

File No. CI24-01- 46047

THE KING'S BENCH
Winnipeg Centre

BETWEEN:

PEGUIS FIRST NATION

Plaintiff

- and -

**THE ATTORNEY GENERAL OF CANADA, THE GOVERNMENT OF
MANITOBA, THE RURAL MUNICIPALITY OF FISHER, and THE
MUNICIPALITY OF BIFROST-RIVERTON**

Defendants

FILED APR 23 2024

STATEMENT OF CLAIM

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Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU
by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a Manitoba
lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed
by the *King's Bench Rules*, serve it on the plaintiff's lawyer or, where the plaintiff
does not have a lawyer, serve it on the plaintiff, and file it in this Court Office, WITHIN
TWENTY DAYS after this Statement of Claim is served on you, if you are served in
Manitoba.

If you are served in another province or territory of Canada or 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 is sixty days.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

April 23, 2024

Issued by B. BOTELHO
DEPUTY REGISTRAR
COURT OF KING'S BENCH
MANITOBA
Deputy Registrar
Court of King's Bench
100c - 408 York Avenue
Winnipeg MB R3C 0P9

- TO: Department of Justice of Canada
c/o Minister of Justice and Attorney General of Canada
The Honourable Arif Virani
284 Wellington Street
Ottawa, Ontario K1A 0H8
- AND TO: Minister of Justice and Attorney General of Manitoba
c/o Ministry of Justice and Attorney General of Manitoba
The Honourable Matt Wiebe
104 Legislative Building
410 Broadway
Winnipeg, Manitoba R3C 0V8
- AND TO: The Municipality of Bifrost-Riverton
c/o Chief Administrative Officer
Larissa Love
P.O. Box 70
329 River Road, Arborg, Manitoba R0C 0A0
- AND TO: The Rural Municipality of Fisher
c/o Chief Administrative Officer
Kelly Marykuca
30 Tache Street Fisher Branch, Manitoba R0C 0Z0

CLAIM

1.0 PRAYER FOR RELIEF

1. The Plaintiff claims against the defendant, the Attorney General of Canada (“Canada”) for:

- a. damages for all pecuniary losses experienced by the Plaintiff arising out of or connected to the 2022 Flood (as defined below at section 9.0);
- b. damages for all expenses that the Plaintiff was forced to incur which were expended on flood protection and repairs that were not reimbursed by Canada in fighting the 2022 Flood and prior floods;
- c. damages caused by its breach of duty of care and negligence in failing to prevent and/or remedy the severe flooding, caused by the 2022 Flood, which has made living conditions on the Reserve Land (as defined below at section 5.0) intolerable and which led to a wholesale evacuation;
- d. a declaration that Canada has breached its Treaty obligations, including incidental honourable and fiduciary obligations, in not providing the Plaintiff with a sustainable and tolerable living environment, safe and secure from flooding disasters, through adequate permanent flood protection for the Reserve Land;
- e. a declaration that Canada has failed to act in accordance with its fiduciary undertaking in its dealings with the Plaintiff and has breached its fiduciary obligations to the Plaintiff to protect the Reserve Land and the Plaintiff’s interests in same;
- f. damages caused by a breach of Canada’s Treaty and fiduciary obligations for all losses suffered by the Plaintiff arising out of or connected to the repeated flooding of the Reserve Land, including the 2022 Flood;
- g. damages for the Plaintiff’s loss of use and enjoyment of the Reserve Land caused by the repeated flooding of the Reserve Land, including the 2022 Flood;
- h. a declaration that Canada fulfill its promise to construct, or approve and fund the construction of adequate permanent flood protection,

including implementing appropriate interim measures to prevent the frequent and severe flooding experienced by the Plaintiff;

- i. a mandatory injunction requiring Canada to immediately construct or to provide the necessary immediate funds for the Plaintiff to construct adequate permanent flood protection;
- j. costs on a solicitor and his own client basis or on such other basis as this Court deems just;
- k. pre-judgment interest, from the date of loss to the date of full judgment and post-judgment interest from the date of judgment to the date of its satisfaction in accordance with sections 80 and 84 of *The Court of King's Bench Act, C.C.S.M.cC280* ("KBA");
- l. exemplary and/or punitive damages; and,
- m. such further and other relief as this Court deems just;

2. The Plaintiff, claims against the Defendant, the Government of Manitoba ("Manitoba") for:

- a. damages for all pecuniary losses experienced by the Plaintiff arising out of or connected to the 2022 Flood for which Manitoba is liable;
- b. damages in nuisance for the wrongful interference and loss caused by the events and circumstances surrounding the 2022 Flood with the Plaintiff's use and enjoyment of the Reserve Land;
- c. damages caused by its breach of duty of care and negligence in causing, or in failing to prevent and/or remedy, the severe flooding, caused by the 2022 Flood, which has made living conditions on the Reserve Land intolerable and which led to a wholesale evacuation;
- d. a declaration that Manitoba has breached its Treaty obligations, including incidental honourable and fiduciary obligations, through its actions and inactions, by impairing or defeating the Plaintiff's use of the Reserve Land;
- e. a declaration that Manitoba has failed to act in accordance with its fiduciary undertaking in its dealings with the Plaintiff and has breached

its fiduciary obligations to the Plaintiff to protect the Reserve Land and the Plaintiff's interests in same;

- f. damages caused by a breach of Manitoba's Treaty and fiduciary obligations for all losses suffered by the Plaintiff arising out of or connected to repeated flooding of the Reserve Land, including the 2022 Flood;
- g. a declaration that Manitoba has failed to comply with the requirements of *The Water Rights Act*, C.C.S.M. c W80 ("*The Water Rights Act*") by permitting or allowing drainage improvements which caused or contributed to the 2022 Flood;
- h. damages for the Plaintiff's loss of use and enjoyment of the Reserve Land caused by the repeated flooding of the Reserve Land, including the 2022 Flood;
- i. pre-judgment interest from the date of loss to the date of full judgment and post-judgment interest from the date of judgment to the date of its satisfaction in accordance with sections 80 and 84 of the *KBA*;
- j. costs on a solicitor and his own client basis, or such other basis as this Court deems just;
- k. exemplary and/or punitive damages; and,
- l. such further and other relief as this Court deems just.

3. The Plaintiff claims against the defendants, the Rural Municipality of Fisher ("Fisher") and the Municipality of Bifrost-Riverton ("Bifrost") for:

- a. damages for nuisance in changing, or in allowing the change in, land use and the increase in drainage over time such as to divert waters from their respective municipalities onto the Reserve Land and thereby causing or contributing to the 2022 Flood and the resultant loss of use and enjoyment by the Plaintiff of the Reserve Land;
- b. damages for a breach of a duty of care and negligence in changing, or in allowing the change in, land use and the increase in drainage over time such as to divert waters from their respective municipalities onto the Reserve Land and thereby causing or contributing to the 2022 Flood and resultant damage and loss of use by the Plaintiff of the Reserve Land; and,

- c. special damages related to the damage caused by the 2022 Flood to the Reserve Land, including to its buildings, road network and other infrastructure.
4. The Plaintiff claims against all Defendants the total sum of \$1,000,000,000.00 for all losses suffered by the Plaintiff or such other amount as may be proven at trial.

2.0 PARTIES

5. The Plaintiff, Peguis First Nation (“Peguis” or “First Nation” or “Plaintiff”) is a “band” within the meaning of the *Indian Act*, RSC 1985, c I-5 (“*Indian Act*”), and an “Aboriginal people” as defined by section 35 of *The Constitution Act*, 1982 schedule B to *The Canada Act* (1982) (UK), 1982, c.11 (“*The Constitution Act*”). Peguis and its members are beneficiaries of Treaty No.1 which is a “treaty” within the meaning of section 35 of *The Constitution Act*. The Plaintiff brings this Claim on its own behalf and in a representative capacity on behalf of all its members in respect of the collective rights of the First Nation.

6. The Plaintiff claims against Canada as represented by The Attorney General of Canada pursuant to section 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50.

7. The Plaintiff claims against Manitoba, as representing Her Majesty the King in Right of the Province of Manitoba, as well as its officers and servants, in

accordance with the provisions of *The Proceedings Against the Crown Act*, C.C.S.M. P-140, including section 10 thereof.

8. Fisher is a Municipal Corporation established pursuant to *The Municipal Act*, C.C.S.M.. c.M225 (*The Municipal Act*), and borders the west, east and south of, and is adjacent to, the Reserve Land.

9. Bifrost is a Municipal Corporation established pursuant to *The Municipal Act*, and is situated to the east and south-east of the Reserve Land.

3.0 OVERVIEW

10. The Reserve Land is comprised of the land and waters, and all resources therein within the Province of Manitoba ("Province"), which are reserved and held in trust by Canada as a reserve for the collective use and benefit of Peguis members; and is administered and controlled by Canada. The Reserve Land is commonly called the Peguis Reserve or Reserve. The Plaintiff has a continuing cognizable Aboriginal interest in, and to the use and benefit of, the Reserve Land. Interest or interests as referred to in this Claim are collective in nature.

11. Over the course of its history on the Reserve Land, Peguis has been flooded repeatedly and severely due to natural and man-made causes without the Plaintiff receiving any or any meaningful protection, remediation, or compensation.

12. In particular, the Plaintiff says that the 2022 Flood, which was the largest flood in recorded history on the Reserve Land, has negatively and substantially affected the Plaintiff's interests in the Reserve Land and has caused untold damage, suffering and harm.

4.0 PEGUIS RIGHT TO USE THE RESERVE LAND

13. Peguis has a population of approximately 10,000 members of Anishinaabe and Cree descent with approximately 4,500 members living on the Reserve Land as of April 2022. It is the largest First Nation in Manitoba.

14. In the early 1800's Chief Peguis and his people were established in an area in, and north of, the present day City of Selkirk, Manitoba ("Selkirk"). Decades later, in July 1870, Manitoba entered into confederation by way of the *Manitoba Act*, 1870, S.C. 1870, c.3.

15. On August 3, 1871, Chief Peguis' son, Chief Henry Prince, on behalf of the St. Peter's Indian Band (as the Plaintiff was then called) signed Treaty No. 1, assuring land for Peguis to occupy. In discussions preceding Treaty No. 1, the Crown's lead negotiator, Lieutenant-Governor Adams Archibald ("Archibald") orally promised to the St. Peter's Indian Band property to call its home on the following terms: "that as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land". In his opening speech, Archibald further

explained the purpose of reserve land as a place for First Nations “to live on and cultivate”.

16. Ultimately, the text of Treaty No. 1 contains the following purposive undertaking: “[...] Her Majesty the Queen hereby agrees and undertakes to lay aside and reserve for the sole and exclusive use of the Indians the following tracts of land, that is to say: For the use of the Indians belonging to the band of which Henry Prince [...]”. The Crown’s honourable undertaking to “reserve” the Reserve Land for the “use” of Peguis, and Peguis’ corresponding right to make use of the Reserve Land, constitute the constitutional right and duty at issue in this Claim. The undertakings made in Treaty No. 1 were undertakings of the Crown. Manitoba was not a signatory to Treaty No. 1, but along with Canada is duty bound within its respective sphere of jurisdiction to accomplish, not impair or defeat, the stated purpose of the Reserve Land.

