

Federal Court



Cour fédérale

Date: 20201008

Docket: T-1673-19

Ottawa, Ontario, October 8, 2020

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

**CURVE LAKE FIRST NATION AND CHIEF EMILY WHETUNG ON HER OWN
BEHALF AND ON BEHALF OF ALL MEMBERS OF CURVE LAKE FIRST NATION
AND NESKANTAGA FIRST NATION AND CHIEF CHRISTOPHER MOONIAS ON
HIS OWN BEHALF AND
ON BEHALF OF ALL MEMBERS OF NESKANTAGA FIRST NATION**

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

ORDER

THIS MOTION for certification, brought by the Plaintiffs, was heard on September 16, 2020.

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 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 November 20, 1995 to present (“**Impacted First Nations**”);
 - (ii) had not died before November 20, 2017; and
 - (iii) ordinarily resided in an Impacted First Nation while it was subject to a drinking water advisory that lasted at least one year; and
- (b) *Curve Lake First Nation, Neskantaga 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, and Michael Darryl Isnardy.

3. **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.

4. **THIS COURT ORDERS AND DECLARES** that the following common issues be and are hereby certified for resolution on behalf of the Class as a whole:

- (a) *From November 20, 1995 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. **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;

6. **THIS COURT ORDERS AND DECLARES** that the following common issues be and are hereby certified for resolution on behalf of each sub-group:

- (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 6(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 6(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 6(a) is “yes” and the answer to common issue 6(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?

7. **THIS COURT ORDERS AND DECLARES** that Chief Emily Whetung, Curve Lake First Nation, Chief Christopher Moonias, and Neskantaga First Nation are hereby appointed as Representative Plaintiffs for the Class.

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

9. **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.

10. **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 set out in **Schedule "A"** and Long Form Notice 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, in ¼ of a page size in the weekend edition of each newspaper, if possible;*

(c) *by the Administrator distributing the Short Form Notice to all offices of Curve Lake First Nation, Neskantaga First Nation, and the Assembly of First Nations;*

- (d) *by the Administrator forwarding the Short Form Notice and Long Form Notice to any Class member who requests them;*
- (e) *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 12, below, except for Excluded Persons;*
- (f) *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 12, below, except for Excluded Persons, together with a request that they be posted in a prominent place;*
- (g) *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.*

11. **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 10, above.

12. **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 10(e) and 10(f), above.

13. **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, within one-hundred-and-twenty (120) days of the date on which notice is first published in accordance with paragraph 10(b), above (the “**Opt Out Deadline**”), to the Administrator. 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.

14. **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.

15. **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.

16. **THIS COURT ORDERS** that any Impacted First Nation may opt into this class proceeding by retaining Class Counsel no fewer than one-hundred-and-twenty (120) days before the disposition of any of the common issues (the “**Opt In Deadline**”), to Class Counsel, at the address set out in paragraph 11, above.

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

18. **THIS COURT ORDERS** that Class Counsel shall serve on the parties and file with the Court, within sixty (30) days of the expiry of the Opt In Deadline, a list of all the Impacted First Nations that have opted into the class proceeding.

19. **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.

20. **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

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 Manitoba Court of Queen's Bench and 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 Tataskweyak Cree Nation, Chief Doreen Spence, Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, and Chief Christopher Moonias 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 **Eric Khan** 1(800) 538-0009 or info@classaction2.com.

Who represents the class?

The Court has appointed McCarthy Tétrault LLP and Olthuis Kler 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 (such as a boil water advisory, etc.) that lasted at least one year at any time from November 20, 1995 to the present; (b) had not died before November 20, 2017; and (c) ordinarily lived on their reserve.

Band Members Excluded: Members of the Tsuu T'ina Nation, Sucker Creek First Nation, Ermineskin Cree Nation, the Blood Tribe, Okanagan Indian Band, and Michael Darryl Isnardy 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 CA2 Inc., 9 Prince Arthur Avenue, Toronto, Ontario M5R 1B2 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: 90 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 1(800)538-0009 or info@classaction2.com. First Nations may also contact Class Counsel Stephanie Willsey (toll free:1-877-244-7711; swillsey@mccarthy.ca) or Class Counsel Kevin Hille ((416) 598-3694; khille@oktlaw.com). **Your request to opt in must be sent no later than 120 days before Class members' claims are determined.**

How Can I Get More Information?

Name of Administrator: CA2

Contact Information: 1(800)538-0009 or info@classaction2.com

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

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 Manitoba Court of Queen’s Bench and 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 Tataskweyak Cree Nation, Chief Doreen Spence, Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, and Chief Christopher Moonias 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 ACTION	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 1-800-538-0009 OR VISIT [HTTPS://CLASSACTION2.COM/](https://classaction2.com/)

**DO NOTHING:
LOSE YOUR
FIRST
NATION'S
RIGHTS
UNDER THE
CLASS
ACTION**

By doing nothing, your First Nation will lose the possibility of receiving money and other benefits if the Class Action succeeds.

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.

