, and it continues to the present day. Every home and building in Shamattawa is impacted by the long-term drinking water advisory, which has lasted nearly four years.

38. For years, Canada has been aware of the need to upgrade Shamattawa's water system and improve support for operations and maintenance to reflect the actual costs incurred by a remote fly-in community, as well as the difficulty of hiring and retaining qualified operators. As described below, however, Canada has failed to meet its obligations to Shamattawa.

## **CANADA'S INACTION PRECIPITATED AND PERPETUATED SHAMATTAWA'S WATER CRISIS**

39. Shamattawa's antiquated and deficient water infrastructure impedes the delivery of potable water. In turn, Canada's chronic underfunding of operations and maintenance has ensured that Shamattawa's water system continues to backslide, hastening degradation and prolonging failure.

40. As described above, the location and mechanics of Shamattawa's water intake pipe result in regular breakdowns as dirt and debris accumulate. Thereafter, the water distribution system must be shut off until the reservoir is replenished. This has become a more common occurrence as Shamattawa's water treatment plant continues to age.

41. Even when the intake is properly working, the filtration system repeatedly malfunctions, producing water that fails to meet the *Canadian Drinking Water Guidelines*. As a result, Shamattawa's water frequently exhibits elevated turbidity, and it is commonly contaminated by *Escherichia coli*. Both of these conditions render Shamattawa's water unsafe to drink for extensive periods.

42. In addition to appropriate infrastructure, a functioning water treatment plant depends on appropriately qualified operators and proper maintenance. However, Canada has impeded Shamattawa's ability to secure both of the latter.

43. Canada allocates operations and maintenance funding to First Nations on the basis of ideal circumstances, in which equipment and infrastructure functions on an infinite lifespan, there are no breakdowns, population is stagnant or declining, and costs are akin to those in urban centers. These conditions are not common on reserves, and especially not remote reserves, like Shamattawa's. Rather, water system failures are common, and First Nations pay higher costs for equipment and repairs, particularly in remote locations. Furthermore, population growth on reserve is often substantial, and it generally exceeds the national average, as is the case in Shamattawa. As a result of these factors, the funding that Canada provides is inadequate to maintain and operate First Nation water systems like Shamattawa's.

44. Canada has long been aware of the higher costs of maintaining and operating water systems on Class Members' reserves. Rather than accommodate these costs, the Defendant instead implemented a cruel system that deliberately undercut First Nations' ability to meet their needs. Until at least 2021, Canada consistently set First Nations' funding at no more than 80% of Canada's already inadequate cost estimate. The Defendant expected First Nations to make up the shortfall with their own funds, knowing that most, like Shamattawa, could not. This approach created structural deficits in reserve communities like Shamattawa and entrenched hardship.

45. On December 2, 2020 the Honourable Marc Miller, then Minister of Indigenous Services, convened a press conference and publicly admitted that Canada had deliberately underfunded operation and maintenance of First Nations' water systems. Mr. Miller promised to correct this deficiency going forward, explaining that operations and maintenance funding "in our current policies, the communities were only getting, I believe 80% and had to come up with the next 20%. So, that was a legitimate criticism as to how we deployed our support...my full expectation is that'll move to 100%".

46. Communities like Shamattawa, however, live with the effects of Canada's systematic failure to provide for adequate operation and maintenance of water systems. When Shamattawa does not have adequate funds to purchase an essential part required to operate or maintain the water treatment plant, the community regularly goes without. Often, this results in an emergency meeting with Indigenous Services Canada to discuss the issue. Sometimes there is a solution, and other times there is not. The process is characterized by bureaucracy and delay, with the consequence of aggravating and prolonging deficiencies in Shamattawa's water system.

47. Canada's sporadic support leaves Shamattawa's water system to lurch from crisis to crisis. Rather than maintain an inventory of commonly required parts, for example, Shamattawa is left scramble when parts urgently need to be replaced. Canada does not engage until Shamattawa's water system fails. Then Shamattawa is left to wait for replacement parts to arrive from the south, which can take days or weeks or even months. These problems would be foreign to non-Indigenous Canadians, who are

accustomed to water problems being fixed in a matter of hours. Yet delays have become a way of life in Shamattawa.

48. For example, Shamattawa's water treatment plant is designed to use liquid chlorine. However, Canada's funding model does not provide adequate funds to fly liquid chlorine to Shamattawa. Instead, Shamattawa is obliged to use rehydrated chlorine powder for water treatment. This substitute produces water that fails to meet the *Canadian Drinking Water Guidelines* when it reaches Class Members' homes. This is a systemic problem that calls for a systemic solution to make liquid chlorine more readily available. However, Canada does not intervene until Shamattawa's water system actually fails.

49. Similarly, the pipes that form Shamattawa's water distribution system are riddled with holes that cause inconsistent water pressure across the reserve. This deficiency results in essential community needs going unmet. For example, the nursing station in Shamattawa has long suffered an insufficient water supply, which is often reduced to a trickle. Likewise, Shamattawa's school needed a cistern tank because the water supply was otherwise unreliable.

50. Shamattawa's latest State of Emergency arose in May 2022 when brown water was found to be coming out of Class Members' taps. This is a regular occurrence in the spring when the ice breaks up, fracturing clay in the ground. The water treatment plant is ill equipped to treat the resulting contamination, leaving Shamattawa without access to water. Although this outcome is the a predictable consequence of Shamattawa's deficient water system, the community's funds are insufficient to proactively prepare.

