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

Brought pursuant to the *Class Proceedings Act*, RSBC 1996, c. 50

RESPONSE TO CIVIL CLAIM

Filed by: The Defendant, His Majesty the King in Right of the Province of British Columbia (the "Province")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendant's Response to Facts

1. Except as expressly admitted herein, the Province denies each and every allegation set out in the Consolidated Notice of Civil Claim, filed on June 5, 2023 (the "Claim").

2. Part 1 of the Claim contains a blend of alleged facts and extensive legal argument. Additionally, many of the paragraphs contain multiple allegations of fact, limiting the Province's ability to make admissions to those paragraphs where all facts could be admitted.

3. The facts alleged in paragraphs 10, 12, 15, 19, 20, 41, 102, 104, 119, of Part 1 of the Claim are admitted.

4. The facts alleged in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 14, 16, 17, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 39, 40, 42, 43, 44, 45, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 67, 68, 69, 70, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 86, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 100, 101, 103, 105, 106, 107, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 124, 125, 126, 127, 128, 129, 133, 134, 135, 136, 137 and 138 of Part 1 of the Claim are denied.

5. The facts alleged in paragraphs 18, 24, 25, 35, 38, 46, 47, 48, 60, 66, 71, 72, 84, 85, 87, 98, 99, 108, 120, 121, 122, 123, 130, 131, 132, of Part 1 of the Claim are outside the knowledge of the Province.

Division 2 – Defendants' Version of Facts

Overview of Province's Position

6. The Province acknowledges British Columbia and Canada's history of colonization and related policies and practices. The Province also recognizes that the administration of child and family services is an important and pressing matter for all governments, citizens, and future generations. This is particularly so in the context of Indigenous children and youth, whom the Province acknowledges have been historically overrepresented in care. While the rates of their representation in care have declined over time, the Province remains committed to working with Indigenous peoples to continue implementing changes to further reduce such rates.

7. However, the Claim does not identify any particular act or omission that would be actionable against the Province. The Claim is instead a wholesale challenge to the entirety of the Provincial child welfare system as well as the provision and adequacy of all government services, including "health and social services", for Indigenous children under the age of 18 and their families, over a period of more than three decades, going back to January 1, 1992. In that sense, the Claim is more akin to a call for a broad public inquiry than a notice of civil claim.

8. The Claim alleges negligence, breach of fiduciary duty, breach of rights under the *Canadian Charter of Rights and Freedoms* ("*Charter*"), and unjust enrichment, as well as failure to uphold the honour of the Crown, but it does not identify any specific programs, services or funding mechanisms that are alleged to be in issue throughout the extensive period that the Claim proposes to cover (the "Proposed Class Period").

9. To the extent that it is possible to do so, the Province is providing below its response on generalities of identified paragraphs and reserves the right to provide a further specific response to those or other paragraphs of the Claim if the plaintiffs particularize and bring further precision to same.

Province's Response to Facts

10. The Province does not adopt the definitions as pleaded in the Claim. To the extent any of the plaintiffs' defined terms are used by the Province in this response, they are used for reference purposes only.

11. In response to paragraphs 1-2, 58-59, 62, 68 and the whole of the Claim, the Province specifically denies that it has discriminated against Indigenous children in the provision of child and family services, or that it has underfunded child and family services, including prevention services, for Indigenous children, as alleged in the Claim.

12. In response to paragraph 2, the Province specifically denies that provincial funding levels or mechanisms for child and family services have prevented Indigenous Child and Family Service Agencies ("ICFSAs") or others from providing adequate public services and products to Indigenous children ordinarily residing off-reserve, as alleged or at all.

13. In response to paragraphs 3-6, 46-68, and 71-78, and the whole of the Claim, the Province specifically denies that off-reserve Indigenous children or Métis and Inuit children were removed from their homes, families and communities so that those children could access benefits, programs or services, as alleged in the Claim or at all, and says that there are material differences between Canada's historic funding formulas, policies and practices and those in place in BC during the time period covered by the Claim. Further, while there may be an overrepresentation of Indigenous children in care (meaning in the care, custody or guardianship of a director designated under the *Child,*

Family and Community Services Act, RSBC 1996, c. 46 (a "CFCSA director" and the "*CFCSA*", respectively) or a director of adoption) the Province expressly denies that this is as a result of funding decisions for off-reserve services, as alleged or at all.

14. The Province denies that provincial funding approaches for child and family services create a "perverse incentive" to place Indigenous children into care, as alleged or at all. Decisions to place children into care are ones of last resort, that are governed by the provincial legislative scheme and subject to mandatory judicial oversight.

15. Further, the Province says that funding levels alone do not determine whether the provision of child and family services is sufficient. The Province provides social services and programs, including health and education-related services and programs as well as numerous Indigenous-specific initiatives, broadly within and across numerous ministries. Although the plaintiffs have not defined what services are "prevention services" or "essential services" with any precision, the sufficiency of services, including prevention and essential services, must be considered in the broad context of child and family services provided by all government ministries and many community agencies, including ICFSAs, funded by the Province.

16. In response to paragraph 9, and the whole of the Claim, the Province denies that this action meets the requirements for certification as a class proceeding pursuant to s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 or that these unparticularized claims, advanced on behalf of a very broad class over a class period spanning more than three decades, can be adjudicated in the mass class structure proposed by the plaintiffs.

