Court File Nos. T-402-19 / T-141-20

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

XAVIER MOUSHOOM, JEREMY MEAWASIGE (by his litigation guardian, Jonavon Joseph Meawasige), JONAVON JOSEPH MEAWASIGE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS, ASHLEY DAWN LOUISE BACH, KAREN OSACHOFF, MELISSA WALTERSON,
NOAH BUFFALO-JACKSON by his Litigation Guardian, Carolyn Buffalo, CAROLYN BUFFALO, and DICK EUGENE JACKSON also known as RICHARD JACKSON

Plaintiffs

and

HER MAJESTY THE QUEEN
AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Defendant

CONSOLIDATED STATEMENT OF CLAIM

I. NATURE OF THE ACTION

1. Year after year, decade after decade, generation after generation, the Crown[1] has systematically discriminated against First Nation children because of their race, nationality and ethnicity. In child welfare services, the discrimination has taken two forms.

2. **First**, the Crown has knowingly underfunded child and family services for First Nations children living on Reserve and in the Yukon. This underfunding has prevented child welfare service agencies from providing adequate Prevention Services to First Nations children and families. The underfunding persists despite the heightened need for such services on Reserve due to the inter-generational trauma inflicted on First Nations peoples by the legacy of the Residential Schools and the Sixties Scoop, and despite numerous calls to action by several official, independent fact-finders. The Crown has known about the severe inadequacies of its funding formulas, policies, and practices for years, but has not adequately addressed them.

3. At the same time that the Crown has underfunded Prevention Services to First Nations children and families living on Reserve and in the Yukon, it has fully funded the costs of care for First Nations children who are removed from their homes and placed into out-of-home care. This practice has created a perverse incentive for First Nations child welfare service agencies to remove First Nations children living on Reserve and in the Yukon from their homes and place them in out-of-home care. Because of these funding formulas, policies, and practices, a child on Reserve must often be removed from their home in order to receive public services that are available to children off Reserve.

[1] All capitalized terms have the meanings assigned to them in "II. Defined Terms", below.

4. The removal of a child from his/her home necessarily causes severe and long-lasting trauma to that child and his or her family. It is therefore only used as a last resort for children who do not live on a Reserve or in the Yukon. Because of the underfunding of Prevention Services and the full funding of out-of-home care, however, First Nations children on Reserve and in the Yukon have been removed from their homes as a first resort, and not as a last resort. The funding incentive to remove First Nations children from their homes accounts for the staggering number of First Nations children in state care. There are approximately three times the numbers of First Nations children in state care now than there were in Residential Schools at their apex in the 1940s.

5. The incentivized removal of First Nations children from their homes has caused traumatic and enduring consequences to First Nations children and their families. This action seeks individual compensation for on Reserve First Nations children and their family members who were victims of this systemic discrimination.

6. **Second**, the Crown has failed to comply with Jordan's Principle, a legal requirement designed to safeguard First Nations children's existing substantive equality rights guaranteed in the *Charter*. Jordan's Principle aims to prevent First Nations children from suffering gaps, delays, disruptions or denials in receiving necessary services and products contrary to their existing *Charter*-protected substantive equality rights. The Crown has admitted that Jordan's Principle is a "legal requirement" and thus an actionable wrong. However, the Crown has disregarded the rights embodied by Jordan's Principle and thereby denied crucial services and products to tens of thousands of First Nations children in breach of Jordan's Principle. This action seeks compensation for those First Nations children who suffered or died while awaiting the services or products that the Crown was legally required to provide but did not provide, in breach of Jordan's Principle and the substantive equality rights that it embodies.

7. Both forms of discrimination were directed at the Class because they were First Nations. The Crown's discriminatory policies and practices and other Impugned Conduct particularized herein breached section 15(1) of the *Charter*, the Crown's fiduciary duties to First Nations, and constituted negligence at common law and a fault at civil law.

8. The plaintiff AFN together with the Caring Society brought a complaint before the Tribunal to address this Impugned Conduct. In a landmark decision released in 2016, the Tribunal found that the Crown had systemically discriminated against First Nations children on both of the above grounds, contrary to the *CHRA*.

9. On March 4, 2019, Xavier Moushoom commenced a proposed class action under Court File Number T-402-19, seeking compensation for the Class on account of the Impugned Conduct dating back to 1991.

10. On September 6, 2019, the AFN and the Caring Society obtained a favourable decision from the Tribunal, which included an award of $40,000 per affected individual for a period commencing in 2006.

11. On January 28, 2020, the AFN and other plaintiffs also filed a proposed class action under Court File Number T-141-20 regarding the Impugned Conduct dating back to 1991.

12. Both groups of plaintiffs have come together to combine efforts in the best interests of the Class. The consolidated action seeks compensation for First Nations individuals who were victims of the Crown's systemic discrimination while they were under the age of majority and for family members who suffered the break-up of their families and other harm when their children were

removed from their homes and/or their Jordan's Principle substantive equality rights were breached.

13. This Consolidated Statement of Claim removes, with the Court's approval, the members of Jordan's Class and their corresponding Family Class members whose claims date back to between April 1, 1991 and December 12, 2007, that were previously part of Court File Number T-402-19 and/or Court File Number T-141-20. Those claims are proceeding separately as part of a new Statement of Claim in the Federal Court that captures all the pleaded facts and legal arguments belonging to those class members.

II. DEFINED TERMS

14. The capitalized terms in this statement of claim have the following meanings (including both the singular or plural as the context requires):

(a) "**1965 Agreement**" means the Memorandum of Agreement Respecting Welfare Programs for Indians of 1965, a cost-sharing agreement between the **Crown** and the Province of Ontario for the provision of certain services to **First Nations** in Ontario, including but not limited to child and family services, child care, and social assistance.

(b) "**AFN**" means the Assembly of First Nations, a national advocacy organization representing **First Nation** citizens in Canada, including more than 900,000 people living in 634 **First Nation** communities and in cities and towns across the country. Pursuant to Article 17 of the **AFN**'s Charter, the Executive Committee consists of the National Chief, the AFN Regional Chiefs and the Chairman of the Council of Elders.

(c) "**Caring Society**" means the First Nations Child and Family Caring Society, an umbrella service organization.

(d) "***Child and Family Services Act***" means the *Child and Family Services Act*, R.S.O. 1990, c. C.11.

(e) "***CHRA***" means *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

(f) "**Class**" and "**Class Members**" means the **Removed Child Class**, **Jordan's Class**, and **Family Class**, collectively.

(g) "**Class Period**" means:

(i) for the **Removed Child Class** members and their corresponding **Family Class** members, the period of time beginning on April 1, 1991 and ending on the date this action is certified or such other date as the Court decides; and

(ii) for the **Jordan's Class** members and their corresponding **Family Class** members, the period of time beginning on December 12, 2007 and ending on the date this action is certified or such other date as the Court decides.

(h) "**Crown**" means Her Majesty in right of Canada as defined under the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50 and the agents of Her Majesty in right of Canada, including the various federal departments responsible for the funding formulas, policies and practices at issue in this action relating to **First Nations** children in Canada during the **Class Period**, as follows: the Department of Indian Affairs and Northern Development using the title Indian and Northern Affairs Canada ("**INAC**") until 2011; Aboriginal Affairs and

Northern Development Canada ("**AANDC**") from 2011 to 2015; Indigenous and Northern Affairs Canada ("**INAC**") from 2015 to 2017; and Indigenous Services Canada and Crown-Indigenous Relations and Northern Affairs Canada, following the 2017 dissolution of **INAC**. In this claim, **INAC** and its predecessors or successors, are referred to interchangeably as the **Crown**, unless specifically named. The Crown is represented herein by the defendant Attorney General of Canada.