51. Instead, Shamattawa was forced to ask Canada for assistance once the emergency had materialized, and then wait for Canada to act. This meant waiting two weeks for the required part to repair the water treatment plant. In the meantime, Canada arranged for six chartered airplanes to deliver bottled water and a temporary portable water filtration machine so that Shamattawa's members could survive. After restoring water service, however, Canada made no effort to implement any permanent solution to this seasonal problem, which will likely recur.

52. Shamattawa's May 2022 State of Emergency was itself a repeat of an incident that had occurred some two years earlier, when the spring thaw clogged the intake for the water treatment plant. With the intake blocked, no water could be distributed. Shamattawa had to fly bottled water to the reserve by chartered airplane, and the community did not have running water for weeks while they awaited a solution.

53. Because of Shamattawa's unreliable water system, many community members haul pails of water from Trot Creek, as they had in the days before the construction of the water treatment plant. Members access the creek by quad or snowmobile and fill containers to bring home. While many members of Shamattawa consider the creek water to be more reliable than their tap water, Trot Creek freezes in the winter, which creates another barrier to access. Outside of First Nations, few Canadians need an ice auger to draw their water.

54. Poor design and construction of Shamattawa's water system cannot account for the extent of the community's water problems. Rather, these problems also stem from a long course of deficient operations and maintenance. Canada's Annual Performance Inspection of Shamattawa's water system, prepared by the Defendant on October 6, 2021 (the "**2021 API**"), noted risk in the water source, water treatment plant operator, and record keeping and reporting categories.

55. The 2021 API noted the "significant changes" to Shamattawa's water source and found that the water treatment plant has "significant reliability concerns". Some of these issues are connected to the frequent failures of the vacuum pump, a jockey pump, and a heater in the raw water pump house. Troublingly, 2021 API noted that operators lack access to a turbidity meter, even though turbidity has been a longstanding issue in Shamattawa.

56. The 2021 API further acknowledged that Shamattawa's water treatment plant requires two full time operators and one part time operator to allow the system to run smoothly and efficiently. Currently, however, Shamattawa has only one water treatment plant operator and a part-time backup operator. While the operator and backup operator

have received training in water treatment plant operations, the 2021 API recognized that both are uncertified to operate the water system.

57. In the 2021 API, Canada found that “critical parameters” are measured inconsistently or not at all, and that the records failed to demonstrate that all required calibration was being performed. Canada also found that Shamattawa requires a knowledgeable full-time backup operator who can maintain chlorine residuals throughout the system and ensure adequate record keeping. The 2021 API found that other critical needs were also overlooked, noting that the water distribution mains needed flushing and the reservoirs required cleaning.

58. Shamattawa’s meager budget for the operation and maintenance of its water system can only accommodate modest salaries for water treatment plant operators. This makes it difficult for Shamattawa to retain reliable operators. Ultimately, the 2021 API concluded that there was “insufficient maintenance” of Shamattawa’s water system. Yet despite its acknowledgement of this deficiency, Canada has not corrected the underlying lack of resources.

59. Beyond funding limitations, there are other significant barriers to securing, training, and retaining water treatment plant operators in Shamattawa. For example, Indigenous Services Canada requires water treatment plant operators in Manitoba to hold a grade 12 education, unnecessarily excluding members of Shamattawa who are otherwise willing and capable of fulfilling the role. Moreover, even when it is available, Indigenous Services Canada’s Circuit Rider Training Program is unable to overcome Shamattawa’s problems. This program uses western teaching methods, which typically disconnect from Indigenous ways of learning, knowing, and doing, and thus provide subpar training. Nor can additional training overcome the chronic underfunding of Shamattawa’s water system.

60. When Shamattawa’s leadership raised concerns about their water system with a regional representative of Indigenous Services Canada, he told them that they will need to “cry for the money” and he instructed them to use education dollars to fill the gap in their water budget. Incidents like these are common for First Nations across the country,

and they typify the systemic discrimination that Class Members experience. This reinforces a vicious cycle, where water infrastructure deteriorates at an accelerated pace, and First Nations cannot afford adequate operations and maintenance. Ultimately, Indigenous Services Canada has chosen to ignore these concerns.

61. Canada's lack of attention to Shamattawa's water system resulted in the community's current long-term drinking water advisory. Since at least December 2019 Canada has promised to lift Shamattawa's long-term drinking water advisory by implementing a number of corrective measures. This includes addressing issues with the water treatment plant which has exceeded its lifecycle and is operating well beyond its capacity, as well as addressing issues with water operations and maintenance.

62. Canada has determined that, at the very least, Shamattawa will require approximately \$19.9 million to expand and upgrade the water treatment plant to address Shamattawa's long-term water needs, constructing a new raw water intake pump station and piping, upgrading the water main distribution, providing support to resolve operational issues, and dismantling membranes in the ground to prevent future clay build up and contamination.

63. While Canada's commitments reflect a recognition of its obligation to provide Shamattawa and its members with reliable access to potable water, its actions remain grossly deficient, and fail to address the root causes of the water crisis. The upgrades to Shamattawa's water system were unilaterally determined by Canada without meaningful input from community leadership. Canada then required Shamattawa to retain the contractor that bid the lowest price – despite the objections of community leadership about the reliability and responsiveness of that contractor. Shamattawa had previously engaged this contractor to complete upgrades to the sewer system and school, and the community was unsatisfied with their work. Moreover, the contractor refused to engage any community members, which undermines Shamattawa's efforts to build capacity.