17. In response to paragraph 26, the Province is constitutionally empowered to deliver child and family services within its geographic boundaries, pursuant to s. 92 of the *Constitution Act, 1867*.

18. In response to paragraphs 27-33, and the whole of the Claim, while the Province acknowledges that the words "prevention" and "protection" are used in the child welfare context, there is no consistent, universal meaning ascribed to the terms - what is preventative in one context may be characterized as protective in another, and vice versa. Further, the Province says that the classification of child and family services as either

strictly preventative or protective does not reflect the reality of service delivery within the province. The Ministry of Children and Family Development ("MCFD"), is the ministry responsible for the provision of many child and family services in the province, and provides a wide scope of child and family services, ranging from public awareness and education campaigns and programs of general availability, to family-specific voluntary services and involuntary interventions. Some examples include family support services, infant and child development programs, programs for families with children who have support needs, voluntary in care and out of care arrangements, involuntary interventions such as orders to supervise a parent's care, involuntary removals, and in-care supports. MCFD's use of the terms "prevention" and "protection" varies depending on the context, and many of MCFD's services have both preventative and protective aspects.

19. In further response to paragraphs 27-33, and the whole of the Claim, unless a child's health or safety is in immediate danger, CFCSA directors only have authority to remove a child if no other less disruptive measure is available to protect the child. CFCSA directors explore less disruptive measures in consultation with family members and Indigenous communities and take into account a child's Indigenous identity. Any removal of a child is subject to extensive judicial oversight and supervision.

20. In response to paragraphs 33, 40, and the whole of the Claim, the Province specifically denies that it has prioritized protection over prevention for Indigenous children, as alleged in the Claim, or at all. Further, to the extent that CFCSA directors or their delegates provide services to Indigenous children and families, those services are provided in accordance with the guiding principles and service delivery principles set out in the *CFCSA*, with children's ultimate safety and well-being as the paramount considerations.

21. In response to paragraph 42, the Province has entered into agreements with Canada, including through Memorandums of Understanding and Service Level Agreements for the purposes of funding for child and family services, but says that Canada maintained some responsibility for funding off-reserve child and family services to Indigenous people in British Columbia beyond "the early 1990s", as alleged in the Claim.

22. In response to paragraphs 45, 48-70, 86-91 and the whole of the Claim, the Province acknowledges that over the course of various decades, a number of reports, audits and investigations, including by third parties, have been issued on various aspects of government services, and further, that these reports, audits and investigations proposed various changes or perceived improvements. The Province views these reports, audits and investigations as a vital exercise of democracy, but expressly denies the plaintiffs' interpretation of them, or that they provide the basis for any claim against the Province as alleged or at all.

23. In response to paragraph 55, the Province meets and corresponds regularly with ICFSAs, including in relation to 'partnership table' discussion meetings between senior MCFD staff and ICFSA directors. The Province agrees that there was correspondence between MCFD and ICFSA directors in 2007 and 2021. However, the Province denies that requests or suggestions in the correspondence gave rise to any actionable obligations. The existence and contents of the 2018 correspondence referred to at paragraph 55 are outside the Province's knowledge.

24. In response to paragraph 66, the January 2018 comments of then-Minister of Indigenous Services Canada Jane Philpott relate to the manner in which Canada was funding child welfare services within reserves, and did not purport to extend to or intrude upon the autonomy of each province and territory to determine what programs, benefits or services should be made available to those within their respective jurisdiction.

25. In response to paragraphs 7, 79-81, 98-100, and the whole of the Claim, the Province denies that it failed or refused to provide essential health or social services to Indigenous children as alleged or at all. In specific response to paragraphs 80-81, the Province denies that it employed or adopted funding formulas or any approach to jurisdictional disputes that systemically denied essential services to Indigenous children as alleged, or at all.

Division 3 – Additional Facts

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

26. Currently, the *CFCSA* governs the provision of many child and family services in British Columbia. The *CFCSA* was originally enacted in 1994, and since then has been the subject of multiple amendments. However, it was preceded by other legislation providing for the delivery of child and family services in British Columbia, including the *Protection of Children Act*, RSBC 1960, c. 303 (as amended from time to time), and the *Family and Child Service Act*, SBC 1980, c. 11 (as amended from time to time) (the "*FCSA*").

27. Section 2 of the *CFCSA* outlines its guiding principles, and that it must be interpreted and administered such that the safety and well-being of children are the paramount considerations and in accordance with the principles that:

a. children are entitled to be protected from abuse, neglect and harm or threat of harm;

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;

c. Indigenous families and Indigenous communities share responsibility for the upbringing and well-being of Indigenous children;

d. if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;

e. the child's views should be taken into account when decisions relating to a child are made;

f. kinship ties and a child's attachment to the extended family should be preserved if possible;

g. Indigenous children are entitled to

(i)learn about and practise their Indigenous traditions, customs and languages, and

(ii) belong to their Indigenous communities;

h. decisions relating to children should be made and implemented in a timely manner.