17. In the decades after Treaty No. 1, the valuable agricultural land and strategic location of St. Peter’s reserve land in Selkirk made it too desirable for settlers, who pressed to have the lands put into general circulation.

18. In 1906, Canada sought a surrender of the St. Peter’s reserve land and to relocate its band members to a new reserve (the Reserve Land) as a means to accommodate the settler’s interests.

19. Notwithstanding a deeply flawed consultation and local vote leading to an illegal surrender perpetrated by Canada in September 1907 (“Surrender”), Peguis families were over time forcibly relocated north to its present Reserve Land; a more remote reserve along the Fisher River.

20. Despite the Surrender and the subsequent relocation to the Reserve Land, the purpose of the Reserve Land continues to be set out in Treaty No. 1.

5.0 RESERVE LAND AND THE FISHER RIVER

21. The Reserve Land is located approximately 196 kms north of the City of Winnipeg, Manitoba; is roughly rectangular in shape; encompasses approximately 75,000 acres or 303.5 kms²; and, is situated around the lower reach of the Fisher River, which flows from the south to the north. From its headwaters southwest of the Reserve Land, the Fisher River drops from approximately 292 metres above sea level (“masl”) to approximately 217 masl at Lake Winnipeg (a drop of approximately 246 ft.). Two tributaries, the East Fisher River and West Fisher River, plus a number of drainage channels, drain the headwater region of the Fisher River Watershed (“Watershed”) and merge into a single river channel, the Fisher River proper, at the southern end of the Reserve Land. From there the Fisher River flows north through the middle of the Reserve Land into Lake Winnipeg at Fisher Bay.

6.0 FISHER RIVER WATERSHED

22. The Watershed is located in the Interlake region of the Province which includes Fisher, Bifrost and Peguis. The Watershed has a total drainage area of approximately 3,150 km². The steepness of the Watershed makes the Fisher River's response to snowmelt or rainfall in the headwaters exceedingly quick at Peguis.

23. In the Watershed, the drainage network is controlled by private landowners (mostly farmers), municipalities (including Bifrost and Fisher) and Manitoba. There are approximately 160 kms of provincial waterways and approximately 516 kms of municipal drains in the Watershed.

The Watershed contains wetlands and extensive areas of poorly drained land. The Watershed contains approximately 500 kms of drains classified as second order or above. Approximately 200 kms of drainage has been added since the 1960s. The Fisher River drainage network contains approximately 480 kms of stream channels.

7.0 CAUSES OF RECURRENT FLOODING OF THE RESERVE LAND

24. Since at least 1960, forested areas and wetlands have decreased. At the same time, the agricultural drainage network has increased, such that the Reserve Land has experienced repeated and devastating flooding.

25. More specifically, since 1960, the Reserve Land has experienced an increase in the number of floods. According to the record of flows at the Water Survey of Canada hydrometric station near the community of Dallas, Manitoba (“Dallas”), Peguis experienced:

- a. five floods between 1960 – 1979: in 1963, 1965, 1974, 1978 and 1979 (or an average of 1 every 4 years over this time period);
- b. six floods between 1980-1999: in 1984, 1986, 1987, 1996, 1997 and 1998 (or an average of 1 every 3.3 years over this time period); and,
- c. eleven floods between 2000-2021: in 2001, 2004, 2005, 2006, 2008, 2009, 2010, 2011, 2013, 2014, and 2017 (or an average of 1 every 2 years over this time period).

26. The flooding of Peguis has led to the evacuation of members of Peguis on numerous occasions since 2000 including, but not limited to, 2004, 2009, 2010, 2011, 2013, 2014 and 2017, some of whom are still evacuated and/or have never returned to Peguis.

27. A major cause of this frequent flooding has been snowmelt, although rainfall during snowmelt, or rainfall alone, such as in 2010, also have caused flooding. The conversion of forest lands and wetlands to agricultural lands upstream of the Reserve Land, combined with the development of drainage channels that drain the agricultural lands, have resulted in faster drainage and increases in the peak or height of floods. Flooding has become more severe and more common in recent years as a result. Bridges and culverts also contribute to localized flooding as ice jams form at these constrictions and plug the water flow, which in turn causes water

levels to rise upstream of the constriction. As well, poor maintenance of ditches on the Reserve Land causes overland flooding in local areas. This complex combination of factors, that are the cause of floods on the Reserve Land, has been pointed out in engineering reports commissioned and funded by Canada and Manitoba since the 1910s.

28. As the Reserve Land is low-lying and near to Lake Winnipeg, the water table under the Reserve Land is near to the surface, which also causes regular overland flooding on parts of the Reserve Land.

29. The Plaintiff over time has made many requests to Canada and Manitoba for flood emergency assistance due to the frequent flooding of the Reserve Land and for funding to permanently resolve the flooding problem.

30. Studies of Fisher River flooding and, in particular, flooding of the Reserve Land, which were commissioned pre-1984, examined the causes of the recurrent flooding problem on the Reserve Land. These studies presented viable solutions to prevent future flooding, despite reporting mixed opinions as to the impact of drainage and land use in contributing to the flooding over time.

31. In 1984, Canada, through the then Department of Indian and Northern Development ("DIAND"), now the Department of Indigenous Services Canada ("ISC"), commissioned a report on an "Analysis of Alternative Flood Prevention

Solutions for the Fisher River and Peguis Reserve”. The report suggested that upstream drainage network installed by Manitoba had some impact on flooding. Several solutions were considered in addition to a “Do Nothing” scenario. Canada found the “Do Nothing” scenario to be unacceptable. Notwithstanding the stated desire of Canada and Manitoba to resolve the flooding problems, no permanent preventative measures have been implemented by Canada and Manitoba, even though all studies undertaken proposed viable solutions to protect Peguis against repeated flooding.

7.1 1990 Manitoba Water Policies (“Water Policies”)

32. In or about 1990, Manitoba adopted Water Policies to ensure the sustainable development of water resources. The objectives of the Water Policies, including the following:

- a. to conserve and manage the wetlands in the Province so as to protect the ability of the environment to sustain life and provide environmental, economic, and aesthetic benefits to existing and future generations (objective 2);
- b. to alleviate human suffering and minimize the economic cost of damages caused by flooding, including by controlling new development in flood prone areas (objective 5); and,
- c. to provide comprehensively planned drainage infrastructure with the objective of minimizing their environmental impacts (objective 6).

33. Among other commitments, the Water Policies committed Manitoba to:
- a. promote wetland retention and appropriate land use to reduce downstream flooding, including by:
 - (i) guiding land development to achieve conservation objectives through application of the “Provincial Land Use Policies”;
 - (ii) protecting ecologically significant Crown Land and water related ecosystems on Crown Land by either withholding these lands from sale or lease, or by placing special conditions or restrictions on the use of these lands;
 - (iii) reviewing and modifying government legislation and policy to ensure that they support conservation; and,
 - (iv) regulating activities and enforcing compliance, where necessary, to ensure that the public’s general conservation interests are not undermined (policy 2.2);
 - b. manage watersheds to promote water retention and store and slow runoff to reduce peak flows and flow velocities, including by:
 - (i) supporting the retention of wetlands through promotional initiatives, incentives, and regulation where appropriate;
 - (ii) promoting retention of natural vegetation cover to slow runoff;
 - (iii) limiting drainage development and reducing drainage conveyance capacities in headwater areas to reduce peak flows;
 - (iv) ensuring that planning and design of provincial drainage works and those of local governments and conservation districts support water retention and runoff moderation, where appropriate; and,
 - (v) protecting natural water retention areas on Crown Land, and controlling inappropriate drainage of ecologically sensitive

areas on Crown Land by withholding these lands from sale or lease, or by placing special restrictions or conditions on their use; (policy 2.4);

- c. ensure new development on land subject to flooding shall occur only under planning guidelines which prevent human suffering and property damage, including by:
 - (i) discouraging new development in flood risk areas through promotion and education concerning the risks, requirements, and restrictions associated with development in flood prone areas;
 - (ii) ensuring that basin and watershed planning processes consider measures to minimize flooding and other water-related hazards and damages;
 - (iii) discouraging new development in flood risk areas by denying loans or loan guarantees for flood prone structures;
 - (iv) defining, in accordance with the Provincial Land Use Policies, standards and criteria for guiding development in flood prone areas;
 - (v) ensuring that new development and land use in compliance with the Provincial Land Use Policies are also in compliance with environmental requirements;
 - (vi) encouraging local authorities to identify flood prone areas in development plans and zoning by-laws and to regulate new development within those areas; and,
 - (vii) developing and promoting land use policies that support the intent of this policy (policy 5.1);

- d. foster economically viable measures to alleviate personal and property damage to existing development in flood prone areas, including by:
 - (i) operating and maintaining existing flood control dams, reservoirs, and associated works to maximize the level of flood protection;
 - (ii) providing an effective flood forecasting system which assesses, as timely and accurately as possible, the probability of flooding, the projected time of the flood, and the projected level of the flood;
 - (iii) planning and constructing, in cooperation with the federal government and local authorities, flood control projects which are economically justifiable, socially acceptable, and environmentally sound;
 - (iv) promoting appropriate land management practices in flood prone sub-escarpmental areas to minimize the economic loss due to flooding; and,
 - (v) ensuring that provincial drainage and other water control projects are planned and designed to minimize any potential increases in flooding (policy 5.2);

- e. plan and execute drainage projects so that projects in one area do not adversely affect another area, including by:
 - (i) adopting, during the planning or design of provincial drainage projects and those of local governments and conservation districts, measures or procedures to identify and reduce potential adverse impacts, including by modifying project designs to prevent or mitigate adverse downstream impacts in the drainage system, watershed or basins;
 - (ii) guiding drainage projects or activities of local governments, conservation districts, and individuals to avoid or minimize adverse impacts, including by using licensing procedures, and regulation where appropriate;

- (iii) ensuring that comprehensive environmental impact assessments are undertaken for projects that have the potential to cause significant adverse impacts;
 - (iv) exploring and promoting practical on-farm measures to attenuate spring snowmelt drainage and reduce downstream flood potential; and,
 - (v) keeping abreast of, and use, the best available technology for assessing changes to flow regimes as a result of drainage and land development (policy 6.5);
- f. consider the protection of wetlands in the planning and development of drainage projects, including by:
- (i) monitoring wetland loss, maintain wetland inventories and explore practical means of classifying wetlands according to their characteristics and their values;
 - (ii) developing and using practical criteria and means for evaluating wetlands and the impacts of wetland loss and for guiding decisions concerning which wetlands should be retained;
 - (iii) ensuring that planning and design of provincial, local government and conservation district drainage projects include measures to prevent or minimize destruction of important wetlands;
 - (iv) ensuring that decisions concerning sale or lease of Crown Land consider water retention, conservation and other functions and benefits that wetlands provide;
 - (v) reviewing provincial legislation, policies, and farm support programs, and modify them where appropriate, to ensure that they support wetland protection objectives;
 - (vi) exploring and supporting practical incentives for encouraging landowners to retain or restore wetlands on privately owned land;

- (vii) using licensing and regulation, where appropriate, to reduce the potential for adverse off-site impacts due to wetland drainage; and,
 - (viii) ensuring that basin and watershed planning includes consideration for the protection of wetlands (policy 6.6); and,
- g. promote water retention and runoff control, as part of watershed management, including by:
- (i) promoting retaining natural cover to slow runoff;
 - (ii) modifying drainage system designs, where possible, to minimize coincidence of peak flows from tributaries and to attenuate flows in the mainstream; and,
 - (iii) using promotional initiatives and licensing, where appropriate, to guide drainage system development in headwater areas and to limit conveyance capacities of upstream drainage works (policy 6.7).