64. The upgrades to Shamattawa's water system were initially to be completed by July 2022, but the completion date has been pushed back several times, and completion

is now projected for October 2022. Shamattawa expects that this will be yet another missed deadline. Even when the new water infrastructure is complete, the water crisis will continue in Shamattawa because a host of issues will remain unaddressed. The current upgrade is a band-aid solution that will not address training and capacity limitations of water treatment plant operators, or the deficiencies in operations and maintenance to meet the needs of the First Nation. As a result, even if the long-term drinking water advisory can eventually be lifted, persistent underfunding of operations and maintenance costs make another long-term drinking water advisory inevitable.

65. The grave deficiencies in water operations and maintenance funding have had tragic consequences for the members of Shamattawa. It is common for residents of all ages to develop skin conditions from contact with the treated water, commonly resulting in sores, rashes, and boils. Other health problems from the long-term drinking water advisory at Shamattawa are not yet fully understood.

66. Members of Shamattawa are under a constant state of stress from their water being contaminated and unreliable. The water crisis in the community has compelled members to adjust daily aspects of their lives because their water is contaminated, and are under a constant threat of not having access to water at all. As a result, some members of Shamattawa have been forced to leave the reserve and move to urban centres with more reliable access to water. This is particularly true of community members with medical issues like dialysis, who need reliable access to potable water.

67. The impacts of the water crisis on members of Shamattawa were exacerbated during the COVID-19 pandemic. Critically, the long-term drinking water advisory severely impairs effective cleaning, washing, and sanitation – daily necessities which have only increased in importance. Sadly, in December 2020, a quarter of Shamattawa’s residents tested positive for the virus, and approximately 60 members of the Canadian Forces were deployed to the reserve to provide support. At the time, Dr. Brent Roussin, Manitoba’s Chief Public Health Officer, described Shamattawa as the province’s “hardest-hit community”.

68. There are collateral consequences of Shamattawa's ongoing long-term drinking water advisory. They include serious mental health impacts. Living without regular access to safe drinking water is a struggle, and it makes Shamattawa's members feel like second class citizens. This stigma has only been reinforced by the slow progress of Canada's efforts to remedy the situation, which are themselves only a partial solution. In May 2021, Shamattawa's leadership declared a State of Emergency following a series of suicides and attempted suicides among residents. The severe mental health impacts of Shamattawa's water crisis continue today.

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

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

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

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

72. Over time, Canada has also applied pressure to members of First Nations to live on First Nations Lands, often denying program funding for those who are not resident on First Nations Lands. To fulfill the promise that those lands would be a place for

Indigenous peoples to carry on their way of life, Canada began to construct drinking water and sanitation systems for their use.

73. In the 1970s, the Department of Indian Affairs and Northern Development (“INAC”, later Aboriginal Affairs and Northern Development Canada, Indigenous and Northern Affairs Canada, and Indigenous Services Canada, among others), Canada formally took discretionary control over drinking water systems on First Nations Lands. INAC assumed far-reaching responsibilities for the provision of drinking water, which included:

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

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

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

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

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

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

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

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

80. Sections 4(2) and (3) of the *SDWFNA* provide that Canada may also make regulations "respecting standards for the quality of drinking water on First Nation lands", "the monitoring, sampling and testing of drinking water on First Nations lands

and the reporting of test results”, and “emergency measures in response to the contamination of drinking water on First Nation lands”.

81. Additionally, Canada’s commitments under section 36(1) of the *Constitution Act, 1982* require it to “promot[e] equal opportunities for the well-being of Canadians”, “further economic development to reduce disparity in opportunities”, and “provid[e] essential public services of reasonable quality to all Canadians”. This commitment requires Canada to ensure that Class members have adequate access to safe, clean, and reliable water, and that they benefit from effective treatment of wastewater and the protection of source water on and off First Nation Lands.

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

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

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

85. Canada has ratified many treaties that contain obligations relating to the provision of potable water to Class members, including, without limitation, the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”), the

Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the International Covenant on Civil and Political Rights.

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

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

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

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

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

89. Pursuant to the *SDWFNA* and otherwise, Canada purports to have downloaded additional responsibility for some aspects of the provision of drinking water to some First Nations. However, Canada consistently failed to fix the unsafe water systems that it designed, implemented, and constructed on First Nations Lands, and it did not provide adequate funds or training for First Nations to do so. Moreover, Canada has remained the sole funder of water systems on reserves, and as discussed below, by consistently attaching conditions to its funding, it has maintained absolute control over the decision to build, and the scope, design, construction, and commissioning of the system.

90. Through its control of funding, Canada has perpetuated the deficiencies in First Nations' water systems. Canada knew, or should have known, that First Nations lack the resources to maintain, let alone remedy, their deficient water systems. Canada continues to undermine First Nations by consistently underfunding the maintenance and operation of water systems on First Nations Lands, despite its knowledge that First Nations were unable to meet the shortfall. In short, Canada knew, or should have known, that its program of downloading responsibility for water systems to First Nations would fail, with the attendant consequences described below.

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

92. In all cases the construction of a centralized or municipal system to supply water to a First Nation constitutes a major infrastructure project, and it requires a discretionary, specific-purpose grant from Canada. Water infrastructure does not get built in reserve communities unless Canada decides that it should be built. Thereafter, all grants to construct water systems are contingent on Canada's approval of the scope and design of the water system. Canada also supervises the procurement process for the

construction of the water system and directs the selection of contractors and the completion and commissioning of the project.

