NO. S-224088
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**JESSY RAE DESTINY WE-GYET NEAL,
LAURA JULIE-FAITH DOBSON,
JAKE PHILLIP LOPEZ SMITH and
RACHELLE LYNN DESCHAMPS**

PLAINTIFFS

AND:

**THE ATTORNEY GENERAL OF CANADA and
HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA**

DEFENDANTS

CONSOLIDATED NOTICE OF CIVIL CLAIM

Brought under the *Class Proceedings Act*, RSBC 1996, c 50

This action has been started by the plaintiff 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 reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,

(b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,

(c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or

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

Part 1: STATEMENT OF FACTS

A. Overview

1. Canada and the Province of British Columbia ("**Province**" or "**British Columbia**") have systemically discriminated against Indigenous children in British Columbia because of their race, nationality, and ethnicity. This systemic discrimination, which has occurred for decades and generations, has taken two forms in the context of child and family services.

2. First, Canada and the Province have knowingly underfunded prevention services within child and family services for Indigenous children who reside off-reserve in British Columbia in favour of mass removals of such children. This chronic issue has prevented child and family services agencies from providing adequate public services and products to Indigenous children and families. This has occurred despite the enhanced need for such services and products as a result of the inter-generational trauma that has been inflicted on Indigenous peoples through the cultural genocide that has been perpetrated upon them.

3. Canada and the Province also failed to take steps, or took steps that were inadequate, to address these chronic issues despite being well aware of the harm and systemic discrimination it caused. Numerous independent reviews, parliamentary reports, and audits have identified the severe inadequacies of Canada and British Columbia's funding formulas, policies, and practices

and their corresponding devastating impacts on Indigenous children and families in British Columbia.

4. Remarkably, Canada's and the Province's funding formulas, policies, and practices mirror Canada's prior approach to child welfare for First Nations children residing on-reserve, which the Canadian Human Rights Tribunal ("**CHRT**") has already found to be discriminatory. While underfunding, or failing to fund, the delivery of prevention services to Indigenous children who reside off-reserve in British Columbia, Canada and the Province have fully funded costs associated with removing Indigenous children from their homes and placing them into out-of-home care. The net effect of this discriminatory approach is that Indigenous children who reside off-reserve often must be apprehended before they can access required services. This is the same "perverse incentive" that the CHRT ordered Canada to remedy in relation to First Nations children living on-reserve.

5. Removing a child from his or her home must only be used as a last resort, if at all, because of the severe and long-lasting trauma that such removal causes to that child, and his or her family and community. However, as a result of the "perverse incentive" that continues to persist, Indigenous children who reside off-reserve have been removed from their homes as a first resort, rather than a last resort. This accounts, in substantial part, for the staggering number of Indigenous children in care in British Columbia and their egregious overrepresentation in state care: as of March 2022, 68% of the 5,038 children in care were Indigenous, despite representing approximately 10% of all children in the province.

6. The incentivized removal of off-reserve Indigenous children from their homes, families, and communities is not only perverse, it has caused enduring trauma to those children, their families and caregivers, and their communities.

7. In addition to the discriminatory underfunding and other discriminatory practices present in the child and family services regime, Canada and the Province failed to comply with their constitutional and legal obligations to Indigenous children in British Columbia who needed an essential service, including pursuant to Jordan's Principle. The defendants variously blamed their own operational funding allocations, lack of jurisdiction, or the existence of a jurisdictional dispute to justify their failure to provide these services. As a result, Indigenous children faced unreasonable

delays, denials, and service gaps with respect to the essential health and social services that they needed.

8. Canada and British Columbia's conduct violated Indigenous children and families' rights under the *Canadian Charter of Rights and Freedoms*, and breached these governments' fiduciary duties and duty of care owed to Indigenous children and families in British Columbia.

9. This action seeks individual compensation for: (i) First Nations children who did not ordinarily reside on a reserve in British Columbia, and all Inuit and Metis children who were victims of this systemic discrimination between January 1, 1992 and the date of the certification of this action as a class action (the "**Class Period**"); (ii) all Indigenous children who faced delays, denials or service gaps in accessing essential health and social services in British Columbia, and (iii) the parents, grandparents, and caregivers of those children.

B. The Representative Plaintiffs

Jessy Rae Destiny We-gyet Neal

10. Jessy Rae Destiny We-gyet Neal is a Cree person, First Nations registered with the Driftpile Cree Nation, which is a "band" within the meaning of the *Indian Act*, RSC 1985, c I-5 and an "Aboriginal people" within the meaning of s. 35 of the *Constitution Act, 1982*. Ms. Neal was born on August 25, 1987.

11. Around 1992, when Ms. Neal was five years old, she was first apprehended by a Provincial child welfare agency in British Columbia. In the subsequent four years, Ms. Neal was temporarily apprehended and returned to her home on several occasions. When she was about eleven, she became a permanent ward of the provincial child welfare system. During the time spent in the foster care system, she was placed in the care of individuals who were not members of her Indigenous community.

Laura Julie-Faith Dobson

12. Laura Julie-Faith Dobson is First Nations and a member of the Haida Nation, an "Aboriginal people" within the meaning of s. 35 of the *Constitution Act, 1982*.

13. Ms. Dobson was born on June 17, 1987. Around 1995, and following a temporary apprehension in 1991, she was permanently apprehended and removed by a provincial child welfare agency from her mother's care and placed in the care of individuals who were not members of her Indigenous community. She remained in foster care until she was 18. During her ten years in care, she lived in 17 different homes. The vast majority of these placements were not with family members or Indigenous persons.

14. After she was apprehended, Ms. Dobson was denied the opportunity to establish an ongoing relationship with the Haida Nation and the rest of her family. She was separated from the rest of her 13 siblings. After aging out of foster care, she spent a decade suffering from the severe effects of drug and alcohol addiction. At 28 years old, she began a journey to recovery and has now been sober for seven years. Through that process, Laura has also worked to reconnect with her Haida roots.