34. As such, by these Water Policies, Manitoba committed to watershed management in the Province to protect downstream property, including the Reserve Land, from upstream development.

7.2 Manitoba and Canada's Participation in Drainage Improvements

35. In 1935, Canada enacted the *Prairie Farm Rehabilitation Act*, RSC 1985, c P-17 ("*PFRA*") to assist in the reclamation of agricultural lands affected by drought in Alberta, Saskatchewan, and Manitoba. The role of *PFRA* was expanded in 1961 to promote the expansion of improved land and community pastures and to assist with water development projects. Canada and Manitoba, under the *PFRA*, provided technical assistance to farmers for land drainage works.

36. In 1961, Canada enacted the *Agricultural Rehabilitation and Development Act* (“ARDA”), RSC 1985, c A-3 (“ARDA”) to allow Canada to enter into agreements with the provinces to improve agricultural incomes in rural areas.

37. In 1966, Canada created the Fund for Rural Economic Development (“FRED”) under the *ARDA* policy framework to undertake regional economic development in disadvantaged areas. One of these selected areas was the Interlake region of the Province, in which Peguis is located.

38. In the 1970s, Canada funded the improvement of drainage for agricultural purposes in the prairie provinces, including the Province, under the FRED or *ARDA* programs. Fisher and Bifrost were beneficiaries of such funding and drainage improvements were made in those municipalities. In Fisher alone approximately 350 kms of new drainage was funded by the *ARDA* program.

39. Between 1967 and 1977, Canada allocated \$85 million to the Interlake FRED plan, \$20 million of which was for program expenditures on land clearing and drainage. In this period an estimated 126,346 acres of land in the Interlake were cleared for farm production, including in the Watershed.

40. The effect of these drainage projects was to increase arable land at the cost of reducing wetlands. The FRED program resulted in 252 kms of drainage

construction in the Interlake, including 42 kms on the Fisher River directly south of the Reserve Land.

41. Under *ARDA* and *FRED*, Canada and Manitoba jointly provided funding and support for drainage and land clearing works. Fisher and Bifrost participated in and benefited from these programs to the detriment of Peguis' interest in the Reserve Land.

7.3 Decrease in Forest Lands and Wetlands

42. Since the 1960s, there has been a significant change in land use in the Watershed. More specifically, the area of grasslands has increased substantially from 12.3% to 39.1%, which was offset by a substantial decrease in forest lands (from 52.6% to 30.7%) and in wetlands (from 16.6% to 8.9%). The net result is that between 1966 and 2021, the land use changes caused an estimated 30% rise in flood peaks at Peguis.

43. Out of 800 sections (512,000 acres) of the Watershed, 160 sections (102,400 acres) of forest and 60 sections (38,400 acres) of wetlands have been lost (or a total loss of 27.5% of water storage protection).

44. Consequently, the Defendants knew, or ought to have known, that land clearing and drainage in the Watershed upstream from Peguis would result, and did result, in increased flooding to the Reserve Land. Notwithstanding this knowledge,

the Defendants actively encouraged, or participated directly or indirectly in, the continued clearing land for cultivation and construct drainage works. These acts and omissions of the Defendants caused increased flooding and damage to the Reserve Land.

8.0 FLOOD RELATED EVENTS POST - 2000

2004

45. The flood of 2004 resulted in the evacuation of approximately 900 Peguis members; approximately 197 homes were flooded and approximately 28 businesses were affected. Damage to other infrastructure on the Reserve Land was also severe where 147 locations had water running over the roads with 17 locations being washed out completely. Also, many homes were found to have well water contamination.

2009

46. In 2009, the Manitoba Water Stewardship for the province ("MWS"), advised Peguis that there was no chance of flooding. Within four days, the Reserve Land suffered a major flood which resulted in millions of dollars in damages and the evacuation of Peguis members.

47. In or about 2009, as a result of the recurrent flooding, Manitoba commissioned the engineering firm, AECOM (“AECOM Study”):

- a. to model the hydrology and hydraulic characteristics of the Fisher River and its tributaries to identify flood mitigation options;
- b. to provide the economic analysis to justify the implementation of selected mitigation options;
- c. to determine the causes of flooding; and,
- d. to estimate the contribution to flooding from historic land use changes and extension of the drainage network.

48. The AECOM Study determined, among other things, that:

- a. The upper reaches of both the west (.007% slope to the junction) and east (.11% slope to the junction) Fisher River branches are much steeper than the middle and lower reaches.
- b. Channel constrictions were found along the river course; some natural and some man-made, involving 34 bridges, 312 culverts and 22 low-level crossings;
- c. Most large floods in the Watershed occurred as a result of spring melt events.
- d. The Watershed requires approximately 7 inches of precipitation to produce a major flood.
- e. The then current system of improved agricultural drains and natural streams totaled 421 kms (200 kms more than the pre-1966 drainage network).
- f. Local flood levels could be affected in the order of 1 metre due to ice jams at a bridge or a natural constriction in the bed or banks along the Fisher River.
- g. Historical studies considered a variety of flood mitigation measures and preliminary cost estimates were generated, but no options were implemented.

49. The AECOM Study further stated that the Fisher River is prone to flooding from natural causes due to the orientation of the river, topographic features, grade changes and rapids.

50. The AECOM Study concluded, among other things, that:

- a. Peguis floods more frequently and is more severely impacted than most other communities in Manitoba, as the Reserve Land along the Fisher River is predisposed to flooding;
- b. the only economically justified flood mitigation measure identified dikes along both sides of the Fisher River and moving or raising homes situated along the Fisher River;
- c. as ice jams are a major cause of flooding, further mitigation measures need to be undertaken and examined; and,
- d. diking would raise water levels in the confined river channel in a one in 100 year event.

2010

51. In July 2010, due to heavy rain and wind events in the Watershed, approximately 300 homes were damaged on the Reserve Land; and several road crossings were washed out leading to the evacuation of approximately 250 members. In a letter dated July 6, 2010, to the Minister of DIAND (now ISC), Canada was alerted by the Plaintiff of the devastation to the Reserve Land caused by the flooding.

52. On or about July 20, 2010, representatives from Canada and Manitoba met with representatives of Peguis to discuss immediate recovery issues and long term flood protection.

53. On or about October 21, 2010, the then Minister of DIAND, acknowledged that the flooding has resulted in considerable costs and disruptions, and undertook a comprehensive strategy for mitigating flood risk for Peguis.

54. Canada specifically committed to support the protection of 75 of the most vulnerable homes on the Reserve Land as an initial step or phase of several phases in providing a comprehensive strategy for mitigating flood risk to Peguis.

55. The funding promised for flood protection either was not forthcoming, or was woefully inadequate, to compensate the Plaintiff and to protect the Reserve Land from flooding.

2011

56. On or about February 25, 2011, Canada wrote to the Peguis advising that, as Peguis was entering the flood season, it should take precautions against contamination of private wells and cisterns and advised what to do when mould is present after flooding.

57. In March-April 2011, Peguis requested financial assistance from Canada and Manitoba to protect the Reserve Land from anticipated flooding. As late as April 1, 2011, Canada and Manitoba were still discussing the financial assistance to be considered.

58. In the meantime, on or about April 12, 2011, the Plaintiff declared a state of emergency and the evacuation of Peguis members was ordered due to spring flooding.

59. Although temporary flood protection funds and relief funds were provided, again these financial measures were woefully inadequate and did not address the major issue of adequate permanent flood protection.

2013

60. On or about March 26, 2013, MWS issued an updated flood forecast stating that there was a moderate to very high flood risk to the Reserve Land. In response, Canada provided \$2.9 million for flood preparedness, but yet again the funds provided were substantially inadequate to protect the Reserve Land and flooding damage was yet again experienced by Peguis.

61. In or about April, 2013, the Plaintiff declared a state of emergency and again Peguis members were evacuated.

62. On or about November 19, 2013, as a result of severe flooding on First Nation communities, Canada stated in a press release that it was taking action on its Emergency Management Framework of response, recovery, preparedness and mitigation (which Framework is described in detail at paragraph 112(f) below) to help ensure the First Nation communities have access to robust and effective

emergency management regimes. Again, these promises did not come to fruition and nothing was done to prevent recurrent flooding on the Reserve Land.

63. In or about 2013, Manitoba recognized that a 1 in 100 year flood as a measure of protection became an inadequate measurement. Manitoba was advised that the level of protection should be designed to accommodate a 1 in 200 year flood level. As a result, Manitoba recommended that flood protection works be built to align with that flood level.

2014

64. In or about the end of February, MWS forecasted moderate flooding for the Reserve Land.

65. On or about March 10, 2014, Peguis wrote to the then Manitoba Premier, Greg Selinger, and complained about the MWS flood forecast for the Watershed as being moderate, given that the snow level to date was higher than the snow level recorded in 2011, when Peguis experienced one of the worst floods in its history. Peguis also warned the Premier that abnormally thick ice had formed along the Fisher River.

66. As a result, Peguis asked Manitoba for immediate additional monitoring equipment to record water flows more accurately on the Fisher River and a snow

recording station to record the proper snow depth in the Watershed. No equipment was provided.

67. Peguis further advised Manitoba that Canada (through the then Aboriginal Affairs and Northern Development Canada) ("AANDC") would not provide additional funding to protect homes in Peguis based on the MWS flood forecast. Peguis further emphasized the failure to accurately predict flooding would inevitably lead to flood damage.

68. On or about April 7, 2014, the then Manitoba Minister of Infrastructure and Transportation, Steve Ashton ("Ashton"), in a cryptic reply told Peguis to regularly check MWS live forecasts as long term weather forecasts were subject to change.