By not opting-in, your First Nation may keep any rights to sue Canada about the same legal claims in this litigation.

- 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 [**NTD: 90 days from the first publication of notice.**]. To join the Class Action, First Nations must send their opt in notice no later than 120 days before Class members' claims are to be determined.

**QUESTIONS? CALL TOLL-FREE 1(800)538-0009 OR VISIT
[HTTPS://CLASSACTION2.COM/](https://classaction2.com/)**

WHAT THIS NOTICE CONTAINS

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**QUESTIONS? CALL TOLL-FREE 1(800)538-0009 OR VISIT
[HTTPS://CLASSACTION2.COM/](https://classaction2.com/)**

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.

Chief Justice Joyal of the Manitoba Court of Queen’s Bench is currently overseeing the case known as *Tataskweyak Cree Nation and Chief Doreen Spence v. Canada*. Justice Favel of the Federal Court of Canada is currently overseeing the case known as *Curve Lake First Nation, Chief Emily Whetung, Nesktanaga First Nation, and Chief Christopher Moonias 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: <https://www.mccarthy.ca/en/class-action-litigation-drinking-water-advisories-first-nations-0>

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 1 (800) 538-0009 for assistance.

3. Why is this a class action?

In a class action, the “representative plaintiffs” (in this case, Tataskweyak Cree Nation, Chief Doreen Spence, Curve Lake First Nation, Chief Emily Whetung, Nesktanaga First Nation, and Chief Christopher Moonias) 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 1(800)538-0009 OR VISIT
HTTPS://CLASSACTION2.COM/**

4. Who is a member of the Class?

The Class includes and excludes the following:

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 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 November 20, 1995 to present (“**Impacted First Nations**”);
- (ii) were not dead two years prior to the commencement of this action (that is, by November 20, 2017); and
- (iii) ordinarily resided in an Impacted First Nation while it was subject to a drinking water advisory that lasted at least one year; and
- (iv) Tataskweyak Cree Nation, Curve Lake First Nation, Neskantaga 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 and Michael Darryl Isnardy.

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: 90 days from the first publication of notice]**. First Nations must decide whether they want to join the class by **no later than 120 days before the Class members’ claims are determined.**

**QUESTIONS? CALL TOLL-FREE 1(800)538-0009 OR VISIT
[HTTPS://CLASSACTION2.COM/](https://classaction2.com/)**

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 *Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, and Chief Christopher Moonias v. Canada* Court File No. CI-19-01-2466. Include your name, address, telephone number, and signature. You can also get an Opt Out Form at [insert Administrator web link]. You must deliver your removal request by [NTD: 90 days from the first publication of notice] to: CA2 Inc., 9 Prince Arthur Avenue, Toronto, Ontario M5R 1B2 or info@classaction2.com.

Call **1 (800) 538-0009** 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 Administrator **1(800)538-0009** or info@classaction2.com. First Nations may also contact Class Counsel and ask for Class Counsel Stephanie Willsey (toll free: 1-877-244-7711 or swillsey@mccarthy.ca) or Kevin Hille at 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

10. Do Individual Band Members have a lawyer in the case?

Yes. The Court has appointed McCarthy Tétrault LLP and Olthuis Kler 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 TOLL-FREE 1(800)538-0009 OR VISIT
[HTTPS://CLASSACTION2.COM/](https://classaction2.com/)**

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 <https://classaction2.com/> by calling toll free at 1(800)538-0009, by writing to: CA2 Inc., 9 Prince Arthur Avenue, Toronto, Ontario M5R 1B2, or by emailing: info@classaction2.com.

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

Curve Lake First Nation, Chief Emily Whetung, Neskantaga First Nation, Chief Christopher Moonias, Tataskweyak Cree Nation, Chief Doreen Spence, 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 TOLL-FREE 1(800)538-0009 OR VISIT
[HTTPS://CLASSACTION2.COM/](https://classaction2.com/)**

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

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 90 DAYS FROM THE FIRST NOTICE PUBLICATION]*

Court File No.: T-1673-19

CURVE LAKE FIRST NATIONAL and CHIEF EMILY WHETUNG on her own behalf and on behalf of all members of CURVE LAKE FIRST NATION and NESKANTAGA FIRST NATION and CHIEF CHRISTOPHER MOONIAS on his own behalf and on behalf of all members of NESKANTAGA FIRST NATION

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-1673-19

FEDERAL COURT

BETWEEN:

CURVE LAKE FIRST NATION and CHIEF EMILY WHETUNG on her own behalf and on behalf of all members of CURVE LAKE FIRST NATION and NESKANTAGA FIRST NATION and CHIEF CHRISTOPHER MOONIAS on his own behalf and on behalf of all members of NESKANTAGA FIRST NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under *Federal Courts Rules, 334.16 and 334.17*

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 judgement.
2. If the motion for summary judgement is successful, a further plan will be proposed to address any remaining issues, depending on the outcome.
3. Alternatively, if the motion for summary judgement 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 November 20, 1995 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, 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 judgement 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 judgement 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 then deliver a record in support of motions for certification and summary judgement on the Stage 1 Common Issue. At a pre-trial conference following the delivery of the Plaintiffs' record, they will ask the Court to determine that this matter is appropriate for summary judgement and schedule the hearing of their motion for summary judgement together with the hearing of their motion for certification.

