FEDERAL COURT
PROPOSED CLASS PROCEEDING

B E T W E E N:

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Courts Rules* serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date 07/16/2021 Issued by  (Registry Officer)

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I. NATURE OF THE ACTION

1. The Crown[1] has systemically discriminated against First Nations children because of their race, nationality and ethnicity. This discrimination has taken many insidious forms. This action relates to the Crown's decades-long policy of allowing jurisdictional and other funding gaps delay, disrupt, and deny essential services to First Nations children and their families.

2. Whenever First Nations children needed services or products, they faced a wall of Crown bureaucracy, lack of funding and the shirking of responsibility by Crown agents and referring them to other departments and governments where a similar response awaited them. In many instances, the Crown simply ignored the needs and requests of First Nations children for services. This conduct deprived First Nations children of essential services available to non-First Nations children or which would have been required to ensure substantive equality under the *Canadian Charter of Rights and Freedoms* ("***Charter***"). The Crown failed to provide services that responded to the actual needs of First Nations children.

3. This Impugned Conduct breached the equality rights of First Nations children protected under section 15 of the *Charter* as well as the Crown's duties to the Class under the common law, statute, and civil law.

4. The Crown knew for decades that First Nations children and families faced these discriminatory challenges. It did nothing to address the discrimination. Eventually, on December 12, 2007, the House of Commons unanimously passed a motion endorsing a principle named "Jordan's Principle" in honour of one of the victims of the discrimination, calling on the Crown to

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

adopt a child-first approach to First Nations children. The Crown again did nothing to stop the discrimination until the Tribunal found in 2016 that the Crown's conduct was discriminatory. The Crown once again did nothing until after the Tribunal issued multiple non-compliance orders.

5. This action seeks compensation for those First Nations children and families 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 their *Charter*-protected equality rights. The action is on behalf of individuals harmed between 1991 and the House of Commons' December 12, 2007 motion relating to Jordan's Principle.

6. On March 4, 2019, Xavier Moushoom commenced a proposed class action under Court File Number T-402-19, seeking compensation for the Class in this action, as well as certain other First Nations children and family members, on account of the Impugned Conduct dating back to April 1, 1991. 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 April 1, 1991. Both groups of plaintiffs came together to combine efforts and prosecute one action ("**Consolidated Action**").

7. In consolidating the two actions, the Crown agreed to consent to the certification of the Consolidated Action but subject to the separate prosecution of the case on behalf of the Class Members herein whose claims relate to the 1991-2007 time period, hence the commencement of this separate action on behalf of the Class Members by a separate proposed representative plaintiff. All of the Class Members were previously members of the putative classes defined in Court File Number T-402-19 and/or Court File Number T-141-20.

8. In summary, the Consolidated Action covers the following class members:

Class	Class Period
First Nations alleging, amongst others, the Crown's funding and operation of First Nations child and family services systemically discriminated against First Nations and caused the disproportionately high numbers of apprehended First Nations children from Reserves (defined in the Consolidated Action as the Removed Child Class)	1991-present
First Nations alleging, amongst others, the Crown's provision of other services and its handling of jurisdictional and funding disputes with other governments and government departments caused First Nations children's receipt of services to be denied, delayed or hindered contrary to their equality rights (defined in the Consolidated Action as the Jordan's Class)	2007-present
Family members of the above two classes of First Nations children	Same corresponding periods above

9. This action covers the following class members as particularized herein:

Class	Class Period
First Nations alleging, amongst others, the Crown's provision of services and its handling of jurisdictional and funding disputes with other governments and government departments caused First Nations children's receipt of services to be denied, delayed or hindered contrary to their equality rights (defined in this action as the Child Class)	1991-2007
Family members of the above First Nations children	1991-2007

II. DEFINED TERMS

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

(a) "**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.

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

(c) "**Child 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 service or product, or whose receipt of a service or product was delayed or disrupted, on grounds, including but not limited to, lack of funding, lack of jurisdiction, or as a result of a jurisdictional dispute with another government or governmental department.

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

(e) "**Class**" and "**Class Members**" means the **Child Class** and **Family Class**, collectively.

(f) "**Class Period**" means the period of time beginning on April 1, 1991 and ending on December 11, 2007 or such other period as the Court decides.