28. Section 3 of the *CFCSA* outlines its current principles for service delivery, which are:

a. families and children should be informed of the services available to them and encouraged to participate in decisions that affect them;

b. in the planning and delivery of services to Indigenous children and families, there should be consultation and cooperation with Indigenous peoples and Indigenous governing bodies (s. 3(b));

c. services should be planned and provided in ways that prevent discrimination prohibited by the *Human Rights Code* and that promote substantive equality, respect for rights and culture and, in the case of Indigenous children, cultural continuity (s. 3(b.1));

d. services should be planned and provided in ways that are sensitive to the needs and the cultural, racial and religious heritage of those receiving the services (s. 3(c));

e. the impact of residential schools on Indigenous children, families and communities should be considered in the planning and delivery of services to Indigenous children and families (s. 3(c.1));

f. services should be integrated, wherever possible and appropriate, with services provided by government ministries, community agencies and Community Living British Columbia (s. 3(d));

g. services to Indigenous children and families should be provided in a coordinated manner with Indigenous child and family services provided by Indigenous authorities (s. 3(d.1));

h. the community should be involved, wherever possible and appropriate, in the planning and delivery of services, including preventive and support services to families and children (s. 3(e)).

29. As outlined above, one of the *CFCSA* principles for service delivery is that children and families are encouraged to participate in decisions that may impact them (s. 3(a)). Parents and guardians may refuse services that may be recommended or referred by a CFCSA director, but which require voluntary participation. As a result, there may be many different services that are funded and available, but which families elect not to use.

30. Section 4 of the *CFCSA* sets out that the best interests of the child as referenced within the act are to be determined in consideration of factors including the child's safety, the importance of continuity in the child's care, the child's cultural, racial, linguistic and religious heritage, the effect on the child if there is delay in making a decision, and, in the case of Indigenous children, the importance of the child being able to learn about and practise the child's Indigenous traditions, customs and language and belong to their Indigenous community.

31. During the Proposed Class Period, the *CFCSA* has been amended numerous times to better support the rights of Indigenous peoples within the delivery of child and family services, including as they deliver child and family services under their own laws. Some of the relevant amendments include:

a. The *FCSA*, in force at the beginning of the Proposed Class Period was replaced by the *Child, Family and Community Service Act* SBC 1994, c. 27, in force January 29, 1996 (the "*CFCSA 1994*"). The *CFCSA 1994* contained, for the first time, guiding principles, service delivery principles, and factors to be considered when determining the best interests of the child under the act, similar to those that exist in ss. 2, 3 and 4 of the current act.

b. The *CFCSA 1994* included provisions requiring the director to give notice of presentation and protection hearings to "aboriginal organizations" prescribed in regulations, and to provide a child's Indian band or "aboriginal community" with party status in protection hearings.

c. The *CFCSA 1994* also set out that, when considering out-of-home living arrangements for "aboriginal children", a director must prioritize placements with the child's extended family, own community or another aboriginal community.

d. The *CFCSA 1994* was revised and replaced by the *CFCSA* which, though amended, is still in force.

e. In 2018, with the passage of the *Child, Family and Community Service Amendment Act, 2018,* SBC 2018, c. 27, the Province made amendments to the *CFCSA* focused on supporting Indigenous children to remain at home or in their community through measures including: promoting the involvement of Indigenous communities in child welfare matters prior to removal (ss. 7-10); enabling greater information sharing between a director under the *CFCSA* and Indigenous communities (ss. 6-7, 9-10, 41 and 45); expanding the requirements to notify Indigenous communities of proceedings involving children from those communities (ss. 21 and 28); recognizing the shared responsibilities Indigenous communities and Indigenous families have for the upbringing and well-being of their children (s. 2); and, affirming the importance of Indigenous children learning about and practicing their traditions, customs, and languages, and belonging to their Indigenous communities (ss. 2, 4, 19, 23, 40 and 43).

f. Those amendments were furthered in 2022, when the Province enacted Bill 38-2022, the *Indigenous Self-Government in Child and Family Services Amendment Act,* which was co-developed in collaboration with Indigenous peoples in BC, expressly recognizing Indigenous peoples' inherent right of self-government with respect to child and family services.

g. The 2022 amendments align the *CFCSA* with the Province's implementation of the United Nations Declaration on the Rights of Indigenous Peoples, and with the federal *Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c. 24.

32. In relation to the 2022 amendments and in relation to the Province's implementation of the *Declaration on the Rights of Indigenous Peoples Act,* SBC 2019,

c. 44 (the "*Declaration Act*"), the Province is currently engaged in tripartite 'coordination agreement' discussions with Canada and several Indigenous Governing Bodies ("IGB" or "IGBs"). An IGB refers to a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act*, 1982. These discussions are part of the IGBs' intention to resume the exercise of their jurisdiction over child and family services in parts or all of British Columbia

33. At present, the Province has entered into a coordination agreement with Splatsin First Nation for the purpose of supporting Splatsin's exercise of its jurisdiction over child and family services in British Columbia.

34. The Province is currently operating within an interim fiscal approach to fund IGBs under coordination agreements but is in the process of co-developing a fiscal framework with the federal government and Indigenous peoples to support Indigenous jurisdiction in alignment with the *Declaration Act.*

Ministry of Children and Family Development

35. During the Proposed Class Period, the provincial ministry primarily responsible for the delivery of child and family services, now referred to as MCFD, was known first as the Ministry of Social Services (1991-1996), and then as the Ministry for Children and Families (1996-2001).

