S-225194

ACTION NO. _____
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

JAKE PHILLIP LOPEZ SMITH and RACHELLE LYNN DESCHAMPS

PLAINTIFFS

AND

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and ATTORNEY GENERAL OF CANADA

DEFENDANTS

Brought under the *Class Proceedings Act,* R.S.B.C. 1996, c. 50

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiffs for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

(a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

(a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff,

(a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,

(b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or

(d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFFS

Part 1: STATEMENT OF FACTS

Parties

1. The plaintiff, Jake Phillip Lopez Smith, is an in individual resident of British Columbia with an address for service in these proceedings c/o Miller Titerle Law Corporation at 300-638 Smithe Street, Vancouver, British Columbia, V6B 1E3.

2. The plaintiff, Rachelle Lynn Deschamps, is an in individual resident of BC with an address for service in these proceedings c/o Miller Titerle Law Corporation at 300-638 Smithe Street, Vancouver, British Columbia, V6B 1E3.

3. The defendant, Her Majesty the Queen in right of the Province of British Columbia (the "**Province**" or the "**provincial Crown**"), delivers child and family services in BC. It provides these services largely through its Ministry of Children and Family Development ("**MCFD**"). It has an address for service at PO Box 9290 Stn Prov Govt, Victoria, BC.

4. The defendant, Attorney General of Canada ("**Canada**" or the "**federal Crown**"), is named in these proceedings as the legal representative of Her Majesty the Queen in Right of Canada, with an address for service at 900 – 840 Howe Street, Vancouver, BC.

5. Mr. Smith brings this action on his own behalf and on behalf of all Indigenous children (including First Nations, Métis, and Inuit, but excluding federally funded First Nations children ordinarily resident on a reserve) who, while under the age of 19 , were taken into out-of-home care by the Province, an Indigenous Child and Family Services (or "**ICFS**") Agency, or any agents thereof (collectively, the "**Child Class**") between January 1, 1992 and the date of certification of this action as a class proceeding or such other date as the Court may determine to be appropriate (the "**Class Period**").

6. Ms. Deschamps brings this action on her own behalf and on behalf of all persons who were the caregiving mother, caregiving father, caregiving grandmother or caregiving grandfather

of a member of the Child Class at the time of removal during the Class Period (collectively, the "**Family Class**" and, together with the Child Class, the "**Class**").

Overview

7. This case impugns the systemic discrimination perpetrated against the Class by Canada and the Province in the provision of child and family services because of their race, nationality and ethnicity.

8. Through discriminatory and substantively unequal child and family services, the provincial Crown:

(a) failed to adequately fund Indigenous child services off-reserve;

(b) failed to account for the specific needs and circumstances of the Indigenous people for child and family services appropriate to their needs; and

(c) structured funding for Indigenous child and family services off-reserve in a manner that incentivizes removing children from their families rather than supporting families to provide adequate care to their children at home.

9. The federal Crown, despite its constitutional, legal and historic obligations with respect to Indigenous peoples, adopted a policy of abandonment and avoidance in the face of repeated calls for appropriate child and family services for Indigenous people.

10. Canada arbitrarily restricted its funding of services to some subsets of Indigenous peoples (*e.g.*, First Nations on-reserve, where Canada also failed for decades to provide non-discriminatory services, although those failures are not the subject of this action), leaving the Class at the mercy of the provincial Crown's discrimination.

11. Despite being aware of these issues for a significant period of time, the defendants have failed to remedy them.

12. The defendants' conduct discriminates against the Class on the basis of race, national, and ethnic origin, perpetuating the historical disadvantages suffered by the Indigenous class members, contrary to the substantive equality protections of the Class under section 15 of the *Canadian Charter of Rights and Freedoms*.

13. The defendants' impugned conduct, including but not limited to the discriminatory funding practices, promotes the arbitrary removal of Indigenous children from their families, thus also violating class members' constitutional protections of life, liberty and security of person under section 7 of the *Charter* .

14. The defendants are in a fiduciary relationship with the Class on account of the Class's indigeneity. Both defendants also owe fiduciary duties to the Class, which duties required them to act in the best interests of the Class with respect to child and family services. The defendants breached those duties.

15. The defendants owe a statutory and common law duty of care to the Class, by virtue of the Province's position as the funder and administrator of child and family services, and by virtue of Canada's constitutional and other legal obligations toward the Class, amongst others. That duty of care required the defendants to take steps to safeguard the Child Class's safety, Indigenous heritage and community ties, and to prioritize and adequately fund Prevention Services in addition to Protection Services (as defined below). The provincial Crown failed to discharge this duty. The federal Crown completely disregarded its duty to ensure that Indigenous people in British Columbia received non-negligently funded child and family services.

16. Consequently, the defendants have:

(a) violated the class members' rights as guaranteed under sections 7 and 15 of the *Charter*;

(b) breached their fiduciary duty to the Class and failed to act in accordance with the honour of the Crown toward the Class; and

(c) were negligent to the Class.

17. The impugned conduct described herein has uniformly and consistently disadvantaged, and continues to disadvantage, Indigenous children and families in the Class throughout the Class Period.

18. As a direct result of the defendants' acts and omissions, the Class suffered harm including the perpetuation of intergenerational trauma; loss of culture, language, and connection to their families and communities; neglect and abuse in care; pain and suffering; and increased rates of self-destructive behaviour, such as substance abuse, suicide, and incarceration; and the

deprivation of the Family Class of the ability to care for their own children in the absence of substantively equal child and family services.

Indigenous Child Services Before January 1, 1992

19. Canadian history has been replete with racism and systemic discrimination against Indigenous peoples.

20. Starting in the 19th century, the federal Crown systematically tore Indigenous children away from their families and placed them in Indian residential schools. The full horrors of these institutions were described in the Truth and Reconciliation Commission's 2015 final report , which concluded, amongst others:

(a) The establishment of residential schools can be best described as cultural genocide.

