

**FEDERAL COURT  
PROPOSED CLASS PROCEEDING**

BETWEEN:

**MICHAEL DARYL ISNARDY**

Plaintiff

and

**HER MAJESTY THE QUEEN**

Defendant

Brought pursuant to the *Federal Courts Rules*, SOR/98-106

**STATEMENT OF CLAIM**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. 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 Plaintiffs' solicitor or, where the Plaintiffs does not have a solicitor, serve it on the Plaintiffs, 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 Court 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.

(Date) December 13, 2019

Issued by: \_\_\_\_\_  
(Registry Officer)



~~MUN Y CHAN~~  
**REGISTRY OFFICER**  
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## RELIEF SOUGHT

1. The Plaintiff, Michael Daryl Isnardy, claims on his own behalf and on behalf of a proposed class of aboriginal and First Nations persons who have been unable to consume or use water from their community water systems on First Nation reserves, because of water advisories or other warnings regarding water safety, or who have consumed unsafe water from their First Nation reserves (“Class” or “Class Members”, to be further defined in the Plaintiff’s application for certification):
  - a. An order certifying this action as a class proceeding and appointing Michael Daryl Isnardy as representative Plaintiff under the *Federal Courts Rules*, SOR/98-106;
  - b. A declaration that the Defendant, Her Majesty the Queen (“Canada”) has breached its fiduciary duty owed to the Plaintiffs and the Class Members in relation to the creation and management of their respective communities and reserves by creating, sustaining and allowing unsafe drinking water conditions to exist in the First Nation communities and reserves of the Plaintiff and Class members such that their communities and reserves cannot be used for the purposes for which they were set aside and created;
  - c. A declaration that Canada owed the Plaintiff and the Class Members a duty of care to provide them with safe drinking water and that Canada’s actions of creating, sustaining and allowing unsafe drinking water conditions to exist in the First Nation communities and reserves of the Plaintiff and the Class Members constituted systemic negligence which caused losses to the Plaintiff and the Class Members;
  - d. A declaration that Canada’s conduct in creating, sustaining and allowing unsafe drinking water conditions to exist on First Nations reserves and communities, including those of the Plaintiff and the Class Members, violates the Plaintiff’s and the Class Members’ rights to life, liberty and security of the person and is not in accordance with the principles of fundamental justice, contrary to s.7 of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act*, 1982 (UK) 1982, c. 11. “*Charter*”) and is not demonstrably justifiable under section 1 of the *Charter*;

- e. A declaration that Canada's conduct in creating, sustaining and allowing unsafe drinking water conditions to exist on First Nations reserves and communities, including those of the Plaintiff and the Class Members, violates the Plaintiff and the Class Members' rights to equality, contrary to s.15(1) of the *Charter*, and this violation is not demonstrably justifiable under section 1 of the *Charter*;
- f. Damages for breach of fiduciary duty;
- g. Damages for breach of the duty of care resulting from the systemic negligence of Canada, and to include pecuniary and non-pecuniary damages;
- h. Damages for breach of s. 7 and s. 15 of the Charter as provided for in Section 24(1) of the Charter;
- i. Damages equal to the cost of administering the distribution to the Class Members;
- j. Special damages in an amount to be determined;
- k. Exemplary and punitive damages;
- l. Recovery of health care costs incurred by provincial and territorial health insurers on behalf of the Plaintiff and the Class members pursuant to the *Health Care Costs Recovery Act, S.B.C. 2008, c. 27* and similar legislation in other provinces and territories;
- m. Pre-judgment and post judgment interest;
- n. Costs; and
- o. Such further and other relief as this Honourable Court may deem just.

## SUMMARY OF CLAIM

2. Canada has a fiduciary duty, common law duty, and a duty under the *Charter* to provide indigenous and First Nations people with safe drinking water in their communities and reserves. These duties are rooted in the common law, the Honour of the Crown, and legal obligations under the *Constitution Act, 1982*, the *Charter* and various treaties which ensure that indigenous and First Nations persons have the right to safe drinking water in their communities and reserves. Canada is in breach of these duties as a result of systemic conduct that has created, contributed to and sustained unsafe drinking water conditions on First Nations' reserves and communities, including those of the Plaintiff and the Class Members.

