

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

COURT OF QUEEN'S BENCH
CLERK / SAINT JOHN

MAY 28 2019

COUR DU BANC DE LA REINE
GREFFIERE / SAINT-JEAN

BETWEEN:

FRANCES BROWNELL AND CHERYL STEADMAN

Plaintiffs

- and -

CITY OF SAINT JOHN

Defendant

**ORDER
(CERTIFICATION)**

THIS MOTION, made by the Plaintiff for an order certifying this action as a class proceeding, was heard on May 28th, 2019 at 10 Peel Plaza, Saint John, New Brunswick.

ON READING the Plaintiff's motion record and reply motion record and the Defendant's responding motion record, and on hearing the submissions of the lawyers for the parties,

AND ON BEING ADVISED that the parties consent to this Order,

1. **THIS COURT ORDERS** that the Plaintiffs are granted leave to file the Amended Statement of Claim attached hereto as **Schedule "A"**.
2. **THIS COURT ORDERS** that that this action be and hereby is certified as a class proceeding pursuant to the *Class Proceedings Act*, RSNB 2011, c 125.
3. **THIS COURT ORDERS** that the Class is defined as:

All persons, including individuals, partnerships and corporations, who were the owner or occupant of an Affected Property from September 2017 to August 31, 2018.

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"Affected Property" is defined as those commercial, residential, and other properties in West Saint John subject to a change in water source from the Spruce Lake Reservoir to a new well source under the Safe Clean Drinking Water Project.

4. **THIS COURT ORDERS** that Frances Brownell and Cheryl Steadman be and hereby are appointed as the representative plaintiffs for the class.

5. **THIS COURT ORDERS** that the common issues be and are hereby certified as:

- (a) Did the Defendant owe a private law duty of care to the Class in respect of operational decisions relating to the Safe Clean Drinking Water Project?
- (b) If the answer to common issue (a) is "yes", what was the applicable standard of care?
- (c) Did the Defendant breach the standard of care? If so, how?
- (d) If the answer to common issue (c) is "yes", was the breach of the standard of care capable of causing damages to the Class?

6. **THIS COURT ORDERS** that the certification of common issue 5(d) does not eliminate the requirement that every member of the Class must prove specific or individual causation following the trial of the common issues.

7. **THIS COURT ORDERS** that at the trial of the common issues, the Plaintiffs may ask that the court consider the applicability of the provisions of section 31 of the *Class Proceedings Act*, RSNB 2011 c 125, notwithstanding that this Court has not certified a common issue with respect to aggregate damages.

8. **THIS COURT ORDERS** that Koskie Minsky LLP and Gilbert McGloan Gillis be and hereby are appointed as counsel to the class ("**Class Counsel**").

9. **THIS COURT ORDERS** that any other proceeding based on the subject matter of this action is stayed.

10. **THIS COURT ORDER** that no other proceeding based on the subject matter of this action may be commenced without leave of the court.

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11. **THIS COURT ORDERS** that the parties shall negotiate to propose to the Court for approval or otherwise argue if they cannot agree on May 29, 2019 the form and manner in which class members shall be notified that this proceeding has been certified as a class proceeding and the manner in which class members may opt out.

12. **THIS COURT ORDERS** that the Defendant shall pay to the Plaintiff \$5,000.00 plus tax, all inclusive, for costs for the motion for certification of this proceeding payable within thirty (30) days of this Order.

Dated at Saint John, New Brunswick, the 28th day, of May, 2019.



SCHEDULE "A"

Court File No. SJC-

IN THE COURT OF QUEEN'S BENCH OF
NEW BRUNSWICK

COUR DU BANC DE LA REINE DU
NOUVEAU-BRUNSWICK

TRIAL DIVISION

DIVISION DE PREMIERE INSTANCE

JUDICIAL DISTRICT OF SAINT JOHN

CIRCONSCRIPTION JUDICIAIRE DE

B E T W E E N:

E N T R E:

**FRANCES BROWNELL AND CHERYL
STEADMAN,**

demandeur

Plaintiffs,

- et -

- and -

CITY OF SAINT JOHN,

Defendant,

Defendeur

**NOTICE OF ACTION WITH STATEMENT
OF CLAIM ATTACHED**
(Form 16A)

AVIS DE POURSUITE ACCOMPAGNÉ
D'UN EXPOSE DE LA DEMANDE
(Formule 16A)

TO: The Defendant
City of Saint John
15 Market Square
Saint John, N.B.
E2L 4L1

DESTINATAIRE: le défendeur
susmentionné

**LEGAL PROCEEDINGS HAVE
BEEN COMMENCED AGAINST YOU BY
FILING THIS NOTICE OF ACTION WITH
STATEMENT OF CLAIM ATTACHED.**

**PAR LE DEPOT DU PRESENT
AVIS DE POURSUITE ACCOMPAGNE
D'UN EXPOSE DE LA DEMANDE, UNE
POURSUIE JUDICIAIRE A ETE
ENGAGEE CONTRE VOUS.**