36. MCFD has primary responsibility for the administration of the *CFCSA,* though, as discussed below, authority for the administration of parts of the *CFCSA* have been delegated to employees of ICFSAs.

37. MCFD is also responsible for administering other legislation that touches on child welfare, including the *Adoption Act* RSBC 1996, c. 5, the *Social Workers Act,* SBC 2008, c. 31, and provisions of the *Youth Justice Act*, SBC 2003, c. 85.

38. MCFD's primary focus is to support the well-being of all children and youth in British Columbia – Indigenous and non-Indigenous – to live in safe, healthy and nurturing families, and to be strongly connected to their communities and cultures.

39. Addressing the overrepresentation of Indigenous children and youth in the delivery of child and family services is one of the key areas of focus within MCFD.

40. Each year, MCFD delivers a wide variety of child and family services to approximately 190,000 children, youth and families across six core lines of service:

a. Early Years Services;

b. Services for Children and Youth with Support Needs;

c. Child and Youth Mental Health Services;

d. Child Safety, Family, Youth and Children in Care Services;

e. Adoption Services; and

f. Youth Justice Services.

41. The Province's expenditures for child and family services are not confined to MCFD but extend across ministries. Funding for child and family services delivered through MCFD and ICFSAs is within the budget limits prescribed by the Provincial Treasury Board.

42. MCFD delivers on its mandate through approximately 5,200 employees working in partnership with ICFSAs, IGBs, and approximately 6,000 contracted service providers, including Indigenous 'Friendship Centres', foster homes, and Indigenous- and non-Indigenous-serving social service agencies.

43. Except for a few centralized and provincially administered services, child and family services are delivered across the province in 13 Service Delivery Areas ("SDA"). Each SDA is divided into Local Services Areas ("LSA"). There are 46 LSAs distributed across the 13 SDAs. In each of these service areas, MCFD staff must account for a distinct set of challenges, needs and resources in the provision of services. These particularities include, but are not limited to, geographical accessibility, demographics and population dynamics, including diverse cultural needs, and the availability of third-party and non-governmental services across rural, remote and urban settings.

44. Each SDA is allocated a portion of the MCFD annual budget, to be used for all of the SDA's operational and service delivery needs.

45. MCFD delivers services to individuals and families from diverse backgrounds and with diverse identities including those who identify as Indigenous, Black, a Person of Colour, 2SLGBTQQIA+, and as a person with a disability.

46. In delivering services to Indigenous children and families, whether on- or off-reserve, MCFD staff and employees of ICFSAs apply policies and frameworks intended to improve outcomes for Indigenous children, youth, families and communities through restorative policies and practices.

47. MCFD supports children, youth, young adults and their families, emphasizing the principles of early intervention, prevention, and cultural and community connections to keep families together where possible, and to connect children and youth with permanent living arrangements when needed.

48. The services provided by MCFD are intended to provide a system of supports that keep families safely together and ensure children, youth and young adults experience belonging and reach their potential.

49. Over the past two decades, there has been a clear statistical decrease in the numbers of Indigenous children and youth taken into and in state care.

Indigenous Child and Family Service Agencies

50. The Province provides services to both on-reserve and off-reserve Indigenous children as required, regardless of residency.

51. Child and family services are provided to Indigenous children in BC through MCFD, ICFSAs, and contracted community-based service providers. MCFD and ICFSAs provide services under the *CFCSA* through employees who are designated directors, or delegates of directors. MCFD contracts with Indigenous and non-Indigenous community-based service agencies for the provision of non-delegated community and support services.

52. ICFSAs (previously known as Delegated Aboriginal Agencies) are independent, Indigenous-led organizations that provide child and family services to their own or other

Indigenous communities. Most are societies organized under the *Societies Act*, SBC 2015, c. 18, although some are run by IGBs.

53. Section 92 of the *CFCSA* authorizes a director to delegate statutory powers, duties and functions to any person. The designated director responsible for ICFSAs, who is a Ministry employee, delegates authority to individuals employed by ICFSAs.

54. A director is authorized to enter into agreements with delegates' employers, including entering into agreements with ICFSAs. These agreements are typically referred to as delegation agreements ("Delegation Agreements"). Most recently, the authority to enter into Delegation Agreements is conferred under s. 93(1)(g)(vii) of the *CFSCA*.

55. MCFD began negotiating Delegation Agreements with ICFSAs in approximately 1985.

56. Funding for ICFSAs is currently provided through a combination of funding through both the Standardized Funding Approach (the "SFA") for delegated services and service-by-service contracts.

57. Funding for ICFSAs varies from one agency to another, depending in part on the agency's level of delegated authority, which are outlined in paragraph 60. The Province introduced the SFA as a pilot project in 2016. The SFA was then implemented in 2017. The SFA standardized the funding for delegated services for ICFSAs across SDAs.

58. There are approximately 202 First Nations in British Columbia. There are significant linguistic and cultural differences among those First Nations. In addition to the First Nations located within the geographic boundaries of the Province, BC is home to Métis, Inuit and members of First Nations from across Canada.

