

Federal Court



Cour fédérale

Date: 20230314

Docket: T-1937-22

Ottawa, Ontario, March 14, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

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

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

ORDER

THIS MOTION for certification, brought by the Plaintiffs, was heard in writing.

ON READING the motion record of the Plaintiffs and the consent of the Defendant.

1. **THIS COURT ORDERS** that this action be and is hereby certified as a class proceeding pursuant to the *Federal Courts Rules*, 334.16 and 334.17.
2. **THIS COURT ORDERS AND DECLARES** that the Class is defined as:
 - (a) All persons other than Excluded Persons who:
 - (i) are members of a band, as defined in subsection 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5 (“First Nation”), the disposition of whose lands is

subject to that Act, the *First Nations Land Management Act*, S.C. 1999, c. 24, or a Modern Treaty (together, “**First Nations Lands**”), and whose First Nations Lands were subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory, or the like) that lasted at least one year and continued or commenced after June 20, 2021 (“**Impacted First Nations**”); and

(ii) after June 20, 2020 ordinarily resided on First Nation Lands for a period of at least one year while such First Nation Lands were subject to a drinking water advisory that lasted at least one year; and

(b) Shamattawa First Nation, and any other Impacted First Nation that elects to join this action in a representative capacity (“**Participating Nations**”).

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

“**Modern Treaty**” means a land claims agreement within the meaning of s. 35 of the *Constitution Act, 1982*, entered into on or after January 1, 1973.

3. **THIS COURT ORDERS AND DECLARES** that the Class period shall run until the last date to opt out of this class proceeding in the manner prescribed below.

4. **THIS COURT ORDERS AND DECLARES** that until the claims asserted in this class proceeding are fully and finally decided, settled, discontinued, or abandoned, including the exhaustion of all rights of appeal, leave of the Court is required to commence any other proceeding on behalf of any member of the Class in respect of the claims asserted in this action, save and except for proceedings commenced on behalf of those members of the Class who opt out of this class proceeding in the manner prescribed below.

5. **THIS COURT ORDERS AND DECLARES** that the following common issue be and is hereby certified for resolution on behalf of the Class as a whole (“**Stage 1 Common Issue**”):

(a) *From June 20, 2020 to the present, did the Defendant owe a duty or an obligation to Class members to take reasonable measures to provide them with, or ensure they*

were provided with, or refrain from barring, adequate access to drinking water that is safe for human use?

6. **THIS COURT ORDERS AND DECLARES** that a sub-group be and is hereby recognized for the members of each Impacted First Nation, and the First Nation itself, if it is a Participating Nation;

7. **THIS COURT ORDERS AND DECLARES** that the following common issues be and are hereby certified for resolution on behalf of each sub-group ("**Stage 2 Common Issues**"):

- (a) *If the answer to common issue 5(a) is "yes", did Canada breach its duties or obligations to members of the sub-group?*
- (b) *If the answer to common issue 7(a) is yes, is any breach of the Charter of Rights and Freedoms ("**Charter**") saved by s. 1 of the Charter?*
- (c) *If the answer to common issue 7(a) is yes, did the Defendant's breach cause a substantial and unreasonable interference with Class members' or their First Nations' use and enjoyment of their lands?*
- (d) *If the answer to common issue 7(a) is "yes" and the answer to common issue 7(b) is "no", are damages available to members of the sub-group under s. 24(1) of the Charter?*
- (e) *Can the causation of any damages suffered by members of the sub-group be determined as a common issue?*
- (f) *Can the Court make an aggregate assessment of all or part of any damages suffered by members of the sub-group?*
- (g) *Does the Defendant's conduct justify an award of punitive damages, and if so, in what amount?*

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

(i) *If so, what measures should be ordered?*

8. **THIS COURT ORDERS AND DECLARES** that Chief Jordna Hill and Shamattawa First Nation are hereby appointed as Representative Plaintiffs for the Class.

9. **THIS COURT ORDERS AND DECLARES** that McCarthy Tétrault LLP and Olthuis Kleer Townshend are hereby appointed as class counsel ("**Class Counsel**").

10. **THIS COURT ORDERS AND DECLARES** that the Plaintiffs and the Defendant shall make reasonable efforts to agree on the appointment of an administrator for the purpose of giving notice of the certification of this class proceeding (the "**Administrator**"). The Parties shall advise the Court of the appointment of the Administrator within sixty (60) days of the date of this Order, failing which the Court shall appoint an appropriately qualified Administrator.