If you wish to defend these proceedings, either you or a New Brunswick lawyer acting on your behalf must prepare your Statement of Defence in the form prescribed by the Rules of Court and serve it on the Plaintiff or the Plaintiff's lawyer at the address shown below and, with proof of such service, file it in this Court Office, together with the filing fee of \$50.00,

Si vous désirez présenter une défense dans cette instance, vous-même ou un avocat du Nouveau-Brunswick chargé de vous représenter devrez rédiger un exposé de votre défense en la forme prescrite par les Règles de procédure, le signifier au demandeur ou à son avocat à l'adresse indiquée ci-dessous et le déposer au greffe de cette Cour avec un droit de dépôt de \$50 et une preuve de sa signification,

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| <p>(a) if you are served in New Brunswick, WITHIN 20 DAYS after service on you of this Notice of Action With Statement of Claim Attached, or</p> <p>(b) if you are served elsewhere in Canada or in the United States of America, WITHIN 40 DAYS after such service, or</p> <p>(c) if you are served anywhere else, WITHIN 60 DAYS after such service.</p> | <p>(a) DANS LES 20 JOURS de la signification qui vous sera faite du présent avis de pour suite accompagné d'un exposé de la demande, si elle vous est faite au Nouveau-Brunswick ou</p> <p>(b) DANS LES 40 JOURS de la signification, si elle vous est faite dans une autre région du Canada ou dans les Etats-Unis d'Amérique ou</p> <p>(c) DANS LES 60 JOURS de la signification, si elle vous est faite ailleurs.</p> |
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If you fail to do so, you may be deemed to have admitted any claim made against you, and without further notice to you, **JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE.**

You are advised that:

- (a) you are entitled to issue documents and present evidence in the proceeding in English or French or both;
- (b) the Plaintiff intends to proceed in the English language; and
- (c) your Statement of Defence must indicate the language in which you intend to proceed.

If you pay to the Plaintiff or the Plaintiff's lawyer the amount of the Plaintiff's claim, together with the sum of \$100 for the Plaintiff's costs, within the time you are required to serve and file your Statement of Defence, further proceedings will be stayed or you may apply to the court to have the action dismissed.

Si vous omettez de le faire, vous pourrez être réputé avoir admis toute demande formulée contre vous et, sans autre avis, **JUGEMENT POURRA ETRE RENDU CONTRE VOUS EN VOTRE ABSENCE.**

Sachez que:

- (a) vous avez le droit dans la présente instance d'émettre des documents et de présenter votre preuve en français, en anglais ou dans les deux langues;
- (b) le demandeur a l'intention d'utiliser la langue _____; et
- (c) l'exposé de votre défense doit indiquer la langue que vous avez l'intention d'utiliser.

Si, dans le délai accordé pour la signification et le dépôt de l'exposé de votre défense, vous payez au demandeur ou à son avocat le montant qu'il réclame, plus \$100 pour couvrir ses frais, il y aura suspension de l'instance ou vous pourrez demander à la cour de rejeter l'action.

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THIS NOTICE is signed and sealed by the Court of Queen's Bench by Amanda Evans, Clerk of the Court at Saint John, on the 14th day of February, 2018.

CET AVIS est signe et scelle au nom de la Court du Bank de la Reine par greffier de la Cour a ce , 2018.

Court Seal _____
(Clerk)

Sceau de la Cour (greffier)

Address of court office:

Adresse du greffe:

COURT OF QUEEN'S BENCH
Saint John Law Courts - Trial Division
10 Peel Plaza, 2nd Floor
Saint John, NB E2L 4Y9

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AMENDED STATEMENT OF CLAIM

DEFINITIONS

1. The following definitions apply for the purposes of this Claim:
 - (a) "**Affected Property**" means those commercial, residential, and other properties in West Saint John subject to a change in water source from the Spruce Lake Reservoir to a new well source under the Safe Clean Drinking Water Project.
 - (b) "**Agents**" means anyone authorized by a person (including a crown corporation or person carrying out executive functions of government or person exercising powers or duties under a statute or regulation) to act on behalf of that person, and includes where appropriate, agents, servants, contractors, directors, officers, employees;
 - (c) "**Class Act**" means the *Class Proceedings Act*, R.S.N.B. 2011, c 125, as amended from time to time;
 - (d) "**Class Area**" means, West Saint John, being all lands within the city limits of the City of Saint John on the west side of the Saint John River and which are serviced by water supplied by the City of Saint John;
 - (e) "**Class Members**" means all persons, including individuals, partnerships and/or corporations, who ~~satisfy the following criteria:~~
 - ~~i. The person was were the owner or occupant of an Affected Property during the Class Period; and~~
 - ~~ii. The person suffered any loss as a result of the change in water source as described herein;~~
 - (f) "**Class Period**" means the period from the change in water source on September 2017 to the present time to August 31, 2018;