## THE PARTIES AND THE CLASS

3. The Plaintiff, Michael Daryl Isnardy, is an "Indian" within the meaning of the *Indian Act* R.S.C., c. 1-5 (the "*Indian Act*"), and a member of the Toosey First Nation Band which is an "Indian Reserve" within the meaning of Schedule 2 to the *Constitution Act, 1930*, 20-21 George V, c. 26 ("*Constitution Act, 1930*").
4. The Plaintiff and the Class Members are all "Aboriginal" people within the meaning of section 35 of the *Constitution Act, 1982*.
5. The Defendant, Her Majesty the Queen ("Canada"), is liable for the acts, omissions, negligence and malfeasance of the employees, agents and management of the Indigenous and Northern Affairs Canada (INAC) (formerly the Aboriginal Affairs and Northern Development Canada), and the Indigenous Services of Canada (ISC) and Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) in conjunction with Health Canada and Environmental Canada who were at all material times servants of Canada pursuant to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c C-50.
6. As of July 16, 2019, INAC was dissolved and replaced by ISC and CIRNAC.
7. Pursuant to the *Constitution Act, 1982*, the *Indian Act*, various signed treaties, the Honour of the Crown, and its fiduciary duties and common law duties, Canada is responsible for ensuring that First Nations have access to safe drinking water in their communities and reserves. The INAC and the recently created ISC and CIRNAC, is the primary body through which Canada fulfills its legal responsibilities to First Nations. Health Canada and Environment Canada are responsible for working with INAC to ensure there is adequate safe drinking water available on First Nations' reserves and communities.

## **STANDING**

8. The Plaintiffs and the Class assert both private and public interest standing to bring this claim.
9. The Plaintiffs and the Class have private interest standing because they are directly affected by Canada's failure to take reasonable and effective measures to ensure the realization of the right to safe drinking water on First Nation reserves and communities.
10. The Plaintiffs and the Class also have public interest standing. They raise a serious justifiable issue of public import respecting the constitutionality of Canada's systemic conduct that has created, contributed to and sustained the unsafe drinking water conditions on First Nation reserves and communities.
11. The Plaintiffs and the Class have a real stake in Canada's conduct and are both directly and genuinely interested in the resolution of this claim.
12. This claim advances a reasonable and effective method of bringing the issues before the Court in all of the relevant circumstances. Many First Nation reserve communities that are affected by Canada's conduct which created, contributed to and sustained their unsafe drinking water conditions are among the most marginalized communities in Canada and lack the resources to bring forward such a claim.

## **HISTORICAL BACKGROUND**

13. First Nations people used and occupied large areas of land across Canada. They used these lands to carry out their way of life and had done so for many years as the original settlers of Canada.
14. Canada sought to settle various territories of Canada for use by Canadians with European descent. Canada sought to open the lands for development for agricultural, logging, mining and other purposes. Canada recognized that in order to do this effectively, it had to address its obligations to First Nation people.
15. In order to facilitate its plans to develop and settle various territories, Canada decided to enter into a process of treaty making which would commence by opening the land for peaceful sharing between First Nation people and the settlers. The treaties that were negotiated guaranteed that certain lands, to be known as "reserves", would be set aside for the First Nation people for their exclusive use and occupation.

16. The reserves were to serve as locations for First Nation peoples to establish permanent settlements. These reserves were promised as a home in which the First Nation peoples could maintain their distinct communities and way of life which expressly and/or implicitly included access to safe drinking water which has always been recognized as a basic human right.
17. Canada intended that First Nation people would move to reserves as the result of pressure brought to their way of life by the process of settlement as well as more coercive measures such as compulsory education. Canada expected that First Nation peoples would move to reserves and took active and coercive measures to achieve this goal.
18. The First Nation people who elected to move to reserves and who relinquished their traditional way of living, expected that they would have an adequate supply of safe drinking water on their reserves and in their communities.

## **RECOGNITION OF THE NEED FOR SAFE DRINKING WATER ON RESERVES**

19. Access to adequate safe drinking water is a necessity of life and a fundamental human right. Safe drinking water contributes to basic human survival, health, participation in society and the capacity to realize other fundamental rights. The absence of safe drinking water contributes to disease, reduced social and economic participation, and even death.
20. Canada has acceded to a number of international instruments (set out below) that explicitly or implicitly recognizes a right to safe drinking water for all Canadians.
21. Canada has also recognized through various federal laws, policies and initiatives that the provision of safe drinking water on reserves is critical to ensure the health and safety of First Nation peoples, and that the drinking water of many First Nation reserve communities is at high risk.
22. Despite this recognition, many residents of First Nation reserves, including the Plaintiff and the Class Members have not had access to adequate safe drinking water as a direct result of conduct by Canada.
23. The inability of First Nations' members, including the Plaintiff and Class Members to access adequate safe drinking water on reserves causes significant harm to their physical, psychological and emotional health.