(b) The goal was not to educate Indigenous children, but primarily to break their link to their culture and identity, and thus for Canada to divest itself of its legal and financial obligations to Indigenous people and gain control over their land and resources.

(c) Roughly 150,000 Indigenous children were forced to attend residential schools, often taken forcibly from their parents and not allowed to return for years at a time.

(d) Child neglect was institutionalized, and the lack of supervision created situations where students were easy prey to sexual and physical abusers.

(e) Until 1950, the death rate at residential schools was consistently more than twice the death rate for children outside residential schools, and at its peak it was almost four times as high, resulting in mass unmarked graves, that are only now coming to light.

(f) Overall, the Canadian government essentially declared Indigenous people to be unfit parents. Indigenous parents were labelled as being indifferent to the future of their children—a judgment contradicted by the fact that parents often kept their children out of schools because they saw those schools, quite accurately, as dangerous and harsh institutions that sought to raise their children in alien ways.

21. The last residential school in British Columbia did not close until 1985.

22. The same discriminatory motives and unfounded racist stereotypes about the fitness of Indigenous parents have permeated through the provincial child and family services since their inception. Specifically, for decades, child and family services provided by the Province have prioritized "protection" over "prevention", and failed to provide substantive equality to the Class.

23. "Protection services", also called "removal" and sometimes called "apprehension", include child and family services taking a child away from their family in response to perceived concerns about the child's safety or wellbeing. The child is then placed into out-of-home care with individuals or institutions who may or may not be Indigenous. This model of child services ("**Protection Services**") presumes that the parent is and will always be unfit to care for the child. In all properly founded child and family welfare systems, Protection Services should be a last resort solution, rather than the first step.

24. "Prevention services" encompass a wide variety of less intrusive alternatives to Protection Services, including, amongst others:

(a) public awareness campaigns designed to identify problematic circumstances, such as when a child may be neglected or malnourished;

(b) services that provide parents with resources to address those circumstances, such as toolkits for managing specific disabilities;

(c) services provided directly to parents, such as daycare, or help them find employment, housing, or cultural or spiritual guidance;

(d) services provided directly to children, such as language and cultural supports, culturally appropriate counselling, and mental health services; and

(e) in general, services appropriate for Indigenous families aimed at helping the Family Class care for their children at home

("**Prevention Services**").

25. The focus on Protection Services over Prevention Services directly resulted in the "Sixties Scoop". The Sixties Scoop refers to the period between 1951 and 1991 when Indigenous children were taken into care *en masse* and placed with non-Indigenous parents where they were not raised in accordance with their cultural traditions nor taught their traditional languages.

26. At various points during the Sixties Scoop:

(a) one in three Indigenous children were separated from their families by adoption or fostering;

(b) approximately 70% of those children were adopted into non- Indigenous homes; and

(c) it was common practice in British Columbia to "scoop" almost all newly born Indigenous children from their mothers on-reserve.

27. The Sixties Scoop hurt Indigenous children and families in British Columbia. While the types of out of home placement that Indigenous children ended up in varied from well-intentioned to extremely abusive, even the best of those placements were ill-equipped to raise Indigenous children in a culturally sensitive manner and with a view to stopping the cycle of intergenerational trauma exacted on Indigenous people.

28. Things have not particularly improved in British Columbia since the Sixties Scoop. The defendants have continued the same conduct that created the disproportionate discriminatory cycle of Indigenous child removals, including, but not limited to, inadequate levels of child and family service funding to Indigenous children and families, lack of appropriate Prevention Services (which were only made available to those who were already wards of the Superintendent, often rendering the removal of the child from their family the only way in which support could be given to the child).

29. In 1992, a community panel called the "Aboriginal Committee of the Community Panel" reviewed and prepared a report on family and child protection legislation in British Columbia (the "**1992 Report**"). The 1992 Report, entitled "Liberating our Children – Liberating our Nation", contained a comprehensive summary of the negative effects of provincial child protection legislation and a recommendation that the Province introduce legislation to guarantee an adequate level of financial resources for Indigenous child and family services, and in particular a wide range of Prevention Services. The defendants both ignored that recommendation.

30. The 1992 Report also contained recommendations that the Province provide sufficient funding for the following Prevention Services for Indigenous parents:

(a) holistic healing centres capable of addressing the mental, physical and spiritual needs of the people it serves;

(b) respite and homemaker services for single parents;

(c) daycare for Indigenous children located both on and off-reserve;

(d) family support, counselling and re-establishing appropriate parenting;

(e) suicide prevention services, as well as post-suicide counselling and support services; and

(f) recreational facilities, educational opportunities, and cultural, travel and exchange activities comparable to those available to non-Indigenous communities in British Columbia.

31. The defendants did not heed any of those recommendations.

32. The 1992 Report concluded that many services, particularly those dealing with personal and emotional problems, were only accessible to Indigenous communities if the services were staffed by Indigenous people from the same cultural community. It recommended that, in determining an equal level of services to the Indigenous community, governments must not assume that universal, non-Indigenous services are accessible to the Indigenous community.

33. The defendants did not heed that recommendation either.

First Nations Child Services on Reserve During the Class Period

34. The Class does not include federally funded First Nations individuals who were ordinarily resident on-reserve. The claims of those individuals are advanced in the certified Federal Court class action, *Xavier Moushoom et al v Canada*, Court File Nos. T-402-19 / T-141-20 ("**Moushoom Class Action**").

35. However, similar to the Sixties Scoop, the history of the discriminatory underfunding of child and family services on-reserve helps contextualize the impugned conduct herein.