(i) "**Directive 20-1**" means **INAC**'s national policy statement on the **FNCFS Program**, establishing **FNCFS Agencies** under the provincial or territorial child welfare legislation and requiring that **FNCFS Agencies** comply with provincial or territorial legislation and standards.

(j) "**EPFA**" means the Enhanced Prevention Focused Approach, which the **Crown** implemented in 2007, starting in Alberta and later adding Saskatchewan, Manitoba, Quebec, Nova Scotia, and Prince Edward Island.

(k) "**Family Class**" means all persons who are the brother, sister, mother, father, grandmother or grandfather of a member of the **Removed Child Class** and/or **Jordan's Class**, or such other person(s) that the Court directs.

(l) "**First Nation**" and "**First Nations**" means Indigenous peoples in Canada, including the Yukon and the Northwest Territories, who are neither Inuit nor Métis, and includes:

(i) individuals who have Indian status pursuant to the ***Indian Act***;

(ii) individuals who are entitled to be registered under section 6 of the ***Indian Act***, and, in the case of the **Removed Child Class** members, are entitled to be so registered at the time of certification;

(iii) individuals who met band membership requirements under sections 10-12 of the ***Indian Act***, and, in the case of the **Removed Child Class** members, have done so by the time of certification, 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; and

(iv) in the case of **Jordan's Class** members, individuals, other than those listed in sub-paragraphs (i)-(iii) above, recognized as citizens or members of their respective **First Nations** whether under agreements, treaties or **First Nations**' customs, traditions and laws.

(m) "**FNCFS Agencies**" means agencies that provided child and family services, in whole or in part, to the **Class** members pursuant to the **FNCFS Program** and other agreements except where such services were exclusively provided by the province or territory in which the community was located.

(n) "**FNCFS**" or "**FNCFS Program**" means the **Crown**'s First Nations Child and Family Services Program which funded, and continues to fund public services, including **Prevention Services**, **Protection Services** and **Post-Majority Services**, to **First Nations** children and communities.

(o) "**Impugned Conduct**" means the totality of the **Crown**'s discriminatory practices, including unlawful underfunding and the breach of **Jordan's Principle** as pleaded below.

(p) "***Indian Act***" means the *Indian Act*, R.S.C., 1985, c. I-5.

(q) "**Jordan's Class**" means all **First Nations** individuals who were under the applicable provincial/territorial age of majority and who during the **Class Period** were denied a public service or product, or whose receipt of a public service or product was delayed or disrupted, on grounds, including but not limited to, lack of funding or lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department, contrary to their substantive equality rights and **Jordan's Principle**.

(r) "**Jordan's Principle**" is based on the following principles:

(i) On December 12, 2007, the House of Commons unanimously passed a motion that the **Crown** should immediately adopt this child-first principle, based on **Jordan's Principle**, to resolve jurisdictional disputes involving the care of **First Nation** children;

(ii) It is a child-first principle that applies equally to all **First Nation** children, whether resident on or off **Reserve**. It is not limited to **First Nation** 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;

(iii) It addresses the needs of **First Nation** children by ensuring there are no gaps in government services or products 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;

(iv) When a government service is available to all other children, the government department of first contact must pay for the service to a **First Nation** 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;

(v) When a government service or product 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 **First Nation** child to determine if the requested service or product should be provided to ensure substantive equality in the provision of services and products to the child, to ensure culturally appropriate services and products to the child and/or to safeguard the best interests of the child. Where such services or products are to be provided, the government department of first contact will pay for the provision of the services or products to the **First Nation** 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 or government; and

(vi) 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**.

(s) "**Post-Majority Services**" means a range of services provided to individuals who were formerly in out-of-home care as children, to assist them with their transition to adulthood upon reaching the age of majority in the province or territory in which they reside.

(t) "**Prevention Services**" means services intended to secure the best interests of **First Nation** children, including meeting their distinct cultural and linguistic needs, in the least disruptive manner within their families and communities.

(u) "**Protection Services**" means those services intended to secure the best interests of **First Nation** children, including meeting their distinct cultural and linguistic needs, where the risk to the child cannot be prevented by **Prevention Services**.

(v) "**Provincial/Territorial Funding Agreements**" means funding agreements signed by the **Crown** with a province or territory, other than Ontario, or with a non-**First Nations** operated child and family service entity to, amongst others, provide funding for **Prevention Services** or **Protection Services**.

(w) "**Removed Child Class**" means all **First Nations** individuals who:

(i) were under the applicable provincial/territorial age of majority at any time during the **Class Period**; and

(ii) were taken into out-of-home care during the **Class Period** while they, or at least one of their parents, were ordinarily resident on a **Reserve**.

(x) "**Reserve**" means a tract of land, as defined under the ***Indian Act***, the legal title to which is vested in the **Crown** and has been set apart for the use and benefit of an Indian band.

(y) "**Residential Schools**" means schools for **First Nations**, Métis and Inuit children funded by the **Crown** from the 19th Century until 1996, which had the objective of assimilating children into Christian, Euro-Canadian society by stripping away their **First Nations**, Métis and Inuit rights, cultures, languages, and identities, a practice subsequently recognized as "cultural genocide".

(z) "**Sixties Scoop**" means the decades-long practice in Canada of taking Indigenous children, including **First Nations**, from their families and communities for placement in non-Indigenous foster homes or for adoption by non-Indigenous parents.

(aa) "**Tribunal**" means the Canadian Human Rights Tribunal.

III. RELIEF SOUGHT

15. The plaintiffs, on behalf of the Class, claim:

(a) an order certifying this action as a class proceeding and appointing the plaintiffs as representative plaintiffs for the Class and any appropriate sub-class thereof;

(b) a declaration that the Crown breached its common law, civil law, and fiduciary duties to the plaintiffs and the Class;

(c) a declaration that the Crown breached section 15(1) of the *Charter of Rights and Freedoms* ("***Charter***"), and that such breach was not justified under section 1 of the *Charter*;

(d) general and aggregate damages for breach of fiduciary duty, negligence, and under section 24(1) of the *Charter* in the amount of $10,000,000,000, and an order that any undistributed damages be awarded for the benefit of Class members, pursuant to rule 334.28 of the *Federal Courts Rules*;

(e) an order pursuant to rule 334.26 of the *Federal Courts Rules* for the assessment of the individual damages of Class members;

(f) special damages in an amount to be determined prior to trial;

(g) punitive and exemplary damages of $50,000,000 or such other sum as this Honourable Court deems appropriate;

(h) damages for counsel fees and disbursements that the plaintiff AFN expended in the prosecution before the Tribunal;

(i) the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes, pursuant to rule 334.38 of the *Federal Courts Rules*;

(j) costs of the action on a substantial indemnity basis or in an amount that provides full indemnity;

(k) prejudgment and judgment interest pursuant to the *Federal Courts Act*, R.S.C., 1985, c. F-7; and

(l) such further and other relief as this Honourable Court deems just and appropriate in the circumstances.

IV. THE PARTIES

A. The Plaintiffs

i. Xavier Moushoom - Member and Proposed Representative of the Removed Child Class and Family Class

16. Xavier Moushoom was born in Lac Simon in 1987 and is a member of the Anishinaabe Nation. Both of his parents are Residential Schools survivors. From 1987 to 1995, Mr. Moushoom lived with his mother—who suffered from alcohol abuse—and his brother on the Lac Simon Reserve. Mr. Moushoom's father also battled alcohol abuse problems and sought treatment in Montreal, away from the family. As a child, Mr. Moushoom spoke Algonquin fluently with his grandmother.

17. In 1996, Mr. Moushoom was apprehended and placed in out-of-home care in Lac Simon. To this day, he does not know the reason for his apprehension. Mr. Moushoom's brother was also apprehended and placed in a different foster home. Mr. Moushoom was thus entirely isolated from his family.

