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

RESPONSE TO CIVIL CLAIM

Filed by: the defendant, Attorney General of Canada ("**Canada**")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1— Defendant's Response to Facts

1. The facts alleged in paragraphs 24–26, 34- 35, 37, 39, 41, 42, 46, 61, 66, 71–76 and 98 of Part 1 of the consolidated notice of civil claim (the "**Consolidated Claim**") are admitted.

2. The facts alleged in paragraphs 1–9, 27–33, 40, 45, 47–54, 57–60, 63, 64, 67–70, 79–96, 99, 101–108, 119–137, of Part 1 of the Consolidated Claim are denied.

3. The facts alleged in paragraphs 10–23, 36, 38, 43, 44, 52, 55, 56, 62, 65, 69, 77, 78, 97, 100, and 109–118 of Part 1 of the Consolidated Claim are outside Canada's knowledge.

4. Unless expressly admitted, Canada denies the facts contained in the Consolidated Claim.

Division 2 — Defendant's Version of Facts

A. **Overview**

5. Canada is committed to reconciliation with Indigenous peoples. Canada acknowledges that historical wrongs have been committed against Indigenous peoples in Canada in the provision and administration of child welfare services, and that the overrepresentation of Indigenous children in provincial care is a national tragedy. This claim relates to provincial responsibility in relation to certain services provided to Indigenous children and families.

6. The Plaintiffs seek compensation for Canada's policy decisions in the provision of general federal transfer programs on the basis that provincial operational and funding decisions led to discriminatory practices in the provision of services by the province of British Columbia ("**British Columbia**" and together with, Canada, the "**Defendants**").

7. Canada acknowledges certain circumstances may give rise to a fiduciary duty between the federal Crown and an Indigenous collective and accordingly may require the performance of specific duties by the Federal Crown. No such fiduciary duties arise in the circumstances set out in the Consolidated Claim.

8. British Columbia has legislative jurisdiction under section 92 of the *Constitution Act, 1867* with respect to the welfare, protection, and care of all children in the province, including Indigenous children residing off-reserve. At all material times, British Columbia, and not Canada, exercised its jurisdiction through provincial entities acting pursuant to its child and family services legislation. In this case, Canada did not exercise jurisdiction or have control over the child welfare or health services at issue, provided no direct funding, and the circumstances set out in the Consolidated Claim did not give raise to any duties in law or equity. The claims made against Canada should be dismissed.

B. **Terminology**

9. Following the responses and the terminology set out in the Plaintiffs' response to Canada's Demand for Particulars, dated September 4, 2023, this Response will use the following terms to describe the individuals making up the proposed classes, and referred to in the Consolidated Claim and throughout this Response:

    a. the term First Nations refers to people in Canada who: have Indian status pursuant to the *Indian Act,* RSC 1985 c. I-5 [the "***Indian Act***"]; are entitled to be registered under section 6 of the *Indian Act*; and met band membership requirements under section 10–12 of the *Indian Act*, such as where their respective First Nation community assumed control of its own membership by establishing membership rules and the individuals were found to meet the requirements under those membership rules and were included on the Band List by the date of certification;

    b. the term Inuit refers to people who are registered in an Inuit land claim organization or that meet the membership requirements to be so registered;

    c. the term Métis refers to people who have membership in, or meet the membership requirements of, one of the following Métis organizations: Manitoba Métis Federation, Métis Nation Saskatchewan, Métis Nation British Columbia, Métis Nation of Ontario or Métis Nation of Alberta; and,

    d. the term Indigenous peoples is an inclusive term to describe First Nations, Inuit and Métis.

10. Additionally, for clarity, the federal government department currently responsible for on-reserve child and family services and the administration of Jordan's Principle is Indigenous Services Canada. This department at all material times has at various times been called:

a. the Department of Indian and Northern Development (“**DIAND**”);

b. Aboriginal Affairs and Northern Development Canada (“**AANDC**”); and

c. Indian and Northern Affairs Canada (“**INAC**”).

C. The Parties

11. Further to paragraphs 24–26 of the Consolidated Claim, the Attorney General of Canada represents the King in right of Canada (the “**Crown**” or “**Canada**”) and Canada agrees that s. 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, applies.