69. On or about April 9, 2014, Peguis wrote to Ashton, indicating that the current forecast of MWS had not changed since February 28, 2014, which predicted normal to moderate flooding for the Reserve Land. Peguis again indicated to Ashton that AANDC (now ISC) would not provide additional funding to protect vulnerable homes in the Reserve Land and repeated the warning of the inevitable consequences of severe flooding to Peguis.

70. Inevitably, there was severe flooding in the Reserve Land starting in April, 2014 which resulted in another evacuation of Peguis members.

71. On May 13, 2014, in a meeting between Peguis and AANDC representatives, Canada was advised that:

- a. over 112 septic fields and 70 homes were damaged and 197 residents were still evacuated;
- b. mould was rampant in homes, causing damage and health issues;
- c. a ring dike was needed;
- d. Canada's reliance on Manitoba's inaccurate flood forecasting was inappropriate for funding purposes; and,
- e. monies from past floods were still not paid out.

72. Again, Canada provided modest funding for the repairs to damaged homes, which was a fraction of the damage caused and there was little to no funding for flood preparation and no money for permanent flood protection.

2015

73. On or about March 3, 2015, Canada, through AANDC, wrote to First Nations, including Peguis, indicating that AANDC had been working to develop a comprehensive approach to on-reserve emergency management comparable to those accessed by other Canadians, including enhanced on-reserve emergency preparedness activities, such as emergency management planning and flood mapping and drainage studies.

74. On or about May 23, 2015, Peguis, wrote to the AANDC identifying a Phase II of further 75 homes of “the worst of the worst” to be repaired, replaced and/or protected. Peguis further indicated that it was paying for accommodations for 78 Peguis members still evacuated from the 2011 flood.

75. On or about May 30, 2015, AANDC confirmed that there were 126 Peguis members still evacuated from the 2014 flood.

2016

76. On or about February 16, 2016, Canada reiterated that the Emergency Management Assistance Program funding was contingent on receipt of detailed flood forecasts issued by Manitoba.

2017

77. In the spring of 2017, the Reserve Land experienced flooding which caused damage to approximately 34 kms of road network and wells. Members were evacuated due to inaccessibility to their homes from overland flooding and damages to the road network, which consisted of roads, driveways, culverts and crossings. A total of 220 locations were found to be damaged. Some segments of roads and crossings were washed out and were no longer passable by vehicles, including service vehicles (e.g. school buses, emergency, and policing services). The total damage to the roadwork was approximately \$4.3 million. Peguis also experienced health and safety concerns.

78. On July 4, 2017, in a meeting with Indigenous and Northern Affairs Canada (“INAC”) (now ISC), Peguis advised that:

- a. 200 members remained off reserve from previous flood evacuations;
- b. some members had been evacuated 2 or 3 times; and
- c. Manitoba’s drainage improvements to assist farmers south of the Reserve Land had resulted in flash floods in Peguis.

Canada undertook to fully understand the impacts and pledged to work with Peguis to develop an action plan.

79. As a result of these several flooding studies, stated strategies, initiatives, undertakings, and Peguis’ repeated requests for assistance, Canada and Manitoba have been well aware of the omnipresent flooding problems experienced by Peguis; whether they be man-made or natural or a combination of both. Although Canada and Manitoba made commitments to provide a permanent flood protection solution and to compensate the Plaintiff for its losses, the facts are that their consistent responses have been to provide some funding for minimal protection and to pay for some damage claims as flooding occurred, based solely on the premise that this marginal contribution was the least expensive to them; but all without regard to what is needed to protect the Plaintiff and fulfill the purpose of the Reserve Land that Treaty No.1 established.

80. Furthermore, as of February 2022, 77 Peguis members from the 2011 flood and 157 Peguis members from the 2014 flood remained evacuated.

9.0 2022 FLOOD

81. On or about March 7, 2022, Peguis wrote to ISC and warned that Canada should not rely upon the flood outlook of February 18, 2022; a forecast prepared by MWS, which stated that the risk of flooding was low. Manitoba did not appreciate or ignored that the risk of ice jamming from both the Icelandic and Fisher Rivers was high and the Reserve Land was threatened with another potential major flood. Peguis further expressed concern that the emergency funding from Canada would likely be unavailable given Manitoba's forecast of a low risk of flooding and asked for financial assistance in flood prevention.

82. Notwithstanding these persistent warnings from Peguis, Canada continued to rely on Manitoba's flood forecasting to determine the risk of flooding on the Reserve Land. In March of 2022, the Manitoba forecast for risk of flooding was low.

83. On or about April 20, 2022, Peguis wrote to the then Minister of MIT for Manitoba, asking for help in breaking up an ice jam on the Fisher River as the banks were overflowing and flooding the Reserve Land.

84. On April 21, 2022, according to the record of flows at Water Survey of Canada's hydrometric station at Dallas on the Fisher River near the northern

boundary of the Reserve Land, the flow in the Fisher River was 3.9 cubic metres per second (m³/sec).

85. On or about April 28, 2022, the Plaintiff declared a state of emergency which led to the evacuation of Peguis. Roads were flooded, which made evacuation essential, but difficult. Out of approximately 4,500 Peguis members, approximately half stayed behind to fight the flood; to protect the safety of those members who needed assistance; or, to protect their homes as best they could.

86. On or about May 6, 2022, the flood peaked at 153 m³/sec. This rapid response to snowmelt and rainfall in the headwaters did not leave the Plaintiff enough time to prepare itself for emergency flood preparations.

87. The flood waters subsided at the end of May 2022, but in mid-June a heavy rainstorm caused more flooding at the Reserve Land, which created a second wave of evacuations.

88. Manitoba's flood forecasts had been inaccurate and too late to allow the Plaintiff sufficient warning to obtain the necessary funding from Canada for the mobilization and employment of resources and equipment to save Peguis from the severity of the damages caused by the 2022 Flood.

9.1 Immediate Infrastructure Damages – 2022 Flood

89. The 2022 Flood caused severe and widespread immediate damage to the Plaintiff, including, but not limited to, damage to:

- a. the sewage lagoon infrastructure: The infrastructure construction, which was completed around 2021, included an operations building, the aerated lagoons, the SAGR system and the UV building, all of which were flooded. As a result of the flooding lagoon, there was also damage to the lift stations, sewer lines and manholes. There were no repairs completed; and the lagoon had to rely on gravity to function;
- b. the water and sewer conveyance system;
- c. approximately 500 homes, which were either condemned and in need of replacement or in need of repair and/or re-location along with wells and septic systems;
- d. community buildings, including the public works building/yard, the band shop building/yard, isolation units, 18 R41 units, churches and graveyards, apartment blocks, multi-family units, triplexes, and nursing residences;
- e. roads, driveways, low level river crossings, culverts which required repair and/or raising;
- f. drainage, which required clearing of channels, and dike and culvert upsizing; and,
- g. band vehicles.

90. In addition, permanent flood protection to the Reserve Land, which Canada had continuously promised, had not been provided.

9.2 Post 2022 Flood

91. On or about October 17, 2022, Canada, through the Minister of ISC, in recognition of the severe flooding that has impacted Peguis for many years, signed a Memorandum of Understanding (“MOU”) with Peguis, to create a Community Rebuilding Working Group, including Canada, Manitoba and the Plaintiff, to create a long term flood protection and recovery from 2022 Flood events.

92. This MOU was the latest in failed initiatives on the part of Canada and Manitoba; as to date no plans or solutions for long term flood protection and recovery from the 2022 Flood and pre-2022 Flood experiences has been produced or implemented by Canada or Manitoba.

93. Further, in 2022 the Auditor General of Canada submitted a report to the Parliament of Canada entitled “Emergency Management in First Nation Communities – Indigenous Services Canada” (“2022 AGC Report”). The 2022 AGC Report (p. 16) stated:

“8.60 As a result of a number of factors, including the effects of climate change and aging infrastructure, evacuations of First Nations communities are becoming more frequent and longer. We found that between the 2009-2010 and 2021-22 fiscal years, 268 communities were evacuated a total of 584 times. While the majority of these evacuations lasted less than a month, about 15% (90) of evacuations were over 3 months long, and some lasted multiple years. Indigenous Services Canada considers an evacuation of more than 3 months to be long-term. The longest evacuation affects members of the **Peguis First Nation in Manitoba. In 2011, this community was evacuated because of flooding. Over 10 years later, 86 residents were still**

unable to return home because of insufficient housing. The longer evacuations lasted, the greater the impact on individuals, families, and the community.” [emphasis added]

94. The 2022 AGC Report made the following recommendations at page 18:

“8.62 Recommendation. Indigenous Services Canada should, in collaboration with First Nations, provincial governments, and other service providers, ensure that First Nations communities receive the emergency management services they need by:

- establishing emergency management service agreements and wildfire agreements in all jurisdictions that include all First Nations
- establishing mutually agreed-upon evacuation service standards in the jurisdictions that lack such standards
- increasing support for First Nation led approaches to emergency management”

and at page 21:

“8.69 We concluded that Indigenous Services Canada did not provide the support First Nations communities needed to manage emergencies such as floods and wildfires. The department did not identify the First Nations communities at the highest risk of not being able to manage emergencies so it could better target funding to build local capacity. **It spent 3.5 times more on responding to and recovering from emergencies than on supporting First Nations communities to prevent and prepare for them.**” [emphasis added]

95. In terms of preparing for and mitigating emergencies, the 2022 AGC Report

(p. 4) stated:

“8.17 We found that funding for structural mitigation projects identified by First Nations did not meet First Nations’ needs. The department determined that there were 112 projects eligible for funding, but they were still unfunded. The department told us that it had insufficient funding to cover all eligible structural mitigation projects. First Nations communities are likely to continue to experience emergencies that could be prevented or mitigated by building the infrastructure.”

and at page 5:

“8.20 These finding matters because it is likely that Indigenous Services Canada is incurring significant costs to respond to-and help First Nations communities recover from-emergencies that could have been mitigated or avoided. First Nations will continue to be more vulnerable to emergencies if they are not adequately supported to prepare for and mitigate emergencies.

“8.22 Preparedness and mitigation activities are proactive actions that can prevent or reduce the impact of emergencies... Studies point to the fact that it is more cost-effective to spend money on mitigation and preparedness efforts than to respond to emergencies when they occur. Indigenous Services Canada supports First Nations in implementing both infrastructure and non-infrastructure mitigation projects.

96. In or about, March 2023, at a meeting between Peguis and ISC, the Plaintiff was informed by ISC that the dike repair, upgrade and wells and septic fields upgrade projects had been put on hold since the spring of 2022, pending discussions by ISC with Peguis about protecting the whole community rather than partial areas of the Reserve Land and that any discussions would not take place until after the Peguis election, which was held on April 7, 2023.