93. Having assumed control over the construction of water systems from snout to tail, Canada consistently failed to ensure that First Nations had adequate infrastructure to reliably deliver potable water to their members. At all material times, Canada has been, or ought to have been, aware of this deficiency, as well as First Nations' inability to provide their own water systems.

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

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

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

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

- (a) honour its promise to provide reserves with access to potable water of adequate quality and quantity to permit Class members to maintain their Indigenous way of life on First Nations Lands;

- (b) fund, allocate funds, mandate, procure, and supervise the design and construction of water systems to an appropriate standard;
- (c) ensure that water systems were built in appropriate locations, away from potential sources of contamination;
- (d) ensure adequate protections for the source waters that supply First Nations Lands, whether the source waters are located on or off First Nations Lands;
- (e) ensure adequate sanitation and wastewater treatment systems;
- (f) properly operate and maintain, or ensure the operation and maintenance of, water systems, including failing to provide appropriate training and certification;
- (g) ensure that all homes, schools, recreational, and community centres on First Nations Lands have adequate access to water distribution facilities and sanitation;
- (h) assess and remedy the causes of water advisories;
- (i) adopt appropriate operational protocols and directives for the construction, operation, maintenance, and safety of water systems on First Nations lands; and
- (j) appropriately apply and enforce standards to ensure that Class members have adequate access to potable water and are protected from contaminated water.

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

- (a) adequate training and technical expertise to properly operate water systems;
- (b) adequate funding to appropriately construct, operate, and maintain water systems;
- (c) appropriate and enforceable standards for water systems, together with appropriate accountability to ensure compliance;
- (d) appropriate directives for the provision of water to Class members, to be promulgated following proper consultation with First Nations; and
- (e) any meaningful control over the scope, design, procurement, construction, or commissioning of water systems in First Nations.

98. Canada's breaches of its duties have denied Class members adequate access to potable water. Class members face drinking water advisories that continue to persist for months and years, sometimes extending for decades. This crisis has been systemic and prolonged. Although Canada has repeatedly recognized the breach of its duties, it has failed to correct these deficiencies and has allowed them to continue to this day, sometimes without any end in sight.

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

100. By 1995, the Report of the Auditor General of Canada to the House of Commons noted that the Defendant had significantly underfunded its planned investments in capital facilities and maintenance for First Nations. The Auditor General also found that the Defendant had failed to establish benchmarks to compare First Nations communities

with the rest of Canada, noting that “[w]ithout establishing a basis for comparison, [INAC] will not be in a position to report whether conditions in First Nation communities are becoming comparable with other Canadian communities”.

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

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

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

104. On March 21, 2006 Canada announced a Plan of Action for Drinking Water in First Nations, in which it committed to “issuing a clear protocol on water standards”;

“ensuring mandatory training and oversight of water systems by certified operators”; and “address the drinking water concerns of all high risk systems”. As before, Canada failed to satisfy these commitments.

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

106. The Expert Panel found that Canada’s estimates for the capital cost of water and wastewater systems were not based on detailed engineering analysis, and were one-third to one-half of the amount that was actually needed. The Expert Panel cautioned that “[t]he result, going into the next planning cycle, is a known gap between what was spent and what was needed”, and that going forward “several risks and cost pressures are already known”. Canada did not take appropriate measures to avoid a known catastrophe, and it continued to turn a blind eye to the delivery of potable water to Class members.

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

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

to indigenous peoples”. Nevertheless, Canada’s systematic failure to provide Class members with adequate access to potable water has continued.

109. In November 2015, Canada committed to ending all long-term drinking water advisories within five years. Despite ending some long-term drinking water advisories, new long-term drinking water advisories continue to be imposed, as do short-term drinking water advisories. Unfortunately, the Office of the Parliamentary Budget Officer’s December 7, 2017 report titled *Budget Sufficiency for First Nations Water and Wastewater Infrastructure* found that Canada’s promised investments in waste and water infrastructure only represent 70 per cent of what is needed to meet its commitment to end long-term drinking water advisories.

110. Despite Canada’s commitments, it has failed to ensure that First Nations have regular access to potable water. Canada’s own risk rating of water systems on First Nations across the country has, on average, barely declined since 2015, meaning that Class members remain in unacceptable peril. Canada continues to repeatedly recognize that its efforts to address long-term drinking water advisories on reserve have been inadequate, continually pledging to do better.

111. On August 3, 2020, the Honourable Marc Miller, then Minister of Indigenous Services, recognized that water is “essential”, and expressed Canada’s commitment to resource the goal of lifting all long-term drinking water advisories on public systems on reserve by March 2021. He emphasized that Canada’s efforts on this issue reflect “a long-term engagement of this government”, articulating that such efforts “should not be ... partisan” but rather a “long-term engagement of every government”. Minister Miller confirmed the government’s intent to ensure that “no community is left without safe and clean water”.

112. On October 21 2020, Minister Miller declared that “[s]afe, clean and reliable drinking water is an essential service” which has not been extended to all First Nations. On October 30, 2020, Canada described the realities of the water systems in First Nations as a “product of systemic discrimination [and] systemic racism that plagues all our institutions...across government.” Canada recognized its responsibility to make

“consistent investment in Indigenous infrastructure” which extends across political parties.