11. **THIS COURT ORDERS** that class members shall be notified that this action has been certified as a class proceeding as follows, which shall be and is hereby deemed adequate notice:

- (a) by posting the Short Form Notice substantially as set out in **Schedule "A"** and Long Form Notice substantially as set out in **Schedule "B"**, and the French language translations of these documents, as agreed upon by the parties, on the respective websites of Class Counsel, the Defendant, and the Administrator;
- (b) by the Administrator publishing the Short Form Notice in the newspapers set out in **Schedule "C"** attached hereto, insofar as practicable, in ¼ of a page size in the weekend edition of each newspaper, if possible;
- (c) by the Administrator purchasing a total of 1 million impressions on Facebook and Google, allocated in the Administrator's discretion, and linking to the Administrator's website for this class action;

- (d) by the Administrator distributing the Short Form Notice to the Band Office of Shamattawa First Nation and the head office of the Assembly of First Nations;
- (e) by the Administrator forwarding the Short Form Notice and Long Form Notice to any Class member who requests them;
- (f) by the Administrator forwarding the Short Form Notice and Long Form Notice to the Chiefs of every Impacted First Nation identified in accordance with paragraph 13, below, except for Excluded Persons;
- (g) by the Administrator forwarding the Short Form Notice and Long Form Notice to the band office or similar office of every Impacted First Nation identified in accordance with paragraph 13, below, except for Excluded Persons, together with a request that they be posted in a prominent place;
- (h) by the Administrator establishing a national toll-free support line, to provide assistance to Class members, family, guardians, or other persons who make inquiries on their own behalf or on behalf of Class members.

12. **THIS COURT ORDERS** that the Defendant shall be responsible for the cost of giving notice of the certification of a class proceeding as set out in paragraph 11, above.

13. **THIS COURT ORDERS** that within 30 days of the date of this Order, the Plaintiffs and the Defendant shall exchange a list setting out their best information on the names of the First Nations that are eligible to opt into the Class, and taken together these lists shall constitute the means of identifying the First Nations that are entitled to direct notice for the purpose of paragraphs 11(f) and 11(g), above.

14. **THIS COURT ORDERS** that a class member may opt out of this class proceeding by delivering a signed opt-out coupon, a form of which is attached as **Schedule "D"**, or some other legible signed request to opt out, to the Administrator within one-hundred-and-eighty (180) days of the date on which notice is first published in accordance with paragraph 11(b), above (the "**Opt Out Deadline**"). The Short Form Notice and Long Form Notice shall state the Opt Out Deadline and the address of the Administrator for the purpose of receiving opt-out coupons.

15. **THIS COURT ORDERS** that no Class Member may opt out of this class proceeding after the Opt Out Deadline, except with leave of the Court.

16. **THIS COURT ORDERS** that the Administrator shall serve on the parties and file with the Court, within sixty (60) days of the expiry of the Opt Out Deadline, an affidavit listing all persons who have opted out of the class proceeding, if any.

17. **THIS COURT ORDERS** that any Impacted First Nation may opt into this class proceeding by retaining Class Counsel no fewer than ninety (90) days before determination of the Stage 1 Common Issue (the "**Opt In Deadline**").

18. **THIS COURT ORDERS** that no Class member may opt into this class proceeding after the Opt In Deadline, except with leave of the Court.

19. **THIS COURT ORDERS** that Class Counsel shall serve on the parties and file with the Court, within sixty (60) days of the expiry of the Opt In Deadline, a list of all the Impacted First Nations that have opted into the class proceeding.

20. **THIS COURT DECLARES** that the Litigation Plan attached hereto as Appendix 1 is a workable method of advancing the class proceeding on behalf of the Class.

21. **THIS COURT ORDERS** that each party shall bear its own costs of the within motion for certification of this class proceeding.

"Paul Favel"

Judge

SCHEDULE "A"

Schedule A

Legal Notice

Are You a Member of a First Nation That Has Been Subject To A Long-Term Drinking Water Advisory?

A Lawsuit May Affect You and Your First Nation. Please Read this Carefully.

You could be affected by class action litigation regarding the lack of access to clean drinking water on First Nations reserves.

The Federal Court of Canada decided that a class action on behalf of a "Class" of both First Nations and band members may proceed. Band members can choose whether to stay in the Class. First Nations can choose whether to join the Class. There is no money available now and no guarantee that the class action will succeed.

The Courts appointed Shamattawa First Nation and Chief Jordna Hill to act as representative Plaintiffs for the Class.

What is this case about?