10.0 LIABILITY OF CANADA

10.1 Breach of Treaty No. 1

97. As set out above in section 4.0, Canada undertook to reserve the Reserve Land for the Plaintiff's use and the Plaintiff is correspondingly entitled to make use of the Reserve Land. The Plaintiff's right to use the Reserve Land includes:

- a. settling and residing on the Reserve Land predicated on the Plaintiff being able to provide a decent way of life for its members and for the community to be reasonably safe and secure;
- b. providing safety and security for its members and providing a standard of living as a basic right
- c. providing suitable living conditions and protecting the Plaintiff against avoidable disasters;
- d. fulfilling its interests, including the cultivation and farming of the Reserve Land; and,
- e. having uninterrupted enjoyment and use of the Reserve Land to carry out the Plaintiff's cultural, spiritual and community life;

98. The Plaintiff has relied upon Canada's undertakings and promises to its detriment.

99. Canada continues to fail to take the required broad purposive approach to the interpretation of its Treaty promise and act diligently to fulfil it. The honour of the Crown, including its fiduciary obligations, require nothing less from Canada.

100. Canada has breached the Treaty with the Plaintiff by failing to:

- a. exercise its jurisdiction to protect the Plaintiff's interests, including by enacting guidance or criteria for the protection or accommodation of Aboriginal and Treaty rights, including within the *Emergency Management Act*, SC 2007, c 15 and the corresponding sections of the *Department of Indigenous Services Act*, SC 2019, c 29, s 336;
- b. make certain that the Plaintiff did not suffer damages and losses from flooding which the Plaintiff could not endure;
- c. provide adequate permanent flood protection which was promised and to which the Plaintiff is entitled;
- d. act in a proactive, timely and diligent manner to protect the Plaintiff and its members;
- e. provide the Plaintiff with sufficient funds as, and when, required to provide flood mitigation in advance of a given flood;
- f. compensate the Plaintiff for damages caused to the Plaintiff from recurrent flooding experienced;
- g. reimburse the Plaintiff for expenses it incurred from time to time to fight flooding;
- h. to construct, or to provide the funds sufficient to construct, adequate permanent protection for the Plaintiff against recurring flooding of the Reserve Land; and,
- i. overall, do what is needed to accomplish the purpose of the Reserve Land.

101. Canada's conduct concerning its obligation to protect the Reserve Land from flooding exhibits a persistent pattern of errors and indifference that substantially frustrates the purpose of the solemn promise made by Treaty.

102. Canada knew, or ought to have known, that by failing to implement the Plaintiff's Treaty right the Plaintiff would suffer harm. In particular:

- a. Canada knew, or ought to have known, at all material times, that the Reserve Land was located in a basin and was a flood plain and susceptible to recurrent and severe flooding, such as to cause repeated harm to the Plaintiff for repeated flooding which the Plaintiff has endured;
- b. Canada knew, or ought to have known, at all material times, that the Plaintiff's ability to provide safety and security for its members and to provide a standard of living as a basic right was impossible without assistance from Canada;
- c. Canada received consistent and repeated advice, including advice from its own experts, that the Plaintiff was susceptible to experience frequent flooding to its Reserve Land;
- d. Canada was aware that its funding was inadequate, and its responses were weak and token; and,
- e. Canada knew, given the chronic under funding to the Plaintiff and the recurrent denial of funding requests by Canada, Peguis would find itself having to use resources dedicated for other purposes in order to fight the flooding of the Reserve Land.

103. Although Canada has been acutely aware of the devastating consequences of its failures, its response to these disasters was, and continues to be, an exercise in failed promises and inaction.

10.2 Negligence

104. Canada is responsible and has authority over the Plaintiff, its members and its infrastructure to ensure that the First Nation is safe and secure, and remains so, from the devastation of repeated floodings to the Reserve Land.

105. As such, Canada stands in close proximity to the Plaintiff and, at all material times, it was foreseeable that harm would come to the Plaintiff in the absence of Canada exercising its duty of care to protect the Plaintiff.

106. Canada owed a duty of care to the Plaintiff, which included to:

- a. provide the Plaintiff with a safe and secure environment by taking positive steps to protect the Plaintiff from repeated and severe flooding;
- b. provide the Plaintiff with sufficient resources and flood protection management to fulfill the four components or pillars promised and undertaken by Canada to deliver (as described in detail in paragraph 112 (f) below);
- c. provide the Plaintiff with adequate permanent flood protection, which Canada represented, promised and undertook to the Plaintiff on several occasions to provide and upon which Canada knew, or ought to have known, the Plaintiff was relying;
- d. ensure that the Plaintiff's members would be given the financial and other assistance to allow evacuees to return to the Reserve Land and reside in housing that had been repaired, replaced and/or relocated to safer grounds; and to attend to their financial needs and general welfare, so that the Plaintiff would not be forced to make provision for those needs; which it was, and is, unable to do; and,
- e. protect the Plaintiff and its members from the destruction of their community;

107. Canada has repeatedly failed to recognize its significant shortcomings both by way of conduct and by way of omission and neglect.

108. Canada breached its duty of care and was negligent, particulars of which include by:

- a. failing to provide the necessary funds to mitigate against recurring flooding;
- b. failing to compensate the Plaintiff the full amount of funds required by the Plaintiff to fight the 2022 Flood;
- c. failing to reimburse the Plaintiff for expenses incurred as promised by Canada for prior flooding damages;
- d. failing to provide the necessary resources to permit Peguis to repatriate its members in a more timely fashion or at all;
- e. failing to construct adequate permanent flood protection on the Reserve Land; or alternatively, in failing to provide the funding necessary to enable the Plaintiff to construct adequate permanent flood protection as represented, promised and undertaken by Canada and as relied upon by the Plaintiff in order to protect the First Nation and its members from harm;
- f. relying upon Manitoba for flood forecasting before Canada would provide funding preparedness measures for management against the risk of flooding when it knew, or ought to have known, that Manitoba's flood forecasts were inaccurate, deficient, faulty and/or untimely, such that the Plaintiff was not given adequate warning or resources to prepare for flooding of its Reserve Land and to protect itself and its members;
- g. tying flood preparation funding to deficient, inadequate, faulty and/or untimely Manitoba flood forecasts;
- h. failing to provide the Plaintiff with appropriate flood forecasting measures, including flood measurement gauges and snow course measuring equipment to measure the amount of snow upstream in the Watershed and to determine the quickness of the snow melt and the impact of rainfall on the snow melt;

- i. substantially limiting funding to after the fact flooding expenses, instead of providing funding for preventative measures, such that funds used for remediation of infrastructure including housing, were wasted due to recurring damage to the same infrastructure, including housing;
- j. generally failing to protect the Reserve Land from the effects of flooding;
- k. failing to take adequate steps to remediate the Plaintiff's losses to infrastructure on the Reserve Land;
- l. failing to provide resources and funding for the Plaintiff to maintain infrastructure including drains, ditches, culverts, bridges and roads, so as to reduce or prevent flooding;
- m. funding programs to permit Bifrost and Fisher and their constituents to improve drainage and alter land usage, so as to allow for a substantial increase in the volume and flow of water into the Watershed and onto the Reserve Land; and,
- n. causing or contributing to the 2022 Flood.

109. The Plaintiff relied to its detriment upon the representations, promises and undertakings to provide the First Nation with adequate permanent flood protection and to compensate the Plaintiff for the damages it suffered, which representations, promises and undertakings remain unfulfilled.

110. The suffering experienced by the Plaintiff and its members would have been unnecessary if Canada had simply complied with its obligations and discharged its duties. Canada maintains its inertia and reluctance to fund the construction of a permanent flood protection in full knowledge that such protection is necessary and

would largely ameliorate or eliminate the intolerable living conditions and environment in which Peguis finds itself.

10.3 Fiduciary Duty

111. At all material times, Canada stood in a fiduciary relationship with Peguis, who relied on Canada to provide emergency management services regarding the Reserve Land.

112. Canada undertook responsibility, or was otherwise responsible, to provide emergency management services regarding the Reserve Land, including by:

- a. virtue of its exclusive jurisdiction to make laws in relation to “Indians, and Lands reserved for the Indians”, including the Plaintiff and the Reserve Land, pursuant to section 91(24) of the *Constitution Act*, 1867, 30 & 31 Vict, c 3;
- b. applying its jurisdiction, and restricting the Plaintiff’s jurisdiction, in relation to the emergency management of the Reserve Land, including pursuant to the *Indian Act*, the *Emergency Management Act*, and the corresponding sections of the *Department of Indigenous Services Act*;
- c. its administration and control over the Reserve Land which Canada exercises and the fact that such lands are held in trust for Peguis;
- d. adopting, in 1977, a strategy to develop infrastructure for First Nations, including the Plaintiff, (as set out in a memorandum from Prime Minister Pierre Trudeau to Cabinet) that would “provide Indian homes and communities with the physical infrastructure that meets commonly accepted health and safety standards, similar to that available in neighboring, non-Indian communities or comparable locations, and is operated and maintained according to sound management practices”;
- e. stating in a 1991 submission to the Treasury Board, its commitment to assist First Nations, including the Plaintiff, in achieving basic living

conditions, availability of facilities and services and a general quality of life comparable with other Canadian communities; and,

- f. committing to four interdependent components of emergency management, as stated in a 2011 document entitled “An Emergency Management Framework for Canada: Ministers Responsible for Emergency Management”, including:
 - (i) prevention and mitigation to eliminate or reduce the risks of disasters in order to protect lives, property, the environment, and reduce economic disruption including by structural mitigative measures (e.g. construction of floodways and dykes) and non-structural mitigative measures); and,
 - (ii) recovery to repair or restore conditions to an acceptable level through measures taken after a disaster, including return of evacuees, trauma counseling, reconstruction, economic impact studies and financial assistance.

113. Given its lack of resources, the Plaintiff was particularly vulnerable to Canada’s resources and expertise in emergency management and Canada’s commitment to protect the Reserve Land through sufficient emergency management.

114. In breach of its fiduciary obligation, Canada failed to act in the best interests of the Plaintiff in the provision of emergency management, including:

- a. as reported by the Auditor General of Canada in 1995 by:
 - (i) significantly underfunding its planned investments in capital facilities and maintenance for First Nations, including the Plaintiff; and,
 - (ii) failing to establish benchmarks to compare First Nations, including the Plaintiff, with the rest of Canada, thereby not being able to determine whether conditions in First Nations,

including the Plaintiff, are becoming comparable with other Canadian communities;

- b. by failing to adequately fund or implement the four pillars of emergency management, especially prevention and mitigation to eliminate the risk of flooding on the Reserve Land;
- c. by ignoring Peguis' emergency management needs and denying funding for major infrastructure projects for the construction of flood protection on the Reserve Land notwithstanding that Canada has been, or ought to have been, aware of this deficiency, at all material times, as well as the Plaintiff's inability to make up the shortfall;
- d. by failing to fulfill repeated promises and undertakings to the Plaintiff to construct or to provide sufficient funding for adequate permanent flood protection of the Reserve Land;
- e. by failing to ensure proper advanced warning of floods and failing to provide proper forecasting capability including, flood gauges located at proper locations, upstream of the Reserve Land;
- f. as reported by the 2022 AGC Report in 2022, by not providing the support First Nations, including the Plaintiff, needed to manage flood emergencies; and,
- g. overall, by failing to do what was necessary to protect the Reserve Land from flooding.