12. With respect to paragraphs 10–23 of the Consolidated Claim, at this time Canada has no knowledge of the specific circumstances alleged by the Plaintiffs. The Plaintiffs have plead that:

a. Jessy Rae Destiny We-Gyet Neal;

b. Laura Julie-Faith Dobson;

c. Jake Phillip Lopez Smith; and

d. Rachelle Lynn Deschamps

are representatives of the removed child class.

13. The Plaintiffs have not plead that any of the representative Plaintiffs are Métis or Inuit persons, as defined by the Plaintiffs’ response to Canada’s Demand for Particulars dated September 4, 2023.

14. The Plaintiffs have not plead any facts that support that any of the representative Plaintiffs are representatives of the essential services class.

D. The Development of Child Welfare Legislation and Policy in Canada

15. With respect to the entirety of the Consolidated Claim, the Plaintiffs do not distinguish between the roles of Canada and provincial and territorial governments in their description

of the administration of child-welfare for Indigenous children residing off-reserve. Each province and territory has its own legislation that governs the delivery of services to children and families in need. Canada was not in control of the administration of child-welfare programs for children residing off-reserve. A province or territory is responsible for all children residing off-reserve, including Indigenous children, within the province or territory. In this matter, British Columbia is responsible for all children residing off-reserve, including Indigenous children, within the province of British Columbia.

16. In British Columbia, Canada does not provide any direct funding for the provision of off-reserve child welfare services. Canada's role is limited to general funding to assist BC in delivering social programs, including child welfare:

    a. commencing in 1966, pursuant to Part I of the Canada Assistance Plan, Canada began cost sharing by paying 50% of funding to provinces and territories for eligible social programs. These eligible social programs included child welfare services;

    b. commencing in 1977 the Established Programs Financing was introduced and replaced cost-sharing programs for health and post-secondary education; and,

    c. commencing in 1995 the Canada Assistance Plan and the Established Programs Financing was combined into a block transfer arrangement called the Canada Health and Social Transfer, which was split into the Canada Health Transfer and the Canada Social Transfer in 2004.

The allocation of these funds between programs is entirely in the discretion of British Columbia. Canada does not have knowledge of the nature of British Columbia's contribution.

17. In 1989 DIAND developed its program to provide funding for welfare costs for Indigenous peoples on reserve, and in 1991 introduced the First Nations Child and Family Services Program. Canada admits paragraph 46 of the Consolidated Claim generally, apart from its reference to INAC.

18. With respect to paragraph 92 of the Consolidated Claim, Canada admits that the House of Commons unanimously passed Motion 296 (the "**Motion**") and also admits to the expressed content of the Motion. However, Canada denies that the Motion or its passing was in response to any violation of rights of the proposed class or affirmed existing constitutional and quasi-constitutional equality rights to substantively equal access to essential services to the proposed class.

19. With respect to paragraph 93, of the Consolidated Claim, Canada has no knowledge of whether British Columbia addressed any long-standing problems in child welfare programs, as asserted by the Plaintiffs. Canada denies that it did nothing to address any problems in child welfare programs.

E. Canadian Human Rights Tribunal Decisions and Other Child Welfare and other Accessibility Decisions

20. With respect to paragraphs 7, 71–75 and 94–95 of the Consolidated Claim, Canada acknowledges the complaint brought by the First Nations Child and Family Caring Society of Canada to the Canadian Human Rights Tribunal (the "**CHRT**") but denies the implications of the decision as set out by the Plaintiffs. The Consolidated Claim should be understood in relation to a complex series of CHRT decisions on child welfare programs on reserve, and access to government services by First Nations children.

21. In *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (representing the Minister of Indigenous and Northern Affairs Canada), 2016 CHRT 2 (the "**CHRT Merit Decision**"), the CHRT made the following findings with respect to the funding of and administration of First Nations Child and Family Services ("**FNCFS**") Programs and Jordan's Principle:

    a. that the FNCFS Program and the Directive 20-1 funding formula (the "**Directive**") only apply to First Nations people living on-reserve and in the Yukon, and only applied to First Nations people as a result of their race/ethnic origin;

    b. the Directive resulted in an inadequate funding of the operation costs and prevention costs of FNCFS Programs;

    c. that the Directive and the Enhanced Prevention Funding Approach (the "**EPFA**") perpetuated incentives to remove children from their on-reserve communities;

    d. that the failure to coordinate the FNCFS Program and other related government departments, programs, and services for First Nations on-reserve resulted in service gaps, delays and denials for First Nations children and their families; and

    e. the narrow definition and implementation of Jordan's Principle resulted in service gaps, delays and denials for First Nations children.