59. To date, approximately 117 of the First Nations in the province have given ICFSAs a mandate to provide delegated services to their communities. The remaining First Nations, approximately 85 in total, who are not served by an ICFSA receive delegated services from MCFD (with the exceptions of Splatsin First Nation which provides child and family services to Splatsin families province-wide under its own laws, and Sts'ailes First Nation which provides child and family services to Sts'ailes families on Sts'ailes reserve under its own laws).

60. Currently, there are 24 ICFSAs in British Columbia, each with various levels of delegation: three provide voluntary services and recruit and approve foster homes; seven have the additional delegation necessary to provide guardianship services for children and youth in continuing care; and 14 have the delegation required to provide, in addition to the services above, full child protection, including the authority to investigate reports and remove children. An ICFSA's level of delegation will impact its level of funding. Some ICFSAs have additional contracts with MCFD to provide non-delegated services.

Provision of Child and Family Services

61. As noted above, MCFD provides a wide range of child and family services across the six core service lines set out in paragraph 40.

62. Within the Child Safety, Family, Youth and Children in Care Service line, there is a variety of voluntary services available to children and families, such as support agreements, kinship agreements, voluntary care agreements and special needs agreements.

63. MCFD and ICFSAs receive and respond to requests for voluntary supports from families. Delegated staff working within MCFD and ICFSAs also receive child protection reports from a wide range of sources including schools, children's parents or other relatives, police, hospitals, medical professionals, concerned citizens and support workers. Delegated staff assess and respond to child protection reports using the various tools and response paths available under the *CFCSA*.

64. When delegated staff determine that a child protection report does not require a protection response, there are various response paths available including:

a. taking no further action;

b. referring the family to a community agency, or where applicable, to an Indigenous authority or Indigenous community for support services;

c. offering voluntary support services to the family; or

d. providing services supporting a youth.

65. When delegated staff determine that a protection response is required because one of the circumstances set out in s. 13 of the *CFCSA* is present, they must consider various response paths before removal, unless a child's health or safety is in immediate danger. Most of these response paths seek to ensure that families are fully engaged in the assessment and decision-making process, that Indigenous communities are partners in keeping children safe, and that children, youth and families receive the least disruptive services available to ensure their safety and well-being.

66. Removal is a last resort, when there are no other less disruptive measures available that would adequately protect the child.

67. Removal of a child is subject to mandatory judicial oversight in the Provincial Court of British Columbia. When a child is removed, a "presentation hearing" must be held in the Provincial Court within seven days. Notice must be given to the parents and, if the child is Indigenous, the Indigenous organization prescribed in the regulations.

68. At the presentation hearing, a CFCSA director must present a written report that includes the following information:

a. the circumstances that caused the director to remove the child;

b. an interim plan of care for the child, including, in the case of an Indigenous child, the steps to be taken to support the child to learn about and practice the child's Indigenous traditions, customs and language and to belong to the child's Indigenous community; and

c. information about any less disruptive measures considered by the director before removing the child.

69. At the conclusion of the hearing, the court may make:

a. an interim order that the child remain in the custody of the director, return to or remain with the parent apparently entitled to custody under the director's supervision, or be placed in the custody of a person other than a parent (such as a relative) under the director's supervision; or

b. an order that the child return to or remain with the parent apparently entitled to custody.

70. If the court makes an interim order at the presentation hearing, the court must set the earliest possible date for a hearing to determine if the child needs protection. Notice of the protection hearing must be given to the parents and, if the child is Indigenous, the applicable Indigenous organization.

71. At the protection hearing, the court must determine whether the child is in need of protection as defined in the *CFCSA*.

72. If the court determines that a child is in need of protection, it must make one of the following orders in the child's best interest:

a. that the child be returned to or remain in the custody of the parent apparently entitled to custody and be under the director's supervision for a specified period of up to 6 months;

b. that the child be placed in the custody of a person other than a parent with the consent of the other person and under the director's supervision, for a specified period;

c. that the child remain or be placed in the custody of the director for a specified period; or

d. that the child be placed in the continuing custody of the director.

73. In making that determination, the court must consider the plan of care proposed by the director and may hear any other evidence it considers necessary to help determine which order should be made.

Jordan's Principle

74. In 2008 Premier Gordon Campbell publicly endorsed Jordan's Principle. In 2009, the legislature passed a private member's bill stating that the Province endorsed the spirit of Jordan's Principle. The legal effect of the endorsements is addressed under Part 3 below.

The Proposed Representative Plaintiffs

75. The Claim does not provide any information about the plaintiffs that would allow the Province to understand their connection to the various claims advanced in this action. There are no material facts pleaded that would support the plaintiffs' claims that the Province acted in a manner that was negligent, in breach of fiduciary duty, in breach of *Charter* rights or was unjustly enriched in respect of programs, benefits or services extended to the plaintiffs or to their families. The Province reserves the right to provide further response if and when such material facts are pleaded.

A) Jessy Rae Destiny We-gyet Neal

76. In response to paragraph 11 of Part 1 of the Claim, Ms. Neal first became involved with the Superintendent under the *FCSA* on or about March 5, 1990, at the age of three, when her parent, who was experiencing mental health concerns, was facing hardships in managing Ms. Neal's day to day needs and activities. Ms. Neal's parent entered into a voluntary agreement with the Superintendent. This agreement provided for Ms. Neal to be placed with an Indigenous "aunt", who was not a direct relative of Ms. Neal, but who had acted as a maternal figure for the family. Ms. Neal returned to her parent's custody on June 29, 1990.