115. The Plaintiff has sustained loss and damage resulting from Canada's breach of fiduciary duty. This crisis has been systemic and prolonged. Although Canada has repeatedly recognized the breach of its duties, it has failed to correct these deficiencies.

11.0 LIABILITY OF MANITOBA

11.1 Manitoba's Watershed Management

116. In addition to the Water Policies (above at section 7.1) and Manitoba's funding and support for drainage and land clearing works under *ARDA* and *FRED* (above at section 7.2), Manitoba's involvement in watershed management includes the commission of studies, as well as legislative action and a moratorium. However, all those measures were inadequate to control downstream flooding from upstream development.

117. Proper drainage of water has been a concern for Manitoba since the late 19th century. Agricultural settlement in the late 19th century and early 20th century resulted in the clearing of natural landscapes and the construction of drainage works. As a result of these changes, lowland settlers in southern Manitoba observed increased flooding and faster water flows due to the land use changes and drainage infrastructure for highland agriculture.

118. In June 1918, a report (the Elliot report) to Manitoba, recommended a drainage commission to examine the system of drainage districts that existed in the Province at that time.

119. Manitoba created the Sullivan Commission in 1919 to study drainage issues. The Commission's report ("Sullivan Report") found that the greatest factor causing increased flooding in lowland areas was the changed conditions of the highlands

i.e., the increased land clearing and cultivation. The report warned Manitoba “no matter how well the original channels were designed, and no matter how well they were maintained, they would not now be capable of properly taking off the extra rush of waters that comes from the higher grounds on account of the changed conditions.”

120. After the Sullivan Report Manitoba established the Finlayson Drainage Commission to further address land drainage questions in southern Manitoba. The Finlayson report was submitted in March 1936 and recommended the establishment of provincial funding to drain lowland areas.

121. In 1950, a further report by M. A. Lyons (the “Lyons report”) stated that the Province should assume a substantial proportion of drainage costs. These reports emphasized the need to manage upstream development to protect downstream property.

122. To control diversion drainage and water diversion, Manitoba has prohibited unauthorized water diversion by way of *The Water Rights Act* since at least as early as 1930. Since this first iteration, currently by sections 2 and 3(1), *The Water Rights Act* prohibits the alteration or drainage of wetlands without Manitoba’s authorization.

123. As such, a person who wishes to divert or use water pursuant to section 3(1) of *The Water Rights Act* must apply to Manitoba for a license. This requirement applies to all persons, including private landowners and municipalities.

124. Manitoba has continued authority over water in the Province under further amendments to *The Water Rights Act* and the enactment of *The Water Resources Administration Act*, C.C.S.M. c.W70 and *regulations* thereto. In that regard, Manitoba has the authority to grant permits to increase drainage in the Watershed, in particular drainage in Fisher and Bifrost, which could adversely affect Aboriginal and Treaty rights. However, this legislation does not include any explicit or specific criteria to guide the exercise of the Crown's discretion in respect of drainage licensing and approval decisions so as not to adversely affect Aboriginal and Treaty rights.

125. Although Manitoba asserts control over drainage and the diversion of water, it has failed to prevent, and in fact has permitted, drainage works which result in downstream flooding to other lands. By its acts and omissions, Manitoba has caused flooding to increase on the Reserve Land.

126. In or about 2007, notwithstanding the persistent problem that drainage had on the Watershed, particularly on the Reserve Land, Manitoba ended its moratorium on all new drainage activities within Fisher. This moratorium had originally been put into place by Manitoba to monitor drainage maintenance and improvement in Fisher

due to concerns of downstream flooding from land drainage in the upper portion of the Watershed.

127. Although Manitoba had been aware of the importance of wetlands for decades, it failed to establish an official policy of prohibiting the issuance of licenses under *The Water Rights Act* to drain permanent and semi-permanent wetlands until 2009. Manitoba failed to enshrine this policy into law until amendments to *The Water Rights Act* came into effect in 2019. This policy did not restrict the issuance of drainage licenses generally; only those for the drainage of wetlands.

128. Manitoba's operational decisions and failure to enforce the provisions of *The Water Rights Act* have caused flooding in Peguis. As well, Manitoba's inadequate policy and legislative actions are inconsistent with Treaty No. 1 and the honour of the Crown.

11.2 East Interlake Watershed District ("EIWD")

129. The District was established in 2005 as the East Interlake Conservation District, pursuant to *The Conservation Districts Act*, C.C.S.M. c.C175 (now called *The Watershed Districts Act cW95*). On January 2, 2020, with the coming into force of statutory amendments, the conservation districts were renamed as watershed districts. By the *Watershed Districts Regulation* M.R. 141/2019, the East Interlake Conservation District was continued as the EIWD.

130. The EIWD is the water planning authority for the Watershed as designated by the *Watershed Management Regulation* M.R. 142/2019, passed pursuant to *The Water Protection Act* C.C.S.M.c.W65. The EIWD includes Fisher and Bifrost. Although, Peguis participated in matters of concern, they mostly related to quality of water. The Plaintiff's role was in an advisory capacity only. It did not have any voting privileges.

131. In 2015, the EIWD prepared a document entitled "Integrated Watershed Management Plan" ("Plan"). The Plan, among other things, stated (p.8) that:

- a. local accounts indicate that human activities have played a role in wetland loss in the Watershed;
- b. wetlands are threatened by agriculture; and,
- c. wetlands protection and water retention are particularly important in the upstream portions of the Watershed due to their impact in improving water quality in the Fisher River and for reducing peak flows.

132. In terms of water quality in the Fisher River, the Plan (p.22) referenced accounts of the degradation over time of the water quality in the Fisher River.

133. The Plan further states that (p.25), flooding was most common along the corridor of the Fisher River and has caused extensive damage to homes, businesses, infrastructure, such as bridges and roads, agricultural land and wildlife and aquatic habitat.

134. In terms of drainage, the Plan stated (p.29) that agricultural producers are responsible for the maintenance and construction of drains located on their lands and licenses to conduct drainage works are obtained from MWS. A concern was expressed that related to the lack of regular drain maintenance, poor coordination of drainage activities, excessive drainage in the upstream reaches of the Watershed and illegal drainage activities.

135. As it related to Peguis, amongst other communities, the Plan found that the zone in which Peguis is located is low lying and prone to frequent flooding. Management objectives included flood proofing or relocation of buildings within flood prone areas; improvement in communications and coordination of surface water activities with upstream jurisdiction; assessing culvert needs through LiDAR (Light Detection and Ranging) analysis (p.33); and, protection of existing wetlands, particularly in the upstream portions of the Watershed (p.36).

11.3 Manitoba's Flood Forecasting

136. Manitoba has been acutely aware of the geographical topography of the Watershed and the history of flooding of the Reserve Land having been involved in flood forecasting in the Interlake region and in providing forecasts to the Plaintiff. Manitoba has installed flood gauges at various locations in the Watershed to measure Fisher River water levels and is responsible for the maintenance of these gauges.

137. Manitoba is, and has been, aware that, given the scope and the topography of the Watershed, precipitation from snowmelt and heavy rains is rapid upstream of Peguis and reaches the Reserve Land in a matter of days leaving the Plaintiff with little notice of the flooding risks.

138. The forecasting model used by Manitoba was flawed because it did not measure flooding risk for the Watershed; as Manitoba, in or about 2000, had stopped measuring snowpack in the Watershed upstream of Peguis. Therefore, any forecast for Peguis was not an accurate or timely risk measurement of the flooding risk upstream since flooding on the Reserve Land develops quickly after snowfall or rainfall events upstream in the Watershed.

139. At the same time, farmers and other landowners in Bifrost and Fisher had been redirecting significant volume of water from their lands and into drainage which flows into the Fisher River and through the Reserve Land.

140. As Manitoba has not developed an appropriate long range forecast for Peguis, by the time Manitoba realized that flooding was inevitable, the Plaintiff had insufficient resources or time to protect the Reserve Land and its members from severe flooding and flood protection measures were either lacking or non-existent.

11.4 Manitoba Infrastructure

141. Manitoba is also responsible for PTH 224, a provincial highway which runs through the Reserve Land and Manitoba is responsible for repairs, including associated crossings, bridges, and culverts connected to PTH224 located on the Reserve Land.

142. Manitoba also is responsible for provincial roads, culverts, bridges and drains in Fisher and Bifrost including:

- a. the Sylvan drain, a major drain that connects from the Icelandic River in Bifrost and which backs up in heavy flooding conditions and reverses flows into Fisher;
- b. the Kilkenny drain which runs through Fisher and drains into the Fisher River; and,
- c. the Meridian drain, which branches off from the Sylvan drain and drains north;

all of which drains contribute substantial volumes of water during floods; particularly in the 2022 Flood.

143. Manitoba regulates land use through section 4(1) of *The Planning Act*, C.C.S.M. c P80, ("*The Planning Act*") which provides that Manitoba may, by regulation, establish land use policies to guide sustainable land use and development in the Province. The policies inform the development and zoning by-laws of the municipalities. Manitoba has failed to introduce policies or legislation to prevent landowners and municipalities in the Watershed from clearing land and

constructing drainage works in a manner so as to cause downstream flooding to Peguis.

11.5 Breach of Treaty No. 1

144. Manitoba, on behalf of the Crown, owes honourable and fiduciary obligations to Peguis under Treaty No. 1.

145. Part of the honourable and fiduciary obligations arising in this case in respect of the honour of the Crown is to:

- a. exercise its jurisdictional capacities or legislative authorities to protect the Plaintiff's interests;
- b. make certain that the Plaintiff did not suffer damages and losses from flooding which the Plaintiff could not endure;
- c. act in a proactive, timely and diligent manner to protect the Plaintiff and its members;
- d. manage and regulate drainage and land use changes and flood forecast modeling so as to ensure Peguis can exercise its Treaty right to reside on its Reserve Land; and,
- e. overall, do what is needed to fulfill, not impair or defeat, the purpose of the Reserve Land.

146. Manitoba has not acted honourably and diligently to protect the Plaintiff's Treaty rights and interests, the particulars of which include Manitoba failing to:

- a. exercise its jurisdictional capacities or legislative authorities to protect the purpose of the Reserve Land, including by establishing administrative regimes for drainage and land use changes, and flood forecast modeling which promotes and guides the exercise of Crown

discretion for the protection of Peguis' Treaty right to reside on its Reserve Land;

- b. supervise and manage of the Watershed so as not to cause flooding damage to the Reserve Land, including by developing and implementing guidelines or other planning measures to ensure drainage and land use change and flood forecast modeling in the Watershed are managed so as to ensure Peguis can exercise its Treaty right to reside on its Reserve Land;
- c. ensure that any of its actions in the construction, operation and management of infrastructure in the Watershed by Manitoba or others, over whom Manitoba has authority, including on the Reserve Land, did not cause damage to the First Nation; and,
- d. overall, do what is needed to fulfill, not impair or defeat, the purpose of the Reserve Land.