22. In *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (representing the Minister of Indigenous and Northern Affairs Canada), 2017 CHRT 14 (the "**CHRT Content Decision**") the CHRT made the following findings about the content of Jordan's Principle:

    a. Jordan's Principle is a child-first principle that applies equally to all First Nations children in Canada, whether resident on or off reserve. It is not limited to First

Nations 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. It addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is 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 is available to all other children, the government department of first contact will pay for the service for a First Nations child, without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided. Once the service is provided, the government department of first contact can seek reimbursement from another department/government.

d. When a government service is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and safeguard the best interests of the child.

e. While 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 application of Jordan’s Principle.

23. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (representing the Minister of Indigenous and Northern Affairs Canada), 2019 CHRT 39 (the "**CHRT Compensation Decision**"), ordered compensation for those individuals it found Canada had discriminated against in the CHRT Merits Decision.

24. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (representing the Minister of Indigenous and Northern Affairs Canada), 2020 CHRT 20, and *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada*), 2020 CHRT 36 (collectively, the "**CHRT Eligibility Decisions**" and together with CHRT Merit Decision, CHRT Content Decision and CHRT Compensation Decision, the "**CHRT Decisions**") clarified the individuals the CHRT said were eligible for consideration under Jordan's Principle:

   a. a child who is registered or eligible to be registered under the *Indian Act*, as amended from time to time;

   b. a child who has one parent/guardian who is registered or eligible to be registered under the *Indian Act*;

   c. a child who is recognized by their Nation for the purposes of Jordan's Principle; or

   d. a child is ordinarily resident on reserve.

25. Three certified class actions related directly to the decisions described above were brought against Canada (*Xavier Moushoom et al. v. the Attorney General of Canada*, Federal Court File Number T-402-19; *Assembly Of First Nations et al. v. His Majesty the King*, Federal Court File Number T-141-20; and *Assembly Of First Nations et al. v. Attorney General of Canada*, Federal Court File Number T-1120-21 (collectively, the "**Moushoom Class**

Actions"). The Moushoom Class Actions sought compensation for First Nations individuals on the basis that Canada:

a. knowingly underfunded child and family living on reserve and in the Yukon;

b. failed to comply with Jordan's Principle; and

c. failed to provide First Nations Children with essential services available to non-First Nation children, or which would have been required to ensure substantive equality under the Charter.

26. The Moushoom Class Actions allege discrimination, negligence and breach of fiduciary duty, and included certified classes dating back to 1991. In July 2023, the CHRT issued a decision which indicated that a proposed settlement in the Moushoom Class Actions satisfied the orders in the CHRT's Compensation Decision and related orders.

27. Throughout the Consolidated Claim, and with respect to the CHRT decisions in particular, the Plaintiffs rely on facts and findings not specific to the time period or class definition proposed for this class proceeding, including those related to individuals who are explicitly excluded from this proposed class action and included in the Moushoom Class Actions.

28. With respect to the entire Consolidated Claim, the Plaintiffs have not provided sufficient particulars on the nature of the essential services, products, and delays at issue, or on denial of or gaps in the provision of these services and products by the Defendants, as it relates to the proposed classes in this action. Canada is therefore unable to provide a detailed response to these allegations.

F. **Constitutional Structure**

29. In response to paragraph 119 of the Consolidated Claim, Canada acknowledges that the Parliament of Canada has legislative jurisdiction under section 91(24) of the *Constitution*

Act, 1867 with respect to "Indians and Lands reserved for the Indians". Canada also acknowledges that this legislative jurisdiction includes the jurisdiction to legislate with respect to the proposed class members, and in particular First Nations and Inuit and Métis individuals. Constitutional jurisdiction, however, creates no obligation to legislate, nor does s. 91 (24) provide a right to programming.

30. British Columbia has legislative jurisdiction under section 92 of the *Constitution Act, 1867* with respect to the welfare, protection and care of all children in the province, including Indigenous children residing off-reserve. Provincial child and family services statutes are laws of general application. At all material times, British Columbia, and not Canada, exercised this jurisdiction through provincial entities acting pursuant to its child and family services legislation. As acknowledged by the Plaintiffs at paragraph 36 of the Consolidated Claim, pursuant to s. 88 of the *Indian Act,* at all material times laws of general application in force in the province were applicable to the Plaintiffs and proposed class members.

