

THE QUEEN'S BENCH
Winnipeg Centre

B E T W E E N:

**TATASKWEYAK CREE NATION and CHIEF DOREEN SPENCE on her own behalf
and on behalf of all members of TATASKWEYAK CREE NATION**

Plaintiffs

- and -

ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under *The Class Proceedings Act*, C.C.S.M.c. C. 130

ORDER

THIS MOTION for certification, brought by the Plaintiffs was heard on July 14, 2020 at 408 York Ave in Winnipeg, Manitoba.

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

AND ON BEING ADVISED that the parties consent to this order.

1. **THIS COURT ORDERS** that this action be and is hereby certified as a class proceeding pursuant to *The Class Proceedings Act*, C.C.S.M.c. C. 130.

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) Tataskweyak Cree 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 Daryl 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 Doreen Spence and Tataskweyak Cree Nation are hereby appointed as Representative Plaintiffs for the Class.

8. **THIS COURT ORDERS AND DECLARES** that McCarthy Tétrault LLP and Olthuis Kleer 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 $\frac{1}{4}$ 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 Tatakweyak Cree 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-days (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 (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.

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.

July 14 , 2020

G.D. JOYAL

The Honourable Chief Justice Joyal

CONSENTED TO AS TO FORM AND CONTENT:

Per: _____
Stephanie Willsey for Catharine Moore/Scott Farlinger
The Attorney General of Canada

Per: _____
Stephanie Willsey
Tataskweyak Cree Nation and Chief Doreen Spence