

Federal Court



Cour fédérale

Date: 20240430

Docket: T-1207-23

Ottawa, Ontario, April 30, 2024

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

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

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

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

ORDER

THIS MOTION for certification of this action as a class action, pursuant to Rules 334.13(1), 334.16 and 334.17, brought by the Plaintiffs, was heard via Zoom on April 16, 2015,

ON CONSIDERING the submissions by and the motion record of the Plaintiffs as well as the written consent of the Defendant,

AND ON CONSIDERING that the Plaintiffs allege that the Defendant breached its fiduciary duties, its duty of care, the honour of the Crown, and the *Charter of Rights and Freedoms* by failing to take reasonable measures to provide Class members with, or ensure Class members were provided with, or refraining from impeding, access to adequate housing on First Nations Lands, as defined below, and in failing to remedy same.

AND ON CONSIDERING that the Plaintiffs seek damages from the Defendant, as well as declarations of their rights and a supervisory order to prevent continued breaches of their rights,

1. **THIS COURT ORDERS** 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 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 (altogether, “**First Nations Lands**”), and ordinarily resided for at least one year from June 12, 1999 to present while those First Nations Lands were subject to the following conditions:

(A) at least 30% of the members of the First Nation ordinarily resident on reserve live in Band-Owned Housing, being housing that is owned

and administered by a First Nation and funded, directly or indirectly, by Canada:

- (I) with a shortfall of two bedrooms or more relative to the Canada Mortgage and Housing Corporation's National Occupancy Standard; and
 - (II) that requires major repairs, including defective plumbing or electrical wiring, or structural repairs to walls, floors, or ceilings, or which requires replacement; or
- (B) at least 70% of the members of the First Nation ordinarily resident on reserve live in Band-Owned Housing with a shortfall of two bedrooms or more *or* 70% of the members of the First Nation ordinarily resident on reserve live in Band-Owned Housing that requires major repairs; and
- (C) whether (A) or (B) above, or both, is not a Zone 1 First Nation according to the Band Classification Manual, being located within 50 km of the nearest service centre with year-round road access;
- (First Nations with First Nations Lands that satisfy the criteria in either (A) or (B) above, or both, and satisfy the criterion in (C) above are referenced as “**Impacted First Nations**”); or

(D) are First Nations Lands of the First Nations set out in the Impacted First Nations List, attached as **Appendix “1”**, which may be amended by further Order of the Court;

(b) St. Theresa Point First Nation;

(c) Sandy Lake First Nation; and

(d) Any other Impacted First Nation that opts into this action (“**Participating Nations**”).

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

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

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

(a) From June 12, 1999 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 impeding, access to adequate housing on First Nations reserves?

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

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

- (a) If the answer to common issue 5(a) is “yes”, did Canada breach its duties or obligations to members of the sub-group, or limit rights or freedoms enjoyed by members of the sub-group?
- (b) If the answer to common issue 7(a) is yes, is any limitation on rights or freedoms protected by 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” 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?
- (d) Can the causation of any damages suffered by members of the sub-group be determined as a common issue?
- (e) Can the application of statutory limitation periods and/or laches defences, if any, to

damages claims asserted 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 impeding, access to adequate housing?
- (i) If so, what measures should be ordered?

8. **THIS COURT ORDERS** that Chief Emeritus Elvin Flett, Chief Raymond Flett, St. Theresa Point First Nation, Chief Delores Kakegamic, and Sandy Lake First Nation are hereby appointed as Representative Plaintiffs for the Class.

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

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

which the Court shall appoint an appropriately qualified Administrator.

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

- (a) by posting the Short Form Notice substantially as set out in the attached **Schedule “A”** and Long Form Notice substantially as set out in the attached **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 the attached **Schedule “C”**, insofar as practicable, in $\frac{1}{4}$ of a page size in the weekend edition of each newspaper, if possible;
- (c) by the Administrator purchasing a total of 2 million impressions of advertisements on Facebook and Google, allocated in the Administrator’s discretion, and linking the advertisements to the Administrator’s website for this class action, and taking reasonable measures, in the Administrator’s discretion, to target the impressions to bring the advertisements to the attention of Class members, and reporting to the Court within 60 days of the purchase of the impressions on the measures taken to target their distribution;
- (d) by the Administrator distributing the Short Form Notice to the Band Office of St. Theresa Point First Nation, the Band Office of Sandy Lake First Nation, and the head office of the Assembly of First Nations;

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

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

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

14. **THIS COURT ORDERS** that a Class member may opt out of this class proceeding by delivering a signed opt-out coupon, a form of which is attached as **Schedule “D”**, or some other

legible signed request to opt out, to the Administrator within one-hundred-and-**twenty** (120) days of the date on which some form of notice is first published in accordance with paragraph 11(b), above (the “**Opt Out Deadline**”). The Short Form Notice and Long Form Notice shall state the Opt Out Deadline and the address of the Administrator for the purpose of receiving opt-out coupons.