This class action asserts that Canada breached its obligations by failing to ensure that First Nations communities had adequate access to clean drinking water. The class action asserts that members of these communities and the communities themselves were harmed emotionally, physically, financially, and spiritually. The class action asserts that Canada has breached its fiduciary duties, its duty of care, and the *Charter of Rights and Freedoms*. The Court has not decided whether any of these assertions are true. If there is no settlement, the Plaintiffs will have to prove their claims in Court.

If you have questions about this class action, you can contact NTD: Administrator [contact name] [number] or [email]

Who represents the class?

The Court has appointed McCarthy Tétrault LLP and Olthuis Kleer Townshend LLP to represent the Class as "Class Counsel". You do not have to pay Class Counsel, or anyone else, to participate. If Class Counsel obtains money or benefits for the Class they may ask for lawyers' fees and costs, which would be deducted from any money or benefits recovered for Class members.

Individuals Class Members: Who is included and who is excluded?

Band Members Included: The Class includes band members (as defined by the *Indian Act*): (a) whose reserve was subject to a drinking water advisory (whether a boil water, do not consume, or do not use advisory) that lasted at least one year at any time from and continued or commenced after June 20, 2021; and (b) after June 20, 2020, ordinarily lived on their reserve for a period of at least one year while the reserve was subject to a drinking water advisory that lasted at least one year.

Band Members Excluded: Members of the Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, and Okanagan Indian Band are excluded from this class action.

Individuals: What are your options?

Stay in the Class: To stay in the Class, you do not have to do anything. If the Class obtains money or benefits, Class Counsel will give notice about how to ask for your share. You will be legally bound by all orders and judgments, and you will not be able to sue Canada about the legal claims in this case.

Staying in the Class will not impact the supports received from community-based agencies that are funded by any government.

Get out of the Class: If you do not want to participate in this class action litigation, you need to remove yourself by opting out. If you opt out, you cannot get money or benefits from this litigation. To opt out, please visit [NTD: Insert Administrator's website for this action] to obtain an opt out coupon, or write to [NTD: Administrator name and address] requesting to be removed from this class action. Please include your name, address, telephone number, and signature. Your request to opt out must be sent by [NTD: 180 days from the date of the first publication of notice].

First Nations: What are your options?

Elect to join the Class: First Nations that wish to join the Class and assert claims on behalf of their community must take action to opt in. To opt in, or to seek more information, please contact the Administrator at [NTD: insert Administrator number] or [Administrator email]. First Nations may also contact Class Counsel Alana Robert (toll free: 1-877-244-7711 extension 548022; alrobert@mccarthy.ca); Class Counsel Heather Maki (toll free: 1-877-244-7711 extension 523615; hmaki@mccarthy.ca); or Class Counsel Kevin Hille ((416) 598-3694; khille@oktlaw.com). Your request to opt in must be sent no later than 90 days before Class members' claims are determined.

How Can I Get More Information?

Name of Administrator: [NTD: insert name]

Contact Information: [NTD: insert number] or [email]

Getting Information To People Who Need It

The representative Plaintiffs and Class Counsel ask for the help of health care workers, social workers, First Nations community leaders, family members, caregivers and friends of Class members in getting information to Class members who would have trouble reading or understanding this notice. More information about this lawsuit is available at the website or by contacting the Administrator. Please show this notice to people who may be impacted by this lawsuit or their caregivers.

SCHEDULE "B"

Schedule B

Are You a Member of a First Nation That Has Been Subject To A Long-Term Drinking Water Advisory?

If YES, A Class Action May Affect Your Rights and the Rights of First Nations

A court authorized this notice

- You could be affected by a class action involving access to clean drinking water in your First Nation Communities.
- The Federal Court of Canada has decided that class actions on behalf of a "Class" of both First Nations and band members may proceed. Band members can choose whether to stay in the Class. First Nations can choose whether to join the Class. The Courts appointed Shamattawa First Nation and Chief Jordna Hill to act as representative Plaintiffs for the Class.
- The Courts have not decided whether Canada did anything wrong, and there still has to be a Court case about whether Canada did anything wrong. There is no money available now and no guarantee there will ever be any money. However, your rights are affected, and you have a choice to make now. This notice is to help you and your First Nation make that choice.