36. In 1991, Indian and Northern Affairs Canada ("**INAC**", a predecessor to what are now known as "Indigenous Services Canada" and "Crown-Indigenous Relations and Northern Affairs Canada") introduced the Federal First Nations Child and Family Services program (the "**FNCFS Program**") and Directive 20-1, a policy statement setting out a funding formula for the FNCFS Program. These funded Indigenous child services on-reserve pursuant to a formula.

37. However, the funding was never sufficient to meet the needs of First Nations children on-reserve. Directive 20-1 also prioritized Protection Services over Prevention Services, reflecting

the same discriminatory stereotype about Indigenous parents' fitness that led to the Indian residential schools and the Sixties Scoop. Specifically:

(a) the average per capita per child in care expenditure of the system funded Canada was 22% lower than the average expenditure of provinces on non-Indigenous children;

(b) Directive 20-1 provided the same level of funding to agencies regardless of how broad, intense, or costly the range of services was; and

(c) Directive 20-1 did not provide adequate resources to allow FNCFS Agencies to do legislated or targeted prevention, alternative programs, and least disruptive/intrusive measures for children at risk.

38. These shortcomings were brought to the Crown's attention in 2000, in a report prepared for INAC and the Assembly of First Nations entitled "First Nations Child and Family Services: Joint National Policy Review" (the "**2000 Report**").

39. There were additional issues with the Directive 20-1, including, amongst others, that:

(a) the funding that INAC was providing for child welfare services was not based on the actual cost of delivering those services;

(b) INAC paid FNCFS Agencies in British Columbia a pre-determined amount per day of "protective care" and made no attempt to relate this amount to the actual expenses incurred for those children; and

(c) certain provincial legislative requirements and standards were not being fully met by FNCFS Agencies due to a lack of funding or of flexibility in using funds available, and therefore that some on-reserve First Nations children were being placed into care rather than receiving Prevention Services.

40. These issues were published in a 2008 report authored by the Auditor General of Canada (the "**2008 Report**").

41. In 2011, the federal Crown introduced a new funding formula in some provinces, called the Enhanced Prevention Focused Approach (the "**EPFA**"). The purported goal of the EPFA was to provide more funding, especially for Prevention Services. However, it fell short of that goal.

42. In 2016, the Canadian Human Rights Tribunal rendered a decision in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the "**2016 CHRT Decision**") finding, amongst others, that:

(a) the federal Crown has a "constitutional responsibility towards Aboriginal peoples" regarding the provision of child and family services;

(b) that responsibility cannot be evaded by delegating child and family services to a province because the federal Crown has the power to remedy inadequacies;

(c) neither Directive 20-1 nor the EPFA adjusted for the cost of living, which led to the under-funding of services and to distortion in the services funded, namely more Protection Services and fewer Prevention Services;

(d) Directive 20-1 incentivized the removal of children from their homes and communities, and the same underfunding and incentive issues were incorporated into the EPFA; and

(e) due to both the underfunding and the incentive to prioritize Protection Services over Prevention Services, both Directive 20-1 and the EPFA are discriminatory, in breach of section 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6.

Indigenous Child Services off Reserve Since 1992

43. Most funding for Indigenous child services off-reserve in British Columbia is provided by the provincial Crown. Services are provided directly by MCFD staff, indirectly through Indigenous Child and Family Services Agencies ("**ICFS Agencies**"), formerly called Delegated Aboriginal Agencies ("**DAAs**"), or in some cases indirectly by Indigenous nations. These provincial programs have suffered the same deficiencies as Canada's FNCFS Program, but with even less funding.

44. In 2006, various shortcomings of the BC Indigenous child and family services programs were summarized in the *BC Children and Youth Review* (the "**2006 Report**"), which found that, in many cases, ICFS Agencies face greater obstacles than non-Indigenous agencies, and do so with fewer resources.

45. In 2007, the Directors of the ICFS Agencies wrote a letter to the MCFD, requesting that it use a fair and equitable funding formula in line with actual costs to the ICFS Agencies. The MCFD replied, acknowledging that the need for a fair formula had been recognized for some time and

explaining that a project had been commenced in 2006 to develop such a model (the "**2007 Response**"). Nevertheless, the Province failed to actually remedy the issues and the ICFS Agencies were forced to repeat their request in 2018, and then again in September 2021. The latter request reiterated that the existing funding model is based on the number of children in care, and was therefore a clear example of systemic racism.

46. As of today, MCFD has not yet introduced a funding model respectful of Indigenous peoples' constitutional substantive equality rights or even in line with actual costs. The issues with the provincial provision of Indigenous child and family services off-reserve have persisted. As of 2016:

(a) Indigenous children and youth in BC were over 15 times more likely to be in state care than non-Indigenous children and youth.

(b) The MCFD demonstrated a lack of willingness to return Indigenous children to their parents, even in cases where parents met conditions necessary for the return of their children, or imposed onerous conditions on Indigenous parents.

(c) Ignorance about Indigenous communities and leadership existed, due in part to the minimal or nonexistent communication between senior MCFD officials and Indigenous communities and their leaders about the children from these communities who were in care.

(d) MCFD displayed inadequate, culturally insensitive, and discriminatory early-stage inquiries into whether Protection Service-style interventions were justified.

(e) Funding for Indigenous child services off-reserve had fallen such that wages for most DAA workers were significantly lower than wages for comparable workers who work with non-Indigenous children, resulting in issues with staff recruitment and retention.

(f) MCFD provided inadequate funding for Prevention Services like "family preservation".

(g) MCFD displayed an inherent financial policy bias against permanency options for Indigenous children, including in cases where children had the opportunity to remain in the care of their own family.

(h) Most MCFD staff involved in planning permanent placements were not adequately educated on "custom adoption", a process whereby the child is adopted into a family in accordance with the adoption practices of their own Indigenous community.

(i) Efforts to maintain Indigenous children's identities were generic and inadequate, resulting in a loss of a sense of connection to their families, cultures, and communities.