Jake Phillip Lopez Smith

15. Jake Phillip Lopez Smith is First Nations and from Haida Gwaii in British Columbia, and is a registered First Nations individual pursuant to the *Indian Act*, RSC 1985, c I-5. He was born in 1988 and lived off-reserve in Vancouver with his parents.

16. 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.

17. At the age of majority, child welfare authorities abruptly left Mr. Smith out 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.

18. 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, he has finally been able to turn

his life around and overcome many of these challenges. However, his childhood trauma continues to adversely affect his life.

Rachelle Lynn Deschamps

19. Rachelle Lynn Deschamps is First Nations and from the Red Rock First Nations Band in Nipigon, Ontario. She lives off-reserve in Coquitlam, BC.

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

21. 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.

22. 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.

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

C. The Defendants

24. The defendant the Attorney General of Canada is the representative of His Majesty the King in Right of Canada and is named as a defendant pursuant to s. 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50.

25. Canada asserts jurisdiction over "Indians and lands reserved for the Indians" pursuant to s. 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict, c 3. Canada's jurisdiction under s. 91(24)

includes legislative authority respecting all Indigenous peoples, including status and non-status Indian, Inuit, and Métis persons.

26. The defendant the Province asserts general jurisdiction in relation to the delivery of child and family services pursuant to s. 92(13) of the *Constitution Act, 1867* and the common law doctrine of *parens patriae*.

D. Protection and Prevention Services

27. Governments and non-Indigenous social workers tend to define and divide child and family services into two main areas of concern: prevention and protection. They further divide prevention services into three main categories: primary, secondary, and tertiary.

28. Primary prevention services are aimed at the community as a whole. They include the ongoing promotion of public awareness and education about the healthy family and how to prevent or respond to child maltreatment. Secondary prevention services are triggered when concerns begin to arise and early intervention could help avoid a crisis. Tertiary prevention services target specific families when a crisis or risks to a child have been identified. Tertiary prevention services are designed to be "least disruptive measures" that try to mitigate the risks of separating a child from his or her family, rather than separating a child from his or her family (collectively, "**Prevention Services**").

29. Protection services are triggered when the safety or the well-being of a child is considered to be compromised. If the child cannot live safely in the family home while measures are taken with the family to remedy the situation, child and family service workers will make arrangements for temporary or permanent placement of the child in another home or institution where he or she can be cared for. This is called placing the child "in care", or "removal" or "apprehension" ("**Protection Services**"). This model of child services provides a perverse incentive to remove Indigenous children from their families. In all properly funded child and family welfare systems, Protection Services should be a last resort solution, rather than the first.

30. Indigenous perspectives on child and family services tend to reject the compartmentalization of "prevention" and "protection" services, and any arbitrary distinction

between "levels" of prevention support. Such compartmentalization focuses child and family services only on physical safety, at the cost of relational, cultural, spiritual, and emotional safety.

31. When assessment of the well-being and safety of Indigenous children is not considered through a holistic and restorative lens, it allows continued harm to be perpetrated on Indigenous children and youth.

32. For this reason, Indigenous-led child and family service providers have guided the development of lifelong, needs-based, and culturally appropriate wraparound services that prevent poor outcomes (i.e., poverty, homelessness, family violence, mental illness, and drug abuse) and that protect children and families from the ongoing harms associated with colonization.

33. For decades, child and family services in British Columbia have prioritized "protection" over "prevention" for Indigenous children and have failed to provide substantive equality to Indigenous children *vis-à-vis* their non-Indigenous counterparts.

E. Indigenous Child and Family Services in British Columbia

34. Starting in the 19th Century, Indigenous children across Canada, including those residing in British Columbia, were systematically separated from their families and placed in Indian residential schools and day schools. Among other things, these schools were used as "care providers" for Indigenous children who, according to Indian Agents, were allegedly being neglected or otherwise in need of child and family services. The full horrors of these institutions were described in the Truth and Reconciliation Commission's 2015 final report ("**TRC Final Report**"), which concluded:

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; and

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.

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

36. In 1951, the introduction of s. 88 to the *Indian Act* made "all laws of general application from time to time in force in any province applicable to and in respect of Indians in the province". The Province asserted its authority, and began to apprehend children living on-reserve and off-reserve, which resulted in an increase in children placed in care. Before the introduction of s. 88, Indigenous children accounted for less than 1% of children in care in British Columbia. By the early 1960s, these numbers rose to approximately 30%.

37. 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 or taught their traditional languages.

38. 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 newborn Indigenous children from their mothers on-reserve and even off-reserve.

39. The Sixties Scoop hurt Indigenous children and families in British Columbia. While the types of out-of-home placement 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 and maintaining cultural connectivity.

40. Today, the defendants continue to effect the same conduct that perpetuates the disproportionate and discriminatory cycle of removing Indigenous children from their homes, including inadequate levels of Prevention Services within child and family service funding to Indigenous children and families compared to Protection Services, and lack of appropriate Prevention Services (which were only made available to those who were already wards of the Province, often rendering the removal of a child from their family the only way in which support could be given to the child).

41. Each province and territory now has its own child and family services legislation. Child and family services consist of a range of services intended to prevent and respond to child maltreatment and to promote family wellness.

42. In the intervening years, various agreements and funding arrangements have been entered into and rescinded between Canada and the Province dealing with the delivery of child and family services. Until the late 1980s/early 1990s, funding for on- and off-reserve child and family services for Indigenous children and families was provided by Canada. Thereafter, Canada entered into agreements with each province, including the Province of British Columbia, under which each province would fund child and family services for off-reserve Indigenous children and families.