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 it is a Participating First Nation ("**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 judgement 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 being three (3) months following the date of the Certification Order ("**Opt-Out Date**"), and an opt-in date as being six (6) months prior to the commencement of the determination of the Stage 2 Common Issues.

11. If a motion for summary judgement is being heard together with a motion for certification, the Plaintiffs will ask the court to render its decision on certification first, direct that notice issue if a class proceeding is certified, and then render its decision on the Stage 1 Common Issue following the Opt-Out Date.

12. The Plaintiffs will ask the Court to order that the defendant pay the costs of the Notice Program, including the cost of the Administrator.

13. The Plaintiffs will seek an order for the distribution of notice of certification as follows:

- (a) posting the notice on the respective websites of Class Counsel, the Defendant, and the Administrator;

- (b) publishing the notice in designated newspapers;
 - (c) distributing the notice to all offices of Tataskweyak Cree Nation and the Assembly of First Nations.
 - (d) forwarding the notice to any Class member who requests it and the Chiefs of every First Nation that is eligible to opt into the class, as well as each band office;
 - (e) 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.
- (a) And by such other notice as the Court directs.

14. The Plaintiffs will ask the Court to approve opt-out and opt-in forms to be used by class members wishing 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 FAVOURABLE TO THE CLASS

Notice of Resolution of Common Issues

15. 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

16. 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;
- (b) Aggregate damages that accrue to Participating First Nations on a community basis;
and

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

Assessment of Number of Claimants

18. 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.

19. 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

20. 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 from the Notice of Resolution.

Funds not Distributed

21. 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 assist with water infrastructure in Impacted First Nations.

Resolution of the Individual Issues

22. Within thirty (30) days of the issuance of the judgment on the common issues, 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**

23. Class Counsel have entered into an agreement with 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.

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

Claims Administration

25. The Administrator will provide the claims administration for any settlement or judgement 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 judgement 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

26. 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

27. 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 Klerer Townshend LLP will represent the other. Should any conflict arise as between First Nations and their members, which is not anticipated given their commonality of interest, McCarthy Tétrault LLP will represent the members and Olthuis Klerer Townshend LLP will represent the First Nations.

Applicable Law

28. The applicable law is the *Constitution Act, 1982*, the *Constitution Act, 1867*, the *Charter of Rights and Freedoms*, the *Safe Drinking Water for First Nations Act*, S.C. 2013, c. 21, 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.

Coordination of proceedings

29. On July 14, 2020 the Manitoba Court of Queen's Bench certified a related class proceeding in the matter styled *Tataskweyak Cree Nation v. Canada*, Court File No. 19-01-24661 (the

“**Tataskweyak Action**”). The representative plaintiffs in the Tataskweyak Action have pledged to work collaboratively with the Plaintiffs to advance their common interests. Pursuant to the *Canadian Judicial Protocol for the Management of Multi-jurisdictional Class Actions and the Provision of Class Action Notice*, the Plaintiffs will ask the Federal Court and the Manitoba Court of Queen’s Bench to convene joint case management conferences, as appropriate, to ensure coordination between the two proceedings and to promote efficiency. In order to ensure consistent results, the Plaintiffs may ask that the Federal Court and the Manitoba Court of Queen’s Bench sit together to hear any motion for summary judgement or any trial of the Tataskweyak Action and this action.

Schedule A**Timetable**

PROPOSED LITIGATION TIMETABLE		
Steps To Be Completed	By Which Party	Date To Be Completed By
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 Summary Judgement Record	Plaintiffs	June 30, 2020 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Pre-trial to assess summary judgement	All parties	July 2020 (may be adjourned up to 5 months if Defendant consents to certification and engages in exploratory settlement discussions)
Delivery of Responding Record	Defendant	October 30, 2020 (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 16, 2020 (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
Refusals 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 15 days after refusals motion

PROPOSED LITIGATION TIMETABLE		
Steps To Be Completed	By Which Party	Date To Be Completed By
Delivery of Moving Factum	Plaintiffs	To be delivered 45 days after completion of answers to undertakings
Delivery of Responding Factum	Defendant	To be delivered 45 days after delivery of Moving Factum
Delivery of Reply Factum	Plaintiffs	To be delivered 15 days after delivery of Responding Factum
Hearing of possible Summary Judgement Motion	All parties	July-August 2021

Court File No. T-1673-19

FEDERAL COURT

CURVE LAKE FIRST NATION and CHIEF EMILY WHETUNG on her own behalf and on behalf of all members of CURVE LAKE FIRST NATION and NESKANTAGA FIRST NATION and CHIEF CHRISTOPHER MOONIAS on his own behalf and on behalf of all members of NESKANTAGA FIRST NATION

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

LITIGATION PLAN

(Filed this 8th day of September, 2020)

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