(j) Children and youth in care were routinely separated from their communities and lost access to their languages and community support networks.

47. These shortcomings were brought to the defendants' attention again in a 2016 report (the "**2016 Report**"), authored by Grand Chief Ed John, then serving as Special Advisor on Indigenous Children in Care. The 2016 Report also recommended the provincial Crown legislatively prohibit removing a child without a court order.

48. In March 2017, the Representative for Children and Youth submitted a report to the Legislative Assembly of British Columbia entitled "Delegated Aboriginal Agencies: How Resourcing Affects Service Delivery" (the "**2017 Report**"), alerting the defendants again to the deficiencies, including that:

(a) The Province lacked a standardized method for accounting for the unique needs of remote and smaller DAAs, cost-of-living agencies, issues with recruitment and retention of staff, or geographical impacts on operational time and expense.

(b) The MCFD lacked necessary data for determining both the service needs of Indigenous children and families and the staff resources required to provide appropriate levels of culturally-based services.

(c) Several DAAs noted different, inequitable funding between their offices and MCFD offices regarding supplemental supports for foster parents.

(d) Most DAAs lacked funding to offer their own culturally-based foster care training to potential caregivers.

(e) DAAs reported that they did not receive enough funding from INAC or MCFD to cover staffing and costs of service delivery to children, youth, and families. This

lack of funding resulted in clear repercussions for recruitment and retention of qualified staff, in part because of wage and benefits disparities with MCFD.

(f) DAAs were still viewed by MCFD as contractors who must bid against each other for essential funding for the Class.

49. Later in 2017, MCFD introduced the first phase of its "Standardized Funding Approach" purportedly to bring some stability of funding to ICFS Agencies in BC.

50. Nevertheless, as of 2022, the Provinces' provision of child and family services off-reserve remains inadequate, because, amongst other things:

(a) ICFS Agencies providing services off-reserve remain unable to access a needs-based model of funding.

(b) Salaries for ICFS Agency staff are directly linked to caseloads of children in care, and reimbursement of actual in-care costs are guaranteed to any agency that does off-reserve work, which parallels the federal Directive 20-1 that the Canadian Human Rights Tribunal found to be systemically discriminatory.

(c) The Standardized Funding Approach for ICFS Agencies serving children who live off-reserve is limited to Protection Services only, and funding for Prevention Services is attained in a piecemeal fashion, which the Canadian Human Rights Tribunal found to be systemically discriminatory in the case of on-reserve First Nations children and families.

(d) ICFS Agencies funded by MCFD for off-reserve child welfare services must still compete for contracts to receive Prevention Services funding. Instead of the best interests of the Indigenous children and families whose lives are in play, the driving MCFD concern is to spend less.

(e) Due to recent increased funding by Canada for First Nations child services on-reserve as a result of human rights and constitutional litigation such as the Moushoom Class Action and the 2016 CHRT Decision and subsequent orders, Indigenous child services off-reserve are now funded at significantly lower rates than Indigenous child services on-reserve.

51. Accordingly, the Province's Indigenous child services off-reserve under the Standardized Funding Formula remains discriminatory.

52. In March 2022, the Representative submitted another report to the Legislative Assembly, entitled "At the Crossroads: The Roadmap from Fiscal Discrimination to Equity in Indigenous Child Welfare" (the "**2022 Report**"), which again alerted the defendants to the above concerns.

Legislative Scheme

53. The operation of Indigenous child and family services off-reserve differs strikingly from what the Province undertook to do in the *Child, Family and Community Service Act*, RSBC 1996, c 46 (the "***Act***").

54. Section 2 of the *Act* lists a series of guiding principles, including that:

> (b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
>
> (b.1) Indigenous families and Indigenous communities share responsibility for the upbringing and well-being of Indigenous children;
>
> (c) if, with available support, a family can provide a safe and nurturing environment for a child, support services should be provided;
>
> ...
>
> (e) kinship ties and a child's attachment to the extended family should be preserved if possible;
>
> (f) Indigenous children are entitled to
>
> > (i) learn about and practise their Indigenous traditions, customs and languages, and
> >
> > (ii) belong to their Indigenous communities;

55. As such, the *Act* requires that substantively equal services be provided to Indigenous peoples and Prevention Services be prioritized over Protection Services. If Protection Services cannot be avoided, the *Act* requires placements that prioritize family connections.

56. The *Act* also emphasizes the importance of exposing Indigenous children to Indigenous cultures and languages. In addition to s. 2(f) above, the *Act* states:

> 4(2) If the child is an Indigenous child, ... the following factors must be considered in determining the child's best interests:
>
> > (a) the importance of the child being able to learn about and practice the child's Indigenous traditions, customs and language;

(b) the importance of the child belonging to the child's Indigenous community.

57. The *Act* further points to the need for substantive equality by stating that Indigenous child services must reflect a legacy of discrimination. It states that "the impact of residential schools on Indigenous children, families and communities should be considered in the planning and delivery of services to Indigenous children and families" (s. 3(c.1)).

58. These legislative requirements, amongst others, inform the standard of care required, as detailed below.

The Plaintiffs' Experience

Mr. Smith

59. Mr. Smith is a First Nations individual of Haida Gwaii in British Columbia, who is a registered Indian pursuant to the *Indian Act*, RSC 1985, c I-5. He was born in 1988 and lived off-reserve in Vancouver with his parents. Mr. Smith seeks to represent the Child Class.

60. Mr. Smith's stepfather regularly fought with his mother. When he was three or four years old, provincial child welfare authorities removed him from his home. Mr. Smith was placed in numerous foster homes and other types of provincial out-of-home placements during the Class Period, until he was eventually made a permanent Crown ward. While in care, Mr. Smith suffered racism, isolation, and neglect.