43. In the past 40 years, ICFS Agencies and their predecessor entities have also been established to serve Indigenous children and families living in British Columbia. There are currently 24 ICFS Agencies serving 120 First Nations across the province. The remaining 84 First Nations are referred to as "unaffiliated", meaning they are not receiving child and family services

from an ICFS Agency. The 84 unaffiliated First Nations receive child and family services directly from the provincial Ministry of Children and Family Development ("**MCFD**").

44. Indigenous Services Canada allocates funding to ICFS Agencies and MCFD for First Nations children who are status First Nations living on-reserve. Through MCFD, the Province funds—and in many cases delivers—services in British Columbia for children who are status First Nations living off-reserve, and non-status First Nations, Métis, and Inuit children, irrespective of residence.

45. The defendants are well aware of the chronic problems that exist in the under-provision of child and family services—and, specifically, Prevention Services—to Indigenous children, especially those who reside off-reserve. Over the course of the Class Period, numerous independent reviews, parliamentary reports, and audits have identified certain of these deficiencies and described their devastating impact on Indigenous children and families.

46. 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 and the funding of Indigenous child and family services on-reserve.

47. However, the funding was never sufficient to meet the needs of First Nations children respecting Prevention Services. Directive 20-1 also prioritized Protection Services over Prevention Services, reflecting the same discriminatory stereotypes about Indigenous parents' fitness to raise their children that led to the Indian residential schools and the Sixties Scoop. Specifically:

a. the average per capita expenditure funded by Canada for each Indigenous child in care was 22% lower than the average expenditure made by provinces for 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 measures for children at risk.

48. A 2008 report of the Auditor General of Canada considered Directive 20-1 and concluded:

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.

49. In 1992, the Province commissioned a review of child and family services by the Aboriginal Committee of the Community Panel Child Protection Legislation Review, which in turn issued the report *Liberating Our Children – Liberating our Nation*. The 1992 Report 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, for Prevention Services. The defendants both ignored that recommendation.

50. The 1992 Report also recommended 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.

51. 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 Indigenous communities.

52. Despite the 1992 Report's clearly-articulated recommendations 30 years ago, the Province has failed to implement the majority of these recommendations.

53. These shortcomings were again brought to the defendants' 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".

54. In 2006, various shortcomings of the BC Indigenous child and family services programs were summarized in the *BC Children and Youth Review* which found that, in many cases, ICFS Agencies face greater obstacles than non-Indigenous agencies and have less resources.

55. 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. 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.

56. In 2009, the Province committed to the development of child and family services practice standards that were to be informed through traditional Indigenous ways of knowing and being. Such draft standards were developed, but in 2012 the Province unilaterally determined that the standards would not be adopted and implemented, and instead proceeded to adopt and implement so-called "Structured Decision Making", which: (i) perpetuated harm to Indigenous children, youth, and families through culturally unsafe approaches to care; and (ii) resulted in children become at-risk for removal under the Province's criteria.

57. This supposedly "structured" approach perpetuated perverse social policy, despite the Province knowing that there were alternative approaches already developed, available, and endorsed by Indigenous people and communities themselves.

58. The Royal Commission on Aboriginal Peoples (1996), and subsequently the TRC Final Report, each called on the defendants to adequately fund child and family services and fully implement certain principles and equality protections, a concept which has become known as Jordan's Principle.

59. The Truth and Reconciliation Commission found, among other things, that:

a. 3.6% of all Indigenous children under the age of 14 were in out-of-home care, compared with 0.3% of non-Indigenous children;

b. the rate of investigations was 4.2 times the rate of non-Indigenous investigations, and maltreatment allegations were more likely to be substantiated in the cases of Indigenous children;

c. investigations of Indigenous families for neglect were substantiated at a rate eight times greater than for the non-Indigenous population;

d. the child welfare system has simply continued the assimilation that the Residential Schools system started; and

e. Indigenous children are still being taken away from their parents because of their parents' socioeconomic circumstances.

60. In 2011, Canada 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 and in any event, was not implemented in BC.

61. In 2016, the CHRT 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)* — particularized in greater detail below — substantiating the complaint that Canada had engaged in systemic discrimination, in denying equal child and family services to First Nations children and families living on-reserve and in the Yukon, or in differentiating adversely in the provision of those child and family services.

62. 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 Delegated Aboriginal Agency ("**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; and

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

63. These shortcomings were brought to the defendants' attention yet again in a 2016 report (the "**2016 Report**"), authored by Grand Chief Ed John, then serving as Special Advisor on Indigenous Children in Care.

64. 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; and

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

65. 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.

66. In January 2018, then-Minister of Indigenous Services Canada Jane Philpott hosted an emergency national meeting to discuss the child welfare crisis. During the meeting, she acknowledged the issues with the current funding regime, including the "perverse incentive" created by funding systems based on the number of children in care, which prioritize apprehension over prevention.

67. In March 2022, a report was issued regarding the Province's funding practices by Dr. Jennifer Charlesworth, Representative for Children and Youth, entitled *At a Crossroads: The roadmap from fiscal discrimination to equity in Indigenous child welfare* ("**Charlesworth Report**"). The Charlesworth Report, which was presented to the Legislative Assembly of British Columbia, alerted the Province that First Nations, Métis, Inuit, and Urban Indigenous children living off-reserve are at the greatest disadvantage because the funding provided for these children was much lower than for those on-reserve. The Charlesworth Report noted this amounted to discrimination based on (off-reserve) residence, and effectively hampered ICFS Agencies from providing equitable services to every child.

68. Dr. Charlesworth also provided the most up-to-date figures on the number of children in care in British Columbia, based on MCFD's own corporate data: in March 2022, 68% of the 5,038 children in care in British Columbia were Indigenous.

69. Nevertheless, as of 2022, the Province's provision of child and family services off-reserve remains inadequate, because, among 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 CHRT 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 CHRT 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 at stake, 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.

70. As such, the Province's Indigenous child services off-reserve under the Standardized Funding Formula remains discriminatory.