31. In response to the Plaintiffs' assertions throughout the Consolidated Claim against Canada, and in particular at paragraphs 120–123, 131–132 and 140, Canada does not have a positive duty to legislate nor is it obligated to intervene where the province has exercised authority. The Plaintiffs do not provide any particulars specifying the nature of such a positive duty, or how it would be exercised.

32. With respect to paragraph 40 of the Consolidated Claim, the Plaintiffs attribute to Canada operational and policy decisions made by British Columbia, as is done throughout the Consolidated Claim. Canada also disagrees the statements at paragraph 40 and 137 of the Consolidated Claim equating Canada's conduct today and in the circumstances set out in

the Consolidated Claim to the operation of residential schools, day schools, and the Sixties Scoop.

G. **Child Welfare and Access to Government Services**

33. For clarity, Canada acknowledges the CHRT Decisions, but denies the statements made at paragraph 4, 47, 48, 58, 92–94, 95, 96, and 99, as they represent mischaracterizations of findings of the CHRT in the CHRT Decisions and subsequent independent reports related to the conduct of Canada and British Columbia, or of Motion 296 passed in the House of Commons.

34. Canada denies paragraph 4 of the Consolidated Claim as a misleading reproduction of a finding at page 4 of Jennifer Charlesworth's report entitled "At a Crossroads: The Roadmap form Fiscal Discrimination to Equity in Indigenous Child Welfare" (2022) (the "**Charlesworth Report**"). In this report, the British Columbia Representative for Children and Youth found that British Columbia's Ministry of Child and Family Development's ("**MCFD**") funding approach mirrors Canada's previous funding approach which was found to be discriminatory in the CHRT Merit Decision.

35. The statements at paragraphs 47–48 of the Consolidated Claim are statements of evidence about a funding formula which was enacted by Canada and exclusively applied to the operation and administration of Child Welfare Programs by DIAND to First Nations people who ordinarily reside on reserve. This is not relevant to the claim because such individuals are included in the Moushoom Class Actions and therefore explicitly excluded from this claim.

36. With respect to paragraph 58 of the Consolidated Claim, Canada acknowledges that the Royal Commission on Aboriginal Peoples (1996) and the TRC Final Report called on the

Defendants to adequately fund child and family services and fully implement certain principles and equality protections. In further response, Canada otherwise denies this paragraph as it mischaracterizes the meaning and effect of Jordan's Principle.

37. With respect to paragraphs 79 and 80 of the Consolidated Claim, the pleadings do not provide sufficient particulars of the essential services at issue to allow a proper response. In any event, Canada denies that it had control over any essential services at issue or that there were inequalities in funding in the provision of essential services as compared to non-Indigenous peoples as a result of Canada's conduct.

38. With respect to paragraph 96 of the Consolidated Claim, Canada admits that it established the Inuit Child First Initiative in 2018. With respect to paragraph 99 of the Consolidated Claim, Canada says that the Plaintiffs have failed to provide material facts that support any of the Plaintiffs being a member of the Essential Services class, or Métis or Inuit. In any event, Canada denies that it deprived Inuit and Métis children of essential services and says that any detriment suffered by Inuit and Métis children was caused in the provision of services provided by British Columbia.

H. **Evidence**

39. Canada acknowledges that there have been a number of independent and parliamentary reports relating to Indigenous child welfare and the application of Jordan's Principle. To the extent that these reports address Canada's role or actions, they generally demonstrate the types of funding policies of Canada had in place at the time of the report and provide some evidence as to the administration of child welfare policies. However, these reports are evidence and have been described as such by the Plaintiffs in their letters providing Particulars dated August 2, 2023, and September 4, 2023. As such, Canada has denied

paragraphs 27–33, 81–87, 89–91, 93, 94, because these paragraphs constitute the pleading of evidence.

40. Many of the above noted reports are of limited relevance because they are not specific to the time period or proposed class in question and include facts with respect to Indigenous individuals on reserve, who are explicitly excluded from this proposed class action.