113. On that same day, Canada acknowledged that the water crisis in Neskantaga First Nation (“**Neskantaga**”) and other First Nations are the consequence of “two decades of under-capitalization.” Recognizing that Neskantaga had by then been under a long-term drinking water advisory for nearly twenty-six years, Minister Miller then informed its Chief of Canada’s “commitment to clean drinking water for all First Nations on reserve.” Minister Miller has further emphasized Canada’s responsibility, stating “I confirm, unreservedly, our commitment to the work and funding required to bring clean drinking water to Neskantaga First Nation”. Shortly thereafter, Minister Miller described the realities in Neskantaga as “an entirely unacceptable situation for 25 years” which is “the result of massive undercapitalization ... Indigenous communities, specifically with respect to resources that, in most communities in Canada, we all take for granted”. He described this reality as “unacceptable”, and confirmed Canada’s commitment to “clos[e] [the] unacceptable infrastructure gap across the country”.

114. On November 2, 2020, Minister Miller confirmed Canada’s commitment to address long-term drinking water advisories on reserve “with financial resources in partnership with First Nations”. He expressed Canada’s recognition that “[t]here is a lot more work to be done”. Minister Miller described this reality as “a product of decades of neglect”.

115. On December 2, 2020, Minister Miller admitted to Canada’s delay and lack of accountability to First Nations water services. Canada has confirmed “the right for individuals to have access to potable water”, and emphasized their “determin[ation] to ensure that this right is upheld for everyone including all First Nations living on reserves.” Canada committed to “build and maintain sustainable systems that will provide First Nations communities with safe drinking water for the long term – forever.” Minister Miller affirmed that he bears the “responsibility and the duty to get this done”.

116. Minister Miller concluded that deficient water operations and maintenance funding plays a critical role in enabling the widespread water crises incurred by First Nations. Minister Miller recognized Canada's water operations and maintenance model of providing First Nations with 80% of costs and expecting them to make up the remaining 20% was subject to "legitimate criticism". Minister Miller confirmed his "full expectation" that Canada's model will shift to providing First Nations with 100% of their costs. Minister Miller admitted that this was one of the areas that Canada had identified as requiring capital to ensure that short and long term drinking water advisories do not reoccur.

117. Minister Miller publically confirmed his "responsibility and...duty" to address long-term drinking water advisories on First Nations, and to ensure that communities are adequately resourced to rectify their water issues. Canada has defined this as "[p]roviding First Nations communities with the resources they need to operate and maintain their water and wastewater systems" which Minister Miller described as "essential for long lasting solutions".

118. Canada has further defined its responsibility as "be[ing] there every step of the way" for First Nations in the process of lifting drinking water advisories, and has guaranteed to provide "public backing of the Government of Canada". Minister Miller expressed Canada's "responsibility to get it done". He emphasized that Canada "will get clean water to Indigenous communities". Minister Miller declared Canada's commitment to "walking along the path of ensuring that [First Nations] have safe access to clean and reliable drinking water for the long-term".

119. Minister Miller further acknowledged that Indigenous communities disproportionately experience drinking water advisories as a consequence of the undercapitalization of essential water infrastructure. Minister Miller recognized this as "unacceptable, [and] that it requires sustained investment". Canada has admitted that their policies underfund water infrastructure and services in First Nations, and that there has been a historical "massive undercapitalization in the communities for some time".

120. Minister Miller also acknowledged that Canada's commitment to First Nations reflects the public expectation to fix the "disastrous infrastructure, undercapitalization of infrastructure in Indigenous communities...and...essential services like water", to ensure that "everyone in Canada has safe and clean drinking water".

121. Canada has recognized the distinct realities of long-term drinking water advisories on reserve, with Minister Miller confirming that these advisories "occur in a disproportionate incidence in Indigenous communities, and then they go on far too long". Minister Miller further acknowledged Canada has the "financial capacity and the heft ... to lift or remedy [a] condition with respect of water that is entirely unacceptable in one of the most developed countries in the world". Minister Miller confirmed Canada's recognition that doing so "requires sustained investment".

122. Minister Miller has described the inadequate investments into First Nations infrastructure as an example of unequal treatment: "Indigenous peoples aren't treated equally in this country, [including] from their infrastructure investments." Minister Miller has promised to rectify these realities, stating that Canada has the "financial capacity...to lift or remedy a condition with respect of water that is entirely unacceptable".

123. Minister Miller has further expressed the expectation of the Prime Minister by Canadians to ensure that everyone in Canada has clean drinking water. He described this as a priority that is "[a]t the top of every community's list". Minister Miller has confirmed Canada's intent to ensure that First Nations "have the resources" required to "move towards that process of lifting the long-term water advisory".

124. Despite Canada's unequivocal recognition of its responsibility to provide the funding required to ensure that all First Nations have reliable and adequate access to potable water, on December 2, 2020, Canada declared that it would not meet its self imposed deadline of March 2021 for lifting all long-term drinking water advisories on public systems on reserve. At that time, Canada declined to set a new deadline. Sadly, new long-term drinking water advisories continued to emerge in Class members' communities.

125. In February 2021, the Office of the Auditor General released a report entitled *Access to Safe Drinking Water in First Nations Communities*, which confirmed Indigenous Services Canada's role in "ensur[ing] that First Nations ... have access to safe drinking water in a number of ways". This includes by providing advice and funding to First Nations for the design, construction, upgrading, repairs, operations, and maintenance of water systems; supports to monitor drinking water to determine whether it is safe; public health advice when there are concerns about drinking water quality; and assistance with addressing these issues.

126. Critically, the Auditor General found that Indigenous Services Canada was not on track to meet its 2015 commitment of eliminating all long-term drinking water advisories on public water systems on reserve by March 31, 2021. The Auditor General revealed that while the COVID-19 pandemic "delayed progress on some projects, many were already facing delays prior to the pandemic". The Auditor General emphasized the importance of this finding, noting "if long-term drinking water advisories persist, the health and safety of First Nations communities will be at risk". The Auditor General also criticized Canada's commitment, which covered only public water systems on reserve, and excluded the one-third of homes on reserve that obtain water by private well, cistern, or have no running water.