F. The Canadian Human Rights Tribunal Complaint

71. In February 2007, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations filed a complaint with the Canadian Human Rights Commission, pursuant to s. 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the "**Complaint**").

72. The Complaint alleged that Canada discriminates in providing child and family services to First Nations children on-reserve and in the Yukon on the basis of race and national or ethnic origin by providing inequitable and insufficient funding. On October 14, 2008, the Commission referred the Complaint to the CHRT for inquiry.

73. In January 2016, the CHRT found the Complaint to be substantiated and that Canada had engaged in systemic discrimination, contrary to s. 5 of the *Canadian Human Rights Act*, in denying equal child and family services to First Nations children and families living on-reserve and in the Yukon, or in differentiating adversely in the provision of those child and family services.

74. The CHRT also found that First Nations children and families living on-reserve and in the Yukon suffered harm in Canada's provision of child and family services because of the children's and families' race or national or ethnic origin, and that this harm perpetuated the historical disadvantage and trauma suffered by Indigenous people, in particular due to the Residential School system.

75. The CHRT also found the practice of underfunding prevention and least disruptive measures, while fully reimbursing the cost of children when apprehended, created a perverse incentive to remove First Nations children from their homes as a first—not last—resort to ensure that children received necessary services.

76. The CHRT concluded that human rights principles, both domestically and internationally, required Canada to consider the distinct needs and circumstances of First Nations children and families living on-reserve to ensure substantive equality in the provision of child and family services. Among other things, Canada was ordered to undertake a cost analysis of the FNCFS Program relating to on-reserve individuals, and to fund prevention/least disruptive measures based on actual costs.

77. In British Columbia, MCFD likewise directs funding to ICFS Agencies that provide child and family services to off-reserve Indigenous children and families through a funding structure known as the Standardized Funding Approach, which does not include funding for prevention services. The net outcome is that Indigenous children who reside off-reserve must often be apprehended before they can access needed services and products. This is the very nature of the "perverse incentive" to place children in care referred to by Minister Philpott in her welcome speech at the 2018 emergency national meeting.

78. Despite the CHRT's widely-publicized findings, and the fact that the Province was informed via the Charlesworth Report that its own funding model mirrored the discriminatory federal regime, the Province has failed to remedy the situation.

G. Essential Services and Jordan's Principle

79. Separate and apart from the broken child and family services program particularized above, the defendants failed to provide substantively (or even formally) equal essential services—with examples such as allied health, special education, infrastructure, medical equipment and supplies, medical transportation, medications, mental wellness, oral health, respite care, and vision care—to Indigenous children in British Columbia.

80. Instead, Indigenous children in British Columbia routinely faced unreasonable delays, denials or gaps in the receipt of such essential services.

81. For decades, both defendants knew or ought to have known that their funding formulas as well as their approach to jurisdictional barriers systemically denied Indigenous children the essential services they needed contrary to those children's constitutional equality and human rights. Prior to and over the course of the Class Period, independent reviews and parliamentary reports identified these deficiencies and decried their devastating impact on Indigenous children and families.

82. In 1981, the House of Commons Special Committee on the Disabled and the Handicapped issued a report that highlighted these jurisdictional funding issues. The report noted that First Nations people were migrating away from reserves in increasing numbers, which had created a dispute as to which government—federal or provincial—would pay for their essential services.

The report found some provinces were reluctant or unwilling to take over funding, and that the dispute created confusion among First Nations living off reserve, as they were frequently left without any services while the two governments fought over payment.

83. Twelve years later in 1993 when the *Charter* was in force and effect, the House of Commons' Standing Committee on Human Rights and the Status of Disabled Persons issued a follow-up report stating that the situation had not improved in the time since the prior report, and that the most glaring issues arose in the provision of health and social services to Indigenous people. The report explicitly stated that some Indigenous people were "falling through the cracks" and were being unequally treated compared to their fellow citizens.

84. To illustrate this point, the Standing Committee told the story of a British Columbia First Nations child named Little Mountain, who suffered from cerebral palsy. Little Mountain's mother encountered ongoing difficulties in gaining access to on-reserve services, which neither the federal nor provincial government would provide for her daughter despite their availability to non-Indigenous people.

85. The Committee urged Canada to prepare a tripartite action plan between the federal, provincial/territorial, and band governments to ensure consultation and collaboration on any issues regarding Indigenous people with disabilities, including existing or proposed transfers of service delivery to ensure these transfers meet their needs. The Committee recommended the report be completed no later than November 1, 1993, and that it include specific agendas, realistic target dates, and evaluation mechanisms. No such plan was ever prepared.

86. The Royal Commission on Aboriginal Peoples (1996) called on governments, including the defendants, to resolve the "program and jurisdiction rigidities" plaguing the provision of services to the Class. The Royal Commission made the following recommendations, among others, in this respect:

a. that governments recognize the health of a people is of vital importance to its life, welfare, identity, and culture, and is thus a core area for the exercise of self-government by Indigenous nations; and

b. that governments promptly:

i. conclude agreements recognizing Indigenous jurisdiction over areas directly related to Indigenous peoples' health;

ii. create appropriate funding arrangements for funding Indigenous health services; and

iii. establish a framework whereby Indigenous governments, organizations, and communities could mandate agencies to deliver health and social services operating under provincial or territorial jurisdiction, until such time as institutions for Indigenous self-government exist.

87. In 2000, the Joint National Policy Review highlighted some of these issues, ultimately recommending that the then-Department of Indian Affairs and Northern Development, Health Canada, all provinces and territories, and First Nations agencies should prioritize creating clarity around jurisdiction and responsibility for programming and funding for Indigenous children with complex needs.

88. In 2005, *Wen:De: We are Coming to the Light of Day* ("***Wen:De***") reported on a survey of First Nations Child and Family Services program agencies regarding the jurisdictional and funding barriers faced by the Class. Survey responses "indicated that the 12 agencies had experienced 393 jurisdictional disputes this past year requiring an average of 54.25 person hours to resolve each incident".