18. In 1997, Mr. Moushoom was moved to a different foster family outside of his community in Val D'Or. From the age of 9 until 18, Mr. Moushoom was moved from one foster family to another. In total, he lived in fourteen different foster homes in Val D'Or.

19. Mr. Moushoom was rarely granted access to his mother and family. As a result, Mr. Moushoom gradually lost his native Algonquin language, his culture, and his ties to the Lac Simon community.

20. By the time he became an adult, Mr. Moushoom had lost his roots, his culture, and his language. At 18, Mr. Moushoom was forced to leave his foster family because the Crown did not fund Post-Majority Services for First Nations individuals like Mr. Moushoom. He felt completely lost and unprepared for life.

21. After staying with his foster family for an additional three months without financial support, Mr. Moushoom returned to live with his mother in Lac Simon. In the years that followed, Mr. Moushoom suffered from anxiety attacks and developed substance abuse problems that he would eventually overcome through his own determination and the help of his community.

ii. Jeremy Meawasige (by his litigation guardian, Jonavon Joseph Meawasige) - Member and Proposed Representative of Jordan's Class

22. Jeremy Meawasige is a member of the Pictou Landing First Nation in Nova Scotia. He was born in 1994, and has suffered from multiple disabilities and high care needs throughout his life. As a child, Mr. Meawasige was diagnosed with hydrocephalus, cerebral palsy, spinal curvature, and autism. During the relevant time and up to this day, he can only speak a few words and cannot walk unassisted. He requires total personal care, and depends on the assistance of others for showering, diapering, dressing, spoon feeding, and all other personal hygiene needs.

23. Mr. Meawasige lives on the Pictou Landing Indian Reserve.

24. Mr. Meawasige's mother Maurina Beadle was his primary caregiver for most of his life. Ms. Beadle was able to care for her son in the family home without government support or assistance until she suffered a stroke in 2010. At that point, the Pictou Landing Band Council stepped in and started providing necessary services to Mr. Meawasige.

25. However, the funding that the Council received from the Crown was insufficient to meet Mr. Meawasige's needs. The Council applied for funding from the Crown for Mr. Meawasige under Jordan's Principle. The Crown refused that application on the ground that Mr. Meawasige did not meet the test, particularized below, that the Crown had established for Jordan's Principle. The Council and Ms. Beadle sought judicial review of the refusal decision. In April 2013, the Federal Court granted *certiorari*, quashed the refusal decision and ordered the Crown to pay for the services under Jordan's Principle.

26. The Crown's improper interpretation of Jordan's Principle caused the denial, delay and disruption of the receipt of public services and products that were essential to Mr. Meawasige. While Mr. Meawasige received funding for certain services after the Federal Court's 2013 decision, he has not received some other essential public services and products to this date.

27. On May 28, 2019, the Court appointed Ms. Beadle as litigation guardian for Mr. Meawasige in this proceeding. Sadly, Ms. Beadle suffered a stroke, and passed away on November 13, 2019.

28. Mr. Meawasige's brother, Jonavon Joseph Meawasige, is his proposed replacement litigation guardian.

iii. Jonavon Joseph Meawasige - Member and Proposed Representative of the Family Class

29. Jonavon Joseph Meawasige is the brother and legal custodian of the plaintiff Jeremy Meawasige. He is a member of the Pictou Landing First Nation in Nova Scotia.

iv. AFN

30. The AFN is a national advocacy organization representing First Nation citizens in Canada, which includes more than 900,000 people living in 634 First Nation communities and in cities and towns across the country. The AFN is an unincorporated association which is an appropriate party under rule 111 of the *Federal Courts Rules*. AFN is a complainant before the Tribunal in File Number T1340/7008.

31. The AFN was "mandated by resolution following a vote by the Chiefs in Assembly to pursue compensation for First Nation Children and youth in care, or other victims of discrimination and to request maximum compensation allowable under the Act based on the fact that the discrimination was willful and reckless, causing ongoing trauma and harm to children and youth, resulting in a humanitarian crisis" (Assembly of First Nations' resolution: Special Chiefs Assembly, Resolution No. 85/2018, December 4, 5 and 6 2018 (Ottawa, ON) re Financial Compensation for Victims of Discrimination in the Child Welfare System).

32. The AFN's status as a Trustee to advance the claims of the Removed Child Class, Jordan's Class and the Family Class before the Tribunal was decided in a final decision of the Tribunal dated September 6, 2019. The AFN successfully obtained from the Tribunal "an order for compensation to address the discrimination experienced by vulnerable First Nation Children and families in need of child and family support services on reserve." The Tribunal's compensation order covers some, but not all, of the damages of some Class members.

v. Ashley Dawn Louise Bach - Member and Proposed Representative of the Removed Child Class

33. Ashley Dawn Louise Bach was born in 1994 in Vancouver, BC. Her mother was a member of the Mishkeegogamang First Nation, in northern Ontario. Therefore, Ms. Bach was a First Nation child with Indian status and membership in the Mishkeegogamang First Nation.

15. Ms. Bach was removed at birth from her mother. She was not placed on a Reserve. She was put into a special needs, non-native foster care home in Langley, British Columbia. At age 5, Ms. Bach was adopted by a non-native foster family, and she had no access to First Nation culture.

She endured racism. In about 2012, at age 18, she left the hostile environment with her adopted family.

34. Since then, Ms. Bach has attempted to reconnect to her First Nation community, culture, language, and traditional territory. She has connected with some biological family members from her First Nation. Unfortunately, other biological family members passed away while she was still in the closed adoption, including her maternal grandmother, a residential school survivor who had requested to be "kept informed of what is happening with Ashley", and one of her uncles.

vi. Karen Osachoff - Member and Proposed Representative of the Removed Child Class

35. Karen Osachoff was born in 1979 in Regina, Saskatchewan. She was named Erin Faye Kahnapace. She was a First Nation child with Indian status because she is a member of Pasqua First Nation in Treaty Four territory, which is now known as Southern Saskatchewan.

36. Ms. Osachoff was apprehended as an infant and spent time in foster care. In April 1982, by order of the Queen's Bench of Saskatchewan, she was adopted by her adoptive parents. The court also ordered that her name be changed from Erin Faye Kahnapace to Karen Elizabeth Osachoff Denham. Ms. Osachoff was never told she has Indian status. In the fall of 1990, after her adoption broke down, Ms. Osachoff was apprehended and re-entered into the foster care system where she stayed until she was 18 years old.

37. In between foster care placements, Ms. Osachoff returned to her adoptive parents but never lived with them permanently again. During her time in the Saskatchewan child welfare system, Ms. Osachoff lived in various foster homes and attended various schools. Through her own

research, Ms. Osachoff discovered she was the youngest of eleven children, some of who were also apprehended and adopted out.

38. Ms. Osachoff never knew her parents, siblings, grandparents and community. Only because of her own efforts and research, she connected with her mother, some siblings, grandmothers and extended family.

20. In 2009, Ms. Osachoff graduated from the University of British Columbia Law School. In 2012, Ms. Osachoff was called to the Ontario Bar. In 2015, Ms. Osachoff was called to the British Columbia Bar (non-practicing member in British Columbia).

vii. Melissa Walterson - Member and Proposed Representative of the Family Class

39. Melissa Walterson is Ms. Osachoff's sister. She was born in Winnipeg, Manitoba, has Indian status and is registered on Nisichawayasihk Cree Nation in Manitoba. She currently resides in Manitoba. She reconnected with her sister in December 2019.