24. The harms caused by the inability to access adequate safe drinking water are compounded by the fact that aboriginal people are a historically disadvantaged group. They have faced, and continue to face, higher levels of poverty than non-aboriginal Canadians. They have been dispossessed of their lands and isolated on small reserves. They have poorer health and higher rates of mortality than non-aboriginal Canadians. Access to safe drinking water is fundamental not only to ensuring the bare necessities of life, but also to mitigating some of these long-standing disadvantages.
25. The inability of First Nations' members, including the Plaintiff and the Class Members, to access safe drinking water on reserves also adversely affects their use and enjoyment of reserve lands, which were set aside for the use and benefit of First Nations members in fulfilment of a core term of treaties to which the First Nations are signatories. Access to safe drinking water is integral to First Nations' and their members' ability to use and benefit from the reserve lands.

#### **CANADA'S JURSDICTION OVER DELIVERY OF SAFE WATER TO RESERVES**

26. Under section 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict, c. 3 ("*Constitution Act, 1867*"), Canada is responsible for "Indians and Lands reserved for Indians". Only Canada may legislate in respect of First Nation reserve lands. As a result, Canada has jurisdiction to ensure on-reserve drinking water systems provide First Nation communities and reserves with safe drinking water.
27. In addition, through provisions in the Indian Act, Canada has restricted the ability of First Nations to exercise jurisdiction over drinking water on reserves.
28. Canada also has responsibilities under section 36(1) of the *Constitution Act, 1982* to ensure the provision of essential public services of reasonable quality to all Canadians, including First Nations.
29. Subject to section 35 of the *Constitutional Act, 1982* and as a result of entering into treaties with First Nation peoples, Canada owes a fiduciary duty to the First Nations and their members, including the Plaintiffs and the Class Members, to ensure that they can use and benefit from the reserves, including access to an adequate supply of safe drinking water on-reserve, arising out of the fact that:
  - a. Canada had undertaken to act in the best interests of First Nations, including the Plaintiff and the Class Members in establishing reserves;
  - b. this undertaking was owed to First Nations, including the Plaintiff and the Class

Members, as beneficiaries of each of their respective treaties; and

- c. reserves and their creation represented a substantial legal and practical interest of First Nations, including the Plaintiff and the Class Members, arising out of the use of treaties.
30. More generally, even in the absence of a fiduciary duty, Canada is subject to the Honour of the Crown in implementing treaties and, in particular, the promise to set aside the reserves for the use and benefit of First Nations.
31. Canada has, through the *Indian Act*, limited the authority of First Nations, including the Plaintiff and the Class Members, to take steps to ensure the safety of drinking water on reserves, including through limiting First Nations' by-law making powers. Canada has asserted an active and central role in the design, implementation and delivery of drinking water on reserves, including those of the Plaintiff and the Class Members. Through its systemic conduct Canada has created, contributed to and sustained unsafe drinking water conditions on reserves, including those of the Plaintiff and the Class Members.

#### **CANADA'S CONDUCT CREATED AND SUSTAINED UNSAFE DRINKING WATER**

32. In the 1970s, Canada, through INAC, took discretionary control over on-reserve drinking water systems. INAC's responsibilities with respect to drinking water on-reserve, included, inter alia:
- a. planning and implementing water systems;
  - b. designing and constructing water facilities;
  - c. operating and maintaining water systems;
  - d. employing water system operators; and
  - e. performing feasibility studies and conducting water needs analyses.
33. In asserting discretionary control over reserve water systems, Canada, through INAC, created and contributed to unsafe drinking water conditions on reserves, including those of the Plaintiff the Class Members, for the following reasons, inter alia:
- a. INAC failed to build water system facilities to any enforceable building standard or operational standard;

- b. INAC failed to ensure water facilities were built in appropriate locations on-reserve, away from activities that had the potential to contaminate drinking water;
  - c. INAC failed to properly operate and maintain water facilities;
  - d. INAC failed to upgrade water facilities as necessary;
  - e. INAC failed to ensure the water could be safely delivered to reserve residents and that all homes on reserves were connected to water facilities; and
  - f. INAC failed to assess and remedy boil water advisories on-reserves in a timely manner.
34. Starting in the 1980s, Canada entered into agreements with First Nations attempting to make First Nations partly responsible for the delivery of drinking water to on-reserve communities, including responsibility for the maintenance and operation of certain facilities.
35. These agreements were made even though Canada failed to rectify the unsafe drinking water systems it had created and failed to provide First Nations, including the Plaintiff and the Class Members, with the resources and support necessary to assume any shared responsibility for the delivery of safe water to reserve residents. Canada knew or ought to have known that First Nations, including the Plaintiff and the Class Members, did not have the resources or skills required to maintain and operate their already deficient water systems.
36. Further, Canada only partially funded the operations of on-reserve water treatment systems and maintenance costs regardless of a First Nation's ability to generate the rest of the funding. As a result, for most First Nations, including the Plaintiff and the Class Members, the funding was and continues to be too low to, inter alia, retain certified facility operators, replace components as needed, purchase chemicals needed to operate facilities, or engage in the required level of monitoring.
37. As a result, Canada has sustained the unsafe drinking water conditions by, inter alia:
- a. passing substandard water facilities onto First Nations and their members, including the Plaintiff and the Class Members;