(g) "**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 any federal departments responsible for the funding formulas, policies and

practices at issue in this action relating to **First Nations** children in Canada since April 1, 1991, including: the Department of Indian Affairs and Northern Development ("**DIAND**") using the title Indian and Northern Affairs Canada ("**INAC**") until 2011; Aboriginal Affairs and Northern Development Canada from 2011 to 2015; Indigenous and Northern Affairs Canada 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, Health and Welfare Canada, Health Canada and any other department or agent of the Crown are referred to interchangeably as the **Crown**, unless specifically named.

(h) "**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.

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

(j) "**First Nation**" and "**First Nations**" means Indigenous peoples in Canada 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***;

(iii) individuals who have met band membership requirements under sections 10-12 of the ***Indian Act*** by the date of trial or resolution otherwise of this action, 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) 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 by the date of trial or resolution otherwise of this action.

(k) "**FNCFS Agency**" and "**FNCFS Agencies**" means agencies that provided child and family and other 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.

(l) "**FNCFS**" or "**FNCFS Program**" means the **Crown**'s First Nations Child and Family Services Program which funded services to **First Nations** children and communities.

(m) "**Impugned Conduct**" means the totality of the **Crown**'s discriminatory practices pleaded in paragraphs 12-46 below.

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

(o) "**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.

(p) "**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".

(q) "**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.

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

III. RELIEF SOUGHT

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

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

(b) general and aggregate damages for breach of fiduciary duty, negligence, and under section 24(1) of the *Charter* in the amount of $1,000,000,000 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*;

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

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

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

(f) 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*;

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

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

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

IV. THE PARTIES

A. The Plaintiffs

i. AFN

12. 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*. The AFN is a complainant before the Tribunal in File Number T1340/7008.

13. 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).

14. 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.

ii. Zacheus Joseph Trout – Proposed Representative Plaintiff

15. The plaintiff and proposed representative plaintiff Zacheus Joseph Trout lives in Cross Lake First Nation in northern Manitoba. Mr. Trout and his wife Veronica have had six children. Two of their children were Sanaye Mary Frances Trout who was born on July 20, 1998, and Jacob Zacheus Trout, born on June 28, 2002.

16. Sanaye and Jacob suffered from Batten Disease, a neurological disorder that normally begins at an early age in childhood and, if left untreated, is fatal. Batten Disease causes seizures, vision loss, and the loss of cognitive functions. Sanaye and Jacob suffered extreme sickness all their lives as a result of it.

17. Despite their conditions and dire need for medical attention, Sanaye and Jacob fell within a jurisdictional gap between the Province of Manitoba and the Crown. Due to inadequate services and funding to meet the needs of their children's care, Mr. Trout and his wife had to quit their jobs to be able to provide 24-hour care to Sanaye and Jacob, taking turns to sleep.

18. Mr. Trout and his family fought for 13 years for services and products that Sanaye and Jacob desperately needed and were denied or received with undue delay, such as feeding tubes, diapers, and formula. For example, health officials gave the family only six syringes per month for Sanaye, even though she needed to receive six injections a day. The family had to reuse these syringes, causing infections and more seizures. The family was given two feeding bags per month to feed their children four times a day. They had to reuse the bags, which caused more problems

with bacteria and infections. Likewise, the Crown refused for more than a year to provide inclined beds that Jacob and Sanaye needed at home, causing them sleep problems and more seizures.

19. Jacob and Sanaye both died before they reached the age of 10.

B. The Defendant

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

21. In particular, the Crown is liable and vicariously liable for the acts and omissions of its agents—amongst others, INAC and its predecessors and successors, Health and Welfare Canada, and Health Canada—which were responsible for funding the services provided to the Class Members.

V. THE CROWN'S TREATMENT OF FIRST NATIONS CHILDREN

A. The Crown's Provision of Services to First Nations Children and Families

22. Pursuant to section 91(24) of the *Constitution Act, 1867*, Parliament has jurisdiction over First Nations peoples and many aspects of public health. Provinces and territories have jurisdiction over healthcare and social welfare generally.

23. The Crown did not legislate on the needs of First Nations children for essential services, including child and family services, health, etc.

