

Federal Court



Cour fédérale

Date: 20221124

Manitoba Court of King's Bench File No.: CI-19-01-24661

Federal Court File No.: T-1673-19

Ottawa, Ontario, November 24, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

Docket: CI-19-01-24661

**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

**(Class Proceeding commenced under
The Class Proceedings Act, CCSM. c. C. 130)**

AND BETWEEN:

Docket: T-1673-19

**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

**(Class Proceeding commenced under Part 5.1 of the
Federal Courts Rules, SOR/98-106)**

ORDER

THESE MOTIONS for Orders in respect of administrative matters under the settlement agreement between the Plaintiffs and the Defendant dated September 15, 2021 (the “**Settlement Agreement**”), were heard in writing. Capitalized terms used in this Order have the same meaning as they do in the Settlement Agreement unless otherwise defined.

ON READING the motion records and the written submissions of the Plaintiffs and the Defendants (together, the “**Parties**”);

ON READING the supplementary written submissions of the Parties dated November 11, 2022;

AND UPON HEARING from the Parties at a Case Management Conference on November 23, 2022;

AND UPON NOTING the consent of the Parties to the relief sought on this motion;

AND CONSIDERING that the relief sought herein is in the best interests of the Class as a whole;

1. **THIS COURT ORDERS:**

- (a) The Reminder Notice shall be distributed substantially in accordance with the notice plan in the form attached to this Order as **Schedule “A”**, subject to the Parties’ consent to delay the distribution, or some part of it, on the advice of the Administrator, but the distribution of the Reminder Notice shall begin no later than January 31, 2023;

- (b) Notwithstanding Schedule “L” to the Settlement Agreement, the Courts need not approve the form of the Reminder Notice, which shall be in a form agreed by the Parties, acting reasonably, on the advice of the Administrator;
- (c) The Parties shall amend the Claims Form to:
 - (i) identify (i) which Impacted First Nations have multiple Reserves, and (ii) for those Impacted First Nations with multiple Reserves, which Reserve(s) are or were subject to a Long-Term Drinking Water Advisory; and
 - (ii) correct the list of Impacted First Nations as proposed on these motions;
- (d) Additional Impacted First Nations shall be added to the Impacted First Nations List in accordance with the protocol attached to this Order as **Schedule “B”**;
- (e) The Administrator shall require supporting documentation, or a reasonable explanation for the lack of supporting documentation, to support Claims for the most serious “Level 2” liver, tumor/cancer, and bloodstream infection Specified Injuries;
- (f) The Administrator’s fees and disbursements totalling \$2,300,318.64 for Q2 2022 are confirmed in accordance with the Courts’ Order dated May 12, 2022; and
- (g) The payment of legal fees and disbursements totalling \$1,021,035.72 (inclusive of HST) for ongoing legal services rendered by Class Counsel and the Joint Committee for Q2 and Q3 2022 is approved in accordance with Articles 18.02(4) and 15.01(8) of the Settlement Agreement and Class Counsel may pay these fees and disbursements out of the Funds Held in Trust for Ongoing Fees;
- (h) The Acceptance Deadline and paragraph (g) of the Settlement Approval Order dated December 22, 2021 shall be amended to extend the Acceptance Deadline for Impacted First Nations to give notice of Acceptance of the Settlement Agreement from December 2, 2022 to March 7, 2023;

- (i) As soon as reasonably practicable, the Administrator shall give notice by email of the amended Acceptance Deadline to all Impacted First Nations that have not yet delivered notice of Acceptance of the Settlement Agreement.

2. **THIS COURT ORDERS THAT** there shall be no costs of the within motion.

“Paul Favel”

Judge

SCHEDULE A

REMINDER NOTICE PLAN

Direct Mailed Information

The Administrator shall distribute a flyer to residents of Impacted First Nations communities, providing information about the settlement, the deadline for submitting a claim and providing information on supports available. Additional information may be distributed to communities with low participation.