- b. failing to ensure all homes on reserves, including those of the Plaintiff and the Class Members, are connected to water facilities that can deliver safe drinking water;
  - c. failing to assess the capacity of First Nations to operate and maintain water facilities, including those of the Plaintiff and the Class Members.
  - d. failing to allocate funds appropriately for water systems, including those of the Plaintiff and the Class Members;
  - e. failing to provide standards for water systems equivalent to national standards and ensuring a clear line of accountability to ensure compliance;
  - f. failing to provide First Nations, including the Plaintiff and the Class Members, with adequate technical or management support for their drinking water operations;
  - g. failing to provide adequate training programs for on-reserve water operators;
  - h. failing to ensure on-reserve water operators comply with operating practices; and
  - i. failing to ensure that any legislative enactments establish an effective regulatory regime with proper consultation with First Nations, including the Plaintiff and Class Members, to ensure safe drinking water on reserves.
38. Although Canada required First Nations to share responsibility for the operation and maintenance of on-reserve drinking water systems, Canada continued to be responsible and accountable for ensuring that on-reserve drinking water systems provided First Nations' on-reserve communities with safe drinking water.
39. Since signing the agreements and despite various federal initiatives and policies, including Bill S-8, *Safe Drinking Water for First Nations Act*, S.C. 2012 c.13), Canada has continued to sustain the unsafe drinking water conditions on First Nations' reserves and has failed to meet its own objectives and goals in this regard.
40. At all material times Canada knew or should have known that the drinking water systems on reserves was unsafe and posed risks to the Plaintiff and the Class Members.

41. As a result of the cumulative effects of Canada's conduct, Canada has caused or contributed to unsafe drinking water conditions for First Nations communities, including those of the Plaintiff and the Class Members, in the following ways, inter alia:

- a. instituting changes to legislation, policies, programs and services that have resulted in unsafe drinking water on First Nation reserves, including those of the Plaintiff and the Class Members;
- b. failing to ensure First Nation communities, including the Plaintiffs and the Class Members' communities, receive the same level of water safety protection as off-reserve communities;
- c. failing to implement administrative guidelines, policies and funding arrangements with First Nations, including the Plaintiffs and the Class Members, consistently and in a manner that covers all the elements required by any regulatory regime;
- d. undertaking no measures or, alternatively, inadequate measures, to address the impact of the changes resulting from the partial transfer to First Nations of responsibilities for the operation and maintenance of water treatment systems;
- e. failing to undertake appropriate strategic coordination to ensure that government programs effectively provide for safe drinking water on-reserve;
- f. failing to ensure the enforceability of protocols and guidelines in relation to on-reserve drinking water;
- g. failing to enact an adequate regulatory framework for on-reserve drinking water;
- h. failing to ensure on-reserve drinking water is regularly tested
- i. failing to provide training programs for water operators that are accessible to all First Nations;
- j. failing to ensure on-reserve water system operators are appropriately certified;
- k. failing to ensure adequate information is collected about on-reserve drinking water conditions, including:
  - i. whether First Nations meet the conditions of their funding arrangements;

- ii. whether maintenance is conducted or is needed;
- iii. whether inspections have been carried out;
- iv. whether deficiencies have been corrected; and
- v. whether drinking water is safe for human consumption.

42. As a result of these failures:

- a. the design, construction, operation and maintenance of First Nations' drinking water systems, including those of the Plaintiffs and the Class Members First Nations, are deficient;
- b. on-reserve drinking water systems deliver drinking water that poses risks to health and safety of the First Nations living on the reserve;
- c. reserve communities, including the Plaintiffs' and the Class Members' communities, do not benefit from a level of protection comparable to off-reserve communities; and
- d. reserve communities, including those of the Plaintiffs' and the Class Members' communities, do not benefit from a level of protection comparable to federal employees assigned to on-reserve worksites.