40. Because Ms. Osachoff and Ms. Walterson were separated, Ms. Walterson lost the love, care and companionship that she could reasonably have expected to receive from her sister had their separation not occurred.

viii. Noah Buffalo-Jackson (by his Litigation Guardian, Carolyn Buffalo) - Member and Proposed Representative of Jordan's Class

41. Noah Buffalo-Jackson was born on December 2, 2001. He was born 10 weeks premature and weighed only four pounds. He was diagnosed with Spastic Quadriparetic Cerebral Palsy Level 5 on the GMFCS. His diagnosis means that he has "an organic and chronic condition requiring

long-term rehabilitative treatment." He will always be dependent upon his parents and caregivers. He needs help with everything from eating, dressing and brushing his teeth to exercising and will probably always need a wheelchair.

42. Despite Jordan's Principle, Mr. Buffalo-Jackson's rights were affected by discrimination on account of his race and disability.

43. Due to the Crown's Impugned Conduct, Mr. Buffalo-Jackson's parents have been denied funding to meet his basic needs, such as a van equipped with a lift. Because Mr. Buffalo-Jackson's parents chose to care for him at home, they have been denied funding for, among other things, a nanny or aide and respite care.

ix. Carolyn Buffalo - Member and Proposed Representative of the Family Class

44. Carolyn Buffalo is Mr. Buffalo-Jackson's mother and caregiver.

x. Dick Eugene Jackson also known as Richard Jackson - Member and Proposed Representative of the Family Class

45. Dick Eugene Jackson also known as Richard Jackson is Mr. Buffalo-Jackson's father and caregiver.

B. The Defendant

46. The Defendant, the Attorney General of Canada, represents the Crown, and is liable and vicariously liable for the Impugned Conduct.

47. In particular, the Crown is liable and vicariously liable for the acts and omissions of its agents—INAC and its predecessors and successors—which were responsible for funding the services provided to the Class members by the FNCFS Agencies or the province/territory.

V. THE CROWN'S TREATMENT OF FIRST NATIONS CHILDREN

48. Pursuant to section 91(24) of the *Constitution Act, 1867*, Parliament has jurisdiction over First Nations peoples. Provinces and territories have jurisdiction over child and family welfare generally. Each province and territory has its own child and family services legislation.

49. Child and family services, also referred to as "child welfare", consist of a range of services intended to prevent and respond to child maltreatment and to promote family wellness.

50. Starting in the 19th century, the Crown systemically separated First Nations children from their families and placed them in Residential Schools. Among other things, the Crown used the Residential Schools as child welfare care providers for the First Nations children who allegedly needed child and family services.

51. Following the closure of the Residential Schools, the Crown undertook the provision of child and family services for First Nations children and their families. However, Parliament did not pass federal legislation regarding First Nations child and family services.

52. Rather, the Crown chose to operate child welfare services in a federal legislative vacuum filled by two statutory provisions:

(a) section 4 of the *Department of Indian Affairs and Northern Development Act*, R.S.C., 1985, c. I-6, gave the Minister of Indian Affairs and Northern Development authority

over all "Indian affairs" and "Yukon, the Northwest Territories and Nunavut and their resources and affairs"; and

(b) section 88 of the *Indian Act* provided for the application of provincial or territorial child welfare legislation to First Nations as provincial or territorial "laws of general application", with funding for those services from the Crown.

53. The Crown, through INAC and its predecessors and successors, required that FNCFS Agencies use provincial/territorial child welfare laws as a condition of funding. The funding itself was provided on the basis of formulas crafted by the Crown.

54. Thus, Parliament did not enact laws to govern the way essential services were to be provided to Class members and to ensure that they were provided fairly and adequately.

55. The Crown provided funding during the Class Period through four channels that worked on the basis of uniform policies, objectives, and short-comings common to the Class:

(a) the 1965 Agreement;

(b) Directive 20-1;

(c) the EPFA; and

(d) the Provincial/Territorial Funding Agreements.

56. Directive 20-1, which came into effect on April 1, 1991, was a cabinet-level spending measure that established uniform funding standards for the Removed Child Class and their related Family Class members. It governed and controlled federal funding to FNCFS Agencies for child

and family services to Removed Child Class and their related Family Class members where an agreement did not exist between the Crown and the province or territory.

57. The Crown designed its funding channels, including Directive 20-1, based on assumptions ill-suited to the Crown's stated objectives and without regard to the realities of First Nations communities.

58. This approach directly and foreseeably resulted in systemic shortcomings, ultimately assuring the chronic under-provision of essential services and products on which the Removed Child Class, Jordan's Class, and their related Family Class members relied. These shortcomings included the following:

(a) funding models that incentivized the removal of Removed Child Class members from their homes and placed them in out-of-home care;

(b) inflexible funding mechanisms that did not account for the particular needs of diverse First Nations communities on Reserves and in the Yukon, and the operating costs of an agency delivering services therein;

(c) funding models that ignored the pressing need for Prevention Services, family support and culturally appropriate services;

(d) inadequate funding for essential programs and services, and inadequate funding to align services with standards set by provincial or territorial legislation;

(e) a 22% disparity in per-capita funding for Removed Child Class and their related Family Class members, compared with services delivered to children and families off

Reserve, despite the heightened needs of Removed Child Class and their related Family Class members and the increased costs of delivering those services to them; and

(f) a self-serving, parsimonious interpretation by the Crown of Jordan's Principle, leading to Jordan's Class and their related Family Class members receiving delayed or inadequate public services or products or none at all.

59. In 2007, the Crown admitted these systemic deficiencies, and sought to rectify them in some provinces by implementing the EPFA. The Crown announced that the EPFA was designed to allow for a more flexible funding formula and an allocation of funds for Prevention Services.

60. Nonetheless, the implementation of the EPFA failed to remedy the systemic discriminatory funding of services to Removed Child Class and Family Class members. The EPFA suffered from the same shortcomings and false underlying assumptions that plagued Directive 20-1 and the Crown's other funding formulas.

61. These longstanding, systemic failures of the Crown's funding formulas effectively paralyzed the FNCFS Program and harmed generations of First Nations children and families, whose care the Crown undertook to provide.

62. In some instances, the Crown's funding methods and practices imposed on First Nations families what is known as "Care by Agreement", which follows provisions in provincial and territorial child-welfare legislation that allow for parents to voluntarily place their children in child-welfare custody often while maintaining parental guardianship. Care by Agreement became

another mechanism through which Removed Child Class members were separated from their families and placed in out-of-home care to receive the essential services that they required.

63. The Crown was well aware of these chronic problems. As early as the 1980s, the Crown was aware that its funding formulas and policies denied children essential services and products contrary to their substantive equality rights that were later given the name Jordan's Principle. Over the course of the Class Period, numerous independent reviews, parliamentary reports, and audits, including two reviews by the Auditor General of Canada and a joint review by INAC and the AFN, identified these deficiencies and decried their devastating impact on First Nations children and families.

64. The House of Commons' Special Committee on the Disabled and the Handicapped issued a report in 1981 where it stated:

> **Jurisdictional Disputes Between Governments**
>
> The Federal Government delivers services to Status Indians on reserves, and is willing to pay for services for the first year for those individuals who leave the reserve. In recent times, because of greatly increased migration of Status Indians from the reserves to urban centres, a dispute has developed between the Federal and Provincial Governments regarding the responsibility for delivering services to those individuals who are away from the reserve for more than a year. Some provinces, for their part, are reluctant or unwilling to foot the bill for a service that they consider to be the responsibility of the Federal Government. … **The dispute over this matter of service to Status Indians away from the reserve leaves the Indians themselves confused since they are frequently left without any services while the two Governments are arguing over ultimate responsibility**. [emphasis added]

65. Twelve years later in 1993 when the *Charter* was in full force and effect, the House of Commons' Standing Committee on Human Rights and the Status of Disabled Persons made a

follow-up report stating: “the situation of these [Indigenous] people has not improved during the past decade”. The report stated:

> Aboriginal people must not only contend with the fragmented nature of federal programs, but have to overcome the barriers imposed by federal/provincial jurisdictions. Like other disability issues, those related to Aboriginal people either cross federal/provincial boundaries or lie in an area of exclusive provincial responsibility.
>
> …
>
> **The federal/provincial jurisdictional logjam shows up most graphically in the provisions of health and social services to Aboriginal people…. In all of this wrangling, both levels of government appear to have forgotten the needs of the people themselves. In this complex and overlapping web of service structures, some people even find themselves falling through the cracks and unequally treated compared to their fellow citizens**. [emphasis added]

66. The Committee made the following recommendation:

> The federal government should prepare, no later than 1 November 1993, a tripartite federal / provincial-territorial / band governmental action plan that will ensure ongoing consultation, co-operation and collaboration on all issues pertaining to Aboriginal people with disabilities. This action plan must contain specific agendas, realistic target dates and evaluation mechanisms. It should deal with existing or proposed transfers of the delivery of services to ensure that these transfers meet the needs of Aboriginal people with disabilities.