H. Jordan's Principle

89. *Wen:De* proposed a "Jordan's Principle" in honour of Jordan River Anderson, a child born to a family of the Norway House Cree Nation in Manitoba in 1999. Jordan had a serious medical condition, and due to lack of services his family surrendered him to provincial care to get the medical treatment that he needed. After spending the first two years in a hospital, he could have gone into care at a specialized foster home close to his medical facilities in Winnipeg. However, for the next two years, Canada and Manitoba argued over who should pay for Jordan's foster home

costs while Jordan remained in the hospital. They were still arguing about jurisdiction when Jordan passed away in 2005, at the age of five, having spent his entire life in the hospital.

90. *Wen:De* stated that despite section 15 of the *Charter* and international law requiring that First Nations children receive equal benefit under the law, the governments' apathy and inaction denied them that protection. *Wen:De* specifically noted that "jurisdictional wrangling" had resulted in program fragmentation, coordination and reporting issues, and service gaps that allowed First Nations children to "fall through the cracks". *Wen:De* noted that, despite awareness that their policy of avoidance had real impacts on Indigenous children, neither the federal nor provincial/territorial governments had effectively addressed the community needs of First Nations.

91. *Wen:De* proposed the governments adopt Jordan's Principle, a child-first principle whereby the first government (federal or provincial/territorial) to receive a request for payment of services must pay without disruption or delay whenever such services are otherwise available to non-Indigenous children in similar circumstances. To the extent a jurisdictional dispute exists, the government could then refer the matter to a dispute resolution process.

92. On December 12, 2007, the House of Commons unanimously passed Motion 296, stating: "That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children". This motion came about as a result of the federal and provincial governments' persistent violation of the Class Members' equality rights described above. Motion 296 was not a statute that created statutory rights, but a motion affirming existing constitutional and quasi-constitutional equality rights to substantively equal access to essential services.

93. Canada and British Columbia did nothing to address these long-standing problems. They opted instead for neglect and avoidance.

94. In 2016, the CHRT Decision held that Canada had discriminated against First Nations children throughout Canada by not honouring Jordan's Principle. The reason why the CHRT Decision focused on First Nations children as opposed to all Indigenous children was that the human rights Complaint underlying that matter related to First Nations only. However, the same

individual rights and state obligations applied and apply to Inuit and Métis individuals in British Columbia.

95. The CHRT held that the equality protections owed under the rubric of Jordan's Principle include, among others, the following:

a. the equality protections embedded in Jordan's Principle make it a child-first principle that applies equally to all First Nations children, whether resident on- or off-reserve. They are not limited to children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living;

b. the equality protections embedded in Jordan's Principle address the needs of children by ensuring there are no gaps in government services to them. They can address, for example, but are not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment, and physiotherapy;

c. when a government service, including a service assessment, is available to all other children, the government department of first contact should pay for that service to a First Nation child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. The government may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nation child's case, the government should consult those professionals and should only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. The government may also consult with the family, First Nation community or service providers to fund services. After the recommended service is approved and funding is provided, the government

department of first contact can seek reimbursement from another department/government;

d. when a government service, including a service assessment, is not necessarily available to all non-First Nations children or is beyond the normative standard of care, the government department of first contact must still evaluate the individual needs of the First Nation child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the First Nation child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child; and

e. while the equality protections embedded in Jordan's Principle can apply to jurisdictional disputes between governments (*i.e.*, between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the children's entitlement to substantively equal services.

96. On or about September 10, 2018, Canada established the Inuit Child First Initiative to extend its Jordan's Principle program mandated by the CHRT to Inuit children, although the Inuit have continued to suffer service gaps, denials and delays in essential services despite the Inuit Child First Initiative. Canada has done nothing to assist Métis children in this regard unless they live on a reserve.

97. British Columbia has done nothing in this regard during the Class Period altogether.

I. Scope of Essential Services Claims

98. *Moushoom* and *Trout*, both detailed below, hold Canada accountable for its failure to provide essential services to First Nations children who had a confirmed need for an essential service but faced an unreasonable delay, denial or service gap between April 1, 1991 and November 2, 2017.

99. Canada has faced no accountability for discriminating against Inuit and Métis children in British Columbia who experienced the same deprivations of needed essential services. To the extent that Essential Services Class Members' claims are not covered by *Moushoom* or *Trout*, the plaintiffs and the Essential Services Class Members advance those claims against Canada in this proceeding.

100. British Columbia has faced no accountability for the delays, denials and service gaps that Indigenous children faced in British Columbia in the receipt of essential services during the Class Period. The plaintiffs and the Essential Services Class Members seek to hold British Columbia accountable for its joint and several liability to the Class.

J. The Legislative Scheme

101. 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***").

102. 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;

103. 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.

104. 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.

105. The *Act* further points to the need for substantive equality by stating that Indigenous child services must reflect a legacy of discrimination. Section 3(c.1) provides 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".

106. These legislative requirements, among other things, inform the standard of care required, as detailed below.

K. The Class Members

107. The plaintiffs bring this action on behalf of three proposed classes who were harmed by Canada and the Province during the Class Period:

a. all First Nations individuals in British Columbia who at the time of removal were not ordinarily resident on-reserve, and all Inuit and Métis individuals (irrespective of residency on- or off-reserve), who were taken into care at any time between January 1, 1992 and the date of the certification of this action as a class action (the "**Class Period**") (the "**Removed Child Class**" or "**Removed Child Class Members**");

b. Indigenous individuals in British Columbia who, during the Class Period and while they were under the age of 18:

   i. had a need for an essential service (inclusive of essential products); and

   ii. faced a delay, denial, or service gap in the receipt of that essential service on grounds including but not limited to lack of funding or lack of jurisdiction, or a jurisdictional dispute with another government, level of government, or another governmental department (the "**Essential Services Class**" or "**Essential Services Class Members**");

   excluded from the Essential Services Class, but only with respect to the defendant Canada, are: (i) the claims of individuals who meet the definition of the Jordan's Class as certified by the Federal Court in *Moushoom v. Canada (Attorney General)*, 2021 FC 1225 (Federal Court File Nos. T-402-19, T-141-20) ("***Moushoom***"); and (ii) the claims of individuals who meet the definition of the Child Class certified by the Federal Court in *Trout et al v Canada*, 2022 FC 149 (Federal Court File No. T-1120-21) ("***Trout***"); but in every case only to the extent that those claims are captured by *Moushoom* or *Trout*; and

c. the caregiving parents or caregiving grandparents of members of the above classes (the "**Family Class**" or "**Family Class Members**").