127. The Auditor General also found that Indigenous Services Canada's progress was exaggerated, as interim measures were widely implemented to provide impacted First Nations with "temporary access to safe drinking water". In actuality, "some long-term solutions were not expected to be completed for several years". For example, of the 100 long-term drinking water advisories that were lifted between November 1, 2015 and November 1, 2020, 15% were eliminated through interim measures, and Indigenous Services Canada expected that the majority of these projects would be completed between 2022 through 2024. Moreover, 5% of the systems which had the long-term drinking water advisories eliminated subsequently had advisories which became long-term.

128. The Auditor General revealed that the condition of water systems on reserve “had not improved between the 2014-2015 and the 2019-2020 fiscal years”, noting that unresolved deficiencies in water systems mean that First Nations will continue to lack reliable access to safe drinking water. Likewise, the risk rankings of water systems on reserve have remained unchanged, as the same percentage of water systems were assessed as either high or medium risk in both the 2014-2015 fiscal year and the 2019-2020 fiscal year – which indicate that the system has “major deficiencies that need to be addressed” to ensure a First Nation has reliable access to safe drinking water.

129. The Auditor General echoed the concerns that First Nations had long communicated to Canada – that the Defendant “did not provide the support necessary to ensure that First Nations ... have ongoing access to safe drinking water”. Notably, the Auditor General found that Canada’s efforts “have been constrained by a number of issues, including an outdated policy and formula for funding the operation and maintenance of water infrastructure”.

130. The Auditor General detailed Indigenous Services Canada’s approach of allocating operations and maintenance funding to First Nations pursuant to a formula and policy, where the formula “calculates the overall estimated costs required to operate and maintain water systems”, and the policy “dictates that the department will fund only 80% of these calculated costs”. The Auditor General found that Canada “had not amended the operations and maintenance funding formula for First Nations water systems since it was first developed 30 years ago”.

131. The Auditor General further concluded that “because the formula was outdated, it did not provide the full 80% of costs required by the policy”, failing to “keep pace with advances in technology or the actual costs of operating and maintaining infrastructure”. The formula also “did not consider the condition of the infrastructure as determined in [Canada’s] annual risk assessment or information about planned maintenance activities”. Canada’s funding ultimately did not reflect the needs of water systems and “contributed to issues with water system operator capacity and accelerated deterioration of water systems”. The Auditor General noted that many First Nations

“struggled to provide” the outstanding amount for operation and maintenance costs. The Auditor General called Canada to “work with First Nations ... to implement long-term solutions” to ensure that water systems on reserve are equipped to provide continual access to safe drinking water.

132. Importantly, salaries for water system operators are included in Canada’s operations and maintenance funding for First Nations. The Auditor General noted that a 2018 study by Indigenous Services Canada confirmed that “the salaries of water system operators in First Nations communities were 30% lower than their counterparts elsewhere”. The Auditor General confirmed that the salary gap for water system operators “contributed to problems” with retaining qualified personnel, noting that data from Indigenous Services Canada for 2019-2020 demonstrated that more than a quarter of water systems on reserve “lacked a fully trained and certified operator”, and more than half “lacked a fully trained and certified back-up operator”. The Auditor General found that these deficiencies can jeopardize the reliability of a First Nation’s water supply.

133. The underfunding of operations and maintenance carries significant importance, as the Auditor General noted that “if funding to operate and maintain water systems is insufficient, water systems may continue to deteriorate at a faster-than-expected rate”, with costs increasing as infrastructure ages. Canada’s chronic inattention to, and deliberate underfunding of, operations and maintenance have perpetuated the water crisis in Class members’ First Nations.

134. The Auditor General expressly recommended that Indigenous Services Canada prioritize the work of determining the funding that First Nations need to operate and maintain water systems, and amend the funding formula accordingly. Canada agreed with this recommendation, and committed to work with First Nations to implement it.

135. The differential treatment of First Nations compared to non-Indigenous communities was expressly recognized by the Auditor General, who observed the absence of a regulatory regime for managing drinking water in First Nations, and noted that such a regime “would provide First Nations communities with drinking water

protections comparable with other communities in Canada”. The Auditor General pointed out that this is not the first time that the issue has been raised with Canada, citing a 2005 Report of the Commissioner of the Environment and Sustainable Development, Chapter 5—Drinking Water in First Nations Communities, which found that First Nations lack regulatory protections similar to those for non-Indigenous communities. The Auditor General again recommended that Canada develop a regulatory regime for safe drinking water in First Nations, but Canada has yet to propose any such regime.

136. The Auditor General reminded Canada of the collateral impacts of long-term drinking water advisories, including health risks; negative impacts on reserve-based businesses and services; loss of income; and a loss of confidence in drinking water quality, which may cause residents to use unsafe alternatives like untreated source water, even after an advisory is lifted.

137. The Auditor General concluded that Canada “did not provide adequate support to First Nations” to ensure that they had access to safe drinking water. Rather, the Auditor General found that First Nations will continue to be deprived of reliable access to safe drinking water until “deficiencies with water systems are addressed, sufficient operations and maintenance funding is identified and provided, and a regulatory regime is established”.