24. Regarding child and family services, the Crown bureaucratically designed some service funding mechanisms for First Nations children. These mechanisms, which formed the FNCFS Program, started with the Memorandum of Agreement Respecting Welfare Programs for Indians of 1965, a cost-sharing agreement between the Crown and the Province of Ontario. Subsequently

on April 1, 1991, the Crown brought into effect Directive 20-1, a cabinet-level spending measure that established uniform funding standards for the Class.

25. The Crown's child and family service funding policies shared a common feature: they were based on assumptions ill-suited to the realities of First Nations communities. These underfunded or completely ignored the needs of the Class for essential services. Directly and foreseeably, these funding mechanisms resulted in systemic shortcomings and ultimately assured the chronic under-provision of services on which the Class Members relied. The Crown's inflexible funding mechanisms and models ignored First Nations' pressing need for culturally appropriate child and family services. The Crown provided inadequate funding for programs and services, and inadequate funding to align services with standards set by provincial or territorial legislation.

26. Regarding other essential services (*e.g.*, health and social services relating to physical and mental health, special education, dental health, physical therapy, speech therapy, medical equipment, and physiotherapy, etc.), the Crown completely ignored for decades that the Class Members were trapped in jurisdictional limbo between the Crown and provincial governments or between different departments of the same government. In response to Class Members' requests for essential services, government and government departments very often shirked responsibility, pointed to another government or government department as the responsible authority, and failed to address the needs of First Nations children and families. The Crown put no mechanism in place to ensure that Class Members received essential services and products without delay.

27. The Crown's failure to address the jurisdictional and funding challenges that deprived Class Members of essential, often life-saving services further strained the underfunded FNCFS

Agencies that had to expend their scant child and family resources toward responding to Class Members whose needs for essential services the Crown systematically ignored.

28. In addition to the denial and delay in the provision of essential services, the Crown's funding policies led to unprecedented numbers of First Nations children being apprehended and removed from their homes and communities, at times to receive basic services that were not available in First Nations communities. The Crown's policies of covering the expenses of apprehended First Nations children at cost while not funding prevention services to keep the children in their homes and communities further incentivized these discriminatory apprehensions. Many Class Members had to leave their First Nations communities and migrate to non-First Nation urban and other centres to receive essential services.

A. The Crown Knew About Systemic Jurisdictional and Funding Problems

29. For decades, the Crown knew or ought to have known that its funding formulas and policies as well as jurisdictional barriers systemically denied the Class essential services and products contrary to their constitutional equality rights. Prior to and over the course of the Class Period, independent reviews and parliamentary reports identified these deficiencies and decried their devastating impact on First Nations children and families. 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]

30. Twelve years later in 1993 when the *Charter* was in force and effect, the House of Commons' Standing Committee on Human Rights and the Status of Disabled Persons issued a follow-up report stating: "the situation of these [Indigenous] people has not improved during the past decade". The report further 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]

31. 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.

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

> Governments recognize that the health of a people is a matter of vital concern to its life, welfare, identity and culture and is therefore a core area for the exercise of self-government by Aboriginal nations.
>
> Governments act promptly to
>
> (a) conclude agreements recognizing their respective jurisdictions in areas touching directly on Aboriginal health;
>
> (b) agree on appropriate arrangements for funding health services under Aboriginal jurisdiction; and
>
> (c) establish a framework, until institutions of Aboriginal self-government exist, whereby agencies mandated by Aboriginal governments or identified by Aboriginal organizations or communities can deliver health and social services operating under provincial or territorial jurisdiction.

33. In 2000, the Joint National Policy Review prepared for the AFN and the Crown highlighted some of these issues and made the following recommendation:

> DIAND, Health Canada, the provinces/territories and First Nation agencies must give priority to clarifying jurisdiction and resourcing issues related to responsibility for programming and funding for children with complex needs such as handicapped children, children with emotional and/or medical needs. Services provided to these children must incorporate the importance of cultural heritage and identity.

34. In 2002, a 20-month-old First Nation child suffered life-threatening injuries as a result of child abuse. An FNCFS Agency and the Province of Saskatchewan had provided some services to his family at different times during the period between 1999 and 2002. An inquest into the services followed, which resulted in what became known as *The "Baby Andy" Report*. The inquest found that because of federal jurisdictional barriers faced by First Nations, the province intervened only in child welfare matters that were considered to be life and death incidents of child abuse or

neglect. *The "Baby Andy" Report* recommended: "the provisions of the agreements that provide for the development of a process to respond to case-specific questions related to jurisdiction and resolve any disputes that may arise".