I. **Argument**

41. Paragraphs 5–9, 27–33, 40, 45, 57, 70, 79, 80, 81, 99, 101–107, 110–118, and 120–137 of the Consolidated Claim constitute argument and statements of legal conclusion and thus contain no discernible facts to admit or deny. To the extent that the any of the paragraphs do contain facts, Canada denies these facts.

42. With respect to paragraphs 27–33 of the Consolidated Claim, Canada also expressly denies the policy arguments set forth in these paragraphs because the contain no discernable facts to admit or deny.

43. With respect to paragraphs 99, 101–107, 110–118, and 120–137 of the Consolidated Claim, these paragraphs constitute legal arguments and therefore have been addressed in Part 3 of this Response.

Division 3— Additional Facts

A. **Statutory and Policy Context**

44. British Columbia's jurisdiction to legislate with respect to, and administer, child welfare services in the province is based on the *Constitution Act*, *1867* 5 at ss 92 (13) and (16).

45. On June 21, 2019, *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c. 24 (the "***Act***"), received Royal assent, and came into force on January

1, 2020. The *Act* sets out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children.

46. The *Act* also recognizes the right of Indigenous peoples to exercise their right of self-government, which includes jurisdiction in relation to child and family services.

47. Canada continues to fund the delivery of on-reserve child and family services, regardless of whether First Nations have opted to exercise their right to self government with respect to child and family services consistent with the Act.

Part 2: RESPONSE TO RELIEF SOUGHT

48. Canada opposes the granting of all the relief the Plaintiffs seek in Part 2 of the Consolidated Claim. Canada seeks that this action be dismissed with costs.

Part 3: LEGAL BASIS

A. Canada's Constitutional Obligations and the Honour of the Crown

49. In response to paragraphs 7, 142–143, Canada denies that it breached the honour of the Crown or failed to comply with any legal or constitutional obligations, as stated in the Claim.

50. Canada recognizes that the honour of the Crown guides all its interactions with Indigenous peoples. The honour of the Crown is not a stand-alone cause of action. Rather, it speaks to how obligations that attract it must be fulfilled. What specifically constitutes honourable conduct will vary with the circumstances of each case. In the circumstances of this case, the honour of the Crown, while guiding the federal Crown in its conduct with Indigenous collectives, does not give rise to any specific duties.

51. Moreover, the Plaintiffs do not provide sufficient particulars with respect to the asserted breaches of legal and constitutional duties to ground this claim as against the federal Crown.

52. Canada denies the existence of any statutory duties owed to the Plaintiffs or members of the class in the circumstances described in the claim. Canada did not have control over the child welfare and health and social services at issue in the province of British Columbia, nor could it exercise any control over the decisions and actions of the provincial government. To the extent that the Plaintiffs may assert that any general funding agreements between the province and Canada resulted in such control or liability, Canada denies that there is any basis for this in fact or law in the circumstances of this case.

53. While Canada admits Parliament's legislative jurisdiction under s. 91(24) of the *Constitution Act, 1867*, this jurisdiction does not create a positive duty to legislate nor to provide programming. To the extent the Plaintiffs base their claim on discretionary statutory authority, rather than specific duties, no legal liability can arise from the exercise or non-exercise of such authority in the circumstances of this case.

54. Canada also denies the breach of any legal rule or obligation, and asserts that no such breach would be sufficient to ground a claim in the circumstances of this case.

B. **No breach of fiduciary duty**

55. Canada agrees that the relationship between Canada and the Indigenous peoples of Canada can be fiduciary in nature. However, not every aspect of the relationship gives rise to a fiduciary duty. In response to paragraphs 119–123 and 139–141 of the Consolidated Claim, Crown fiduciary duties to Indigenous peoples can arise in two circumstances:

a. the honour of the Crown gives rise to a *sui generis* fiduciary duty where the Crown assumes a sufficient amount of discretionary control over a specific or cognizable 'Aboriginal' interest in such a way that invokes responsibility "in the nature of a private law duty"; or

b. an *ad hoc* fiduciary duty arises where there is an undertaking by the alleged fiduciary to act in the best interests of alleged beneficiaries; a defined class of beneficiaries vulnerable to the fiduciary's control; and a legal or substantial practical interest of the beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

56. The Plaintiffs have not plead the essential elements to establish either an ad hoc or sui generis fiduciary obligation. Further, Canada does not owe any fiduciary duties to the proposed class members, including in relation to the funding or the provision of child and family services, in the specific circumstances alleged in the Consolidated Claim.