INDIVIDUAL BAND MEMBERS: YOUR LEGAL RIGHTS AND OPTIONS AT THIS STAGE	
DO NOTHING: KEEP YOUR RIGHTS UNDER THE CLASS	Stay in these lawsuits and wait for the outcome. Share in possible benefits from the outcome but give up certain individual rights. By doing nothing, you keep the possibility of receiving money or other benefits that may come from a trial or settlement. But, you give up any rights to sue Canada on your own about the same legal claims in this lawsuit.
REMOVE YOURSELF (OPT OUT)	Get out of these lawsuits and get no benefits from it. Keep rights. If you ask to opt out and money or benefits are later awarded to Class members, you won't get a share. But, you keep any rights to sue Canada on your own about the same legal claims in this lawsuit.
FIRST NATIONS: YOUR LEGAL RIGHTS AND OPTIONS AT THIS STAGE	
CHOOSE TO JOIN THE CLASS (OPT IN)	Join the Class. If you join, your First Nations might share in money and benefits from the outcome. By joining the Class (opting in), First Nations might receive money or other benefits, including water infrastructure, that may come from a trial or settlement in the Class Action. Opting in is an easy process, and there is no cost to opt in.

QUESTIONS? CALL TOLL-FREE [NTD: insert Administrator number] OR VISIT [NTD: insert Administrator website]

DO NOTHING: LOSE YOUR FIRST NATION'S RIGHTS UNDER THE CLASS ACTION	<p>By doing nothing, your First Nation will lose the possibility of receiving money and other benefits if the Class Action succeeds.</p> <p>If First Nations do not join the Class (opt in) and money or benefits are later awarded, your First Nation won't share in those.</p> <p>By not opting-in, your First Nation may keep any rights to sue Canada about the same legal claims in this litigation.</p>
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- Lawyers must prove the claims against Canada at a trial or a settlement must be reached. If money or benefits are obtained you will be notified about how to ask for your share.
- Your options are explained in this notice. To be removed from the litigation, individual band members must ask to be removed by [NID: 180 days from the first publication of notice]. To join the Class Action, First Nations must send their opt in notice no later than 90 days before Class members' claims are to be determined.

**QUESTIONS? CALL TOLL-FREE [NID: insert Administrator number] OR VISIT
[NID: insert Administrator website]**

WHAT THIS NOTICE CONTAINS

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**QUESTIONS? CALL TOLL-FREE [NTD: insert Administrator number] OR VISIT
[NTD: insert Administrator website]**

BASIC INFORMATION

1. Why is there a notice?

The Courts have “certified” Class Actions. This means that the lawsuits meets the requirements for class actions and may proceed to trial. If you are included, you may have legal rights and options before the Courts decide whether the claims being made against Canada on your behalf are correct. This notice attempts to explain all of these things.

Justice Favel of the Federal Court of Canada is currently overseeing the case known as *Shamattawa First Nation and Chief Jordna Hill v. Canada*. The persons who sued are called the Plaintiffs. Canada is the Defendant. A link to the latest version of the Statement of Claim (the legal document that makes the allegations against Canada) can be found [here](#).

2. What is this litigation about?

These Class Actions assert that Canada breached its obligations by failing to ensure that First Nations communities had adequate access to clean drinking water. The Class Actions also assert that members of these communities and the communities themselves were harmed emotionally, physically, financially, and spiritually. The Class Actions assert that Canada has breached its fiduciary duties, its duty of care, and the *Charter of Rights and Freedoms*. The Courts have not decided (and Canada has not admitted) that any of these assertions are true. If there is no settlement with Canada, the Plaintiffs will have to prove their claims in Court.

If you are having a difficult time dealing with these issues, or have questions about the Class Action, you can call [NTD: insert Administrator toll-free number] for assistance.

3. What is this a class action?

In a class action, the “representative plaintiffs” (in this case, Shamattawa First Nation and Chief Jordna Hill) sued on behalf of individual band members and First Nations who have similar claims. All of these individual band members are part of the “Class” or “Class Members”, as are First Nations who choose to join the Class Action. The Court resolves the issues for all Class Members in one case, except (in the case of individual band members) for those who remove themselves from (opt out of) the Class and (in the case of First Nations) for those that do not join (opt into) the Class Action.

QUESTIONS? CALL TOLL-FREE [NTD: insert Administrator toll-free number] OR

VISIT

[NTD: insert Administrator website]

PAGE 4

4. Who is a member of the Class?

The Class includes and excludes the following:

(a) All persons, other than "Excluded Persons" who:

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

(b) Shamattawa First Nation and any other Impacted First Nation that elects to join this action in a representative capacity ("Participating Nations").

"Excluded Persons" are members of Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, Okanagan Indian Band, and Okanagan Indian Band.

"Modern Treaty" means a land claims agreement within the meaning of s. 35 of the *Constitution Act, 1982*, entered into on or after January 1, 1973.

5. What are the Plaintiffs asking for?

The Plaintiffs are asking for money and other benefits for the Class, including water infrastructure. The Plaintiffs are also asking for legal fees and costs, plus interest.