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

36. According to *Wen:De*, First Nations children with special medical needs were apprehended from their homes to be primarily transferred to hospitals and institutions. Because of the government dysfunction particularized above, this extreme measure was often the only means of meeting their needs. Due to jurisdictional disputes, these First Nations children were not only taken out of their own homes but were often denied the chance to again live in a family environment. Inadequate funding and inter-jurisdictional dysfunction resulted in a situation where children with complex medical needs were either left to suffer on Reserve without the proper resources, or alternatively were institutionalized with little likelihood of ever having the opportunity to live in a home environment.

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

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

38. *Wen:De* stated that despite section 15 of the *Charter* and international law requiring that First Nations children receive equal benefit under the law, the Crown's apathy and inaction denied them that protection:

> This continual jurisdictional wrangling results in program fragmentation, problems with coordinating programs and reporting mechanisms, gaps in service delivery - thereby leaving First Nations children to fall through the cracks. In short, neither the federal or provincial/territorial governments have effectively addressed the community needs of First Nations despite awareness of the impact of "policies of avoidance".
>
> … We recommend that a child first principle be adopted whereby the government (provincial or federal) who first receives a request for payment of services for a First Nations child will pay without disruption or delay when these services are otherwise available to non Aboriginal children in similar circumstances. The government then has the option of referring the matter to a jurisdictional dispute resolution process.
>
> … In Jordan's memory we recommend that this new child first approach to resolving jurisdictional disputes be called Jordan's Principle and be implemented without delay.

39. The Crown did nothing to address these long-standing problems. It adopted a policy of neglect and avoidance.

B. Tribunal Proceeding and House of Commons' Motion

40. Faced with the Crown's apathy and disregard for First Nations children and families, the AFN and the Caring Society filed a complaint with the Canadian Human Rights Commission in February of 2007. The complaint alleged, amongst others, that the Crown discriminated against First Nations by failing to address the above-noted issues in violation of the *CHRA*:

> These [jurisdictional] disputes result in First Nations children on reserve being denied or delayed receipt of services that are otherwise available to Canadian children. Additionally, these disputes draw from already taxed FNCFSAs human resources as FNCFSAs staff spend an average of 54 hours per incident resolving these disputes. Jordan's Principle, a child-first solution to resolving these disputes, has been developed and endorsed by over 230 individuals and organizations. This solution is cost neutral and would ensure that children's needs are met whilst still allowing for the resolution of the dispute.

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

42. The Canadian Human Rights Commission referred the AFN and Caring Society's complaint to the Tribunal. On January 26, 2016, the Tribunal rendered a decision, finding that the Crown systemically discriminated against First Nations children contrary to the equality protections in section 5 of the *CHRA*. The Tribunal found that the design, management and control of the FNCFS Program and the Crown's manner of addressing jurisdictional issues resulted in denials of services and created various adverse impacts for First Nations children and families. The Tribunal held that these breaches included the violation of the equality rights embedded in "Jordan's Principle".

43. The Tribunal has held that the equality protections owed to the Class under the rubric of Jordan's Principle include, amongst others, the following:

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

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

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

approved and funding is provided, the government department of first contact can seek reimbursement from another department/government.

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

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

44. Prior to the Tribunal's 2016 decision and subsequent orders, the Crown took the position that no Jordan's Principle cases were made out. A fund that the Crown had set up after the Class Period under the rubric of Jordan's Principle was never accessed because of the onerous requirements that the Crown had established. After the Tribunal's decision and subsequent non-compliance orders, the Crown issued hundreds of thousands of remedial orders to address some of its previous failures to comply with Jordan's Principle and the fundamental substantive equality rights that underlie it. The Crown did not address the harm done to the Class.

45. 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's compensation decision relates to the period immediately after December 12, 2007, but does not provide access to justice to the Class Members because their claims predate December 12, 2007. None of the First Nations children and families in the Class whose services were delayed, disrupted or denied as a result of the Crown's unlawful actions have received, or will receive, compensation as a result of the Tribunal proceedings.