108. The classes defined above are collectively referred to as the "**Class**" or "**Class Members**". The plaintiffs and the other Class Members are "Aboriginal peoples of Canada" within the meaning of s. 35(1) of the *Constitution Act, 1982*. The Indigenous peoples of which the plaintiffs and other Class Members are members have exercised laws, customs and traditions integral to their distinctive societies—including in relation to child and family services, such as parenting, child care and customary adoption—since time immemorial. These inherent and Aboriginal and treaty rights are recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

L. Fiduciary Duties

Fiduciary Duties of the Province

109. 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.

110. Further, while in state care, the Province stood in *loco parentis* with respect to the plaintiffs and the Removed Child Class Members within its care. Accordingly, the relationship between the plaintiffs and Removed Child Class Members in care and the Province was that of guardian and wards.

111. The Province was, at all material times, responsible for the management, operation, administration, and funding of MCFD, and all predecessor departments responsible for the development of policies, procedures, programs, and operations management relating to the provision of Indigenous child and family services in the Province of British Columbia, including the funding arrangements reached with Indigenous Services Canada and all predecessor departments.

112. 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.

113. The Removed Child Class and the Essential Services Class Members' physical, mental, emotional, spiritual, and cultural interests stood to be adversely affected by the MCFD's exercise of discretion or control under the *Act* on behalf of the Province. Similar interests were engaged for the Family Class, including to the right to take care of their own children.

114. Further, the Province undertook to act in the best interests of the plaintiffs and the Class.

115. The *Act* imposed a duty on the Province to act in the best interests of the plaintiffs and the Class in care 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.

116. Class Members were particularly vulnerable to the exercise of the discretion or power that the Province had over them as fiduciary given, among other things, the legacy of discrimination and harm inflicted upon Indigenous peoples by the child welfare system, including Residential Schools, and, in the case of the Removed Child Class and the Essential Services Class, their status as minors.

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

a. respecting their constitutional and 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 former involves higher costs than the latter due in part to the intergenerational trauma it caused through, for example, residential schools, the Sixties Scoop, and other factors;

c. providing access to Preventative Services; and

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

118. The Province's conduct, as described herein, constitutes a breach of its fiduciary duty to the Class. As a result of the Province's breach, the plaintiffs and the Class have suffered loss and damage as particularized herein.

Fiduciary Duties of Canada

119. 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.

120. By virtue of Canada's legislative authority, section 35 of the *Constitution Act, 1982*, 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 all Class Members. 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. Canada was, at all material times, responsible for the management, operation, administration, and funding of Indigenous Services Canada, and all predecessor departments responsible for the development of policies, procedures, programs, and operations management relating to the provision of Indigenous child and family services, including the funding arrangements reached with MCFD and all predecessor departments; and

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

121. 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.

122. Canada adopted a policy of denial and avoidance. By deliberately failing or neglecting to remedy 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.

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

M. The Defendants' Breach of their Common Law Duties

124. To the extent that the defendants' conduct consisted of both matters of policy and operation, the plaintiffs limit their negligence claim to the operational aspects of the impugned conduct.

The Province's Negligence

125. The *Act* imposes a statutory duty of care on the Province 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.

126. In addition, a common law duty of care arises by virtue of the proximity of the Province 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.

127. 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.

128. 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, and continuing to give primacy to Protection Services over culturally appropriate Prevention Services;

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; and

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.

129. 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; and

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

Canada's Negligence

130. Canada owes a duty of care to the Class in operating its funding models 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 Canada and all Indigenous peoples. It is reasonably foreseeable that Canada's failure to take reasonable care in operating its funding and policy choices might harm the Class. It is also reasonably foreseeable that Canada's inaction and avoidance would harm the Class.

131. Canada was required to fund Prevention Services compared to Protection Services within the provincial Indigenous 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 its duties or otherwise reduce the standard of care that it was required to meet.

132. Canada breached this duty of care by, among other things:

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; and

c. failing to fund non-discriminatory Indigenous child services off-reserve.

133. Contrary to Jordan's Principle, the operation of the policies and funding formulas employed by the defendants during the Class Period operated to systematically deny Indigenous children in British Columbia from accessing the public services and/or products they needed when they needed them, in a manner consistent with substantive equality and reflective of their cultural needs. The discriminatory and ongoing "perverse incentive" perpetuated by the chronic underfunding of prevention services, while fully funding maintenance and apprehension expenses, is a species of discrimination which violates Jordan's Principle.

134. The plaintiffs and the Class have suffered loss and damage as a direct result of the defendants' negligence, particulars of which are set out below.

N. Damages

135. As a result of the defendants' conduct, the plaintiffs and other Class Members suffered injuries and damages, including the following:

a. the Class Members were denied non-discriminatory child and family services;

b. Removed 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. Removed Child Class and Essential Services 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, as well as forced cultural assimilation;

d. the Removed Child Class Members and the Essential Services Class Members suffered physical, emotional, spiritual, and mental pain and disabilities;

e. the Removed Child Class Members and the Essential Services Class Members suffered sexual, physical, and emotional abuse while in out-of-home care;

f. the Removed Child Class Members and the Essential Services Class Members lost the opportunity to access essential public services and products in a timely manner;

g. the Essential Services Class Members had to fund out of pocket substitutes, where possible and available, for public services and products delayed or improperly denied by the defendants; and

h. Family Class Members suffered loss of guidance, care and companionship, family bonds, language, culture, community ties and resultant psychological trauma. More specifically, these Family 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.