43. The effect of these failures is that the Plaintiffs and the Class Members face:

- a. lack of access to water from water treatment systems;
- b. reliance on untreated and insufficiently protected water sources;
- c. unacceptable levels of contamination in the water system;
- d. unacceptable levels of disease-causing bacteria, viruses or parasites in the water system from the source to the tap;
- e. visibly polluted drinking water;
- f. drinking water with foul odours or tastes;

- g. adverse health effects including gastrointestinal infections, skin infections, lice infestations, urinary tract infections, cancer, hepatitis and eye/ear infections;
  - h. water unfit for non-drinking purposes such as showering, washing clothes or personal hygiene;
  - i. higher suicide rates and mental health issues;
  - j. boil water advisories or bans on using water that can last for years; and
  - k. the expense of obtaining water off-reserve or bottled water.
44. Further particulars of the deficiencies of water systems created, sustained, and contributed to by Canada and the impacts of such deficiencies on the Class are set out below.

#### **ADVERSE EFFECTS**

45. Class Members experience a number of harms as a result of Canada's failure to provide adequate safe drinking water to First Nations' on-reserve communities.
46. On-reserve drinking water has caused the Class Members living on reserves to contract illnesses, and to be at a higher risk of contracting illnesses, such as skin and gastrointestinal conditions, diarrhea and headaches.
47. Unsafe drinking water causes many of the Class Members living on reserve stress and anxiety as a result of, among other things, foul tastes and odours and the presence of chemicals and pollutants in the water.
48. The Plaintiff and the Class Members have undergone repeated boil water advisories, meaning periods when water is safe to drink only after it has been boiled. The occurrence of boil water advisories has caused the Class Members to lose confidence in their water treatment systems.
49. The Class Members' water treatment systems fail to consistently provide enough water for on-reserve members to drink and perform daily tasks. When a cistern or private well becomes unusable due to contamination, reserve members face great difficulty obtaining water from other sources.

50. Class Members do not consider it safe to drink water from the tap and are forced to travel off-reserve to buy bottled water.
51. The lack of safe drinking water has contributed to the decision of Class Members to move off of reserves or consider doing so, despite the intended purpose of the reserves for the use and benefit of the Plaintiff and the Class Members.

## **BREACH OF FIDUCIARY DUTY**

52. Canada has failed to ensure First Nations' on-reserve communities, including those of the Plaintiff and the Class Members, have access to adequate safe drinking water on reserves. Further, Canada has failed to ensure that access to adequate safe drinking water is comparable to that of off-reserve communities or that of federal employees living on reserves.
53. The Plaintiff and the Class Members claim that the lack of safe drinking water on reserves has caused their members and other on-reserve First Nations people adverse health effects and severe psychological stress and exposes them to the threat of a significant health risk.
54. Canada has breached its Fiduciary Duty to First Nations including the Plaintiff and the Class Members.
55. Canada has a fiduciary duty to provide an adequate supply of safe drinking water to reserves, including those of the Plaintiff and the Class Members, and has failed to do so.
56. The fiduciary duty and Honour of the Crown duties imposed upon Canada require that:
  - a. Canada ensure that reserves are suitable for the purposes for which they were intended to be used;
  - b. Canada ensure that the reserves have an adequate supply of water for human consumption in the context of residential use; and
  - c. Canada ensures that reasonable steps are taken to maintain the water supply to the reserves in a manner that is safe for human consumption in the context of residential use.

57. The fiduciary obligations to provide an adequate supply of safe drinking water to First Nations and their members, including the Plaintiff and the Class Members, arose when Canada set aside reserves for the use and benefit of First Nations as fulfillment of a core term of the treaties entered and unilaterally asserted and assumed control of on-reserve drinking water services.
58. Canada has unilaterally asserted or claimed discretionary authority through constitutional and legislative instruments as follows:
- a. Canada asserted authority over reserve lands and communities through section 91(24) of the *Constitution Act*, 1867. Acting under this power and among other measures, Canada enacted the Indian Act, as amended from time to time, which purported to dictate the nature of band governments and to define and restrain the scope of these governments' authority over such matters as reserve land, capital infrastructure and water systems; and
  - b. under the current *Indian Act*, as under previous versions, Canada delegated insignificant powers to statutorily-created band councils to permit First Nations to create water protection regimes. Having failed to delegate such powers, Canada preserved for itself the authority to control matters such as reserve capital infrastructure and the design and delivery of core services, like water.
59. Further, Canada has acted upon its assertion of discretionary control, and under its assumed powers has enacted various policies and initiatives, regarding control of water services on reserve.
60. Having assumed discretionary control over on-reserve water quality and quantity, Canada's duties in these circumstances rise to fiduciary duties.
61. Canada has breached its fiduciary duties and Honour of the Crown in respect of the provision of water to reserves, including those of the Plaintiff and the Class Members, by:
- a. failing to ensure that reserves, including those of the Plaintiff and the Class Members, had and have access to an adequate drinking water supplies;
  - b. failing to ensure that reserves, including those of the Plaintiff and the Class Members, had and have adequate water systems to ensure the delivery of adequate safe drinking water supplies;