C. The Binding Effect of Tribunal's Findings

46. The plaintiffs plead and incorporate the findings of the Tribunal as a correct statement of the law under the *CHRA* (not asserted herein), but equally as a correct statement of the law under section 15 of the *Charter*, the common law, and civil law. The Crown did not seek judicial review of the Tribunal's decision. The Crown is therefore estopped or prevented by doctrine of *res judicata* or issue estoppel from asserting a contrary position here.

VI. THE CROWN'S DUTIES TO THE CLASS

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

47. The Crown owed a duty of care to the Class Members. The Crown's duty of care to the Class included a duty to adequately and free of discrimination fund essential services in the best interests of First Nations children. The Crown's duty of care to the Class also included the duty to ensure formal and substantive equality for First Nations children, provide culturally appropriate services, and avoid gaps, delays, disruption, and denial of services to these children.

48. The Crown had constitutional control over the provision of services to the Class Members throughout Canada. Yet, Parliament chose not to legislate on child and family, health and other essential services for Class Members. Rather, the Crown used various bureaucratically established

funding formulas, policies, and practices. The Crown created, planned, established, operated, financed, supervised, controlled and/or regulated these formulas, policies, and practices throughout Canada.

49. The Crown adopted a policy of avoidance with respect to the jurisdictional and funding problems that the Class faced. The Crown simply ignored the problems and sufferings that the Class Members experienced.

50. The Crown knew or ought to have known for decades that its policies were wholly insufficient for the provision of essential services and products to the Class Members. The Child Class members were vulnerable children at the mercy of the Crown for services. The Crown knew or ought to have known that its policies and practices were having a devastating impact on the Class Members.

51. 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 that the Crown 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 essential services by virtue of its funding formulas, policies and practices.

B. The Crown Owed Fiduciary Obligations to the Class

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

53. 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 Indigenous peoples in Canada, under section 35(1) of the *Constitution Act, 1982*.

54. 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.

55. 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.

56. Moreover, the Crown has expressly and impliedly undertaken to protect specific First Nations interests in the provision of 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 and off Reserve.

57. The Crown's duties toward First Nations in general, and Class Members specifically, are grounded in the honour of the Crown. 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.

58. 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.

59. 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

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

60. 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.

61. 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 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

62. 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.

63. Through its funding formulas, policies, and practices, the Crown played an essential role in the provision of services and products to the Class Members.

64. The Crown's provision of services to First Nations children and families was aimed at the Class Members because they were First Nations. The members of the Child Class qualified for essential services from the Crown expressly on the ground that they were First Nations children who needed a service. The racial, national or ethnic identity of Class Members was the very reason for which protected equality rights applied to them. The determination of the persons to whom the services were offered or not was based entirely on the racial, national or ethnic identity of the Class.

65. The Tribunal found as a fact that the Impugned Conduct differentiated and adversely impacted First Nations children in the provision of essential services because of their race and national or ethnic origin. The Crown is estopped from challenging that finding as the Crown did not seek judicial review of it.

ii. The Impugned Conduct Reinforced and Exacerbated Disadvantages

66. 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.

67. 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 Members, by condemning them to denials or delays in the receipt of essential services and products.

68. More specifically, the Crown's policy of avoidance, and its design, management and control of its funding formulas resulted in delays, disruptions, and denials of services and products, and created adverse impacts on the Class. For example:

(a) 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, resulting in service gaps, delays and denials for First Nations children and families.

(b) The Crown ignored for decades pleas that jurisdictional problems were resulting in service and product gaps, delays and denials in the provision of essential services to the members of the Child Class, causing them harm.

(c) The Crown systemically underfunded First Nations child and family services 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, thus restricting the ability of the FNCFS Agencies to fill the gaps in services to the Class.

69. The discriminatory impact on the Class Members was apparent and immediate. As a result of the Impugned Conduct, the Crown differentiated adversely in the provision of child and family, and other essential services and products to the Class Members compared to non-First Nations children and families. The members of the Class were denied formally and substantively equal 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

70. The Impugned Conduct had no pressing or substantial objective. It worked counter to and frustrated the Crown's professed objectives in the provision of services to the Class Members. The Crown systemically ignored the Class Members' needs and implemented funding formulas and policies in ways that it knew, or ought to have known, would perpetuate the systemic, historic disadvantages suffered by the Class Members.

b. The Means Adopted Were Not Proportional or Minimal

71. Parliament chose not to legislate on the provision of essential services and products to Class Members. The Crown adopted a policy of avoidance, ignoring the jurisdictional and funding barriers afflicting the Class. No means were adopted to be proportional or minimal.