77. Ms. Neal returned to a CFCSA director's care as a result of a request made by Ms. Neal's parent on or about October 8, 1996, for a foster care placement for Ms. Neal. As a result of this request, Ms. Neal's parent gave care of Ms. Neal to a CFCSA director pursuant to a voluntary care agreement. Thereafter, the CFCSA director made best efforts to reunite Ms. Neal with her parent, and from time to time she was indeed able to return to her parent's custody. When Ms. Neal's parent resumed care of Ms. Neal, the family received homemaker, respite, and childcare worker services. At times when Ms. Neal was in the care of a CFCSA director, where placement with relatives, friends or community members was not available, Ms. Neal was placed with an appropriate foster care home.

78. On or about September 21, 1998, when Ms. Neal's parent could no longer care for her, and no other alternative measures were available to care for Ms. Neal, the

Provincial Court ordered Ms. Neal into the continuing custody of a CFCSA director. However, from December 18, 1998, to October 2003, Ms. Neal resumed living with her "aunt". On October 24, 2003, Ms. Neal moved onto an independent living program, during which a CFCSA director supported her to live independently. During this time, she accessed support services directly.

79. As an adult in 2009 and 2010, Ms. Neal entered into various Young Adult Agreements with a CFCSA director pursuant to section 12.3 of the *CFSCA* to aid in funding her post-secondary studies and continued to receive support services including financial support for rent, telephone, food and personal expenses, clothing and local transportation.

B) Laura Julie-Faith Dobson

80. In response to paragraphs 13-14 of Part 1 of the Claim, Ms. Dobson was first removed from the care of her mother due to neglect concerns on November 5, 1994, when Ms. Dobson was seven years old. The CFCSA director's engagement was prompted by community reports from various family members regarding concerns for the safety of Ms. Dobson and her siblings. Ms. Dobson remained under a Continuing Custody Order until she turned nineteen years old on June 17, 2006.

81. During the period Ms. Dobson was in care, to the extent a placement was required, efforts were made to place Ms. Dobson with someone familiar, including with her Indigenous relatives: an aunt, and later with two of her older sisters.

82. The Old Massett Village Council was part of the planning group concerning Ms. Dobson coming into care. Efforts were made to place Ms. Dobson within the community, however that was not possible. Where placement with relatives, friends and community members was not available, Ms. Dobson was placed with an appropriate foster care home.

83. Ms. Dobson had a total of eight siblings, making placement in a single home for all eight children together challenging despite best efforts. Some foster home placements were able to facilitate keeping Ms. Dobson with one or two of her siblings for periods of

time. When Ms. Dobson and her siblings were not in the same foster home placement, at various times Ms. Dobson attended the same schools as some of her siblings.

84. While in care, Ms. Dobson's plan of care included art therapy class, one-on-one childcare worker services, and recreational time outside of the foster home to be facilitated by the childcare worker. Ms. Dobson had the opportunity to have occasional visits and stays with her mother, including periods where in-person visitation was required to be supervised.

85. As an adult, Ms. Dobson entered into a Young Adults Agreement with a CFCSA director pursuant to section 12.3 of the *CFSCA* in 2010 and continued to receive support services including financial support for rent, food and personal expenses, clothing, transportation, and childcare.

C) Jake Philip Lopez Smith

86. In response to paragraphs 15-18 of Part 1 of the Claim, Mr. Smith was first removed from his mother's care on May 11, 1995, and a Continuing Custody Order was granted pursuant to s. 49 of the *CFCSA* on March 5, 1998. Mr. Smith remained in care until he reached the age of majority on August 21, 2007.

87. The FCSA Superintendent became involved with Mr. Smith's care in or around July 1991 following a physical abuse investigation. In an effort to assist with at-home care of Mr. Smith, the Superintendent provided additional homemaking services to the family. However, in or around January 1995, the Superintendent received additional complaints from the community concerning serious allegations of abuse. Investigations led the Superintendent to conclude that Mr. Smith should be removed from his mother's care.

88. During the period in which Mr. Smith was in care, efforts were made to place Mr. Smith with someone familiar. For example, Mr. Smith was placed with his grandparent. Where placement with relatives, friends and community members was not available, Mr. Smith was placed with an appropriate foster care home.

89. While in care, Mr. Smith continued to have both in person and telephone access to his mother, including periods where in-person visitation was required to be supervised.

D) Rachelle Lynn Deschamps

90. In response to paragraphs 21 - 23 of Part 1 of the Claim, a *CFCSA* director removed Ms. Deschamps' daughter on January 8, 2017, and she remained in the director's care until January 20, 2017. This stemmed from Ms. Deschamps' arrest at 2:30 a.m. on January 8, 2017. Ms. Deschamps' twelve-year-old daughter was home alone at the time of the arrest, with no access to a phone and no knowledge of her mothers' whereabouts.