- c. failing to take remedial measures to ensure the delivery of adequate safe drinking water supplies to reserves, including those of the Plaintiff and the Class Members;
  - d. failing to provide adequate training and supervision for persons or entities operating drinking water infrastructure on reserves, including those of the Plaintiff and the Class Members; and
  - e. failing to ensure reserve communities receive the same level of water safety protection as off-reserve communities.
62. The Plaintiffs and the Class Members have all suffered harm as a result of these breaches of duty, including, inter alia:
- a. they have been deprived of the full benefit of the use of their reserves;
  - b. they have seen the value of the residential purposes of their reserves significantly diminish;
  - c. some Class Members have left or declined to return to their reserves on account of the absence of an adequate safe water supply or fear of unsafe drinking water conditions; and
  - d. they have been exposed to risks of health problems and diseases associated with lack of access to safe drinking water on their Reserves.
63. The Crown must act honourably in its dealings with First Nation people and has failed to do so. This flows from the guarantee of aboriginal rights in section 35(1) of the *Constitution Act, 1982*.
64. The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing aboriginal societies with the assertion of Canadian sovereignty.
65. Canada failed to act with diligence or care in implementing water systems that deliver drinking water on reserves.
66. Rather than acting with diligence, Canada has been persistently inattentive to the needs of First Nations for safe drinking water and created or contributed to the conditions that provide for unsafe drinking water. This is inconsistent with the action required by the honour of the Crown.

## BREACH OF THE CHARTER

67. The rights to life, liberty and security of the person under section 7 of the *Charter* and the right to equality under section 15 of the *Charter* should be interpreted in light of Canada's international human rights obligations regarding access to safe drinking water.
68. Several United Nations human rights instruments ratified by Canada have recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realization of all human rights. Those instruments include:
- a. the *International Covenant on Economic, Social and Cultural Rights* (1976), which requires that states ensure access to basic shelter, housing and sanitation and an adequate supply of safe and potable water;
  - b. the *Convention on the Rights of the Child* (1989), which requires state parties to take appropriate measures to combat disease through the provision of clean drinking water;
  - c. the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (1979), which requires state parties to ensure woman in rural areas enjoy adequate living conditions, including in relation to water supply;
  - d. the *United Nations Declaration on the Rights of Indigenous Peoples* (2007), which recognizes a positive obligation on states to ensure continuing improvement of the social conditions for Indigenous people, which would include, safe drinking water; and
  - e. The United Nations General Assembly resolution from the 108th Plenary Meeting of the 64th Session (2010), which recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.
69. Human rights instruments are persuasive sources of interpreting the provisions of the Charter, which should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents that Canada has ratified.
70. Canada's conduct is in breach of section 7 of the Charter.

71. The Plaintiff and the Class Members are entitled to the protection offered by section 7 of the Charter, which provides everyone with the right to life, liberty and security of person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
72. The ability to reside on reserve is an essential aspect of the cultural and personal identity of the Plaintiff and the Class Members and, as such, is an essential aspect of their ability to enjoy their lives.
73. To be able to reside on reserves, First Nation members, including the Plaintiff and the Class Members, must have access to a clean supply of water that is suitable for human consumption and use.
74. Given Canada's control over the creation of reserves, location of the reserves, the resources and benefits derived from the reserve lands, and the provision of water on the reserves, and the fact that the First Nations and their members cannot relocate their reserves or independently provide their own water supplies, Canada is further obliged to ensure the drinking water systems it creates on reserves, delivers the Plaintiff and Class Members an adequate supply of safe drinking water.
75. To satisfy the obligations imposed by section 7 of the Charter, Canada must, inter alia:
  - a. ensure on-reserve water systems meet minimum reasonable standards for the provision of water for human personal use and consumption; and
  - b. provide a water supply that is adequate for the purpose of allowing reserves, including those of the Plaintiff and the Class Members, to be used for the purpose for which they were set aside.
76. Canada has deprived the Plaintiff and the Class Members access to safe drinking water by virtue of its conduct set out above which has, inter alia, resulted in:
  - a. absent or inadequate functional on-reserve water supply systems in certain cases;
  - b. water supplies which are inadequate for human personal use and consumption;
  - c. illness;
  - d. continued fear, distress and concern; and