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

72. 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 Class, and did not advance any of the stated objectives of the Crown regarding the provision of services and products to Class Members.

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

73. 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.

74. Only one alternative was constitutionally available to the Crown: to provide non-discriminatory services 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

75. The Impugned Conduct detrimentally impacted the *Charter*-protected equality rights of the Class Members, many of whom were children and were affected because they were children. Children who are denied essential services, or who are separated from their families to receive services suffer detrimental effects often far more serious and lasting than adults. Similarly, family members of children denied essential services suffer serious and lasting harm as further particularized below. The Impugned Conduct has had a disproportionate effect on the equality rights of the Class Members.

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

76. 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 inaction and apathy regarding the jurisdictional barriers, lack of funding and other service gaps led to delay and denial of essential services and products to the Class contrary to their equality rights.

(b) The Crown created policies and funding formulas without consideration for the specific needs of the First Nations communities, families, and children. The assumptions built into the Crown's funding formulas did not reflect the actual needs of the Class Members or their communities, making provincial or territorial operational standards unattainable for them.

(c) The Crown's policy of avoidance further strained the chronically underfunded FNCFS Agencies who also had to deal with the needs of the Child Class for essential services.

(d) By separating some Class Members from their homes and communities to receive essential services or by effectively forcing their migration from their communities, the Crown's funding formulas and policies deprived Class Members of their right to the non-discriminatory provision of essential services, denied many of the Child Class and Family Class members the opportunity to remain together or be reunited in a timely manner, and deprived some Child Class members of their language and cultural identity.

77. Even after the House of Commons passed the Jordan's Principle motion, the Crown continued breaching its constitutional, common law, and fiduciary duties through its narrow interpretation of, and complete disregard for, First Nations children's equality rights included in Jordan's Principle.

78. The Crown's approach deprived Child Class members of essential protections on which they relied, and which the Crown undertook to provide. Specifically, the Crown, through its subsequent adoption of Jordan's Principle, acknowledged its longstanding duty to protect the unique interests of First Nations children, including the Child Class. The Crown's performance of this duty constituted a dishonourable exercise of discretion that critically affected these children, who it knew were eminently vulnerable.

79. 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.

80. 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

E. Damages Suffered by the Class Members

81. 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 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 services;

(b) some Child Class members were removed from their homes and communities, or had to migrate away from their communities with their families, to receive essential services, and thus lost their cultural identity;

(c) Child Class and Family Class members suffered physical, emotional, spiritual, and mental pain and disabilities;

(d) The Child Class members lost the opportunity to access essential services and products in a timely manner;

(e) Child Class members developed physical and mental health complications as a result of the denial or delay in the receipt of services;

(f) Class Members had to fund out of pocket substitutes, where available, for 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, financial harm as result of having to provide the care and services that the Crown refused to provide in a timely manner or at all.

F. Section 24(1) *Charter* Damages

82. The 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 conduct by the Crown.

G. Disgorgement

83. The plaintiffs seek disgorgement of the revenues and other monetary benefits generated by the Crown as a result of the Impugned Conduct. The Crown's failure to resolve funding gaps and jurisdictional issues, and to provide adequate and equal funding for services to the Class Members constituted a breach of its duties, through which breach the Crown inequitably obtained quantifiable monetary benefits over the course of the Class Period. Disgorgement is appropriate because (a) actionable misconduct is alleged; (b) compensatory damages may be inadequate; and (c) the circumstances of this case and the gravity of the Impugned Conduct warrant such a reward.

84. The Crown should be required to disgorge those benefits, plus interest.

H. Punitive and Exemplary Damages

85. The high-handed manner in which 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 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*

86. 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.

87. 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 harm the Class Members. The Members of the 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. Child Class members also sustained bodily and moral injuries through the Crown's discriminatory denial or delayed delivery of services and products.

88. 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 No.

FEDERAL COURT
PROPOSED CLASS ACTION PROCEEDING

B E T W E E N

ASSEMBLY OF FIRST NATIONS and ZACHEUS JOSEPH TROUT

Plaintiffs

and

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