136. The plaintiffs and Class suffered injury and loss, including those listed above, 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.

137. The plaintiffs and the Class claim aggravated and punitive damages. The high-handed way that the defendants have conducted their affairs warrants the condemnation of this Court. The

defendants, including their agents, had complete knowledge of the fact and effects of their negligent and discriminatory conduct with respect to the provision of child and family services to the Class Members.

138. They proceeded with callous indifference to the foreseeable injuries that the Class Members would, and did, suffer. The defendants knew, or ought to have known, that their conduct would perpetuate and exacerbate the harm and suffering caused by Indian residential schools and the Sixties Scoop.

Part 2: RELIEF SOUGHT

139. The plaintiffs claim as follows on their own behalf, and on behalf of the Class Members:

a. an order certifying this action as a class proceeding and appointing Jessy Rae Destiny We-Gyet Neal, Laura Julie-Faith Dobson, Jake Phillip Lopez Smith, and Rachelle Lynn Deschamps as representative plaintiffs for the Removed Child Class, the Essential Services Class, and the Family Class;

b. general and aggregate damages for breach of fiduciary duty, failure to uphold the honour of the Crown, negligence, and under s. 24(1) of the *Charter*;

c. a declaration that the defendants breached their common law, fiduciary, and constitutional duties to the plaintiffs and the other Class Members;

d. a declaration that the defendants failed to uphold the honour of the Crown;

e. a declaration that the defendants breached the rights of the plaintiffs and the other Class Members under ss . 7 and 15(1) of the *Charter*, without justification;

f. a declaration that the defendants have breached Jordan's Principle;

g. a declaration that the defendants were unjustly enriched;

h. special damages;

i. aggravated damages;

j. exemplary and punitive damages;

k. restitution by the defendants of their wrongful gains 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;

l. a reference to decide any issues not decided at the trial of the common issues;

m. damages equal to the costs of administering notice and the plan of distribution;

n. pre-judgment and post-judgment interest;

o. costs; and

p. such further and other relief as this Honourable Court may deem just.

Part 3: LEGAL BASIS

A. Claims

Breach of Fiduciary Duty

140. The defendants each owed a fiduciary duty to the Class in regard to the provision of child and family services.

141. 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 to the Class. 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.

142. The defendants' conduct, as described herein, breached their fiduciary obligations to the Class, including by:

a. funding child and family services in a manner that incentivizes Protection Services over Prevention Services, to the Class Members' detriment;

b. failing to ensure Class Members' constitutionally-protected rights were safeguarded in the provision of child and family services;

c. funding and operating an inequitable, discriminatory child welfare regime which provided less funding for the Class than for non-Class Members; and

d. failing to remedy these deficiencies even after repeated notice of the harm being caused to the Class.

Failure to Uphold the Honour of the Crown

143. The honour of the Crown is always at stake in its dealing with Indigenous peoples. It required that the defendants act honourably and in good faith in each such dealing. Canada and the Province failed to diligently and purposively fulfil the honour of the Crown in provision of child and family services to the Class. This failure caused the Class to suffer loss and damage.

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

Negligence

145. At all material times during the Class Period, the defendants owed a common law duty of care to the plaintiffs and the other Class Members to take steps to: (i) sufficiently fund Prevention Services as opposed to Protection Services within Indigenous child and family services and the operational and other costs of child and family service agencies, including by ensuring that reasonable and appropriate levels preventative care and other child and family services, were made available and provided to the Class Members; and (ii) comply with Jordan's Principle and the rights and obligations underlying it. This duty went unmet.

146. The defendants' negligence caused injury and loss to the Class, as particularized above.

Breach of Section 15 of the *Charter*

147. The defendants' policies draw distinctions between the Class Members and other individuals solely based on their status as Indigenous children and families who do not reside on-reserve, or alternatively their residence on-reserve but lack of First Nations status.

148. During the Class Period, the defendants infringed the s. 15(1) rights of the plaintiffs and the other Class Members under the *Charter* as set out in the whole of this claim by, *inter alia*:

a. failing to sufficiently fund Indigenous child and family services, including the operational and other costs of child and family service agencies, to ensure that reasonable and appropriate preventative and other child and family services were made available and provided to the plaintiffs and other Class Members, in some cases by the Province itself; and

b. breaching Jordan's Principle, and causing delays, denials or service gaps in the Essential Services Class Members' access to needed essential services.

149. These policies produce a discriminatory effect and have increasingly resulted in, aggravated, and perpetuated substantive and formal inequalities, including that Indigenous children are: (i) many times more likely to be removed from their families than non-Indigenous children; (ii) more disconnected from their communities, cultures, and languages; (iii) more likely to resort to self-destructive behaviour; (iv) face headwinds and systemic barriers in accessing essential services for which they have a confirmed need.

150. The defendants' infringements of the plaintiffs and the other Class Members' s. 15(1) *Charter* rights, as set out above and in the whole of this claim, were not "prescribed by law" and cannot be justified in a free and democratic society.

151. This ongoing discrimination is now taking place against the backdrop of Canada and the Province's respective adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* into legislation, their public commitments to the Truth and Reconciliation Commission's

Calls to Action, and the Province's *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples*. Canada has adopted a similar set of principles.

152. In sum, the defendants' conduct has created an increasingly disproportionate adverse impact on the Class because of their indigeneity. As a result, the defendants' impugned conduct has reinforced, perpetuated, and exacerbated the Class members' historical disadvantage resulting from the legacy of the Indian residential schools, the Sixties Scoop, and other forms of cultural genocide.