57. At all material times Canada did not have a role in British Columbia's direction, supervision, administration, coordination or other responsibilities relating to the provision of child and family services for children living off reserve in British Columbia, nor did it have a role in the provision of other health and social services which may be included in the claims relevant to the proposed Essential Services classes. As a consequence, Canada did not undertake to act in the best interests of the proposed class members in this context.

58. Accordingly, further to the statements in paragraphs 56–61 of this Response, Canada denies that any legal rule, any legislative authority, the Honour of the Crown or any provision of the *Constitution Act, 1982* gave rise to a fiduciary duty in the circumstances outlined in the Consolidated Claim.

59. The Consolidated Claim does not identify the source of the alleged discretion allowing Canada to interfere with the manner in which British Columbia provided child and family services or health and social supports in the province. Further, there is no indication of an undertaking by Canada to exercise discretionary control over child and family services or health and social supports provided by British Columbia.

60. Alternatively, if a fiduciary duty was owed by Canada, Canada met this obligation.

C. **No Negligence**

61. Canada pleads and relies on s. 3(b)(i) of the *Crown Liability and Proceedings Act*, R.S.C. 1985 ch. C-50, as amended. Under this provision, the Crown in right of Canada is only vicariously liable in negligence. In other words, the Crown will only be liable in negligence where a federal Crown servant was negligent.

62. To the extent that harm is alleged to have arisen from the formulation and implementation of policy, these are core policy decisions for which Canada is immune from tort liability. As the claim against Canada is predicated directly on policy decisions with respect to funding, and in particular the decision to not directly fund or direct the provision of services for the proposed class, a claim in negligence is not available to the Plaintiffs.

63. In any event, Canada denies that it owed a duty of care in the specific circumstances of this case with respect to the Plaintiffs and the proposed classes. In response to paragraph 130, while Canada acknowledges the legislative jurisdiction grounded in s. 91(24) of the *Constitution Act, 1867*, and the specific duties established in the *Indian Act* with respect to Indigenous peoples as defined at paragraph 9 of the Response, this does not in itself create a duty of care. The Plaintiffs have not provided facts or particulars which would support such a duty.

64. Further, considering British Columbia's exercise of jurisdiction and control relating to the provision of child and family services for children living off reserve in British Columbia, and to the provision of other health and social services which may be included in the claims relevant to the proposed Essential Services classes, Canada denies sufficient proximity with the class to create a duty of care.

65. In the alternative, if Canada did owe the Plaintiffs and proposed class members any duty of care, which is denied, Canada did not breach any such duty, nor did Canada's actions cause any of the damage alleged.

D. No Liability Under the *Charter*

66. Canada recognizes that individual rights are guaranteed by sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Canada denies, however, that it breached the Plaintiffs' or any proposed class members' *Charter* rights as asserted, or at all.

67. In response to paragraphs 146–158 of the Consolidated Claim, Canada does not admit that the Plaintiffs have established Canada's conduct and actions violates section 15 or section 7 of the *Charter*. At all material times, British Columbia, and not Canada, exercised jurisdiction through entities acting under its child and family services legislation, and with respect to the provision of health and essential services. British Columbia has legislative jurisdiction under section 92 of the *Constitution Act, 1867* with respect to the welfare, protection, and care of all children in the province, including Indigenous children. Provincial child and family services statutes are laws of general application.

68. With respect to paragraphs 146–148 and 151 of the Consolidated Claim, Canada denies that any of its policies drew distinctions or produced a discriminatory effect, infringing in any way on the Plaintiffs or proposed class members' section 15 (1) Charter rights.

69. In response to paragraphs 153–158, Canada denies that it deprived the Plaintiffs or any member of the proposed class of their right to life, liberty or security of the person. Section 7 does not impose a positive right to benefits.

70. In the alternative, if any action or non-action of Canada deprived Plaintiffs and proposed class members the right to life, liberty or security of the person, then the deprivation accorded with the principles of fundamental justice.

71. In the alternative, if Canada has infringed any of the *Charter* rights of the Plaintiffs or of any other member of the proposed class, which Canada does not admit, any infringement was justifiable under s. 1 of the *Charter* as reasonably proportionate in a free and democratic society.