61. At the age of majority, child welfare authorities abruptly left Mr. Smith outside of the child and family welfare system. He received no post-majority assistance and had to fend for himself. Eventually, Mr. Smith was able to find shelter with his family to avoid homelessness.

62. Over the years that followed, Mr. Smith struggled with the effects of the trauma that he experienced as an Indigenous child in the Province's child and family welfare system. As a result of that trauma, he struggled with substance abuse and mental and emotional health challenges. Through Mr. Smith's own hard work and the community support that he found after leaving the child welfare system, he has been able to turn his life around and overcome many of those challenges. However, his childhood trauma continues to adversely affect his life.

Ms. Deschamps

63. Ms. Deschamps is a First Nations individual, registered Indian, and member of the Red Rock Indian Band in Nipigon, Ontario. She lives off-reserve in Coquitlam, BC. Ms. Deschamps represents the Family Class.

64. In 2016, Ms. Deschamps and her then 12-year-old daughter (who is also a First Nations individual and registered Indian) lived off-reserve in Abbotsford, BC.

65. In or about late December 2016, while Ms. Deschamps' daughter was home alone, the police attended at Ms. Deschamps' house, removed her daughter, and placed her in the custody of a child welfare agency in Abbotsford. Ms. Deschamps was advised that the reason for her daughter's abrupt removal was that her daughter did not have a cellphone when she was home alone.

66. Ms. Deschamps commenced a desperate and frantic attempt to retrieve her child. Her daughter remained in provincial care for two weeks while Ms. Deschamps struggled to have her return home. In the end, Ms. Deschamps was able to recover her daughter, but not before both Ms. Deschamps and her daughter suffered extreme anxiety and trauma.

67. Child welfare authorities have had no basis to remove, and have not removed, Ms. Deschamps' daughter ever again. However, Ms. Deschamps and her daughter continue to cope with the trauma that they suffered because of the removal.

The Defendants Breached Their Fiduciary Duties to the Class

The Province's Breach of its Fiduciary Duties

68. Throughout the Class Period, the Province, in its capacity as the provincial Crown, was in a fiduciary relationship with Indigenous peoples in British Columbia generally, and with the Class specifically. The Province was duty-bound to act in the best interests of the Class and in compliance with the honour of the Crown.

69. Further, while in state care, the Province stood in *loco parentis* with respect to Mr. Smith and the Child Class within its care. Accordingly, the relationship between Mr. Smith and the Child Class members and the Province was that of guardian and wards, an established fiduciary relationship.

70. Further, the Province undertook to act in the best interests of Mr. Smith and the Child Class.

71. The Province exercised discretionary control or power over all aspects of the lives of the Class, including their Indigenous culture and identity, their family unity and connections, life and safety, as the MCFD is statutorily empowered to make decisions impacting the residence, access to family, culture, and language, access to services, etc. of Mr. Smith and the Child Class members.

72. The *Act* imposed a duty on the Province to act in the best interests of Mr. Smith and the Child Class when rendering decisions to remove those children from their homes and all other decisions impacting those children while they remained in state care. Further, under s. 2(f) of the *Act,* MCFD is obligated to administer the *Act* in accordance with the principle that Indigenous children are entitled to learn about and practice their Indigenous traditions, customs and languages.

73. The Class was particularly vulnerable to the exercise of the discretion or power that the Province had over them as fiduciary.

74. The Province's fiduciary duty required it to act loyally and in the best interests of the Class by, amongst others:

(a) respecting their constitutional substantive equality rights as Indigenous people;

(b) not funding Indigenous child services off-reserve at a level lower than it funded non-Indigenous child services, after accounting for the fact that serving the prior involves higher costs due in part to the intergenerational trauma it caused through residential schools and the Sixties Scoop;

(c) providing access to Preventative Services; and

(d) not structuring its funding to require service providers to prioritize Protection Services over Preventive Services.

75. The Class stood to be adversely affected by the MCFD's exercise of discretion or control under the *Act* on behalf of the provincial Crown. The Family Class's right to take care of their own children was undermined by the MCFD's exercise of discretion or control under the *Act*.

76. By engaging in the actions particularized herein, the Province breached its fiduciary duty owed to the Class. These enumerated actions amounted to the Province putting its own interests ahead of those of the Class, and committing acts that harmed the plaintiffs and the Class in a way that amounted to betrayal of trust and disloyalty.

77. As a result of the Province's breach of fiduciary duty, the plaintiffs and the Class have suffered loss and damage as particularized herein.

Canada's Breach of its Fiduciary Duties

78. Under section 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict, c 3, Canada is constitutionally responsible for "Indians, and Lands reserved for the Indians", not solely "Indians on Lands reserved for the Indians". Under section 91(24), the term "Indian" includes all Indigenous people in the Class. Canada has exclusive legislative authority over and responsibility for all Indigenous peoples, including status and non-status First Nations individuals living off-reserve, Métis, and Inuit peoples throughout British Columbia.

79. By virtue of Canada's legislative authority, section 35 of the *Constitution Act*, and the honour of the Crown, Canada stands in a fiduciary relationship with Canada's Indigenous peoples, including the Class, which gives rise to fiduciary obligations in specific circumstances. In this case:

(a) Canada has a positive duty to act in the best interests of Indigenous children and families to ensure the provision of substantively equal, adequate and culturally appropriate child welfare services off-reserve. This includes responsibilities to: (i) protect off-reserve Indigenous children and families from separation; (ii) take reasonable steps to prevent injury and loss to those off-reserve Indigenous children of their identity, culture, heritage, language, family, and federal benefits; and (iii) protect removed off-reserve Indigenous children from harm when in state care.

(b) Canada's constitutional and statutory obligations, policies, and the common law empowered and required it to take steps to monitor, fund, influence, safeguard, secure, and otherwise protect the vital interests of the plaintiffs and the Class. These obligations required particular care with respect to the interests of children and their families, whose wellbeing and security were vulnerable to Canada's exercise of its discretion.