THE PARTIES

2. The first Plaintiff, Frances Brownell, is a resident of Saint John, New Brunswick and is the registered owner of PID 407882, having civic address 443 Dwyer Road, Saint John and PAN 1718127.
3. The second Plaintiff, Cheryl Steadman (together with the first Plaintiff, Frances Brownell, the "**Representative Plaintiffs**"), is a resident of Saint John, New Brunswick and is the registered owner of PID 55162184, having civic address 9

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Acorn Drive, Saint John and PAN 5451612. (together with the above-mentioned property of Frances Brownell, the "**Representative Plaintiffs' Properties**").

4. The Plaintiffs bring this action on their own behalf and on behalf of all Class Members. Where a fact is alleged or a claim made herein by the Representative Plaintiffs, the Representative Plaintiffs state or make the analogous fact or claim on behalf of all other Class Members.
5. The Plaintiffs rely upon the Class Act, both generally and in particular sections 2(1), 3, 6, 8, and 9.
6. The Defendant is the City of Saint John a body corporate.

MATERIAL FACTS

7. This action is brought on behalf of all ~~current owners and/or occupants in Saint John, New Brunswick of the Affected Properties (hereinafter referred to as "Class Members")~~.
8. The City of Saint John, including its ~~a~~ Agents for which it is vicariously liable, (the Defendant) engaged in a program to renovate and replace the source and means of supply of drinking water to Representative Plaintiffs and Class Members, publicly named Safe Clean Drinking Water.
9. The Defendant at all times material had building by-laws relating to any construction on the Affected Properties and also a system of inspections carried out by building inspectors, for which the Defendant charged a fee. The Defendant knew or ought to have known of the physical and chemical properties of the water distribution system in the Affected Properties as all of the Affected Properties at one time or another having a building permit for which plans were filed or ought to have been filed and a system of inspection of actual construction.
10. The Defendant changed the source of drinking, washing and bathing water supplied to the Representative Plaintiffs and Class Members within the Class Area from the Spruce Lake Reservoir to a new well source which water source had its

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distinct physical and chemistry properties ('distinct chemistry') known to the Defendant.

11. This change in water supply and/or change in pressure exposed Representative Plaintiffs and Class Members' water pipes to a distinct chemistry which de-scaled those water distribution pipes and caused the water distribution pipes to be damaged and/or fail.
12. This change in water supply and/or change in pressure exposed Representative Plaintiffs and Class Members' chattels, including appliances, equipment and water heaters to a distinct chemistry that caused the chattels, including appliances, equipment and water heaters to be damaged and/or fail.
13. The Defendant owed the proposed Representative Plaintiffs and the Class Members a duty of care.
14. The Defendant City of Saint John was negligent and breached duties of care to the proposed Representative Plaintiffs and the Class Members, the particulars of which include:
 - (a) Failure to adequately test, analyze and/or review the distinct chemistry and the condition generally of the water pipes that were in use in the eClass aArea prior to, during and/or subsequent to the change in the source of drinking, washing and bathing water.
 - (b) Failure to adequately design, construct, inspect, repair, maintain, operate and supervise the water supply and distribution system in the Class Area which was and is owned, operated and controlled by the Defendant prior to, during and/or subsequent to the change in the source of drinking, washing and bathing water.
 - (c) Failed to collect, calculate, analyze and/or inspect the data both of the distinct chemistry and/or pressure in a timely manner or at all.
 - (d) Deliberately creating and increased the hazards, threats and dangers that arose by changing the source of drinking, washing and bathing water.
 - (e) Failure to adequately warn the Representative Plaintiffs and the Class Members of the hazards, threats and dangers that arose from the change in the source of drinking, washing and bathing water.