- e. Class Members leaving their Reserves.
77. By failing to ensure on-reserve First Nation members, including the Plaintiff and the Class Members, have access to safe drinking water, for the reasons set out above, Canada has infringed section 7 of the Charter rights of the Plaintiff and Class Members. In particular:
- a. the right to life is engaged and infringed by placing reserve members of First Nations, including the Plaintiff and the Class Members at a risk of death and water-borne illness as a result of in adequately treated drinking water;
  - b. the right to liberty is engaged and infringed by the energy and effort required to access safe drinking water. The liberty interests of the Plaintiff and the Class Members are infringed as they are effectively compelled to leave their reserves to protect their health, and are therefore unable to freely choose whether to live on- or off- reserve; and
  - c. the right to security of the person is engaged and infringed by the physical and serious psychological impacts or risk thereof to the Class Members, and the impacts caused by severing their close ties to their reserve communities.
78. The foregoing deprivations of the rights to life, liberty and security of the person are not in accordance with the principles of fundamental justice as they are arbitrary, grossly disproportionate to any government interest, contrary to international human rights norms, discriminatory and would shock the conscience of all Canadians.
79. Canada's infringements of the section 7 *Charter* rights of First Nation members, including the Plaintiff Class Members, cannot be justified as a reasonable limit that is justifiable in a free and democratic society.
80. Canada's conduct in in breach of section 15(1) of the Charter.
81. Canada's conduct in creating and sustaining the unsafe drinking water conditions on First Nations reserves, including those of the Plaintiff and the Class Members, violates section 15(1) of the Charter by creating and sustaining conditions of inequality for the Plaintiff and the Class Members.

- e. Class Members leaving their Reserves.
77. By failing to ensure on-reserve First Nation members, including the Plaintiff and the Class Members, have access to safe drinking water, for the reasons set out above, Canada has infringed section 7 of the Charter rights of the Plaintiff and Class Members. In particular:
- a. the right to life is engaged and infringed by placing reserve members of First Nations, including the Plaintiff and the Class Members at a risk of death and water-borne illness as a result of in adequately treated drinking water;
  - b. the right to liberty is engaged and infringed by the energy and effort required to access safe drinking water. The liberty interests of the Plaintiff and the Class Members are infringed as they are effectively compelled to leave their reserves to protect their health, and are therefore unable to freely choose whether to live on- or off- reserve; and
  - c. the right to security of the person is engaged and infringed by the physical and serious psychological impacts or risk thereof to the Class Members, and the impacts caused by severing their close ties to their reserve communities.
78. The foregoing deprivations of the rights to life, liberty and security of the person are not in accordance with the principles of fundamental justice as they are arbitrary, grossly disproportionate to any government interest, contrary to international human rights norms, discriminatory and would shock the conscience of all Canadians.
79. Canada's infringements of the section 7 *Charter* rights of First Nation members, including the Plaintiff Class Members, cannot be justified as a reasonable limit that is justifiable in a free and democratic society.
80. Canada's conduct in in breach of section 15(1) of the Charter.
81. Canada's conduct in creating and sustaining the unsafe drinking water conditions on First Nations reserves, including those of the Plaintiff and the Class Members, violates section 15(1) of the Charter by creating and sustaining conditions of inequality for the Plaintiff and the Class Members.

82. Section 15(1) of the Charter provides that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability
83. In the case of Canada's conduct in delivering drinking water, the on-reserve Plaintiff and Class Members are subject to differential treatment. Their drinking water is unsafe compared to similarly situated off-reserve non-aboriginal communities as well as federal government employees who are assigned to work on reserves.
84. This distinction is drawn on the ground of aboriginal ancestry and residence and this inequity is accentuated given the duty of the Crown to act honourably in all of its dealings with aboriginal peoples.
85. The Plaintiff and the Class Members are subject to widespread prejudice and stereotyping and have been historically disadvantaged in Canadian society. Their rights, needs and interests have been frequently ignored or overlooked by Canadian governments. They have a long history of being denied access to similar levels of public services that are routinely expected by non-aboriginal Canadians in similar situations.
86. For over a century, non-aboriginal communities in Canada have had the benefit of increasing levels of service in relation to clean drinking water that is suitable for human personal use and consumption. This development has continued to the point where now all or nearly all non-aboriginal communities in Canada expect to receive a supply of clean water that is suitable for human personal use and consumption.
87. By contrast, First Nations people, including the Plaintiff and Class Members, have been consistently provided with inadequate support for the development and maintenance of on-reserve drinking water supply. As a result, on-reserve communities are provided with a significantly lower level of quality of water than non-aboriginal communities, and in many cases the water supply is not suitable for human personal use or consumption.
88. The effect of this deprivation is profound. It is discouraging to aboriginal people who find it difficult to maintain cohesion in their communities. Aboriginal people are rendered physically ill through the direct consequences of inadequate safe drinking water. Aboriginal people are unable to economically develop their communities without access to such basic infrastructure.