Print notices to be mailed by regular postal mail to each of the following:

- The band office or similar office of all Impacted First Nations, requesting that the notices be posted in prominent locations, with sufficient copies of notice materials to distribute to community residents;
- The Chief of each Impacted First Nation;
- Head office and regional offices of the Assembly of First Nations;
- To the extent that their addresses are known, all Individual Class Members who are identified to the Administrator by a First Nation in a Band Council Confirmation or otherwise; and
- Any person who requests a copy of the Settlement Approval Notices,

Print Media Advertising

The Administrator shall publish an advertisement, encouraging Class Members to submit a Claim Form, using information in the Short Form Notice set out in Schedule M. Print notices in Court-approved short form to run twice, 60 days apart, on the best circulation day, in 1/4 page size and placed to maximize visibility and readership, in each of the following publications, or such reasonable substitutions as the Administrator may advise:

Publication	Geographical Scope
<i>Ha-Shilth-Sha</i>	British Columbia
<i>Alberta Native News</i>	Alberta
<i>Eagle Feather News</i>	Saskatchewan
<i>Grassroots News</i>	Manitoba
<i>Wawatay News</i>	Ontario
<i>Mi'kmaq Maliseet Nations News</i>	Nova Scotia
<i>First Nations Drum</i>	National

<i>Turtle Island News</i>	National
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Radio and Television Advertisements and Public Service Announcements

Radio advertisements providing content substantially similar to the Court-approved Short Form Notice in **Error! Reference source not found.**, to be run on radio stations serving areas in which Impacted First Nations are situated, Indigenous and in-community radio stations (e.g., CFNR Terrace, MBC Network SK) as well as popular streamed content (e.g., Spotify and podcasts). Advertisements to run in a concentrated campaign period with high rotation to improve awareness and listener recall.

Television advertisements providing content substantially similar to the Court-approved Short Form Notice in **Error! Reference source not found.**, to be run on national networks focused on First Nations audiences and local television stations serving regions in which Impacted First Nations are located, at times of high viewership (e.g., evening news time, prime time, or CBC News Indigenous). Campaign to run high rotation of advertisements in a concentrated time period to support high viewer awareness and recall:

Station	Language	Approximate Duration	Number of Broadcasts per Week	Total Number of Spots
APTN	English/French	0:30	8 week campaign	448 (English: 416/French: 32)
CBC News Indigenous	English	0:30	8 week campaign	136
Administrator to identify additional targeted television stations	[•]	[•]	[•]	[•]

Websites

- Administrator to create informational website providing access to copies of the Settlement Agreement, Claims Form, FAQs, and other informational resources. Website to be referenced in all notice materials and advertisements.
- Notice materials to be posted on websites of Class Counsel, Canada, and the Administrator.

Social Media Advertising

- Targeted online advertisements, including short videos, to run on popular social media platforms, including Facebook, Instagram, Twitter, Google Ads, YouTube.
- Impressions to be geo-targeted to Class Members and persons searching for information about drinking water class actions.

Minimum 3.5 million impressions, to be allocated as advised by the Administrator.

In Community Advertising (Out of Home)

- In-community advertising including Convenience store posters with a focus on geographic areas with lower engagement.
- Poster or digital advertising in community locations like community recreation centres, arenas, pharmacies and doctor's offices.
- Poster distribution to Band Council offices (one round completed, with another in early 2023).
- Digital Billboards in key areas identified to target Class Members.

Community Meetings

- Administrator to support the hosting of Webinars, in-person and online community meetings, both independently, and in collaboration with First Nation Class Members.
- Administrator to offer a meeting to any First Nation Class Member that requests it.
- Meetings to provide details of Settlement Agreement and claims process and provide time for attendee Q&A.
- Printed notice materials and Claims Forms to be made available at all in-person community meetings.

Press Release

- Administrator will issue a national press release by Canadian Newswire (CNW) service press outlets across Canada and on NationTalk announcing settlement deadline and supports available, to attract unpaid news coverage.
- The press release will include the toll-free numbers and website information.

Other Communications activities

In conversations with communities and partner organizations, additional opportunities to communicate directly with Class Members may arise. The Administrator will work with the Parties

to respond to requests and opportunities in a reasonable manner. This may include the exploration of social media influencer partnerships and expanded direct community outreach and training,

SCHEDULE B

OLTHUIS, KLEER, TOWNSHEND LLP
MEMORANDUM

DATE: August 4, 2022
TO: Deloitte
FROM: Class Counsel
RE: Guidance on the evaluation of unlisted First Nation claims

Below we have set out a proposed strategy for Deloitte to assess eligibility of First Nations to be included in the Settlement Agreement as Impacted First Nations, and for existing Impacted First Nations to extend the dates their members are eligible for compensation.

Evaluating Unlisted First Nations and First Nations Claiming Longer/Different DWA Dates

In the definitions in s. 1.01 of the settlement agreement, an Impacted First Nation means a First Nation “whose First Nations Lands were subject to a Drinking Water Advisory that lasted at least one year between November 20, 1995 and June 20, 2021.”

“First Nations Lands” means lands of a First Nation, the disposition of which is subject to the *Indian Act*, the *First Nations Land Management Act* or a Modern Treaty. These are the common lands of the First Nation, held collectively by the First Nation as a community, usually in the form of reserve lands.