6. Is there any money available to Class Members now?

No money or benefits are available now because the Court has not yet decided whether Canada did anything wrong, and the two sides have not settled the case. There is no guarantee that money or benefits will ever be obtained. If money or other benefits become available, notice will be provided about how to ask for your share.

YOUR RIGHTS AND OPTIONS

Individual band members must decide whether to stay in the Class, and you have to decide this by **[NTD: 180 days from the first publication of notice]**. First Nations must decide whether they want to join the class by no later than 90 days before the Class members' claims are determined.

QUESTIONS? CALL TOLL-FREE [NTD: insert Administrator number] OR VISIT [NTD: insert Administrator website]

7. What happens if I do nothing at all? What happens if the First Nation does nothing at all?

Individuals Band Members: if you do nothing, you will automatically remain in the Class Action. You will be bound by all Court orders, good or bad. If any money or other benefits are awarded, you may need to take action after notice to you to receive any benefits.

First Nations: First Nations must chose to join the Class Action to receive the potential benefits and to be bound by all Court orders, good or bad.

8. What if I don't want to be in the Lawsuit? What if a First Nation wants to join the Lawsuit?

Individual Band Members: If you do not want to be in the lawsuit, you must remove yourself – this is referred to as “opting out.” If you remove yourself, you will not receive any benefit that may be obtained from the Class Action. You will not be bound by any Court orders and you keep your right to sue Canada as an individual regarding the issues in this case.

To remove yourself, send a communication that says you want to be removed from the Class in *Shamattawa First Nation and Chief Jordna Hill v. Canada* Court File No. T-1937-22. Include your name, address, telephone number, and signature. You can also get an Opt Out Form at [NTD: insert web link]. You must deliver your removal request by [NTD: 180 days from the first publication of notice] to: [NTD: Administrator name and address] or [Administrator email].

Call [NTD: insert toll-free number] if you have any questions about how to get out of the Class Action.

First Nations: First Nations that wish to join the Class Action and assert claims on behalf of their band or community must take action to join – this is referred to as “opting in.” To opt in, or to seek more information, please contact the [NTD: insert toll-free number] or [insert email]. First Nations may also contact Class Counsel Alana Robert (toll free: 1-877-244-7711 extension 548022 or alrobert@mccarthy.ca); Class Counsel Heather Maki (toll free: 1-877-244-7711 extension 523615 or hmake@mccarthy.ca); or Class Counsel Kevin Hille (khille@oktlaw.com or (416) 598-3694). Requests by First Nations to opt in must be sent no later than 120 days before Class members’ claims are determined.

THE LAWYERS REPRESENTING YOU

11. Do individual Band Members have a lawyer in the case?

Yes. The Court has appointed McCarthy Tétrault LLP and Olthuis Kleer Townshend LLP to represent you and other Class Members as “Class Counsel.” You will not be charged legal or other fees or expenses for these lawyers. If you want to be represented by another lawyer, you may hire one to appear in Court for you at your own expense.

QUESTIONS? CALL [NTD: insert Administrator number] OR VISIT [NTD: insert Administrator website]

11. How will the lawyers be paid?

Class Counsel will only be paid if they win judgement or if there is a settlement. The Court has to also approve their request to be paid. The fees and expenses could be deducted from any money obtained for the Class, or paid separately by the Defendant.

A TRIAL**12. How and when will the Court decide who is right?**

If the Class Action is not dismissed or settled, the Plaintiffs must prove their claims at a motion for summary judgement or a trial that will take place in Ottawa, Ontario. During the motion or trial, the Court will hear all of the evidence, so that a decision can be reached about whether the Plaintiffs or Canada is right about the claims in the Class Action. There is no guarantee that the Plaintiffs will win any money or benefits for the Class.

13. Will I get money after the trial?

If the Plaintiffs obtain money or benefits as a result of a trial or settlement, you will be notified about how to ask for a share or what your other options are at that time. These things are not known right now. Important information about the case will be posted on the website [NTD: insert Administrator website] as it becomes available.

GETTING MORE INFORMATION**14. How do I get more information? How to I get information to people who need it?**

You can get more information at [NTD: insert Administrator website] by calling toll free at [NTD: insert toll-free number], by writing to: [NTD: insert Administrator name and address], or by emailing: [NTD: insert Administrator email].

First Nations and Individual Band Members may also contact Class Counsel (toll free: 1-877-244-7711) and ask for Class Counsel Alana Robert (alrobert@mccarthy.ca or 66 Wellington Street West, Toronto, Ontario, M5K 1E6); or Class Counsel Kevin Hille (khille@oktlaw.com or (416) 598-3694 or 250 University Avenue, 8th floor, Toronto, Ontario, M5H 3E5).