67. The Royal Commission on Aboriginal Peoples (1996), and subsequently the Report of the Truth and Reconciliation Commission of Canada called on the Crown to adequately fund child and family services and fully implement principles and equality protections that later became known as Jordan’s Principle. In so doing, the Truth and Reconciliation Commission found, among other things, that:

(a) 3.6% of all First Nations children under the age of 14 were in out-of-home care, compared with 0.3% of non-Aboriginal children;

(b) the rate of investigations involving First Nations children was 4.2 times the rate of non-Aboriginal investigations, and maltreatment allegations were more likely to be substantiated in the cases of First Nations children;

(c) investigations of First Nations families for neglect were substantiated at a rate eight times greater than for the non-Aboriginal population;

(d) the Crown's child-welfare system simply continued the assimilation that the Residential Schools system started; and

(e) First Nations children are still being taken away from their parents because their parents are poor.

68. These reviews, reports, and audits fell largely on deaf ears.

69. Faced with the Crown's inaction and apathy, the plaintiff AFN and the Caring Society filed a complaint with the Canadian Human Rights Commission in February 2007. The complaint alleged that the Crown discriminated against First Nations peoples on Reserve and in the Yukon in the provision of child and family services and by its failure to properly implement Jordan's Principle, in violation of section 5 of the *CHRA*.

70. In 2008, the Canadian Human Rights Commission referred the complaint to the Tribunal.

71. On January 26, 2016, the Tribunal rendered a 176-page decision, finding that the Crown systemically discriminated against First Nations children on Reserve and in the Yukon in providing services contrary to section 5 of the *CHRA*.

72. Since then, the Tribunal has retained jurisdiction over the complaint and has issued multiple non-compliance orders against the Crown. On September 6, 2019, the AFN and Caring Society successfully obtained from the Tribunal "an order for compensation to address the discrimination experienced by vulnerable First Nation Children and families in need of child and family support services on reserve." The Tribunal also ordered that the Crown discuss with the parties how to identify individuals to be compensated and in what manner those individuals would be compensated under the Tribunal's order (*e.g.*, trust funds for minors, direct payments to adults, etc.).

A. Tribunal's Findings Regarding Crown's Funding Practices

73. The Tribunal found that, despite changes made to the FNCFS Program, the following systemic flaws plagued the delivery of child and family services:

(a) The design and application of the Directive 20-1 funding formula provided funding based on flawed assumptions about children in out-of-home care and based on population thresholds that did not accurately reflect the service needs of many on Reserve communities. This resulted in inadequate fixed funding for operation (such as capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness, and travel) and Prevention Service costs. The inadequate fixed funding hindered the ability of FNCFS Agencies to provide provincially/territorially mandated child-welfare services, and prevented FNCFS Agencies from providing culturally appropriate services to First Nations children and families.

(b) While the Crown systematically underfunded Prevention Services, it fully funded out-of-home care by reimbursing all such expenses at cost except for Post-Majority Services.

(c) The Crown's practice of under-funding prevention and least disruptive measures while fully reimbursing the cost of children in out-of-home care created a perverse incentive to remove First Nations children from their homes as a first, not a last, resort, in order to ensure that a child received necessary services.

(d) The structure and implementation of the EPFA funding formula perpetuated the incentives to remove children from their homes and incorporated the flawed assumptions of Directive 20-1 in determining funding for operations and prevention, and perpetuating the adverse impacts of Directive 20-1 in many communities.

(e) The Crown failed to adjust Directive 20-1 funding levels, since 1995, along with funding levels under the EPFA since its implementation, to account for inflation and cost of living.

(f) The Crown failed to update the 1965 Agreement in Ontario to ensure that on Reserve child and family services comply fully with the *Child and Family Services Act*.

(g) The Crown failed to coordinate the FNCFS Program and the Provincial/Territorial Funding Agreements with other federal departments and government programs and services for First Nations children on Reserve, resulting in service gaps, delays, and denials for First Nations children and families.

B. Tribunal's Findings Regarding the Application of Jordan's Principle

74. Jordan's Principle is a child-first legal rule that guides the provision of public services and products to First Nations children. The Crown has admitted that Jordan's Principle is a legal rule, not merely a principle or aspiration. Jordan's Principle incorporates the Crown's longstanding obligations to treat Class members without discrimination and with a view to safeguarding their substantive equality.

75. The Crown's policies and funding formulas systemically denied First Nations children the public services and/or products that they needed, when they needed them and in a manner consistent with substantive equality and reflective of their cultural needs.

76. This state of affairs continued until the mid-2000s when the House of Commons formally named the *Charter*-protected substantive equality protections "Jordan's Principle" to honour the memory of Jordan River Anderson, a First Nation child who died in a hospital bed while officials from the governments of Canada and Manitoba bickered over who should pay for his specialized care close to his hospital. The Tribunal summarized Jordan's life story as follows:

> Jordan River Anderson [was] a child who was born to a family of the Norway House Cree Nation in 1999. Jordan had a serious medical condition, and because of a lack of services on reserve, Jordan's family surrendered him to provincial care in order to get the medical treatment he needed. After spending the first two years of his life in a hospital, he could have gone into care at a specialized foster home close to his medical facilities in Winnipeg. However, for the next two years, AANDC, Health Canada and the Province of Manitoba argued over who should pay for Jordan's foster home costs and Jordan remained in hospital. They were still arguing when Jordan passed away, at the age of five, having spent his entire life in hospital.

77. Jordan's Principle mandates that all First Nations children should receive the public services and/or products they need, when they need them and in a manner consistent with

substantive equality and reflective of their cultural needs. The need for the legal rule arose from the Crown's practice of denying, delaying or disrupting services to First Nations children due to, among other reasons, jurisdictional payment disputes within the federal government or with provinces or territories.

78. Jordan's Principle reaffirms existing *Charter* and quasi-constitutional rights of First Nations children to substantive equality, and seeks to ensure substantive equality and the provision of culturally appropriate services. For that purpose, the needs of each individual child must be considered and evaluated, including by taking into account any needs that stem from historical disadvantage and the lack of on Reserve or surrounding services.

79. Jordan's Principle preserves human dignity by providing First Nations children with essential services and products without adverse differentiation including denials, disruptions or delays because of intergovernmental/interdepartmental funding squabbles. Jordan's Principle requires the government (federal, provincial or territorial) or department that first received the request to pay for the service or product. Once it has paid and the child has received the service or product, the payor can resolve jurisdictional issues about who was responsible to pay.

80. In breach of the letter and spirit of Jordan's Principle and the rights that underlie it, the Crown's bureaucratic arm unilaterally restricted its application to cases that could meet the following three criteria:

(a) a jurisdictional dispute has arisen **between a provincial government and the federal government**;

(b) the child has **multiple** disabilities requiring services from **multiple** service providers; and

(c) the service in question is a service that would be available to a child residing off Reserve **in the same location**.