(c) Canada wielded discretionary power to remedy inadequacies in the Province's provision of child and family services.

(d) Accordingly, Canada was, at all material times, acting in its capacity as a fiduciary with respect to the Class.

80. Canada's fiduciary duties owed to the Class were not delegable to the Province. It was empowered and obligated to monitor and remedy any gaps in the Province's provision of child and family services.

81. The mere fact that the Province was the party providing the discriminatory services did not absolve Canada of its own fiduciary obligations. Members of the Class all stood to be adversely affected by Canada's exercise, or lack thereof, of discretion or control in these circumstances.

82. As particularized herein, Canada was alerted numerous times to the discriminatory inadequacies of the provincial child and family services provided to the Class. Canada knew or reasonably ought to have known of all of the inadequacies of the Province's child and family services programs with respect to off-reserve Indigenous children and families and, in breach of the honour of the Crown and its fiduciary duties, did nothing to intervene or meet its duties owed to those groups.

83. Canada adopted a policy of denial and avoidance. By deliberately failing or neglecting to remedy blatant inadequacies in the Province's child and family services program with respect to Indigenous children and families, Canada breached the fiduciary duties it owed to the Class. Canada's deliberate inaction amounted to it putting its own interests ahead of those of the Class, and harmed the Class in a way that amounted to betrayal of trust and/or disloyalty.

The Honour of the Crown

84. The honour of the Crown is at stake in every dealing with Indigenous peoples. It required that the defendants act honourably and in good faith in each such dealing.

85. The honour of the Crown and the Crown's fiduciary duties owed to Indigenous peoples are not in competition. The Court may find that the federal and/or provincial Crown simultaneously breached the honour of the Crown and their respective fiduciary obligations in their dealings with the Class.

86. As particularized herein, the federal Crown and provincial Crown failed to diligently and purposively fulfil the honour of the Crown in these circumstances.

Negligence

The Province's Negligence

87. The *Act* imposes a statutory duty of care on the provincial Crown with respect to the Child Class, stipulating at section 2 that the *Act* must be administered "so that the safety and well-being of children are the paramount considerations". The idea that the *Act* must be administered in the "best interests of the child" permeates the *Act* and underpins the Province's duty of care. This is a high standard, requiring the Province to exercise a degree of care akin to a careful parent.

88. In addition, a common law duty of care arises by virtue of the proximity of the provincial Crown to the Class. The class members' indigeneity and the Crown's obligations in that respect specifically inform this proximity. The Province has directly undertaken to administer child and family services for the Class. This relationship is paternalistic and involves significant and direct interference in the lives of the members of the Class.

89. It is reasonably foreseeable that, as a result of the Province's administration of Indigenous child and family services, harm might come to both the Indigenous children and their families. It is further reasonable for the Class to rely on the Province to execute this administration with a considerable level of care.

90. Regardless of the source, the content of the Province's duty may be informed by the provisions in the *Act*. Section 2 of the *Act* reaffirms and lists a variety of existing principles that must inform the Crown's administration of child and family services. These duties can be broadly summarized as requiring the Province to:

(a) Provide the Class with substantively equal child and family services respectful of their indigeneity.

(b) Adequately fund and prioritize Prevention Services over Protection Services (given the strongly-indicated preference for leaving children in the care of their families), with the knowledge that Indigenous families may require more support for that purpose than non-Indigenous families.

(c) Ensure that Indigenous families and communities are involved in the upbringing of off-reserve Indigenous children, and that those children were able to remain in their communities and to learn about and practice their traditions, culture, and language.

91. As detailed above, the Province has breached this standard, including by:

(a) Providing discriminatory services to the Class.

(b) Failing to provide holistic healing centres capable of addressing mental health and spiritual needs, respite and homemaker services for single parents, daycare, family support, counselling, services to re-establish appropriate parenting, suicide prevention, post-suicide counselling, recreational facilities, educational opportunities, and cultural, travel, and exchange activities comparable to those available to non-Indigenous communities.

(c) Failing to provide sufficient funding for Prevention Services to meet legislated requirements. Those requirements, set out in the *Act*, include providing funding for Indigenous children to (i) learn about and practice Indigenous traditions, customs, and language; and (ii) address the impact of residential schools.

(d) Regularly failing to fund Prevention Services even if a nurturing environment could be created with support.

(e) Failing to pay staff who provide services to Indigenous children at levels substantively or normatively equal to staff providing services to non-Indigenous children.

(f) Failing to properly train MCFD staff in Indigenous culture, and in particular on custom adoptions.

Canada's Negligence

92. The federal Crown owes a duty of care to the Class in funding and otherwise administering child and family services. This duty arises out of the unique statutory and constitutional relationship detailed above, which creates a close and trust-like proximity between the federal Crown and all Indigenous peoples. It is reasonably foreseeable that Canada's failure to take reasonable care in its funding and policy choices might harm the Class. It is also reasonably foreseeable that Canada's inaction and avoidance would harm the Class.

93. Canada was required to fund provincial child and family services in a manner that: (i) does not discriminate against Indigenous children off-reserve; and (ii) prioritizes support for and preservation of Indigenous traditions, culture and language. The Province's discrimination did not absolve Canada of the standard of care that it was required to meet.

94. The federal Crown breached this duty of care, amongst others, by:

(a) Failing to fix its funding policy relating to Indigenous child services off-reserve, even years after it had done so for to Indigenous child services on-reserve, contrary to 2006 Report, the 2007 Response, the 2008 Report, the 2016 CHRT Decision, the 2017 Report, and the 2022 Report.

(b) Failing to cure the discriminatory deficiencies in the Province's child and family services to the Class.

(c) Failing to fund non-discriminatory Indigenous child services off-reserve.