Shamattawa First Nation, Chief Jordna Hill, and Class Counsel kindly ask for the help of health care workers, social workers, First Nation community leaders, family members, caregivers and friends of Class members in getting information to Class Members who would have trouble reading or understanding this notice. More information about this lawsuit is available at the website or by contacting the Administrator or Class Counsel. Please show this notice to people who may be impacted by this lawsuit or their caregivers.

QUESTIONS? CALL [NTD: insert Administrator number] OR VISIT [NTD: insert Administrator website]

SCHEDULE "C"

Schedule C

List of Newspapers

Globe and Mail
National Post
Winnipeg Free Press
Vancouver Sun
Edmonton Sun
Calgary Herald
Saskatoon Star Phoenix
Regina Leader Post
Thunder Bay Chronicle-Journal
Toronto Star
Ottawa Citizen
Montreal Gazette
Montreal La Presse (digital edition)
Halifax Chronicle-Herald
Moncton Times and Transcript
First Nations Drum

SCHEDULE "D"

Schedule D

FORM OF OPT OUT COUPON

To: [Insert Claim Administrator Address]
[Insert Administrator Email Address]

This is NOT a claim form. Completing this OPT OUT COUPON will exclude you from receiving any compensation or other benefits arising out of any settlement or judgment in the class proceeding named below:

Note: To opt out, this coupon must be properly completed and sent to the above-address no later than [INSERT DATE THAT IS 180 DAYS FROM THE FIRST NOTICE PUBLICATION]

Court File No.: T-1937-22

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

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

I understand that by opting out of this class proceeding, I am confirming that I do not wish to participate in this class proceeding.

I understand that any individual claim I may have must be commenced within a specified limitation period or that claim will be legally barred.

I understand that the certification of this class proceeding suspended the running of the limitation period from the time the class proceeding was filed. The limitation period will resume running against me if I opt out of this class proceeding.

I understand that by opting out, I take full responsibility for the resumption of the running of any relevant limitation period legal steps to protect any claim I may have.

Date: _____

Name of Class Member: _____

Signature of Witness

Signature of Class Member Opting Out

Name of Witness

APPENDIX 1

Court File No. T-1937-22

FEDERAL COURT

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

Proposed Class Proceeding commenced under Part 5.1 of the
*Federal Court Rules, SOR/98-106***LITIGATION PLAN****FOR COMMON ISSUES, CERTIFICATION, AND SUMMARY JUDGMENT MOTIONS**

1. Attached as Schedule "A" is the Parties' consent timetable. This Litigation Plan is intended to address the Plaintiffs' motions for certification and summary judgment.
2. If the motion for summary judgment is successful, a further plan will be proposed to address any remaining issues, depending on the outcome.
3. Alternatively, if the motion for summary judgment is not successful, the Plaintiffs will propose a further plan for the trial of the common issues.
4. The Plaintiffs seek certification of the following common issue to be resolved on behalf of the class as a whole ("Stage 1 Common Issue"):
 - (a) From June 20, 2020 to the present, did the Defendant owe a duty or an obligation to Class members to take reasonable measures to provide them with, or ensure they were provided with, or refrain from barring, adequate access to water that is safe for human use?

5. If the Defendant consents to certification of a class proceeding, the Plaintiffs will negotiate with the Defendant to resolve the common issues. If the negotiations fail or do not yield sufficient progress, the Plaintiffs will require the delivery of a Statement of Defence, following which they will deliver a record in support of a motion for summary judgment on the Stage 1 Common Issue. At a pre-trial conference following delivery of the Plaintiffs' record, they will ask the Court to determine that this matter is appropriate for summary judgment and schedule a hearing of their motion.

6. If the Defendant opposes the certification of a class proceeding, the Plaintiffs will require the Defendant to deliver a Statement of Defence. The Plaintiffs will deliver a record in support of a motion for certification, followed by a record in support of a motion for summary judgment on the Stage 1 Common Issue. At a case conference following the delivery of the Plaintiffs' records, they will ask the Court to provide further directions on their motion for summary judgment and schedule the hearing of same.