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- (f) Such further and other particulars as the Plaintiff may become aware
15. At all material times, it was reasonably foreseeable that the Defendant's actions or inaction could harm the Representative Plaintiffs and the Class Members.
16. The Defendant was in a relationship of proximity with the Representative Plaintiffs and the Class Members by virtue of:
- (a) having authority and control over the change of the source water supplied to the Representative Plaintiffs and Class Members;
 - (b) specific interaction arising from the change of the source water; and
 - (c) the Defendant's special and professional skill and knowledge in respect of changing the source of water supplied to the Representative Plaintiffs and Class Members.
17. At all material times, the Defendant represented to the Representative Plaintiffs and the Class Members that the change of the source of water would be conducted in a safe manner, and the Defendant undertook to the Representative Plaintiffs and the Class Members to do so. This representation and undertaking were relied upon by the Representative Plaintiffs and the Class Members.
18. Before and during the Class Period, the Defendant inspected or caused to inspect the source and means of supply of water to the Representative Plaintiffs and Class Members. The Defendant was aware of the dangers posed by the change of the source of water and the ineffective measures that had been taken to prevent these dangers.
19. The Representative Plaintiffs and the Class Members reasonably expected that the Defendant would be mindful of the damages that might arise out of its misconduct in relation to the change of the source of water supplied to the Representative Plaintiffs and Class Members.
- ~~20. In the alternative the Representative Plaintiffs and the Class Members claim for a breach of contract. The Defendant charged the Representative Plaintiffs and the Class Members a fee for the delivery of water to the water distribution system of~~

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~~the Representative Plaintiffs' Properties and the Class Members Properties. The Defendant knew or ought to have known of the water distribution system of the Representative Plaintiffs and the Class Members and there was an implied term that the water supplied would be fit for the purpose and would not damage the water distribution system of the Representative Plaintiffs and the Class Members.~~

- ~~21. The Plaintiff pleads and relies upon the *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1 as amended and in particular sections 1, 2, 4, 5, 7, 10, 11, 15, 24, 25, 27 and 28 thereof.~~
- ~~22. In the alternative, the Plaintiff pleads and relies upon the *Sale of Goods Act*, RSNB 1973, c. S-1, as amended, and in particular section 15 thereof.~~
20. The proposed Representative Plaintiffs and other Class Members have suffered an ascertainable loss as a result of the Defendants' acts and/or omissions associated with the Affected Properties, including but not limited to: out-of-pocket loss, including costs of repairs and/or replacement of chattels and structural repairs, alternate accommodation costs diminution in value of property, physical and emotional damage.

DAMAGES SUFFERED BY CLASS MEMBERS

21. As a result of the Defendant's acts and/or omissions ~~and in the alternative for breach of contract~~, the proposed Representative Plaintiffs and Class Members have suffered or will suffer damages including:
- (a) Pecuniary losses being the cost of repair of damaged pipes and chattels including appliances, equipment and water heaters;
 - (b) Cost or repair of water damage caused by escaping water including all repairs to building and structures necessary as a result of repairs to water pipes undertaken;
 - (c) Past and future cost of repairs and/or replacement of water pipes, equipment and appliances;
 - (d) Cost of having all pipes inspected including all joints to determine the extent of repairs needed on a semiannual basis.

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- (e) Diminution in value of real property;
- (f) Loss of use and enjoyment of property and business;
- (g) Loss of the amenities of life;
- (h) Mental, emotional, psychological damages and loss of enjoyment of life; and
- (i) Such further and other damages as may occur.

PUNITIVE & EXEMPLARY DAMAGES

22. The acts and omissions of the Defendant referred to herein were conducted in a reckless and grossly negligent manner. As a result of the conduct of the Defendant and its acts and omissions referred to herein, an award of punitive damages to recognize the purposes of class actions, protect consumers and to punish and deter wrongful corporate conduct is entirely appropriate.

REMEDY SOUGHT

23. The proposed Representative Plaintiffs, on their own behalf and on behalf of the Class Members, claim:
- (a) An order certifying this proceeding as a Class Action pursuant to the *Class Proceedings Act*, S.N.B. 2011, c.125 and appointing Cheryl Steadman and Frances Brownell as Representative Plaintiffs for the class and any appropriate subgroup thereof;
 - (b) Damages for:
 - (i) All cost of repairs to water system including ancillary costs incurred during repairs
 - (ii) All cost of repairs or replace chattels including appliances equipment and water heaters including ancillary costs incurred during repairs
 - (iii) Future cost of repairs and/or replacement of water system, equipment and appliances
 - (iv) Cost of testing of all of the water pipes, equipment and appliances of each Class Member at least twice over the next twelve months
 - (v) Diminution in property value and loss of use and enjoyment of real property
 - (vi) Loss of the amenities of life, for mental, emotional and psychological harm including loss of the enjoyment of life.

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- (c) An Order for the aggregate assessment of money relief and distribution therefore to the proposed Representative Plaintiffs and Class Members;
- (d) Punitive damages;
- (e) Costs;
- (f) Interest; and
- (g) Such further and other relief as Counsel may advise and this Honourable Court may permit.

DATED at Saint John, New Brunswick this 14th day of February 2018.

Rodney J. Gillis, Q.C.
GILBERT McGLOAN GILLIS
Solicitors for the Plaintiffs

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