95. The reasonably foreseeable effects of the defendants' negligence include the harm and damages particularized below.

Breach of Section 15 of the Charter

96. As detailed above, the defendants' policies make distinctions that affect the Class on the grounds of race and off-reserve residence.

97. Not only have the defendants failed to respect the substantive equality rights of the Class during the Class Period, they have even failed to provide formal or normative equality in the child and family services provided to the Class.

98. The provincial Crown funds Indigenous child services off-reserve far less than it funds non-Indigenous child services. In very recent years, the Province has also fallen behind in funding child services off-reserve at the level that Canada has been compelled to fund First Nations child services on-reserve through constitutional and human rights litigation.

99. The disparity in funding of Indigenous child services off-reserve is exacerbated by the fact that substantive equality would require the defendants to fund such services to the Class at a higher level to account for the higher costs of addressing the legacy of the defendants' historical racism, systemic discrimination and the inter-generational trauma caused to Indigenous people.

100. The conduct impugned herein had no pressing or substantial objective. It worked counter to and frustrated the defendants' professed objectives and legal obligations in the provision of child and family services to the Class. The defendants methodically implemented funding formulas and policies in ways that they knew, or ought to have known, would perpetuate the systemic, historic disadvantages suffered by the Class.

101. There was no clear legislative goal to be attained by the defendants' conduct, which was contrary to their constitutional and fiduciary obligations to the Class. Therefore, the defendants' conduct falls outside a range of reasonable alternatives available to the provincial Crown or the federal Crown.

102. The defendants' conduct has detrimentally impacted the *Charter*-protected equality rights of the Class members, many of whom are or were children and were affected because they were children. Children who are separated from their families suffer detrimental effects often far more serious and lasting than adults. Similarly, family members of removed children suffer serious and lasting trauma. The defendants' conduct has had a disproportionate effect on the equality rights of the Class members.

103. Only one alternative was constitutionally available to the defendants: to provide non-discriminatory child and family services to the Class consistent with their historic, constitutional, and statutory obligations to Indigenous children and their families. The defendants failed to do so.

104. The federal Crown has been aware of these shortcomings. It had jurisdiction and a constitutional obligation to fix them. Jointly with the provincial Crown, it also had both fiduciary and *parens patriae* duties to do so. It chose not to and is therefore equally responsible for these discriminatory impacts, individually and jointly with the provincial Crown.

105. The effect of this distinction is discriminatory in nature, and has resulted in or perpetuated substantive inequalities. The effects of the defendants' distinction include that:

(a) Child Class members are at least 15 times more likely to be placed in care than non-Indigenous children;

(b) Child Class members are more disconnected from their communities, cultures, and languages, and are more likely to resort to self-destructive behaviour; and

(c) both the Child Class and the Family Class suffer from continuing intergenerational trauma from the residential school system and the Sixties Scoop.

Breach of Section 7 of the Charter

106. The defendants have infringed the Class's section 7 *Charter* right to life, liberty and security of the person, and such infringement was not in accordance with the principles of fundamental justice.

107. As the provision of child and family services contemplates the disproportionate removal of Indigenous children from parental care, it constitutes an infringement of the right to security of the person, both for the child and the parent or guardian in question.

108. In its provision of these services, the defendants systemically underfund and arbitrarily incentivize Prevention Services over Protection Services for off-reserve Indigenous children. As a result, the provision of services provides for the arbitrary removal of off-reserve Indigenous children, in violation of section 7. The Class members have suffered direct breaches of their section 7 rights.

109. The Child Class members have suffered additional infringements on their life, liberty and security of person by this conduct, including:

(a) abuse, racism, and neglect while in care;

(b) psychological harm, resulting from their removal from their families, disconnection from their culture and communities, and continued intergenerational trauma; and

(c) spiritual harm, resulting from the loss of their Indigenous traditions, culture, and community connections.

Damages

Damages Suffered by the Plaintiffs and Class

110. As a result of the defendants' breach of their constitutional, statutory, common law, and fiduciary duties, including breaches by the defendants' agents, the plaintiffs and other class members suffered injuries and damages, including but not limited to the relief sought below, and for the following:

(a) the defendants' conduct denied the Class members non-discriminatory child and family services;

(b) Child Class members were removed from their homes and communities to be placed in care and lost their cultural identity, Indigenous customs, language, religion, spirituality and traditions;

(c) Child Class members suffered the loss of opportunity to exercise their Indigenous rights; isolation from their families and communities; loss of self-esteem and self-

worth; social dysfunctionality and alienation from family and community, forced cultural assimilation;

(d) Child Class members suffered physical, emotional, spiritual, mental pain and suffering, and adverse outcomes such as depression, anxiety, emotional dysfunction, suicidal ideation, loss of self-worth, and substance abuse;

(e) Child Class suffered sexual, physical, and emotional abuse while being in out-of-home care; and

(f) Family Class members suffered loss of guidance, care and companionship, family bonds, language, culture, community ties and resultant psychological trauma. More specifically, these class members suffered the loss of the ability to parent; they were deprived of their ability to pass their culture and identity on to their children; and suffered psychological injury, including depression, anxiety, emotional dysfunction, suicidal ideation, and loss of self-worth.

Section 24(1) Charter Damages

111. The plaintiffs and Class suffered loss as a result of the defendants' breach of sections 7 and 15(1) of the *Charter.* An award of damages under section 24(1) the *Charter* is appropriate in this case because it would compensate the Class for the loss they have suffered. *Charter* damages would also vindicate the class members' equality rights under the *Charter* and deter future discriminatory funding of child and family services by the defendants.

Aggravated, Punitive and Exemplary Damages

112. The high-handed way in which the defendants conducted their affairs warrants the condemnation of this Court. The defendants, including their agents, had express knowledge of the fact and effect of their negligent and discriminatory conduct with respect to the provision of child and family services to Class members. They proceeded in callous indifference to the foreseeable injuries that the Class would, and did, suffer.