147. As stated above, the exercise of Peguis' right to use its Reserve Land has been significantly and detrimentally affected by the cumulative and ongoing impacts of the whole of Manitoba's scheme of Watershed management, including increased drainage, reducing wetlands, and insufficient flood forecasting. Manitoba's conduct concerning the Reserve Land is a persistent pattern of errors and indifference that substantially frustrates the purpose of the solemn promise made.

11.6 Nuisance

148. The Plaintiff states that the 2022 Flood was caused by Manitoba's operational decisions and conduct as stated above and constitutes a nuisance to the Plaintiff, including losses arising directly or indirectly due to the Plaintiff and its members

being prevented from the enjoyment and use of the Reserve Land, which has caused extensive damage, for which Manitoba is responsible at law.

149. Manitoba's acts and omissions in respect of land use changes caused peak flood flows on the Reserve Land to increase by approximately 30%. But for Manitoba's involvement in the increased water flow caused by increased drainage and changes in land use in the Watershed, the Plaintiff would not have suffered the flooding damage, as alleged or at all.

150. At all material times, Manitoba was aware of alternative drainage strategies that could have reduced or eliminated downstream flooding to the Plaintiff. The nuisance that Manitoba created could have been prevented by other methods of conceptualizing, designing, constructing, maintaining and operating its drainage system.

11.7 Negligence

151. Manitoba committed to protect the Reserve Land from flooding due to land use changes and drainage improvements upstream from, and within, the Reserve Land and inadequate flood forecasting.

152. Pursuant to its commitment, Manitoba owed a duty of care to the Plaintiff to manage land use changes, drainage improvements, and flood forecasting to protect the Reserve Land from flooding. The duty belongs within the established category

of a government's duty to act pursuant to an established policy or commitment where it is reasonably foreseeable that failure to do so will cause the Plaintiff harm.

153. Manitoba has been negligent in that it failed to manage land use changes, drainage improvements and flood forecasting in accordance with its commitment, particulars of which include:

- a. in failing to conceptualize, design, construct, maintain, and operate infrastructure including highways, roads, drains, drainage systems, ditches, bridges, and culverts on the Reserve Land and upstream of the Reserve Land, owned by or under the control of Manitoba, so as to prevent or alleviate flooding on the Reserve Land;
- b. in permitting drainage improvements and land use changes in the Watershed, including in Fisher and Bifrost, that caused flooding to the Reserve Land;
- c. in failing to prevent the loss of valuable wetlands and forest lands in the Watershed which would have prevented flooding to the Reserve Land;
- d. in failing to supervise, monitor, or manage the Watershed so as to protect the Reserve Land from upstream flooding;
- e. in failing to withhold licenses or permits under *The Water Rights Act* to construct and/or improve drainage that causes or contributed to flooding of the Reserve Land;
- f. in causing or contributing to the 2022 Flood;
- g. in providing or participating in funding to Bifrost and Fisher for drainage improvement and land use changes that caused flooding to the Reserve Land;

- h. in lifting the moratorium on drainage improvements and land use changes in Fisher which prevented or reduced flooding to the Reserve Land;
- i. in failing to have in place accurate and timely flood forecasting for the Watershed, particularly for the Reserve Land, where Canada was reliant upon that forecasting in providing the Plaintiff with the necessary funding and resources for protecting the Reserve Land from flooding;
- j. in failing to have in place the necessary equipment or measuring stations or devices to measure snow course in the Watershed;
- k. in failing to provide accurate and timely flood forecasting and warning for the Plaintiff to obtain funding from Canada for flood prevention measures and to adequately prepare itself against imminent flooding to the Reserve Land; and,
- l. in generally failing to have any or any accurate long range flood forecasting in place for the Watershed, particularly for the Reserve Land.

154. Manitoba knew, or ought to have known, at all material times, that by failing to manage land use changes, drainage improvements and flood forecasting in accordance with its commitment, the Reserve Land would flood and the Plaintiff would suffer harm.

11.8 Fiduciary duty

155. Manitoba's fiduciary duty arises from its undertaking of responsibility and authority over Watershed and emergency management with respect to the Reserve Land. In the circumstances, Manitoba owes a fiduciary duty to the Plaintiff regarding Watershed and emergency management to protect the Reserve Land. The fiduciary

duty should have protected the Plaintiff's interests on the Reserve Land from Manitoba's indifference and ineptitude.

156. Manitoba knew, at all material times, that the Plaintiff was particularly vulnerable to flooding given the location of the Reserve Land. Manitoba had commissioned studies which identified the flooding problem and offered solutions; it knew of environmental and conservation concerns over flooding caused by the Watershed; it repaired public roads and associated infrastructure on the Reserve Land; it was involved in forecasting flood events; and it assisted in disaster relief.

157. As such, it owed a fiduciary duty to make sure that its actions would not harm the Plaintiff by contributing to conditions which caused and perpetuated flooding damage. Manitoba also undertook to protect downstream interests of the Plaintiff from upstream improvements.

158. In exercising control over the Plaintiff, Manitoba systematically breached its duties to Peguis, particulars of which include failing to:

- a. honour its promise to provide Peguis with adequate flood protection assistance to permit Peguis members to maintain their way of life on the Reserve Land;
- b. ensure that all homes, other living accommodations and community facilities, and all infrastructure, including water and sewer treatment facilities and the road network on the Reserve Land were protected from Manitoba's infrastructure;
- c. provide proper advanced warning of floods;

- d. provide proper forecasting capability including flood gauges, located at proper locations, upstream of the Reserve Land; and,
- e. adopt operational protocols and directives for the conceptualizing, design, construction, maintenance, and operation of infrastructure upstream of the Reserve Land to protect the Plaintiff akin to the protections under provincial and territorial law.

159. Manitoba's breaches of its duties have continually denied Peguis adequate flood protection and Peguis continues to face recurrent flooding with little or no warning. This crisis has been systemic and prolonged. Although Manitoba has repeatedly recognized the breach of its duties, it has failed to correct these deficiencies.

160. As such, Manitoba's persistent acts and omissions over decades has contributed to the flooding damages and harm caused repeatedly to the Plaintiff and its members.

12.0 LIABILITY OF FISHER AND BIFROST

12.1 Negligence

161. Fisher was incorporated as a Local Government District in 1945 under *The Local Government Districts Act* SM 1944, c 59. Fisher was continued as a Rural Municipality in 1997 under *The Municipal Act*.

162. Bifrost was incorporated as the Rural Municipality of Bifrost in 1907 under *The Municipal Act*. In 2015, the Village of Riverton was amalgamated with the Rural Municipality of Bifrost to form the Municipality of Bifrost-Riverton.

163. At all material times, Fisher, Bifrost and Manitoba have had jurisdiction over land use and drainage in the relevant areas of the Watershed. Manitoba has delegated authority over municipal drainage to Fisher and Bifrost under sections 232 and 294 .1 of *The Municipal Act* and under any preceding legislation, to ensure that development within Fisher and Bifrost does not result in the alteration of permanent or semi-permanent wetlands.

164. Fisher and Bifrost have had jurisdiction over land use under *The Town Planning Act* (RSM 1954, c 267); its replacement statute, *The Planning Act* (SM 1964, c 39); and, any successive legislation, including *The Planning Act*. *The Provincial Planning Regulation*, M.R.81/2011, including the Provincial Land Use Policies, requires that development within Fisher and Bifrost must not result in the alteration of permanent or semi-permanent wetlands.

165. Fisher and Bifrost approved and permitted, or failed to prevent, development and land use changes which reduced natural water storage in the Watershed and increased downstream flows to Peguis.

166. Fisher and Bifrost had authority over drainage and land use in the Watershed. As such, Fisher and Bifrost owed a duty of care to the Plaintiff not to cause damage to the Plaintiff and its members.

167. Fisher and Bifrost conceptualized, designed, constructed, maintained and operated drainage works in the Watershed for the purpose of draining wetlands and improving agricultural land. Fisher and Bifrost owed a duty of care to the Plaintiff and its members to ensure these drainage works did not increase water flows to Peguis so as to cause damage.

168. Fisher and Bifrost owed a duty of care to the Plaintiff to:

- a. protect the Plaintiff from flooding;
- b. properly conceptualize, design, construct, maintain and operate drainage works which it owned, operated and controlled in a manner which would not cause downstream flooding;
- c. construct and/or properly license drainage works in accordance with *The Water Rights Act*;
- d. take reasonable steps to prevent, or alternatively, to minimize flooding resulting from its drainage works;
- e. regulate land use in a manner which did not cause flooding to the Plaintiff;
- f. monitor drainage and land use in Fisher and Bifrost to prevent flooding on the Reserve Land; and,
- g. manage the Watershed in such a way so as to protect Peguis from flooding damage.

169. Some or all of Fisher and Bifrost's drainage works were not properly licensed under *The Water Rights Act*. Fisher and Bifrost planned and constructed their drainage works without consideration for the downstream effect that these works would have on the Reserve Land.

170. Fisher and Bifrost, their servants, employees, or agents breached the duty of care they owed to the Plaintiff and were negligent by:

- a. failing to conceptualize, design, construct, maintain and operate its drainage works in a manner which did not cause flooding to the Plaintiff;
- b. failing to regulate land use in a manner which would avoid or minimize downstream flooding to the Plaintiff;
- c. constructing, or allowing to be constructed, illegal drainage works contrary to *The Water Rights Act* which caused flooding to the Plaintiff; and,
- d. failing to manage the Watershed in such a way so as not to cause flooding damage to the Plaintiff.

171. Further, from time to time, Fisher and Bifrost have permitted enhanced drainage and land use changes; or alternatively knew, or ought to have known, of drainage enhancements and land use changes by its constituents which have increased significant water volumes and flow into the Watershed and have caused or contributed to severe and recurrent damage to the Reserve Land.

172. In or about 2009, Bifrost replaced a wooden bridge in the Icelandic Watershed with an 18" culvert in order to protect farmland which has resulted in flood water being directed from the Icelandic Watershed to the Watershed and on to the Reserve Land in the 2022 Flood.

173. Also, culverts in the community of Morweena in Bifrost cause water to back up into the Sylvan drain during high water events on the Icelandic River. This backup

pushed water from the Icelandic River Watershed into the Watershed, increasing flooding on the Reserve Land in 2022.

174. Municipal drains in Fisher connect the Sylvan drain to the Meridian drain and Bottle Creek, allowing water to flow from the Icelandic Watershed into the Watershed, which increased flooding on the Reserve Land in 2022.

175. Municipal drains in Fisher further extend the provincial drainage system, allowing more agricultural lands to drain faster at the expense of the Plaintiff, including the Leroy, Hodgson, Meridian, Sylvan, Rus School, Dumoulin, and Kilkenny drains.