7. At the certification motion, the Plaintiffs will also seek certification of the following common issues to be resolved on behalf of each Impacted First Nation sub-group, being the members of that First Nation and the First Nation itself if elects to participate in the action (a "Participating First Nation"), which will form the second stage of common issues ("Stage 2 Common Issues"):

- (a) If the answer to common issue 4(a) is "yes", did Canada breach its duties or obligations to members of the sub-group?
- (b) If the answer to common issue 7(a) is yes, is any breach of the *Charter of Rights and Freedoms* ("*Charter*") saved by s. 1 of the *Charter*?
- (c) If the answer to common issue 7(a) is yes, did the Defendant's breach cause a substantial and unreasonable interference with Class members' or their First Nations' use and enjoyment of their lands?

- (d) If the answer to common issue 7(a) is "yes" and the answer to common issue 7(b) is "no", are damages available to members of the sub-group under s. 24(1) of the *Charter*?
- (e) Can the causation of any damages suffered by members of the sub-group be determined as a common issue?
- (f) Can the Court make an aggregate assessment of all or part of any damages suffered by members of the sub-group?
- (g) Does the Defendant's conduct justify an award of punitive damages, and if so, in what amount?
- (h) Should the Court order that the Defendant take measures to provide or ensure that members of the sub-group are provided with, or refrain from barring, adequate access to clean tap water?
 - (i) If so, what measures should be ordered?

8. If the Stage 1 Common Issue is determined in favour of the Plaintiffs, the parties will conclude a discovery plan to manage the Defendant's timely production of relevant documents in respect of the Stage 2 Common Issues for each Impacted First Nation sub-group.

9. Upon assessing the Defendant's productions, the Plaintiffs will decide whether to bring motions for summary judgment on the Stage 2 Common Issues for some or all of the Impacted First Nation sub-groups, or alternatively, to schedule a trial of these common issues.

NOTIFICATION OF CERTIFICATION AND OPT OUT PROCEDURE

10. On the motion for certification, the Plaintiffs will ask that the Court settle the form and content for notification of the certification of this action (the "Notice of Certification"), the timing and manner of providing Notice of Certification ("Notice Program") and set out an opt-out date as one-hundred-and-eighty (180) days of the date on which some form of notice is first published in accordance with paragraph 12(b) ("Opt-Out Date"), and an opt-in date three (3) months prior to the commencement of the determination of the Stage 1 Common Issues, or such other date as the Court may order.

11. The Plaintiffs will ask the Court to order that the Defendant pay the costs of the Notice Program, including the cost of the Administrator.
12. The Plaintiffs will seek an order for the distribution of notice of certification as follows:
 - (a) by posting the Short Form Notice and Long Form Notice, and the French language translations of these documents, as agreed upon by the parties, on the respective websites of Class Counsel, the Defendant, and the Administrator;
 - (b) by the Administrator publishing the Short Form Notice in the newspapers, insofar as practicable, in $\frac{1}{4}$ of a page size in the weekend edition of each newspaper, if possible;
 - (c) by the Administrator purchasing a total of 1 million impressions on Facebook and Google, allocated in the Administrator's discretion, and linking to the Administrator's website for this class action;
 - (d) by the Administrator distributing the Short Form Notice to the Band Office of Shamattawa First Nation and the head office of the Assembly of First Nations;
 - (e) by the Administrator forwarding the Short Form Notice and Long Form Notice to any Class member who requests them;
 - (f) by the Administrator forwarding the Short Form Notice and Long Form Notice to the Chiefs of every Impacted First Nation identified, except for Excluded Persons;
 - (g) by the Administrator forwarding the Short Form Notice and Long Form Notice to the band office or similar office of every Impacted First Nation identified, except for Excluded Persons, together with a request that they be posted in a prominent place;
 - (h) by the Administrator establishing a national toll-free support line, to provide assistance to Class members, family, guardians, or other persons who make inquiries on their own behalf or on behalf of Class members.

13. The Plaintiffs will prepare opt-out and opt-in forms to be used by Class members wanting to opt out of, or opt into, the class action, which will require the Class member to provide sufficient information to establish their membership in the Class.

**LITIGATION STEPS FOLLOWING THE DETERMINATION OF COMMON ISSUES
IN FAVOUR OF THE CLASS**

Notice of Resolution of Common Issues

14. The Plaintiffs will ask that the Court settle the form and content for notification of the resolution of the Stage 1 and Stage 2 Common Issues ("Resolution Notice Plan") and the means by which Class members will file claims ("Claim Forms") by a fixed date with the Administrator. The Plaintiffs will also ask that the Court settle an appropriate process to determine any remaining individual issues.

Valuation of Damages

15. If the Common Issues are resolved in favour of the Plaintiffs, the Plaintiffs propose two (2) methods for assessing and distributing damages for the class members as follows:

- (a) aggregate damages that accrue to individual Class members on a *pro rata* basis or on a *pro rata* basis within a sub-group; and
- (b) aggregate damages that accrue to Participating First Nations on a community basis.