E. United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)

72. In response to paragraph 150 of the Consolidated Claim, Canada supports the UN Declaration and has committed to its implementation in Canada as part of its commitments to reconciliation, and to the renewal of nation-to-nation and government-to-government and Inuit-Crown relationships.

73. Canada recognizes that international instruments for which Canada has expressed support, like the UN Declaration, may be used as a contextual aid to interpret domestic law, including the Constitution of Canada. However, the UN Declaration does not create a stand-alone cause of action in Canadian courts.

74. On June 21, 2021, Parliament adopted the *United Nations Declaration on the Rights of Indigenous Peoples Act* (the "***UN Declaration Act***"). That Act provides a framework for implementation of the UN Declaration at the federal level by requiring Canada to take all measures necessary to ensure that its laws are consistent with the UN Declaration, and that

an action plan be prepared and implemented to achieve the objectives of the UN Declaration.

75. Canada's obligations must be carried out in consultation and cooperation with Indigenous peoples in Canada. In essence, it provides a framework for furthering the implementation of the UN Declaration in Canada and a process for discussions between the Crown and Indigenous peoples on measures to contribute to the implementation of the Declaration over time. As part of implementation of the UN Declaration Act, Canada has committed through its Action Plan,[1] released in June 2023, to continuing the implementation of the *Act respecting First Nations, Inuit and Métis children, youth and families* with the aim of reducing the number of Indigenous children in care, and ensure that they remain connected to their families, communities and culture.

F. **Damages and Unjust Enrichment**

76. Canada acknowledges that the over representation of Indigenous children in provincial care is a national tragedy. However, to the extent the Plaintiffs or proposed class suffered any damage, losses or injuries as set out in the Consolidated Claim, these were not caused by any acts or omissions of Canada, and Canada is not liable for the damage, losses, or injuries.

77. In the alternative, to the extent Canada is liable for any portion of the Plaintiff class's damage, losses or injuries, British Columbia is also liable, and damages should be apportioned accordingly.

78. In the circumstances, the assessment of aggregate damages is not appropriate given the highly individual experiences of the proposed Plaintiff classes and class members. The experience of individual proposed class members vary greatly.

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[1] https://www.justice.gc.ca/eng/declaration/ap-pa/ah/p2.html

79. Canada does not admit there is a reasonable claim for section 24(1) *Charter* damages, and states that the circumstances, if proven, would not give rise to liability for special, punitive, or exemplary damages.

80. In response to paragraphs 159–162, Canada denies that it has been unjustly enriched as is stated in the Consolidated Claim or at all. Canada denies that there is a basis for equitable relief in this regard.

G. **Proposed Family Classes**

81. Although the Consolidated Claim seeks compensation on behalf of parents, grandparents and caregivers, the Plaintiffs have not particularized any legal basis for those claims, separate and apart from bases applicable to children who were removed from their home or the Plaintiffs say were denied public services or products. Canada denies that it is liable for any claims in relation to Ms. Deschamps and these proposed class members for the reasons stated above, and in light of the lack of particulars in fact and law establishing Canada's liability with respect to them.

H. **Limitations and Laches**

82. The Plaintiffs' claims are out of time and statute-barred pursuant to s. *Limitation Act*, R.S.B.C. 1996. C. 266, as amended. Canada also relies upon the equitable doctrines of laches and acquiescence and upon the *Crown Liability and Proceedings Act*, R.S.C. 1985, Ch. C-50 and the *Crown Liability Act*, S.C. 1952-53, c.30.

I. **Inappropriate Class Proceeding**

83. The issues set out in the Consolidated Claim are not appropriately determined in common.

84. Canada seeks that the consolidated notice of claim be dismissed.

Legislation

85. The legislation Canada relies on include:

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, s 91(24);

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

d. *Class Proceedings Act*, RSBC 1996, c 46;

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

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

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

h. *Indian Act,* RSC 1985, c. I-5 and its predecessor statutes;

i. *Negligence Act*, RSBC 1996, c. 333;

j. *Limitation Act*, SBC 2012, c 13; and

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

Defendant's address for service: **Department of Justice**
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Attention: Sarah-Dawn Norris
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October 16, 2023

ATTORNEY GENERAL OF CANADA

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Per : Sarah-Dawn Norris
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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.