81. The Tribunal found that the processes set up by the Crown (via memorandums of understanding between Health Canada and AANDC) to respond to Jordan's Principle requests made delays inevitable: the processes included a review of policy and programs, case conferencing and approvals from the Assistant Deputy Minister, before interim funding was provided. These processes exacerbated the very delay and disruption that Jordan's Principle was designed to prevent.

82. Not surprisingly, the Crown's narrow interpretation of Jordan's Principle resulted in no cases meeting its stringent criteria for Jordan's Principle. The Tribunal found that the Crown's stringent definition and its layered assessment of each case "defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve".

83. In fact, the Crown's application of Jordan's Principle was so stingy that an $11-million fund set up by the Crown with Health Canada to address Jordan's Principle requests was never accessed. In essence, the Crown interpreted away Jordan's Principle, leaving tens of thousands of First Nations children to suffer or to be placed in out-of-home care in order to receive the public services or products that they needed and that they relied on the Crown to provide.

84. The Crown's wrongful application of Jordan's Principle further exacerbated the numbers of First Nations children in out-of-home care. Due to a lack of public services on Reserve, many

First Nations children were placed in out-of-home care in order to access the services and products that they needed.

85. In light of the above, the Tribunal ordered the Crown to cease its discriminatory practices, reform the FNCFS Program, and take measures to implement the full meaning and scope of Jordan's Principle.

C. The Binding Effect of Tribunal Findings

86. The Tribunal made numerous factual findings against the Crown, who participated as a party in that proceeding. Neither the Crown nor the complainants sought judicial review of the Tribunal's decision. The decision became final on March 2, 2016. Accordingly, the Crown is estopped in this action from re-litigating or denying the Tribunal's findings.

87. Prior to the Tribunal's decision and subsequent orders, the Crown took the position that no Jordan's Principle cases were made out. The Crown's Jordan's Principle fund was never accessed. After the Tribunal's decision and subsequent orders, the Crown issued over 165,000 remedial orders to address its previous failures to comply with Jordan's Principle and the fundamental substantive equality rights that underlie it.

88. None of the First Nation children whose services were delayed, disrupted or denied as a result of the Crown's unlawful actions have received, or will receive, full compensation a result of the Tribunal proceedings.

VI. THE CROWN'S DUTIES TO THE CLASS

A. The Crown Owes a Common Law Duty of Care to the Class

89. The Crown owes a duty of care to all First Nations Class members. Section 91(24) of the *Constitution Act, 1867* gave Parliament exclusive jurisdiction over First Nations, including the Class.

90. The Crown had full control over the provision of public services and products to the Class members throughout Canada by virtue of the application of its funding formulas and by its application of Jordan's Principle.

91. Parliament chose not to legislate on child and family and other public services provided to the Class members; rather, the Crown operated in this legislative vacuum using various funding formulas, policies, and practices that were established bureaucratically. Using these funding mechanisms, the Crown created, planned, established, operated, financed, supervised, controlled and/or regulated the provision of services and products to the Class members throughout Canada.

92. The Crown has known for decades that its funding formulas and policies were wholly insufficient for the provision of essential services and products to the Class members. The Crown knew or ought to have known that its policies and practices were having a devastating impact on the Class members and their communities.

93. This was especially true because all of the Removed Child Class and Jordan's Class members are, or were at the relevant time, vulnerable children at the mercy of the Crown for essential services. The Crown's duty of care to the Removed Child Class and the Family Class included a duty to adequately fund Prevention Services and least disruptive measures in the best interests of the children.

94. Furthermore, Jordan's Principle prescribed the content of the Crown's duty of care to the Class—and particularly Jordan's Class. This included the duty to ensure substantive equality for First Nations children, provide culturally appropriate services, and avoid gaps, delays, disruption, and denial of services to these children.

95. The Crown's proximity to the Class members is reinforced by the honour of the Crown, the fiduciary relationship that exists between the Crown and the Class, and by the fiduciary obligations it owes to the Class members in respect of their specific interests, including their health and welfare, and their essential connection to their First Nation histories, cultures, languages, customs, and traditions. Moreover, the Crown assumed an obligation towards First Nations peoples regarding the provision of child and family and other public services by virtue of its funding formulas, policies and practices.

B. The Crown Owed Fiduciary Obligations to the Class

96. The Crown stands in a special, fiduciary relationship with First Nations in Canada.

97. The Crown has exclusive constitutional and common law jurisdiction in respect of the Class, and has been specifically entrusted to recognize and affirm the rights of Aboriginal peoples in Canada, under section 35(1) of the *Constitution Act, 1982*.

98. The Crown has assumed and maintains a large degree of discretionary control over First Nations peoples' lives and interests in general, and the care and welfare of the Class members in particular.

99. Under section 18 of the *Indian Act*, the Crown holds Reserve lands for the use and benefit of First Nations for whom they were set apart. The Crown has discretionary authority over the use

of such lands for the purpose of the administration of First Nations affairs including, but not limited to, early childhood, education, social and health services.

100. Moreover, the Crown has expressly and impliedly undertaken to protect specific First Nations interests in the provision of child and family and certain other services and products to the Class members. These undertakings require the Crown to act loyally and in the best interests of First Nations, particularly children, on Reserve, in the Yukon and in The Northwest Territories.

101. The Crown's duties toward First Nations in general, and Class members specifically, are grounded in the honour of the Crown. In the case at bar, the honour of the Crown is at stake in the Crown's dealing with Indigenous people, which requires the Crown to always act honourably, with the utmost faith and integrity in the exercise of its discretionary powers towards the Class members.

102. Further, the Crown's constitutional and statutory obligations, policies, and the common law required the Crown to take steps to monitor, influence, safeguard, secure, and otherwise protect the vital interests of First Nations, including the Class members. These obligations required particular care with respect to the interests of children and their families, whose wellbeing and security were vulnerable to the Crown's exercise of its discretion.

103. The Crown's fiduciary duties as described in this claim are non-delegable in nature and continue notwithstanding any agreements between the Crown and its agents, or agreements with other levels of government.

VII. THE CROWN BREACHED ITS DUTIES TO THE CLASS

A. The Crown Breached *Charter* Equality Rights of the Class

104. Section 15(1) of the *Charter* entrenches equality rights for every individual:

> **Equality before and under law and equal protection and benefit of law**
>
> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

105. The Crown's Impugned Conduct violated section 15(1) of the *Charter* and is not saved by section 1 of the *Charter*. The Impugned Conduct was directed exclusively at First Nations people and therefore discriminated on an enumerated ground, *i.e.*, race, national or ethnic origin. This distinction created a disadvantage for the Class by perpetuating historical prejudice caused by the legacy of the Residential Schools and Sixties Scoop. The distinction was substantively discriminatory. No pressing or substantial concern justified the Impugned Conduct under section 1 of the *Charter*.

i. The Impugned Conduct Created a Distinction Based on Race, National or Ethnic Origin

106. The Class members, as First Nations, possessed the enumerated characteristics of race, national and ethnic origin. The Impugned Conduct had a prejudicial effect on the Class members based on their membership in that group.

107. Through its funding formulas, policies, and practices, the Crown played an essential role in the provision of child and family services and other public services and products to the Class members.

108. Child and family services under the FNCFS Program and the Provincial/Territorial Funding Agreements were aimed at the members of the Removed Child Class and Family Class because they were First Nations. The determination of the persons to whom the services were offered was based entirely on the racial, national or ethnic identity of the Removed Child Class and Family Class.

109. Likewise, the members of Jordan's Class qualified for public services or products under Jordan's Principle expressly on the ground that they were First Nations children who needed a public service or product. The racial, national or ethnic identity of Jordan's Class members was the very reason for which Jordan's Principle and its substantive equality purpose applied to them.