113. The defendants had already caused unimaginable harm and suffering to Indigenous peoples through the Indian residential school system and the Sixties Scoop, and knew, or ought to have known, that their conduct particularized herein would perpetuate and exacerbate those harms to Indigenous children and their families living off-reserve.

Part 2: RELIEF SOUGHT

114. The plaintiffs claim, on their own behalf and on behalf of the Class:

(a) an order certifying this action as a class proceeding and appointing the plaintiffs as the representative plaintiffs under the *Class Proceedings Act,* RSBC 1996, c. 50;

(b) a declaration that the defendants breached their common law and fiduciary duties to the plaintiffs and to the Class;

(c) a declaration that the defendants failed to uphold the honour of the Crown;

(d) a declaration that the defendants breached sections 7 and 15(1) of the *Charter*, and such breaches are not justified under section 1 of the *Charter*;

(e) disgorgement of the defendants' ill-gotten profits or equitable compensation in the amount that the defendants ought to have paid to avoid the discriminatory effects of Indigenous child services off-reserve, as described herein;

(f) general and aggregate damages for breach of fiduciary duty and negligence in an amount to be determined at trial;

(g) damages and aggregate damages under section 24 of the *Charter* in an amount to be determined at trial;

(h) aggravated damages;

(i) exemplary and punitive damages;

(j) a reference to decide any issues not decided at the trial of the common issues;

(k) costs of notice and distribution pursuant to sections 24(1) and 33(6)(a) of the *Class Proceedings Act*;

(l) costs of this action;

(m) interest pursuant to the *Court Order Interest Act*, RSBC 1996, c 79; and

(n) such further and other relief this court may deem just.

Part 3: LEGAL BASIS

Overview

1. The plaintiffs claim against the defendants for:

   (a) breach of fiduciary duty;

   (b) breach of their duty of care to the Class;

   (c) breach of the honour of the crown with respect to the Class;

   (d) discrimination contrary the Class's equality rights under section 15 of the *Charter*, and

   (e) infringement of the Class's right to life, liberty and security of the person under section 7 of the *Charter*.

Breach of Fiduciary Duty

2. The defendants breached their respective fiduciary duties owed to the plaintiffs and the Class.

Honour of the Crown

3. The defendants have failed to diligently and purposively fulfil the honour of the Crown in their provision of child and family services to off-reserve Indigenous persons in British Columbia.

Negligence

4. The plaintiffs plead and rely on the law of negligence.

5. The defendants breached their duty of care to the plaintiffs and the Class by, amongst others, providing child and family services in a discriminatory manner, and in a manner that prioritized Protection Services over Prevention Services.

Breach of Section 15 of the Charter

6. The plaintiffs plead and rely on section 15 of the *Charter*.

7. In the provision of child and family services to Indigenous persons off-reserve, and in specific via its funding policies, the defendants created a distinction based on enumerated and analogous grounds, being race, nationality and ethnic origin.

8. The effect of the differential treatment described above was discriminatory, as it:

   (a) exacerbated the overrepresentation of the Child Class in state care;

   (b) treated Indigenous families in a discriminatory way and perpetuated racist stereotypes about their fitness to care for their children; and

   (c) perpetuated intergenerational trauma for both Class through institutional centuries-old anti-Indigenous racism, the legacy of the Indian residential schools and the Sixties Scoop.

Breach of Section 7 of the Charter

9. The plaintiffs plead and rely on section 7 of the *Charter*.

10. The Crown has unjustifiably infringed upon the Class's section 7 rights by:

   (a) causing class members unnecessary psychological, spiritual, and in some cases physical harm; and

   (b) arbitrarily removing Child Class members from their families and communities.

Plaintiffs' address for service:	Miller Titerle Law Corporation 300 – 638 Smithe Street Vancouver, BC V6B 1E3 **Attention: Joelle Walker**
Fax number address for service (if any):	N/A
E-mail address for service (if any):	Joelle@millertiterle.com Erin@millertiterle.com Allison@millertiterle.com Dsterns@sotos.ca MSeddigh@sotos.ca Aabdulla@sotos.ca
Place of trial:	Vancouver, British Columbia
The address of the registry is:	800 Smithe Street Vancouver, BC V6Z 2E1

Dated: June 24, 2022

Signature of Joelle Walker,
Lawyer for the Plaintiffs

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
    (a) prepare a list of documents in Form 22 that lists
        (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
        (ii) all other documents to which the party intends to refer at trial, and
    (b) serve the list on all parties of record.

Appendix

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

A claim for breach of sections 7 and 15 of the *Charter*, breach of fiduciary duty, breach of the honour of the crown, and negligence for:

(1) Failing to fund Indigenous child services off-reserve adequately; and

(2) Structuring funding for Indigenous child and family services in a manner that incentivizes removing Indigenous children from their families rather than supporting families to provide care to their children.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- ☐ a motor vehicle accident
- ☐ medical malpractice
- ☒ another cause

A dispute concerning:

- ☐ contaminated sites
- ☐ construction defects
- ☐ real property (real estate)
- ☐ personal property
- ☐ the provision of goods or services or other general commercial matters
- ☐ investment losses
- ☐ the lending of money
- ☐ an employment relationship
- ☐ a will or other issues concerning the probate of an estate
- ☒ a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- ☒ a class action
- ☐ maritime law
- ☐ aboriginal law
- ☒ constitutional law
- ☐ conflict of laws
- ☐ none of the above
- ☐ do not know

Part 4:

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11
2. *Child, Family and Community Service Act*, RSBC 1996
3. *Class Proceedings Act*, R.S.B.C. 1996, c. 50
4. *Court Order Interest Act*, R.S.B.C. 1996, c. 79