176. To the extent that these drains, traverse municipal boundaries, Fisher and Bifrost failed to exercise control over these drains so as to prevent excessive water flows to reach Peguis.

177. Fisher and Bifrost, as part of the EIWD, at all material times, were aware of the negative impact that the increased drainage and loss of forest lands and wetlands had in the increase in flooding in the Watershed, and in particular to the Reserve Land.

178. From time to time Fisher and Bifrost have been the beneficiaries of funding from Canada to increase drainage to assist in advancing agriculture in these municipalities, which has been used to the detriment of the Plaintiff.

179. Fisher and Bifrost are negligent in failing to show due concern for the Plaintiff in the way they conceptualized, designed, constructed, maintained and operated drainage and land use in the Watershed. Fisher and Bifrost were aware, at all material times, of the direct and foreseeable consequences to the Plaintiff as a result of their actions. Fisher and Bifrost improperly made the operational decision to carry out and allow work without sufficient regard for the consequences to the Plaintiff.

12.2 Nuisance

180. Fisher and Bifrost are liable in nuisance for the 2022 Flood on the Reserve Land by the release and flow of water from drainage in their municipalities caused by land use and drainage improvements made under their control, as stated above, which has prevented the Plaintiff from the use and enjoyment of the Reserve Land.

181. But for the actions and/or omissions of Fisher and Bifrost in the increased water flow on to the Reserve Land, the Plaintiff would not have suffered the loss of use and enjoyment of the Reserve Land and the extensive damage which the Plaintiff suffered and for which Fisher and Bifrost are responsible at law.

182. At all material times, Fisher and Bifrost were aware of alternative methods of managing and regulating land use and conceptualizing, designing, maintaining and operating drainage works which would not have caused damage to the Plaintiff. Fisher and Bifrost failed to use other methods of conceptualizing, designing, constructing, maintaining and operating their drainage works which would have prevented the nuisance.

13.0 DAMAGES

183. Prior to the 2022 Flood the Plaintiff has spent millions of dollars in fighting floods and repatriating its members who were evacuated since 2010. Canada has reimbursed the Plaintiff very little of that amount.

13.1 Evacuees/Lack of Housing

184. On or about September 24, 2019, the Regional Director of ISC wrote to Peguis concerning finalizing a plan to return evacuees from the 2010, 2011, 2014 and 2017 floods to Peguis. He also indicated a desire to discuss how ISC could partner with Peguis to resolve the overall flooding issue. However, many Peguis members remain out of their homes.

185. Approximately 549 Peguis members remain evacuated as a result of the 2022 Flood; and 235 Peguis members remain evacuated as a result of the 2014 and 2017 floods. The Plaintiff is still dealing with repatriation attempts, but has inadequate resources and funding to provide these evacuees with homes to which

they can return. In addition, there are approximately 50 families who were evacuated and which families have been denied assistance from the Canadian Red Cross ("CRC") who is paid by Canada to manage evacuation accommodation efforts.

186. In addition, there were many Peguis members who were evacuated from the Reserve Land and who relocated elsewhere, but who were not part of the CRC evacuation program.

187. In 2021, Canada provided modest funds for renovations/repairs; new housing and dike remediation, which funds were substantially deficient to deal with the crisis created by the repeated flooding disasters.

188. Only 53 out of 75 homes promised by Canada in the Phase I repairs undertaking had been provided. In addition, Peguis requested funds of \$9.2 million for additional expenditures and renovations for the 22 homes not repaired which has not been received. No funds have been received for Phase II homes.

189. The Plaintiff had reviewed cost overruns related to annual flooding where river crossings were washed out or removed and replaced to alleviate flooding in certain areas. Although Canada had developed a flood strategy in 2011 to repair low-level river crossings; repair and/or replace bridges over the Fisher River and to

raise the west road to protect homes, the bridge and west road work had not been completed.

190. On or about March 17, 2022, ISC, in a letter to Peguis, acknowledged the need to work together in partnership to improve flood response, and increased its contribution to \$28 million as a final contribution to assist in repatriation of evacuees to Peguis. However, ISC went on to confirm its commitment to address longer term flood protection efforts for Peguis.

191. On or about March 23, 2022, Peguis stated to ISC that Canada still owed a fiduciary duty to:

- a. provide homes for evacuees whose families have grown since being displaced in 2011 and in 2014 and who cannot return to overcrowded conditions;
- b. address the flood and mould damage for the 75 homes originally agreed to; and,
- c. implement an overall strategy to protect Peguis from experiencing reoccurring flood events.

192. Monies received by Peguis in March 2022 to rehabilitate infrastructure for prior years had to be redirected to the 2022 Flood damages, as Canada has been chronically behind in its financial commitments.

193. To date, Peguis has had to invest millions of dollars in resources to facilitate and organize housing off reserve and the return of its members to the Reserve Land, for which the Plaintiff has received substantially inadequate funding.

194. Although the damages caused by the 2022 Flood are immense, very little funding has been provided by Canada to provide repairs, relocation and replacement of condemned homes.

195. To date, out of the \$56 million the Plaintiff has requested of Canada for repairs only to homes damaged in the 2022 Flood, \$4.1 million has been approved by Canada and \$2.6 million has been received.

196. More tragically, to date no new homes have been provided to replace approximately 85 homes condemned due to flooding and no commitment is forthcoming from Canada.

197. The March 2024 Report by the Auditor General of Canada on “Housing in First Nations Communities” (“2024 AGC Report”), found that Canada had not made any meaningful improvement in housing conditions on First Nations. The 2024 AGC Report found that, among other things:

- a. housing is a longstanding problem on many First Nations communities. Poor housing conditions in First Nations communities significantly affect the health and well-being of individuals and families and exacerbate social and economic challenges on reserves;
- b. mould is a prevalent issue and the strategies to address mould in First Nation housing is lacking; and,
- c. First Nations communities will continue to experience poor and unsafe housing, which is often connected with family violence, substance abuse, suicide, poor physical and mental health, educational and

economic obstacles, and migration from the community leading to cultural loss.

198. The findings of the 2024 AGC Report are applicable to Peguis and the recent flooding on the Reserve Land has been a major contributing factor to the present housing crisis.

199. In order to repair; replace and/or relocate all the buildings, including homes and all infrastructure damaged, including the road network, and to have the necessary permanent flood protection infrastructure constructed, as promised, and to compensate the Plaintiff for monies expended on flood protection, evacuation and repairs, the total cost as referenced in para. 4 above is \$1,000,000,000.00.

13.2 Other losses

200. There has been an economic loss to the Plaintiff in terms of wages the Plaintiff was obligated to pay employees, while they were unable to work during the flooding.

201. The Reserve Land was cut off from vehicular traffic due to the roads being impassable and the main traffic artery on the Reserve Land (PTH224) has a weight restriction preventing the transportation of supplies, including groceries and other necessities.

202. Parts of the Reserve Land has become unfit for human habitation and remain unfit for human habitation because of contamination caused directly or indirectly from the flooding.

203. Homes on the Reserve Land need to be relocated due to damage or threat of damage to buildings and threat of harm to Peguis members, and there is a present housing crisis on the Reserve.

204. Agricultural has all but disappeared due to continual flooding, such that only 1 or 2 farming operations remain on the entire Reserve Land.

205. Buildings have suffered from structural deterioration and mould development.

206. Drinking water wells on Reserve Land have been damaged such that water has to be trucked into the community.

207. Approximately 400 septic tanks have been damaged and have to be replaced.

208. Peguis recreational facilities including parks, ball diamonds, play structures, track and field facilities, and Treaty grounds have been damaged or destroyed.

209. The well being of the First Nation as a collective has been significantly damaged as a result of the dislocation of Peguis members caused by the 2022 Flood

and prior floods. This loss is not an aggregate of the individual losses experienced by individual Peguis members, but is a collective loss experienced by the First Nation which has damaged the First Nation as a people and has adversely impacted them as a community. The way of life of the First Nation has been negatively affected and its economic and social well-being has been compromised.

210. The enjoyment by the First Nation and its members of their constitutionally protected rights, including their Treaty rights has been interfered with or impaired, and the Plaintiff has suffered damages in respect of this interference or impairment in an amount to be proven at trial. These losses include both economic losses and social, cultural, and spiritual losses to the Plaintiff, the particulars include the use of Reserve Land for all purposes including for:

- a. fishing
- b. trapping
- c. farming
- d. gathering
- e. burial sites;
- f. sacred sites;
- g. spiritual uses of the Reserve Land and waters;
- h. cultural uses of the Reserve Land and waters;
- i. traditional knowledge teaching;

211. As well, the mental and physical well-being of the Plaintiff has been shattered due to the stress, strain and health issues experienced by the community, especially due to the pervasive sickness experienced by its children; including respiratory bacterial and other diseases. Drugs, depression, and suicides have also been pervasive in the community.

212. Further, many Plaintiff members who had to be evacuated from the Reserve Land were or are living in unfamiliar environments in various parts of Winnipeg and other communities in the Province. The dispersal of Peguis members has damaged the community fabric and bonds between members. The community collectively has suffered trauma and disenfranchisement.

13.3 Exemplary and Punitive Damages

213. Canada and Manitoba, had, or should have had, specific and complete knowledge of the widespread damage to the Plaintiff that resulted from the breaches set out above. Despite this knowledge, Canada and Manitoba continued to breach its duties to the Plaintiff with devastating consequences.

214. The high-handed and callous conduct of Canada and Manitoba warrants the condemnation of the Court. At all material times, Canada and Manitoba asserted control over the Plaintiff's ability to provide adequate permanent flood protection for the First Nation, and it conducted, and continues to conduct, its affairs with wanton and callous disregard for the interests, safety and security of the Plaintiff and its members.

215. The Plaintiff pleads and relies upon the:

- a. *The Court of King's Bench Act*, C.C.S.M. c.C280;
- b. *Indian Act*, R.S.C. 1985, c.1-5;
- c. *The Constitution Act, 1867*, 30 & 31 Victoria. c. 3 (U.K.);

- d. *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11;
- e. *Emergency Management Act*, SC 2007, c15;
- f. *Department of Indigenous Services Act*, SC 2019, c.29 s336;
- g. *Prairie Farm Rehabilitation Act*, RSC 1985;
- h. *Agricultural Rehabilitation and Development Act, ARDA*, RSC 1985;
- i. *The Water Rights Act*; C.C.S.M. c. W80;
- j. *The Municipal Act*, C.C.S.M. c. M225;
- k. *The Planning Act*, C.C.S.M. c. P80 and Regulations thereto;
- l. *The Conservation Districts Act*, C.C.S.M. c. C175;
- m. *The Watershed Districts Act*, C.C.S.M. c. R95 and *Regulations* thereto;
- n. *The Water Protection Act*, C.C.S.M. c. W65;
- o. *The Water Resources Administration Act*, C.C.S.M. c. W70; and,
- p. Such other legislation or regulations as may apply.

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