“First Nation ” means a band, as defined in subsection 2(1) of the Indian Act, the disposition of whose lands is subject to that Act or the *First Nations Land Management Act*, or a Modern Treaty First Nation.

“Modern Treaty First Nations ” means aboriginal peoples of Canada, other than the Inuit or Métis aboriginal peoples of Canada, with a Modern Treaty.

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

A “Drinking Water Advisory” is a notification issued in order “to warn the public” about a particular water system. These are advisories to the public at large, rather than a particular household.

A Drinking Water Advisory must be issued by an “Advisory Body” meaning a recognized organization that issues such advisories, such as the federal or provincial government, chief, band council, or health authority.

There are three different types of advisory: “Boil Water”, “Do Not Consume” and “Do Not Use”. Each of these is also defined in the Settlement Agreement.

These definitions were developed to determine which First Nations had persistent and pervasive drinking water problems that could be attributable to Canada's breaches of its duties. In framing it this way, it excluded shorter and more isolated advisories.

Taken together, the definitions mean that in order to be an Impacted First Nation, a First Nation must be subject to:

1. a general warning to the public at large;
2. to boil, to not consume or to not use;
3. water from a particular water system;
4. which is located on the lands of that First Nation;
5. issued by a recognized Advisory Body;
6. which lasted one year or more between November 20, 1995 and June 20, 2021.

In assessing these elements, Deloitte should ask itself a few questions:

1. Is the community a "First Nation" for the purposes of the Settlement Agreement?

→ It must be either a Band under subsection 2(1) of the *Indian Act* or a Modern Treaty First Nation.
2. Is the advisory a warning to the community at large or is it a warning to a specific person, business or particular residents of a home or group of homes?

→ It must be a warning to the public, to the community at large. The important distinction is whether the advisory is public in nature and not private. It does not turn on the number of households or people affected, but rather whether the advisory can be said to have been truly a warning to the public.
3. Does the advisory fall into one of the categories of advisory (Boil Water, Do Not Consume or Do Not Use)? Or is it more general, such as cautioning people about water systems, or requiring them to test their water regularly?

→ It must be in one of the three categories of advisory.
4. Is the advisory about a specific identified water system? Or is it about water systems more generally, suggesting or requiring regular testing?

→ It must be about a particular identified water system. The public warning must specifically be about the drinking water coming out of individual class members' taps. It is not sufficient for it to be a warning to the public about water in the abstract. It is a warning to the public specifically about water that is being supplied to homes on reserve.
5. Where is the water system located? Is the water system located on the lands of the community?

→ It must be located on the First Nation's lands, the disposition of which is subject to the *Indian Act*, the *First Nations Land Management Act* or a Modern Treaty.

6. What type of body issued the advisory? Was it a governmental body, such as those listed in the definition of "Advisory Body"? Or was it a private company, such as an independent lab, technician or consultant?

→ It must be a recognized "Advisory Body" which is generally a government or government agency, usually the First Nation.

7. When did it begin and when was it lifted? Did it last for an unbroken year-long period between November 20, 1995, and June 20, 2021? Or was it a series of shorter, interrupted advisories?

→ It must have lasted for an unbroken year-long period within those dates.

Evidence Required

If a First Nation or an Individual Class Member puts forward evidence that the First Nation in question meets the above requirements, they are an Impacted First Nation and need to be added to the list and included in the settlement agreement.

Similarly, if an already identified Impacted First Nation or Individual Class Member puts forward evidence that the Impacted First Nation met the above requirements for different dates than the dates listed for that Impacted First Nation in the Claims Form, the dates for that Impacted First Nation need to be adjusted to be consistent with the dates supported by the evidence provided. For clarity, an Impacted First Nation that chooses to provide evidence of additional dates need only provide evidence of dates extending the dates already identified (i.e. they don't have to provide any evidence of the dates we have already listed on the claims form).

The below procedure can be followed in evaluating evidence provided in support of qualification of an Impacted First Nation or changing of the dates of an Impacted First Nation.

1. In the absence of evidence to the contrary, the Administrator should accept an affidavit from a representative of the Advisory Body that issued the advisory confirming the period during which it remained in effect.
2. In the absence of evidence to the contrary, the Administrator should accept an affidavit from a member of the leadership of a First Nation attaching notice of the advisory and confirming the period during which it remained in effect.
3. In the alternative, the Administrator should consider whatever evidence the class member provides, and if it falls short of (1) or (2), above, the Administrator should consult with the Settlement Implementation Committee before deciding whether it is more likely than not that the community was subject to a LTDWA during the class period.