110. The Tribunal found as a fact that the Crown's underfunding and other Impugned Conduct differentiated and adversely impacted First Nations children in the provision of certain services because of their race and national or ethnic origin. The Crown is estopped from challenging that finding.

ii. The Impugned Conduct Reinforced and Exacerbated Disadvantages

111. First Nations in Canada have historically suffered from the continuing effects of colonialism, systemic discrimination, and other disadvantages often directly linked to federal legislation, policies, and practices. This discrimination has manifested itself in numerous ways, including the tragic history of the Residential Schools and the Sixties Scoop.

112. The social and economic context in which the claims of the Class members have arisen further aggravated the negative impact of the Impugned Conduct on the Class members. The Impugned Conduct widened the gap between the historically disadvantaged group of the Class

members on the one hand, and the rest of society on the other, rather than narrowing it. The Crown added to the historical disadvantages suffered by the Class, and condemned many children to separation from their families, communities, and cultural identity.

113. More specifically, the Crown's design, management and control of the FNCFS Program, its funding formulas, and its restrictive interpretation of Jordan's Principle resulted in delays, disruptions, and denials of services and products, and created adverse impacts to the Class. For example:

(a) The structure and implementation of the Crown's funding formulas created built-in incentives to remove the Removed Child Class members from their homes as a first, not a last, resort. This practice had the opposite effect of provincial/territorial child welfare legislation and standards, which focus on prevention and least disruptive measures. The Impugned Conduct had a devastating impact on these children and their families.

(b) The Crown directed funding based on flawed assumptions about children in out-of-home care and population thresholds that did not accurately reflect the needs of the Class members.

(c) The Crown provided inadequate fixed funding for operation and Prevention Service costs, hindering the ability of FNCFS Agencies to provide provincially/territorially mandated services to the Class.

(d) The Crown's inadequate funding deprived the Class members of culturally appropriate services.

(e) The structure and implementation of the Crown's funding formulas perpetuated the adverse impacts of Directive 20-1 on Class members and their communities.

(f) The Crown failed to adjust Directive 20-1 funding levels for decades, and failed to adjust funding levels under the EPFA, since its implementation, to account for inflation and cost of living.

(g) The Crown failed to update the 1965 Agreement in Ontario to ensure on Reserve communities could comply fully with the *Child and Family Services Act* and meet the needs of children in the context of their distinct First Nations cultures and realities.

(h) The Crown failed to coordinate the FNCFS Program and other related funding formulas with other federal departments and government programs and services for First Nations on Reserve, resulting in service gaps, delays and denials for First Nations children and families.

(i) The Crown failed to fund Post-Majority Services to Class members who were formerly in out-of-home care to assist them with the transition to adulthood.

(j) The Crown narrowly defined and inadequately implemented Jordan's Principle, resulting in public service and product gaps, delays and denials in the provision of services to the members of Jordan's Class, causing them harm. As Jordan's Principle aims at its core to ensure the substantive equality guaranteed by section 15 of the *Charter*, the Crown's near erasure of Jordan's Principle was a direct affront to the Class members' section 15 equality right.

114. The discriminatory impact on the Class members was and is apparent and immediate. As a result of the Impugned Conduct, the Crown differentiated adversely in the provision of child and family, and other public services and products to the Class members compared to non-First Nations children and families, and children and families in similar circumstances off Reserve. The

members of the Class were denied equal child and family services because of their First Nations race, national or ethnic origin.

iii. Section 15 Violation Was not Justified Under Section 1

a. No Pressing or Substantial Objective for the Impugned Conduct

115. The Impugned Conduct had no pressing or substantial objective. It worked counter to and frustrated the Crown's professed objectives in the provision of essential services and products to the Class members.

116. The objectives of the FNCFS Program and other related funding formulas were to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations children. More specifically, the principles of Directive 20-1 included a commitment to "expanding First Nations Child and Family Services on-reserve **to a level comparable to the services provided off reserve in similar circumstances** […] in accordance with the applicable provincial child and family services legislation" [emphasis added].

117. In 2005, INAC issued the "First Nations Child and Family Services National Program Manual" in which the Crown listed the following objectives for the FNCFS Program:

(a) to support culturally appropriate child and family services for First Nations children, in the best interest of the child, in accordance with the legislation and standards of the reference province;
(b) to protect children from neglect and abuse;
(c) to manage the FNCFS Program in accordance with provincial or territorial legislation and standards;

(d) to provide to First Nations child and family services that are culturally relevant and comparable to those offered by the reference province or territory to residents living off Reserve in similar circumstances;

(e) to increase the ability and capacity of First Nations families to remain together and to support the needs of First Nations children in their parental homes and communities; and

(f) to ensure that the First Nations children receive a full range of child and family services reasonably comparable to those provided off Reserve by the reference province or territory.

118. The Impugned Conduct was counter to these objectives and other objectives announced by the Crown for the betterment of public services and products provided to the Class members. The Crown methodically implemented funding formulas and interpreted Jordan's Principle in ways that it knew, or ought to have known, would hinder these objectives and perpetuate the systemic, historic disadvantages suffered by the Class members.

b. The Means Adopted Were Not Proportional or Minimal

119. Parliament chose not to legislate on the provision of public services and products to Class members. Instead, the Crown filled the federal statutory vacuum that ensued with funding formulas, policies, and practices that gave rise to the Impugned Conduct.

c. No Rational Connection Between the Discriminatory Distinction and Any Valid Objective

120. No rational connection existed between the Impugned Conduct toward the Class members on the one hand and the Crown's objectives in this respect. The Impugned Conduct disadvantaged the plaintiffs and the Class, and did not advance any of the stated objectives of the Crown regarding the provision of public services and products to Class members.

d. Impugned Conduct Did Not Fall Within a Range of Reasonable Alternatives

121. There was no clear legislative goal to be attained by the Impugned Conduct. The Crown's conduct was contrary to its stated policy goals. The Crown's conduct was also contrary to its constitutional and fiduciary obligations to the Class members. Therefore, the Impugned Conduct falls outside a range of reasonable alternatives available to the Crown.

122. Only one alternative was constitutionally available to the Crown: to provide non-discriminatory public services and products to Class members consistent with its historic, constitutional, and statutory obligations to First Nations children and their families. The Crown failed to do that.

e. Detrimental Effects of Impugned Conduct on Equality Rights Disproportionate to Any Legislative Objective

123. The Impugned Conduct has detrimentally impacted the *Charter*-protected equality rights of the Class members, many of whom are or were children and were affected because they were children. Children who are denied essential services, who receive deficient care, and/or who are separated from their families suffer detrimental effects often far more serious and lasting than adults. Similarly, family members of apprehended children and of those children whose Jordan's Principle substantive equality rights were violated suffer serious and lasting harm. The Impugned Conduct has had a disproportionate effect on the equality rights of the Class members.

B. The Crown Breached Its Fiduciary Duties and Duty of Care

124. The Crown's Impugned Conduct during the Class Period, including the following particulars, constituted a systemic breach of its common law duty of care and its fiduciary duties to the Class:

(a) The Crown's funding formulas incentivized, and foreseeably caused, the removal of Removed Child Class members from their homes as a first resort rather than as a last resort, by covering maintenance expenses at cost and providing insufficient fixed budgets for Prevention Services and least disruptive measures.

(b) The Crown failed to ensure that an appropriate child welfare program for the Class members, as First Nations children, was delivered in the provinces and territories.

(c) By separating the Removed Child Class members from their homes and communities, the Crown's funding formulas deprived Class members of their right to the non-discriminatory provision of essential services, denied many of the Removed Child Class and Family Class members the opportunity to remain together or be reunited in a timely manner, and further deprived Removed Child Class members of their language and cultural identity.