153. The defendants' misconduct, and the impact of their breaches of Jordan's Principle and the infringements s. 15(1) rights of the plaintiffs and other Class Members warrant an award of damages under s. 24(1) of the *Charter*. Such damages would, in these circumstances, serve to compensate the plaintiffs and the other Class Members for their losses, vindicate their rights, and deter future misconduct by the defendants.

Breach of Section 7 of the *Charter*

154. The defendants have infringed the Class' 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.

155. As the provision of child and family services contemplates and operates to effect 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.

156. In its provision of these services, the defendants systemically underfunded and arbitrarily incentivized the use of 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.

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

a. abuse, trauma, 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.

158. In addition, the defendants failed to provide other services or products that were essential to the life and wellbeing of the Essential Services Class, instead subjecting Class Members to undue delays, denials and service gaps, in breach of their section 7 rights.

159. The defendants' impugned conduct has had an arbitrary and overbroad impact on the life, liberty, and security of the person of the Class Members who have been subjected to a broken and systemically discriminatory delivery system of child welfare and other essential services.

B. Unjust Enrichment

160. At all material times during the Class Period, the defendants underfunded child and family services for the plaintiffs and the Removed Child Class Members in a discriminatory manner, and breached Jordan's Principle.

161. As a consequence of the defendants' conduct and the conduct of their respective servants, the defendants were enriched and received financial benefit and gain. The defendants spent less on the provision of child and family services, and the provision of essential prevention services pursuant to Jordan's Principle, to off-reserve Indigenous peoples and to non-status First Nations resident on-reserve than they would have spent had they not engaged in the discriminatory conduct set out in the whole of this claim.

162. The plaintiffs and the other Class Members suffered a corresponding deprivation.

163. There was no juristic reason for the defendants' enrichment or the corresponding deprivation to plaintiffs and the other Class Members. The defendants have been unjustly enriched at the expense of the plaintiffs and the other Class Members, and are required to make restitution to them for their wrongful gains.

C. Legislation

164. The plaintiffs plead and rely on various statutes, regulations and international instruments, including:

a. *An Act Respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24;

b. *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;

c. *Child, Family and Community Service Act*, RSBC 1996, c 46;

d. *Class Proceeding Act*, RSBC 1996, c 50;

e. *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK);

f. *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982 c 11;

g. *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3;

h. *Court Order Interest Act*, RSBC 1996, c 79;

i. *Crown Liability and Proceedings Act*, RSC 1985, c C-50;

j. *Crown Proceeding Act*, RSBC 1986, c 89;

k. *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44;

l. *Department of Indigenous Services Act*, SC 2019, c 29, s 336;

m. *Health Care Costs Recovery Act*, SBC 2008, c 27;

n. *Indian Act*, RSC 1985, c I-5;

o. *International Convention on the Elimination of All Forms of Racial Discrimination*, 26 October 1966, 660 UNTS 195;

p. *Limitation Act,* SBC 2012, c 13;

q. *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14; and

r. all other comparable and relevant acts and regulations and their predecessors and successors.

Plaintiffs' addresses for service:

Murphy Battista LLP
Suite 2020 – 650 West Georgia Street
Vancouver, BC V6B 4N7
Telephone: 604-683-9621

Lawyers for the Plaintiffs Jessy Rae Destiny We-Gyeat Neal and Laura Julie-Faith Dobson

Sotos LLP
820 – 980 Howe Street
Vancouver BC V6Z 0C8
Telephone: (236) 301-4919

Miller Titerle Law Corporation
300 – 638 Smithe Street
Vancouver, BC V6B 1E3
Telephone: (603) 681-4112

Cochrane Saxberg LLP
201 – 211 Bannatyne Avenue
Winnipeg, MB R3B 3P2
Telephone: (204) 594-6688

Lawyers for the Plaintiffs Jake Phillip Lopez Smith and Rachelle Lynn Deschamps

Fax number address for service: n/a

E-mail addresses for service:

Bespflug@murphybattista.com
Oconnor@murphybattista.com
Ohama-darcus@murphybattista.com
Joelle@millertiterle.com
Erin@millertiterle.com
Dsterns@sotos.ca

MSeddigh@sotos.ca
Aabdulla@sotos.ca
Sscarcello@cochranesaxberg.com
Hcochrane@cochranesaxberg.com
Mserbin@cochranesaxberg.com
Ssoldier@cochranesaxberg.com

Place of trial: Vancouver, BC

The address of the registry is: 800 Smithe Street, Vancouver, BC V6Z 2E1

Date: May 30, 2023

Angela Bespflug

☐ plaintiffs ☑ 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:

This action concerns the discriminatory underfunding of child welfare services for Indigenous children in British Columbia, and breaches of Jordan's Principle, by the defendants B.C. and Canada.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

[ ] a motor vehicle accident
[ ] medical malpractice
[X] 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
[X] a matter not listed here

Part 3: THIS CLAIM INVOLVES:

[X] a class action
[ ] maritime law
[X] aboriginal law
[X] constitutional law
[ ] conflict of laws
[ ] none of the above
[ ] do not know

Part 4:

Enactments relied on:

a. *An Act Respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24;

b. *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;

c. *Class Proceeding Act*, RSBC 1996, c 50;

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NO. S-224088
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JESSY RAE DESTINY WE-GYET NEAL, LAURA JULIE-FAITH DOBSON, JAKE PHILLIP LOPEZ SMITH and RACHELLE LYNN DESCHAMPS

PLAINTIFFS

AND:

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and THE ATTORNEY GENERAL OF CANADA

DEFENDANTS

CONSOLIDATED NOTICE OF CIVIL CLAIM

Murphy Battista LLP
Suite 2020 – 650 West Georgia Street
Vancouver, BC V6B 4N7

Attention: Angela Bespflug

Telephone: 604-683-9621