91. The social worker assigned to Ms. Deschamps and her daughter attempted to identify a family member with whom Ms. Deschamps' daughter could stay, but it was not possible to identify someone who could care for Ms. Deschamp's daughter. Efforts were made to identify an Indigenous home that could care for Ms. Deschamps' daughter but there were none available.

92. Ms. Deschamps' daughter returned to her mother's care on January 20, 2017. The director advised Ms. Deschamps that her daughter could be expeditiously returned to her exclusive care if she was willing to come up with a strong support network and if those supports could be brought together for a Traditional Family Planning Meeting. A Traditional Family Planning Meeting took place on or about January 18, 2017, to determine what could be done to expedite the return of Ms. Deschamps' daughter to her mother's care. The director and Ms. Deschamps entered into an agreement that the director felt would adequately protect Ms. Deschamps' daughter, which included providing her daughter with access to a phone and contact information in the event of an emergency, and ensuring she would not be home without an adult after midnight. As such, the director withdrew from *CFCSA* proceedings. After the agreement was implemented, the director did not receive any further reports, or requests for services involving Ms. Deschamps and her daughter.

93. While in care, Ms. Deschamps' daughter was able to continue going to her regular school and participate in volleyball and other extracurricular activities. She was also able to remain in frequent contact with her mother.

Part 2: RESPONSE TO RELIEF SOUGHT

94. The Province consents to the granting of the relief sought in none of the paragraphs of Part 2 of the Claim.

95. The Province opposes the granting of the relief sought in all of Part 2 of the Claim.

96. The Province takes no position on the granting of the relief sought in none of the paragraphs of Part 2 of the Claim.

Part 3: LEGAL BASIS

Insufficient Pleadings

97. The Claim does not sufficiently plead the elements or material facts required for each of the causes of action alleged against the Province, and instead advances argument and factually unsupported legal conclusions.

98. Further, and in particular, the Claim does not plead material facts to show where services are said to have been denied.

99. The Claim's reliance on third party reports is not proper pleading, as references to these reports are generalized, decontextualized, and cannot establish the necessary material facts to support any cause of action. Rather, while independent reviews and audits to investigate areas for improvement in the delivery or funding of government services or benefits are important to democracy, the implementation of any resulting recommendations is a matter that is wholly within the discretion of government.

100. In determining whether or not to implement any given recommendations made in respect of the delivery of funding of government services or benefits, government considers a large number of factors, including the availability of limited resources and competing priorities.

101. Although government is accountable to the Legislature and ultimately to the public, the alleged failure on the part of government to implement improvements identified or suggested by independent reviews, parliamentary reviews and audits is not actionable.

The Plaintiffs' Reliance on CHRT Proceedings is Misplaced

102. The Province acknowledges the proceedings pleaded to have taken place at the Canadian Human Rights Tribunal as against Canada (the "CHRT Complaint"), to which the Province was not a party, but expressly denies that any findings or conclusions reached in that case can be imported into the proceedings in this matter or are in any way binding upon this Court or the Province.

103. In addition, the Province denies the relevance of the CHRT Complaint to the present matter. The CHRT Complaint considered federal funding of programs that would be carried out in accordance with provincial standards and legislation. The CHRT Complaint thus accepted that the determination of what services, programs and benefits were to be provided was a matter of provincial or territorial determination.

Claims are Not Justiciable

104. The Province recognizes that the administration of child and family services, particularly as it pertains to Indigenous children and youth, is an important and pressing matter. Nonetheless, the separation of powers within our system of democracy does not allow the courts to adjudicate the matter in the way proposed by the plaintiffs in their Claim.

105. The plaintiffs do not challenge any particular law or the application of any legislation as violating their constitutional rights. Rather, they challenge the historical governmental distribution of public funds and the nature of services (going to prevention or protection) delivered in furtherance of legislative and governmental policy choices.

106. However, only the executive and legislative branches of government may make policy, pass laws, and authorize the allocation of public funds. These are decisions that fall outside the realm of permissible review by the courts and are therefore not justiciable.

107. The nature and extent of services funded and provided by the Province is a matter of policy and legislative decision-making regarding limited public funds.

No Claim in Negligence

108. The Province denies that it was negligent and denies each and every allegation of negligence listed in the Claim.

109. The Province does not owe a private law duty of care in negligence to the plaintiffs. To the extent the Claim discloses any causes of action in tort, which is denied, the Province pleads and relies upon the doctrine of core policy immunity.

110. In particular, all decisions or actions of the Province as alleged in the Claim were in accordance with provincial policy standards. These are true policy decisions, including but not limited to:

a. The development, regulation, and administration of child and family services under the *CFCSA* and other applicable legislation; and

b. Prioritization and allocation of resources, including financial resources, for child and family services.

111. In the alternative, if the Province owes a private law duty of care to the plaintiffs, which is denied, the Province at all material times adopted, and met or exceeded the applicable policies, procedures, standards or specifications and can rely upon same as a complete defence to the Claim.

No Breach of Statutory Duty

112. An alleged breach of statutory duty is not privately actionable.

No Breach of Honour of the Crown

113. The Province acknowledges that the honour of the Crown is always at stake in its dealings with Indigenous peoples. However, an alleged failure to uphold the honour of the Crown is not independently actionable, absent a legally enforceable duty.