(d) The Crown created funding formulas without consideration for the specific needs of the First Nations communities or the individual families and children residing therein.

(e) The assumptions built into the Crown's funding formulas, in terms of children in out-of-home care, families in need and population levels, did not reflect the actual needs of the Class members or their communities, making provincial or territorial operational standards unattainable for them.

(f) In cases where the Crown provided separate funding for Prevention Services, the Crown's static funding formula did not provide for the increasing operational costs of FNCFS Agencies, including the costs of salaries, benefits, capital expenditures,

cost of living, and travel for FNCFS Agencies to attract and retain staff and, generally, to provide service levels in line with provincial or territorial requirements.

(g) The Crown did not fund Post-Majority Services to Removed Child Class members who were formerly in out-of-home care to assist them with the transition to adulthood.

125. The Crown breached its common law and fiduciary duties to Jordan's Class through its narrow interpretation, and complete disregard, of Jordan's Principle. The Crown's approach deprived Jordan's Class members of essential protections on which they relied, and which the Crown undertook to provide.

126. Specifically, the Crown, through its adoption of Jordan's Principle, acknowledged its longstanding duty to protect the unique interests of First Nations children, including Jordan's Class. Its performance of this duty constituted a dishonourable exercise of discretion that critically affected these children, who it knew were eminently vulnerable.

127. In the aftermath of the Residential Schools and Sixties Scoop, the Crown undertook to assist First Nations in their journey toward reconciliation and recovery. It undertook to support their communities, culture and welfare, and protect them from further disadvantage and abuse. In so doing, it encouraged First Nations peoples, and particularly First Nations children in the Class, to repose trust in the Crown. The Impugned Conduct constituted a dishonest, disloyal and dishonourable betrayal of this trust, placing the interests of the Crown and others ahead of the interests of Class members.

128. At all times during the Class Period, the Crown retained a degree of supervisory jurisdiction over the Class. It did not, and could not, delegate its fiduciary and common law duties in respect of the important interests it undertook to protect.

VIII. DAMAGES

A. Damages Suffered by the Plaintiffs and Class Members

129. As a result of the Crown's breach of its constitutional, statutory, common law, civil law, and fiduciary duties, including breaches by agents of the Crown, the plaintiffs and other Class members suffered injuries and damages, including but not limited to the relief sought above, and for the following:

(a) the Impugned Conduct denied the Class members non-discriminatory child and family services;

(b) Removed Child Class members were removed from their homes and communities to be placed in care and lost their cultural identity;

(c) Removed Child Class and Jordan's Class members suffered physical, emotional, spiritual, and mental pain and disabilities;

(d) Removed Child Class and Jordan's Class members suffered sexual, physical, and emotional abuse while being in out-of-home care;

(e) Removed Child Class and Jordan's Class members lost the opportunity to access essential public services and products in a timely manner;

(f) Jordan's Class members had to fund out of pocket substitutes, where available, for public services and products delayed or improperly denied by the Crown; and

(g) Family Class members suffered loss of guidance, care and companionship, family bonds, language, culture, community ties and resultant psychological trauma.

B. Section 24(1) *Charter* Damages

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

C. Disgorgement

131. The Crown's failure to provide adequate and equal funding for services and products to the Class members constituted a breach of its fiduciary duties, through which the Crown inequitably obtained quantifiable monetary benefits over the course of the Class Period. The Crown should be required to disgorge those benefits, plus interest.

D. Punitive and Exemplary Damages

132. The high-handed way that the Crown conducted its affairs warrants the condemnation of this Court. The Crown, including its agents, had complete knowledge of the fact and effect of its negligent and discriminatory conduct with respect to the provision of public services and products to Class members. It proceeded in callous indifference to the foreseeable injuries that the Class

members would, and did suffer. The Crown had already caused unimaginable harm and suffering to First Nations through Residential Schools and the Sixties Scoop, and knew, or should have known, that the Impugned Conduct would perpetuate and exacerbate those harms to First Nations children and their families.

IX. PLEADED STATUTES AND *CIVIL CODE OF QUEBEC*

133. In addition to the foregoing, the Impugned Conduct breached the Family Class members' rights under the *Family Compensation Act*, R.S.B.C. 1996, c. 126; *Fatal Accidents Act*, R.S.A. 2000, c. F-8; *Tort-Feasors Act*, R.S.A. 2000, c. T-5; *The Fatal Accidents Act*, R.S.S. 1978 c.F-11; *Fatal Accidents Act*, C.C.S.M. c. F150; *Family Law Act*, R.S.O. 1990, c. F.3; *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5; *Fatal Accidents Act*, R.S.N. 1990, c. F-6; *Fatal Accidents Act*, R.S.N.B. 2012, c. 104; *Fatal Injuries Act*, R.S.N.S. 1989, c. 163; *Fatal Accidents Act*, R.S.Y. 2002, c. 86; *Fatal Accidents Act*, R.S.N.W.T., 1988, c. F-3; and *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3, all as amended.

134. Where the actions of the Crown and its agents and servants took place in Quebec, the Impugned Conduct constituted a fault pursuant to Article 1457 of the *Civil Code of Quebec*. The Crown knew or ought to have known that the Impugned Conduct, including its denials of service and adverse impacts, would cause tremendous harm to the Class members. The Members of the Removed Child Class sustained bodily and moral injuries as a direct and immediate consequence of the Impugned Conduct. These injuries include, but are not limited to, loss of companionship, family bonds, language, culture, community ties and resultant psychological trauma. Jordan's Class members also sustained bodily and moral injuries through the Crown's denial or delayed delivery of public services and products that they were owed.

135. In addition to the *Civil Code of Quebec* and any other statute pleaded in this claim, the plaintiffs rely upon the common law and the following statutes and authorities, amongst others, all as amended:

(a) *An Act respecting First Nations, Inuit and Metis children, youth and families*, S.C. 2019, c. 24;

(b) *Canadian Human Rights Act*, R.S.C., 1985, c. H-6;

(c) *Child and Family Services Act*, R.S.O. 1990, c. C.11;

(d) *Child and Family Services Act*, S.N.W.T. 1997, c 13;

(e) *Child Protection Act*, R.S.P.E.I. 1988, c. C-5.1;

(f) *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46;

(g) *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12;

(h) *Children and Family Services Act*, S.N.S. 1990, c. 5;

(i) *Children and Youth Care and Protection Act*, S.N.L. 2010, c. C-12.2;

(j) *Constitution Act, 1867 and Constitution Act, 1982*;

(k) *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50;

(l) *Department of Indian Affairs and Northern Development Act*, R.S.C., 1985, c. I-6;

(m) *Family Services Act*, S.N.B. 1980, c. F-2.2;

(n) *Federal Courts Act*, R.S.C., 1985, c. F-7;

(o) *Federal Courts Rules*, SOR /98-106;

(p) *Indian Act*, R.S.C., 1985, c. I-5;

(q) *Interpretation Act*, R.S.C., 1985, c. I-21;

(r) *The Child and Family Services Act*, C.C.S.M. c. C80;

(s) *The Child and Family Services Act*, S.S. 1989-90, c. C-7.2;

(t) *The United Nations Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p.3;

(u) UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295; and

(v) *Youth Protection Act*, C.Q.L.R. c. P-34.1.

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Court File Nos. T-402-19 / T-141-20

FEDERAL COURT
PROPOSED CLASS ACTION PROCEEDING

B E T W E E N

XAVIER MOUSHOOM et al	**ASSEMBLY OF FIRST NATIONS et al**
Plaintiffs	Plaintiffs
and	and
THE ATTORNEY GENERAL OF CANADA	**HER MAJESTY THE QUEEN AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA**
Defendant	Defendant

CONSOLIDATED STATEMENT OF CLAIM

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