16. Following the determination of aggregate damages, including punitive damages, additional damages may be awarded in individual issues proceedings.

Assessment of Number of Claimants

17. After the deadline for submitting Claim Forms has expired, the Administrator shall calculate the total number of claimants for the purpose of any *pro rata* distribution of aggregate damages.

18. The Parties may also retain an actuary to assist with the determination of Class size and the demographics of the Class.

Global Punitive Damages Distribution

19. Should the Court award aggregate damages to the Class or a sub-group, the total amount of damages will be apportioned to the class in a manner to be determined by the Court within a fixed period of time set by the Court.

Funds Not Distributed

20. Any monies not distributed will be distributed *cy-près* as the Court directs. The Plaintiffs propose that any residual amounts be distributed *cy-près* to community organizations that promote child welfare in Impacted First Nations.

Resolution of the Individual Issues

21. Within thirty (30) days of the entry of the judgment for the Plaintiffs on the first-level common issue, the parties will convene to settle a protocol to resolve any individual issues. If the parties cannot settle such a protocol, the Plaintiffs will move for directions from the Court within sixty (60) days.

MISCELLANEOUS REQUIREMENTS OF THE LITIGATION PLAN

Funding

22. Class Counsel have entered into an agreement with the Chief Hill and Shamattawa First Nation (the "Representative Plaintiffs") with respect to legal fees and disbursements. This agreement provides that counsel will not receive payment for their work unless and until the class proceeding is successful or costs are recovered from the Defendant.

23. Class Counsel's legal fees are subject to court approval.

Claims Administration

24. The Administrator will provide the claims administration for any settlement or judgment achieved. The Administrator will distribute notice in accordance with the Resolution Notice Plan. If a settlement is achieved and a settlement fund is provided, or if judgment results in an award in favour of Class members, the Administrator will administer payments out of the fund to claimants based on the procedures set out above, after approval and/or modification by the Court.

Class Action Website

25. From time to time, Class Counsel will post relevant pleadings and court filings, the latest documents and summaries of the latest developments, anticipated timelines, frequently asked questions and answers, and contact information for class counsel for the information of class members.

Conflict Management

26. Class Counsel and the Plaintiffs have taken appropriate measures to determine that no conflict of interest exists among the members of the Class, and no such conflict is anticipated. Should a conflict arise, McCarthy Tétrault LLP will represent one sub-group, and Olthuis Kleer Townshend LLP will represent the other. Should any conflict arise as between First Nations and

their members, which is not anticipated, McCarthy Tétrault LLP will represent the members and Olthuis Kleer Townshend LLP will represent the First Nations.

Applicable Law

27. The applicable law is the *Constitution Act, 1982*, the *Constitution Act, 1867*, the *Charter of Rights and Freedoms*, the *Indian Act*, R.S.C. 1985, c. I-5, the *First Nations Land Management Act*, S.C. 1999, c. 24, *The Federal Courts Act*, R.S.C., 1985 c. F-7 as well as applicable regulations, the common law, and the law of Canada.

Schedule "A"

Timetable

PROPOSED LITIGATION TIMETABLE		
Steps To Be Completed	By Which Party	Date To Be Completed
Delivery of Statement of Defence	Defendant	To be delivered on 60 days' notice by the Plaintiffs
Delivery of Reply, if any	Plaintiffs	To be delivered 15 days after delivery of Statement of Defence
Delivery of Certification Record	Plaintiffs	March 3, 2023
Delivery of Summary Judgment Record	Plaintiffs	June 30, 2023 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Case Conference to plan for Summary Judgment Motion	All parties	July 2023 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Delivery of Responding Record	Defendant	November 2, 2023 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Delivery of Reply Record, if any	Plaintiffs	December 18, 2023 (or 45 days after delivery of Responding Record, whichever is later)
Cross-examinations	All parties	To be completed 75 days after delivery of Reply Record, if any, or 120 days after delivery of Responding Record
Refusal Motions, if any	All parties	To be completed 30 days after completion of cross-examinations
Delivery of answers to undertakings	All parties	To be completed 30 days after refusals motion
Delivery of Moving Factum	Plaintiffs	To be delivered 45 days after completion of

		answers to undertakings
Delivery of Responding Factum	Defendant	To be delivered 60 days after delivery of Moving Factum
Delivery of Reply Factum	Plaintiffs	To be delivered 15 days after delivery of Responding Factum
Hearing of Summary Judgment Motion	All parties	September 2024