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

16. **THIS COURT ORDERS** that the Administrator shall serve on the parties and file with the Court, within sixty (60) days of the expiry of the Opt Out Deadline, an affidavit listing all persons who have opted out of the class proceeding, and the Defendant shall advise the Court upon the expiry of the Opt Out Deadline of any Class members or Impacted First Nations captured by the automatic exclusion provision found in Rule 334.21(2) of the *Federal Courts Rules*.

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

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

19. **THIS COURT ORDERS** that Class Counsel shall serve on the parties and file with the

Court, within sixty (60) days of the expiry of the Opt In Deadline, a list of all the Impacted First Nations that have opted into the class proceeding.

20. **THIS COURT DECLARES** that the Litigation Plan, attached as **Appendix “2”**, is a workable method of advancing the class proceeding on behalf of the Class, however, that the case management Judge or Associate Judge shall retain discretion to vary the litigation plan as they may determine to be necessary and appropriate.

21. **THIS COURT ORDERS** that the style of cause in the within action is hereby amended to add Chief Raymond Flett as a Plaintiff and to correct the misnomer of the Defendant by replacing the Attorney General of Canada with His Majesty the King.

22. **THIS COURT ORDERS** that the Registry shall issue the Fresh as Further Amended Statement of Claim attached as **Appendix “3”** of this Order.

23. **THIS COURT ORDERS** that each of the Schedules and Appendixes referred to and attached to this Order form a part thereof.

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

"Cecily Y. Strickland"

Judge

Appendix '1'
Impacted First Nations List

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| 1. Ahtahkakoop Cree Nation | 44. Pauingassi |
| 2. Alexis Nakota Sioux Nation | 45. Paul First Nation |
| 3. Attawapiskat First Nation | 46. Peepeekisis Cree Nation |
| 4. Barren Lands | 47. Pelican Lake First Nation |
| 5. Beardy's and Okemasis First Nation | 48. Peter Ballantyne Cree Nation |
| 6. Berens River First Nation
(Miimiiwiziibiing) | 49. Pikangikum First Nation |
| 7. Big Island Lake Cree Nation | 50. Poplar Hill First Nation |
| 8. Big River First Nation | 51. Poplar River First Nation |
| 9. Black Lake Denesuline First Nation | 52. Red Earth First Nation |
| 10. Buffalo Point First Nation | 53. Red Sucker Lake First Nation |
| 11. Bunibonabee Cree Nation | 54. Sachigo Lake First Nation |
| 12. Cat Lake First Nation | 55. Sandy Bay Ojibway First Nation |
| 13. Cheslatta Carrier Nation | 56. Sandy Lake First Nation |
| 14. Clearwater River Dene | 57. Sauleaux First Nation |
| 15. Cross Lake Band | 58. Sayisi Dene |
| 16. Deh Gáh Got'ie Dene First Nation | 59. Shamattawa First Nation |
| 17. Deninu K'ue First Nation | 60. Shoal Lake Cree Nation |
| 18. Fort Albany and Kashechewan First
Nation | 61. Skatin Nations (Skookumchuck) |
| 19. Fort Severn First Nation | 62. St. Theresa Point First Nation |
| 20. Garden Hill First Nations | 63. Star Blanket Cree Nation |
| 21. Hatchet Lake Denesuline Nation | 64. Tallcree First Nation |
| 22. Kitchenuhmaykoosib Inninuwug First
Nation | 65. Tataskweyak Cree Nation |
| 23. Little Grand Rapids First Nation | 66. Thunderchild First Nation |
| 24. Little Pine First Nation | 67. Tl'etinqox Government |
| 25. Little Red River Cree Nation | 68. Wabaseemoong Independent Nations |
| 26. Little Saskatchewan First Nation | 69. Wasagamack First Nation |
| 27. Lyackson | 70. Wawakapewin First Nation |
| 28. Manto Sipi Cree Nation | 71. Webequie First Nation |
| 29. Marcel Colomb First Nation | 72. White Bear First Nation |
| 30. Mathias Colomb Cree Nation | 73. Whitefish Lake |
| 31. Ministikwan Lake Cree Nation | 74. Wunnumin Lake First Nation |
| 32. Mishkeegogamang Ojibway Nation | 75. Wuskwi Sipiik First Nation |
| 33. Mistawasis First Nation | |
| 34. Mosakahiken Cree Nation | |
| 35. Mushuau Innu First Nation | |
| 36. Muskrat Dam First Nation | |
| 37. Neskantaga First Nation | |
| 38. Nibnamik First Nation | |
| 39. Nicomen | |
| 40. Nisichawayasihk Cree Nation | |
| 41. Northlands Denesuline First Nation | |
| 42. O-Chi-Chak-Ko-Sipi First Nation | |
| 43. O-Pipon-Na-Piwin Cree Nation | |