No Breach of Fiduciary Duty

114. The Province acknowledges that the relationship between the Crown and Indigenous peoples in Canada is fiduciary in nature and may, in certain circumstances,

give rise to specific fiduciary duties. The Province denies that it owed fiduciary duties to the plaintiffs as alleged, or at all.

115. The Province acted in accordance with valid statutory authority – which is a public law creation and governed by the government's broad public law obligations and not independent fiduciary duties as alleged or at all.

116. In any event, the plaintiffs have not identified any specific or cognizable Indigenous interest over which the Province assumed discretionary control.

117. If the Province is found to owe any of the fiduciary duties alleged in the Claim, which is denied, then the Province says it fulfilled those obligations.

No Breach of Jordan's Principle

118. The Province denies that it has breached Jordan's Principle.

119. At all materials times, the Province has operated according to and in the spirit of Jordan's Principle, as endorsed by the premier and as expressed by the legislature. However, endorsement of Jordan's Principle by the Province did not create binding legal obligations such that an alleged failure to adhere to Jordan's Principle in a given instance is justiciable.

120. Nothing in the pleadings shows any breach of Jordan's Principle by the Province. In addition, and to the extent that the plaintiffs' claim relates to a delay or denial of an essential service or a service gap that is distinct from claims relating to a breach of Jordan's Principle, the plaintiffs have failed to plead any material facts to support the allegations that they were denied a service, that provision of a service was delayed, or that there was a gap in service as a result of a jurisdictional dispute.

No Breach of the *Charter*

Section 7

121. In specific reply to paragraphs 153-158 of the Claim, the Province denies that the child welfare system or the provision of child and family services in British Columbia

deprives the plaintiffs of their rights to life, liberty, or security of the person within the meaning of s. 7 of the *Charter*.

122. Section 7 of the *Charter* does not impose a positive duty on government to provide funding or services that are required to maintain a specific quality of life, liberty or security of the person.

123. Further, and in the alternative, any deprivation of the plaintiffs' rights to life, liberty, or security of the person, or any failure to provide a specific quality of life, liberty or security of the person to the plaintiffs, through funding or provision of child and family services, which is denied, was not contrary to any of the principles of fundamental justice.

124. In the further alternative, removals of children reflected a reasonable and proportionate balance between the class members' rights under s. 7 of the *Charter* and the statutory objective of the *CFCSA* of ensuring the safety and well-being of children.

Section 15

125. In specific response to paragraphs 146-152, and the whole of the Claim, the Province denies that it has discriminated against Indigenous children or their families by underfunding child and family services, including prevention services, for Indigenous children, within the meaning of s. 15(1) of the *Charter*, as alleged in the Claim, or at all. The Province further denies that it breached Jordan's Principle or caused delays or denials of service or serve gaps for essential services, as alleged or at all.

126. The Claim does not set out material facts on which a court could find that the structure, funding, or operation of child and family services in British Columbia have created a distinction based on enumerated or analogous grounds.

127. The Claim does not set out material facts on which a court could find that the plaintiffs failed to receive a benefit that the law provided or that a burden had been imposed on them that the law does not impose on someone else.

No Unjust Enrichment

128. The plaintiffs impugn, without specificity, the Province's funding regimes over a period of more than three decades.

129. The Province has not been enriched as a result of the allocation of its limited resources.

130. In addition, or in the alternative, the Province has juristic reason for its funding allocations. There has been no unjust enrichment, and no restitution is owed.

Historical Wrongs of Others and Causation

131. The plaintiffs make reference to historical wrongs perpetrated by other parties. Many of these historical wrongs have been the subject of settlements, and to the extent the plaintiffs' claims include a claim for the effects of the settled historical wrongs, the terms of those settlements and in particular the releases will have to be considered to determine whether and to what extent any claims arising from the same conduct can be advanced as against the Province.

132. For example, the settlement of the "Sixties Scoop" claims provides, among other things, that class members and their heirs finally released their claims, and that any third-party claims would be "restricted to whatever such third party may be directly liable for, and that do not include whatever such third party can be jointly liable for together with Canada".

Damages and Remedy

133. The plaintiffs have not suffered any loss or damage that was caused or contributed to by any negligence, breach of any legal duty, or breach of the *Charter*, by or on behalf of the Province.

134. *Charter* damages are not a just or appropriate remedy.

135. Good governance concerns militate strongly against *Charter* damages.

136. In the alternative, the claim for *Charter* damages is duplicative of the claim for damages in tort. If tort liability is found, tort damages would be an adequate and more appropriate alternative remedy to *Charter* damages.

137. The Province specifically denies that the facts of this matter, as alleged or at all, are such to attract punitive damages,

138. The plaintiffs have failed to mitigate their damages, and the Province pleads and relies upon the *Negligence Act,* RSBC 1996, c. 333.

Limitation Periods

139. The Province pleads and relies on the *Limitation Act*, SBC 2012, c. 13, including s. 21 and the *Limitation Act*, R.S.B.C. 1996, c. 266, including s. 8.

Action Not Suitable as a Class Proceeding

140. The Province denies that this action meets the requirements for certification as a class proceeding pursuant to s. 4(1) of the *Class Proceedings Act*, RSBC 1996, c. 50.

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Date: 16 October 2023

Lawyer for the Province
J. Cherisse Friesen

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.