138. Canada responded to the Auditor General’s findings by committing to:

- (a) support First Nations to prevent advisories from becoming long term by “providing sustainable investments” to address advisories, expand delivery systems, build capacity of local water operators, and support monitoring and testing;
- (b) advocate for a “continuation of program funding with central agencies” to support water services in First Nations, “with the objective of obtaining long-term stable funding” and addressing the long-term needs of First Nations;

- (c) “proactively identify and address underlying deficiencies in water systems to prevent recurring advisories”;
- (d) undertake annual performance inspections of water systems and condition assessments every 3 years to identify deficiencies;
- (e) “increase support for the operation and maintenance of water systems” acknowledging that this will assist First Nations in sustaining their infrastructure;
- (f) support operator training and retention and improve capacity building and operator support for First Nations;
- (g) support the development of a “more holistic asset management approach” including for “future infrastructure investment requirements while engaging on operations and maintenance policy reform”; and
- (h) “support long-term measures to ensure that First Nations have ongoing access to safe drinking water”.

139. On March 10, 2021 at a press conference, Minister Miller, Canada’s Minister of Indigenous Services, confirmed that he would be connecting with First Nations under a long-term drinking water advisory to provide confirmation of the progress to date and providing reinforcement of “the long-term commitment of the Government of Canada to them”. Minister Miller acknowledged his duty on behalf of Canada to “get it done”, and committed to providing First Nations under a long-term drinking water advisory with “further undertakings that we will be with them for the long run”. Minister Miller articulated Canada’s focus as “building long-term solutions to support sustainable access to safe, clean drinking water and restore trust in the water supply”. Minister Miller represented that Canada will make “investments in expanding water infrastructure and operations and maintenance and training programs to ensure we never find ourselves in this situation again”.

140. Minister Miller further acknowledged that Canada has heard from First Nations that “operations and maintenance is essential to effectively managing ... water infrastructure”, which is a “critical asset” in First Nations. Minister Miller confirmed that Canada can reduce the risks to water systems by supporting infrastructure upkeep and maintenance which has “been over looked for far too long”.

141. Minister Miller recognized that Canada needs “to have a long-term commitment in operations and maintenance” including by providing “equal pay for equal work”. He described Canada’s 80-20 model for operations and maintenance as “outdated”, and recognized that some First Nations “didn’t have that extra 20” which they were left to contribute. Minister Miller described this policy as “unfair”. He stated that Canada should “fully fund[]” the operations and maintenance cost, and expressed Canada’s commitment to do so. He reiterated that Canada’s “commitment to [First Nations] is we will be there in the long run”.

142. Minister Miller affirmed that the “project to raise long-term drinking water advisories in First Nations communities ... are the responsibility of the Government of Canada”. He further confirmed that “private wells, which are sometimes very far from a water system or source” are also “the responsibility of the Government of Canada”.

143. Minister Miller expressed Canada’s longstanding role in providing infrastructure to First Nations. He noted that Indigenous Services Canada “may be new legally” but is “an old department” which carries a “long, painful history to it”. Minister Miller also admitted that the poor state of First Nations’ water systems is “a situation that shouldn’t have been the case in the first place”, and that “Canadians, rightfully, have been asking the Federal Government to do something”, emphasizing Canada’s commitment to fulfill its promises. Minister Miller confirmed Canada’s recognition that it is “a basic matter of human decency that in a country like Canada, people don’t have access to clean water”.

144. In April 2021, Canada released a Detailed Action Plan on its responses to the recommendations made by the Auditor General, key interim measures it will take to advance its response, and expected completion dates.

145. On June 21, 2021 Canada reached an agreement in principle that led to the Settlement. At a press conference on July 30, 2021 Minister Miller described the agreement as providing “reparations for past harms of prior governments” and “a binding commitment of the Government of Canada” to eliminate long-term drinking water advisories in reserve communities.

146. Minister Miller further stated that Canada is “assuming our responsibility to lift boil water advisories in the short and long term” across the country. He unequivocally pledged that Canada is “accepting our responsibility”. Minister Miller confirmed Canada’s “commitment that every First Nations person should have reliable access to safe, clean drinking water, now and in the future”, and that Canada will “hold our obligations up vis-à-vis Indigenous peoples”. He described these efforts as “reflective of a basic right”.

147. Minister Miller declared that Canada is “commit[ed] ... to ensur[ing] that all First Nations communities have access to safe, clean and reliable drinking water”, describing this as “an expanded commitment” from Canada’s 2015 promise to address long-term drinking water advisories on reserve. Minister Miller stated that there is “no credible excuse for a country such as Canada to have taken this long”, and that there is “much more to do”.

148. Unfortunately, Canada’s recognition of its obligations came too late for many First Nations, which were already under long-term drinking water advisories, and which – solely because of Canada’s acts and omissions – will require time to address the problems with their respective water systems. Many Class members have remained subject to ongoing long-term drinking water advisories, and additional First Nations have continued to see their water systems fail. Class members have borne, and continue to bear, the effects of Canada’s breaches of its obligations.

149. The Settlement was intended to address claims that arose on or before June 20, 2021 and it expressly excluded continuing and future claims. First Nations and their members who benefit from the Settlement have a right to compel Canada to make all reasonable efforts to ensure that they have regular access to potable water. Canada’s

delivery on that commitment will mitigate these Class members' damages. However, other Class members has not yet experienced a long-term drinking water advisory before June 20, 2021, and they are not entitled to enforce rights under the Settlement Agreement. These Class members require declaratory and injunctive relief to secure potable water.