89. The distinction resulting from Canada's conduct in creating and sustaining unsafe drinking water on reserves gives rise to discrimination by perpetuating historical disadvantage, prejudice and stereotyping. In particular, the deprivation of equal or adequate safe drinking water to First Nations people, including the Plaintiff and Class Members:

- a. exacerbates the situation of a group that already suffers social, political and legal disadvantage by denying equal access to safe drinking water to a group that has been historically underserved, underrepresented and excluded;
- b. denies to the Class Members equal benefit of one of the most vital sources of both dignity and health: safe drinking water;
- c. demeans the position of aboriginals relative to their non-aboriginal neighbours; and
- d. reinforces the impoverished and disadvantaged position of aboriginal people within Canadian society.

90. For the reasons set out, Canada has infringed the rights of the Plaintiff and the Class Members, under section 15(1) of the Charter.

91. This systematic differential treatment constitutes discriminatory treatment by Canada cannot be maintained as a reasonable limit on the section 15 Charter rights of aboriginal people that can be justified in accordance with law.

## **SYSTEMIC NEGLIGENCE**

92. At all material times, Canada, by virtue of its control over and operation of the INAC, ISC and CIRNA, owed a duty of care to the Plaintiff and Class Members to ensure that they have access to safe on-reserve drinking water. Specifically, Canada had a duty to:

- a. ensure that reserves are reasonably suitable for the purposes for which they were intended to be used;
- b. ensure that the reserves have a reasonably adequate supply of water for human consumption in the context of residential use;

- c. ensure that reasonable steps are taken to maintain the water supply to the reserves in a manner that is safe for human consumption in the context of residential use; and
  - d. use reasonable care in assuring the safety, well-being and protection of the Plaintiff and the Class Members.
93. Canada negligently breached the duty of care it owed to the Plaintiff and the Class Members by, among other things:
- a. failing to ensure that reserves, including those of the Plaintiff and the Class Members, had and have access to an adequate drinking water supplies;
  - b. failing to ensure that reserves, including those of the Plaintiff and the Class Members, had and have adequate water systems to ensure the delivery of adequate safe drinking water supplies;
  - c. failing to take remedial measures to ensure the delivery of adequate safe drinking water supplies to reserves, including those of the Plaintiff and the Class Members;
  - d. failing to provide adequate training and supervision for persons or entities operating drinking water infrastructure on reserves, including those of the Plaintiff and the Class Members;
  - e. failing to ensure reserve communities receive the same level of water safety protection as off-reserve communities; and
  - f. such further particulars as counsel may advise.
94. As a result of Canada's negligent conduct, the Plaintiffs and other Class Members suffered personal injuries, including both physical and mental, as well as economic harms, particularized below:
- a. absent or inadequate functional on-serve water supply systems;
  - b. illness and higher risk of contracting illness such as skin and gastrointestinal conditions, diarrhea and headaches;
  - c. foul tastes and odours and the presence of chemicals and pollutants in the water;

- d. higher suicide rates and mental health issues;
- e. continued fear, distress and concern;
- f. loss of confidence in water treatment systems
- g. boil water advisories or bans on using water that can last for years; and
- h. the expense of obtaining water off-reserve or bottled water.

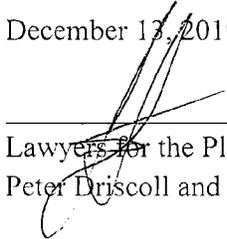
95. Canada knew, or ought to have known, that the negligent acts described above were of a kind reasonably capable of traumatizing a person of normal emotional fortitude, and that the Plaintiff and the Class Members would suffer damages as a result.

## REMEDIES

96. The Plaintiff and the Class repeat the claims for relief sought set out in paragraph 1 above.

The Plaintiffs proposes that this action be tried at the City of Vancouver, in the Province of British Columbia.

December 13, 2019

  
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