150. The Settlement released Canada in respect of damages that the members of the class "incurred prior to June 20, 2021". However, section 10.01 of the Settlement expressly provided that there was "No Provision for Continued Damages", stating:

**10.01 No Provision for Continued Damages**

This Agreement makes no provision for any damages that may accrue to Class Members in respect of Long-Term Drinking Water Advisories that begin or continue after June 20, 2021, and Class Members shall not release any claims to any such damages.

151. The within action is not intended to re-litigate matters that were resolved in the Settlement. However, Canada knew and understood that further efforts would be required to resolve its liability for Class members for damages incurred after June 20, 2021. That is the purpose of the within action.

152. On April 28, 2022, the Honourable Patty Hajdu, by that time Minister of Indigenous Services, gave a press conference where she stated that the parties' settlement agreement, "Canada accepts the role that the government has played in First Nations' lack of access to clean drinking water". Canada "acknowledge[d] the significant harm and discrimination that First Nation people have felt and experienced at the hands of the Canadian government". Minister Hajdu affirmed that ongoing long-term drinking water advisories on reserve are "unacceptable" and the "injustice of not having access to ... clean potable water" needs to end.

153. In June 2022, the Auditor General of Canada, Karen Hogan, provided an update to the Office of the Auditor General's 2021 report on Access to Safe Drinking Water in First Nations Communities. She described eliminating long-term drinking water advisories and addressing infrastructure needs as "[a] key component of reconciliation".

The Auditor General emphasized that many of the timelines set by Canada to address the findings of the report have now passed. She highlighted that “[t]o improve the situation for First Nations communities, actions have to catch up to words”, describing ongoing follow up work by the House of Commons on this issue is “critically important”.

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

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

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

*Charter breaches*

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

*Canada breaches Section 15*

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

158. Canada’s failure to provide Class members with adequate access to potable water, and to protect them from contaminated water, places them at a disadvantage

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

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

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

#### *Canada breaches Section 7*

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

were and are dependent on Canada for access to potable water, and for protection from contaminated water.

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

*Canada breaches Section 2(a)*

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

164. The lack of adequate access to clean water has precluded Class members from exercising their traditional religious practices and from passing on those sacred practices from one generation to another. Canada has also deprived Class members of their ability to effectively discharge their culturally significant obligation to protect water. These are serious interferences with Class members' ability to act in accordance with their freedom of religion, and they constitute a breach of Class members' rights under section 2(a) of the *Charter*.

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

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

*Canada breaches Section 36*

166. Furthermore, Canada has breached section 36 of the *Constitution Act, 1982*, which requires it to provide “promot[e] equal opportunities for the well-being of Canadians”, including Class members, “further economic development to reduce disparity in opportunities”, including the opportunities afforded to Class members, and “provid[e] essential public services of reasonable quality to all Canadians”, including Class members. All of these commitments require Class members to have reasonable access to potable water in their communities.

Nuisance

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

**RESTITUTIONARY RELIEF**

168. In the alternative, Canada realized cost savings from the breaches of its duties described above (the “**Unjust Gains**”). Canada was unjustly enriched to the extent of the Unjust Gains. The Unjust Gains resulted from expenditures that Canada was obligated to make on behalf of Class members, and these cost savings were realized only through Canada’s unlawful conduct.

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

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

### **VICARIOUS LIABILITY**

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

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

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

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

## **CLASS MEMBERS SUFFERED DAMAGES**

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

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

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

- (a) adverse health effects, including influenza, pneumonia, gastrointestinal infections and disease, skin infections and disease, whooping cough and other respiratory infections, shigellosis, diarrhea, cancer, hepatitis, and impetigo;
- (b) adverse psychological effects including severe anxiety and severe depression, which effects are caused by fear of consuming contaminated water, lack of a safe and secure supply of water, foul tastes and odours, and the presence of chemicals and pollutants in the water;
- (c) adverse health effects, particular to infants, including lower respiratory tract infections and respiratory syncytial virus;
- (d) higher suicide rates;

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

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

- (a) serious physical and psychological harm;
- (b) loss of income and loss of advantage;
- (c) significant out-of-pocket expenses to obtain potable water, where possible, or to travel to communities with access to potable water;
- (d) inability to practice their traditional ceremonies and spiritual beliefs, with intergenerational effects;
- (e) loss of opportunity to live on First Nations Lands, some Class members having left First Nations Lands to live in places with adequate access to potable water;
- (f) loss of opportunity to develop First Nations Lands for economic benefit; and
- (g) pain and suffering.

## **PUNITIVE AND EXEMPLARY DAMAGES**

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

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

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

## **MISCELLANEOUS**

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

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

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

184. The Plaintiffs plead and rely upon the:

- (a) *Federal Courts Rules*, SOR/98-106, including Part 5.1 and Rule 114;
- (b) *Indian Act*, R.S.C. 1985, c. I-5

- (c) *First Nations Land Management Act*, S.C. 1999, c. 24.
- (d) *Federal Courts Act*, RSC., 1985, c. F-7;
- (e) *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.);
- (f) Common law; and,
- (g) Such other legislation or regulation as may apply.

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

**DATED** at Toronto, Ontario, this 22 day of September, 2022.

September 22, 2022

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I Kadara Thompson, certify that the above document is a Certified True Copy of the Statement of Claim filed with the Federal Court on September 22, 2022.

**FEDERAL COURT**

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BETWEEN:

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

Plaintiffs

– and –

ATTORNEY GENERAL OF CANADA

Defendant

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

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**STATEMENT OF CLAIM**

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